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• SURVEYING THE LANDSCAPE: VESTING ORDERS, INTERESTS IN LAND AND THE IMPLICATIONS OF *THIRD EYE V. DIANOR RESOURCES* •

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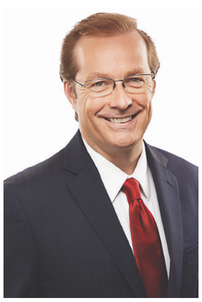

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On June 19, 2019, the Ontario Court of Appeal (OCA) released its much-anticipated decision in *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*[1] This case has garnered signification attention for its careful explanation of vesting orders and their impact on interests in land in the context of receivership proceedings.

Let's be clear from the outset on two points.

First, we very much needed a legal framework in which to better understand vesting orders. As frequently as they are granted and as common as they have become, we have lacked a clearly-articulated paradigm in which to contextualize this valuable tool, including understanding the application and limitations of the tool. The *Dianor* decision is a welcome addition to the law in this area.

Second, the OCA clearly wanted to say something about this issue. Justice Pepall — who wrote for a unanimous panel of the OCA — was well-situated to explain the law on vesting orders, being a former Justice of the Ontario Superior Court of Justice (Commercial List) and having considered and granted many such orders in her time on that court. The *Dianor* matter was originally heard by the OCA in May of 2017, with a decision by the OCA on other matters raised in the appeal released in March 2018.[2] In that 2018 decision, the OCA expressly directed the parties to provide further submissions with respect to the questions raised about vesting orders and interests in land.[3] Intervenor status was granted to the Insolvency Institute of Canada, further written submissions

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were provided and a further oral hearing occurred in September 2018 — with the resulting purposive decision resolving these matters not being released for another nine months. Importantly, the Dianor decision could have been a four-page decision instead of a 63-page decision. Having concluded that the appeal was out of time and brought too late, and having denied any extension of time for the appeal to be commenced, the court could have stopped there. The OCA could have concluded that it need not decide the substantive issues regarding vesting orders and interests in land, instead leaving that to a future case raising the same issues. Arguably, the OCA could also have dismissed the appeal on the basis of mootness without a further consideration of vesting orders and interests in land, since the sale transaction in question had already closed. However, in both its 2018 and 2019 decisions, the OCA rejected mootness as a basis not to consider further these substantive issues.

BACKGROUND

The basic facts are, that in the course of receivership proceedings involving a mining exploration company, a receiver sought court approval for the sale of certain assets, which included interest in land. The purchaser required a vesting order that vested the purchase assets in the purchaser free and clear of specified encumbrances, including certain gross overriding royalties (GORs)[4]. That order was granted at first instance, but was appealed from. In the OCA's 2018 decision, it overturned the decision of the court at first instance and held that GORs constituted interests in land and were not mere contractual entitlements.

In the OCA's 2019 decision, it held that:

- vesting orders are equitable in origin and discretionary in nature;
- the root of jurisdiction to grant vesting orders in the context of receivership proceedings is properly found in section 243 of the *Bankruptcy and Insolvency Act* (BIA), not provincial legislation providing for the appointment of receivers, such as the *Courts of Justice Act* (Ontario) (CJA), and not inherent jurisdiction;

- the court's power to grant (and a receiver's right to seek) a vesting order is incidental and ancillary to the court's power to grant (and a receiver's right to seek) approval of the sale of property over which a receiver has been appointed;
- while there is jurisdiction to seek and grant vesting orders, the exercise of that jurisdiction is not unlimited;
- in considering whether to grant a vesting order that extinguishes interests, courts should adopt a rigorous cascade analysis consisting of:
  (i) first, assessing the nature and strength of the interest proposed to be extinguished;
  (ii) second, noting whether the parties have consented to such extinguishment, either at the time of sale or through prior agreement (*e.g*. contractual subordinations); and
  (iii) third, where the foregoing considerations are not conclusive, considering whether a vesting order would be appropriate, which in turn depends on consideration of such things as: (a) the prejudice, if any, to the third party interest holder; (b) whether the third party may be adequately compensated for its interest from the proceeds of sale; (c) whether, based on evidence of value, the is any equity in the property; and (d) whether the parties are acting in good faith;
- the priority of interests reflected in freely-negotiated agreements between parties is an important factor to consider — such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of insolvency;
- fee simple interests and many lesser interests in land such as GORs and easements in active use should not be extinguished by vesting orders, particularly interests that are not of a monetary nature. Interests of a monetary nature that may be extinguished by vesting order include such things as mortgages and municipal tax liens (*i.e*., an interest that will cease in accordance with its terms upon payment of a specified monetary amount);
- where a receiver is appointed concurrently under the BIA and provincial legislation (in this case, the CJA), the making of a vesting order in such receivership proceedings is subject to a 10-day appeal period under the BIA and not a longer appeal period under the applicable provincial legislation[5]; and
- the appellant had commenced its appeal too late, and there was no basis for granting an extension of time and no basis to permit a discretionary remedy under the *Land Titles Act* (Ontario) for rectification of title to reinstate the GORs in question, or to direct the matter back to the trial court to consider an application for rectification.

As a result, the appellant lost this battle (*i.e.*, this specific appeal, in which its GORs were forfeit and could not be saved) but likely won the war (*i.e.*, establishing the principle that GORs and other such interests in land are, for the most part, beyond the reach of vesting orders in future cases).

THE IMPLICATIONS OF *DIANOR*

A vesting order is a strange animal, and the *Dianor* decision touches on several legal and practice points worth highlighting:

1. Receivership proceedings vs. debtor-in-possession proceedings. An important next step in the development of this law is the judicial application of *Dianor* (or perhaps the differentiation of *Dianor*) to debtor-in-possession proceedings. As confirmed by the OCA[6], a vesting order made in the course of receivership proceedings serves a vital purpose in bridging title. Where Company X is in receivership and Company Y purchases the assets of Company X from a receiver (in whom title has not vested, title still residing with Company X), a vesting order — having the nature of a conveyance instrument — provides a helpful bridge in showing a chain of title by which Company Y lawful acquires title formerly held by Company X even though Company X does not execute any contractual conveyance and does not voluntarily dispose of its title.

However, this reasoning does not apply to debtor-in-possession proceedings such as under the *Companies' Creditors Arrangement Act* (CCAA) or BIA proposal proceedings. In that case, Company X in CCAA proceedings may execute a contractual conveyance in favour of Company Y and establish a valid chain of title without the need for a vesting order as an instrument of conveyance. In fact, no one ever relies on a vesting order in debtor-in-possession proceedings solely or even principally as a conveyance instrument (other than for collateral purposes, such as attempts to moot subsequent appeals). Instead, there is always a contractual conveyance document between the insolvent debtor-in-possession and the purchaser, including bills of sale on closing and transfers/ conveyances registered on title to real property. As a result, vesting orders serve little purpose as conveyance instruments in such proceedings.

Additionally, whereas there is little statutory guidance as to a receiver's sale powers (and thus the OCA's need to consider the basis and scope of such powers and any incidental or ancillary powers, such as the ability to grant vesting orders), the same cannot be said of debtor-in-possession proceedings. The BIA and CCAA provide an express authority for judicial approval of sale transactions "free and clear of any security, charge or other restriction".[7] This raises a question as to whether the statutory authority in the BIA and CCAA is a broader authority than the jurisdiction found by the OCA to exist in receivership proceedings. For example, can GORs be subject to vesting orders made in debtor-in-possession proceedings even though they may not be affected by a vesting order made in receivership, ostensibly on the basis of a broader and express statutory authority? In our view, this statutory authority ought to be reconciled with the OCA's findings in *Dianor*, in that the BIA and CCAA authority to vest out security, charges or other restrictions, ought not to be construed more broadly to support extinguishing interests in land such as GORs. There ought to be a thoughtful harmony in the scope of vesting orders in receivership and debtor-in-possession proceedings alike. It would be an odd result if the incidental and ancillary powers in receivership proceedings so carefully expostulated by the OCA in *Dianor* do not permit extinguishing *non-monetary* interests in land, and yet the statutory authority to extinguishing interests found in debtor-in-possessions proceedings was interpreted more broadly to permit extinguishing such interests in land.

2. <u>Line-drawing and other interests in land</u>. It is clearly very helpful that participants in oil and gas, mining and other natural resource industries, among others, have clarity as to: (i) how interests in land ought to be constructed so as to be treated as interest in land and not mere contractual entitlements; and (ii) the limits on vesting orders as a means to extinguish such interests in land. Clearly, we now know how royalty interests that are properly structured as interests in land will be treated. But there are various other actual or alleged interests in land that will undoubtedly bear greater scrutiny given the principles and considerations articulated by the OCA in *Dianor*. For example, what of rights of first refusal (ROFRs) and other rights of reconveyance, which are common in oil and gas and other natural resource sectors? Are they — or can they be structured to be — interests in land? At first blush, a ROFR does not seem to meet the definition of monetary interests as articulated by the OCA, such that they would appear to be out of reach of a vesting order if found to be interests in land (although there are other tools that might be utilized to eliminate an inequitable ROFR, such as a right to purchase land at less than fair value — for example, the doctrine of fraud on the creditors might be invoked). If a court found it necessary to consider the equitable factors set out in the "rigorous cascade analysis" established by the OCA, what would adequate compensation for extinguishment of something like a ROFR consist of?

3. Do purchasers' really need such expansive vesting orders? Purchasers like vesting orders, and such orders are an incentive for their participation in insolvency proceedings. It is against this backdrop that the *Dianor* decision may assist in curtailing overly opportunistic and aggressive behaviour by would-be purchasers. Understandably, any commercial-minded purchaser will maximize the value that it acquires in a purchase transaction. If extinguishing third party interests is an option (and a profitable one at that for a purchaser), then of course purchasers will seek it, demand it even. A purchaser will declare it to be essential and make it a condition precedent to its acquisition. As we have observed, they will at times seek value that belongs to a third party rather than to the debtor (*i.e.* a confiscation of rights and interests — that is, value — held by someone other than the insolvent person). Put differently, they may ask to be put in a better position via court order than the debtor itself. And that demand may be championed by vendor, principal secured creditor and court officer alike on the basis that it will maximize recoveries, though whether a purchaser would actually "walk away" from the transaction cannot be known with certainty by stakeholders until after a court has ruled. That is the theory underlying vesting orders in the insolvency context and it has always been a speculative one; namely, that a purchaser will participate in a sale process and pay more for property — thereby maximizing recoveries for creditors — if it can acquire the property free and clear of encumbrances and other interests.

However, in the Supreme Court of Canada's decision in *Redwater*, the Court affirmed that bankruptcy is not a license to ignore law, irrespective of the consequences that this may have on secured creditor recoveries.[8] Whether it is an aggressive DIP financing order that must be granted at risk of otherwise losing the DIP financing, or aggressive vesting orders required by a purchaser at risk of not closing, or any other aggressive order that the court is warned must be granted to avoid dire consequences, the reality is that what any of these stakeholders will actually do when push comes to shove cannot be known. But as *Redwater* holds, you cannot do an unlawful thing simply because it results in greater realizations for creditors. Purchasers have demanded broad vesting orders because it has been open for them to do so. Would they pay less because such orders are less sweeping? Would they not agree to purchase at all? As a result of the limitations placed on vesting orders in *Dianor* by the OCA, it will be interesting to see if there will be any observable lessening of interest or lowering of purchase prices by would-be purchasers of mining, oil and gas, and other natural resource assets for which there are encumbrances and interests that cannot be extinguished. In any event, the much-needed drawing of lines in *Dianor* may discourage needlessly aggressive tactics by purchasers seeking to maximize the value of their acquisitions.

4. Vesting orders and national receiverships. One of the bumps in the road with vesting orders has arisen in provinces — particularly in Eastern Canada — in which courts have sometimes struggled with jurisdictional issues; namely, whether the applicable provincial statutes provide the provincial courts with authority to grant vesting orders and/or to recognize and give effect to vesting orders granted by the courts of other provinces. There have been some instances in which such orders have been denied or refused recognition as a result of jurisdictional concerns. One very helpful consequence of the *Dianor* decision is the OCA's extensive discussion regarding the jurisdictional basis of such orders and the conclusion that such authority is found in the BIA, not in provincial statutes.[9] It is clear that vesting orders are made pursuant to authority found in federal bankruptcy and insolvency statutes, and this should put to rest these provincial jurisdictional problems.

5. Rushing to close transactions. As noted, one of the arguments raised during the *Dianor* appeal process was that the appeal was moot as a result of the transaction having closed. There is a long line of cases that have upheld the doctrine of mootness in the insolvency context, and closing transactions in insolvency proceedings prior to the expiration of appeal periods has become the norm as a result. There is an important cautionary note in the OCA's decision in *Dianor*. First, the OCA refused to apply the doctrine to moot the appeal. Second, and more importantly, the OCA held that professional courtesy requires that a potentially preclusive step not be taken when a party is advised of a possible pending appeal.[10] Although the court did not find fault with the receiver in the present case, it did warn that "[t]his is not to say that the Receiver's conduct would always be advisable" and that a receiver should, absent some emergency that has been highlighted in its report to the court, typically wait out an appeal period before closing sale transactions.[11]

This case is one of several of late in which there has been apparent judicial discomfort with the absence of due process in the sometimes fast and loose world of real time insolvency litigation (in this case, arguably giving short shrift to appeal rights in racing to close a sale transaction). This has potentially significant implications and raises many questions. Does this principle apply only to court officers (*i.e.*, receivers) due to the fiduciary nature of their role, or does the principle apply equally to debtors-in-possession? Does this overlap with the increased focus on good faith, including new statutory requirements that parties act in good faith in BIA and CCAA restructurings? The *Dianor* appeal process took years to play out, and few insolvent businesses can tread water awaiting the closing of a sale transaction for that long while waiting out appeals. At least some urgency to close will exist in most cases, including where the company needs new or additional funding, where an existing DIP lender is not prepared to fund through an appeal process, where customers need certainty and will not wait out the fate of the business if it drags through appeal processes, where key employees may leave if their employment remains uncertain. The passage of time between entering into a sale agreement and closing at the end of a sale process may invariably highlight changes in the value of the business and the resulting mismatch at closing of the purchase price and value at such time (*e.g.*, a commodity-based business in which commodity prices continue to fluctuate after entering in the purchase agreement and before closing). At a minimum, it appears to be advisable to expressly note in the court materials supporting an application for a vesting order the urgency of closing and the parties' intention to close forthwith upon obtaining the vesting order. It may also warrant careful drafting of purchase agreements, including provisions attesting that time is of the essence.

Alternatively, it may be possible to deal with all of this in the context of a further court hearing to deal with the question of a stay of the vesting order. In most insolvency proceedings, leave to appeal is required and there is no automatic appeal as of right. In these cases, a stay of the order under appeal must be sought and granted by the court. An insolvent vendor and its supporters would have an opportunity to set out reasons why closing should be permitted and a stay of the vesting order not granted. Even where there is an automatic right of appeal and an automatic stay of the vesting order, an insolvent vendor and its supporters could still bring a motion to lift the stay to permit closing. The takeaway here may be that rather than rush to close and moot an appeal, it is preferable for a considered decision about closing in the face of a possible appeal to be made by the court in an orderly fashion in which all stakeholders have notice and an opportunity to be heard, thereby ensuring due process and preserving the integrity of the insolvency system.

6. Other lessons learned. Perhaps lost in the midst of the OCA's important substantive determinations,

there were several criticisms by the OCA of the appellant's conduct that bear noting. First, the OCA's comments suggest that the appellant ought to have been mindful that the express terms of the purchase agreement required the extinguishment of its GORs and that it should have acted in a more timely and forceful way. Among other things: (i) it knew of the intention to extinguish the GORs for over a month before the matter was heard; (ii) it knew that the agreement specified that time was of the essence; (iii) it knew that its GORs were valued at $250,000 (which amount it was to receive in compensation for the loss of its GORs) but did not provide any competing valuation evidence; (iv) it should have objected outright to the vesting order sought at first instance (whereas it did not object, but instead asked that its GORs be carved out of the order); (v) it knew that the approval order directed the receiver to complete the sale transaction; (vi) it knew of the motion court's decision to extinguish the GORs for approximately three weeks before it formed and communicated its intention to appeal; and (vii) it took no step to stay the vesting order. All of this led the OCA to conclude that the appellant's objection was a tactical maneuver to extract a larger payment from the purchaser. The OCA found that aggrieved stakeholders should act promptly and definitively to challenge a decision they dispute and to preserve its rights, failing which they must absorb the consequences associated with failing to do so. It bears repeating: an objecting party should object in a fulsome and timely basis, but mindful that tyrannical tactics will not be sanctioned.

CONCLUSION

Ultimately, the OCA decision in *Dianor* will not be the final word on vesting orders; rather it is an important and thoughtful decision that will undoubtedly be further considered and expanded upon. The decision lays a much-needed foundation on which to continue to build and frame future use of this impactful tool. Perhaps most helpfully, the decision has provided additional transparency and clarity that will benefit all participants in future insolvency proceedings by establishing reasonable expectations about what can and cannot be accomplished by vesting orders.

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1 [2019] O.J. No. 3211, 2019 ONCA 508.

2 [2018] O.J. No. 1381, 2018 ONCA 253.

3 *Ibid*., para. 121.

4 A Gross Overriding Royalty (GOR) is a contractual agreement between two parties that entitles the royalty holder to a share of the production from specific lands.

5 See also *Business Development Bank of Canada v. Astoria Organic Matters Ltd*., [2019] O.J. No. 1742, 2019 ONCA 269.

6 *Supra*, note 1, para. 80.

7 CCAA s. 36(6); and BIA s. 65.13(7).

8 *Orphan Well Association v. Grant Thornton Ltd.*, [2019] S.C.J. No. 5, 2019 SCC 5, at p. 160.

9 *Supra*, note 1, at p. 72, 76, 83–85.

10 *Ibid*., p. 133.

11 *Ibid*., p. 139.

• BUDGET ACT BRINGS CHANGES TO CANADIAN CORPORATE & RESTRUCTURING LEGISLATION •

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The *Budget Implementation Act, 2019* (the "**Act**") received royal ascent on June 21, 2019, bringing into law the Federal budget as well as various changes to existing Canadian legislation. The Act includes changes to the *Canada Business Corporations Act* ("**CBCA**"), the *Bankruptcy and Insolvency Act* ("**BIA**") and the *Companies Creditors' Arrangements Act* ("**CCAA**").[1] One of the reasons for the changes is to make insolvency proceedings more fair, transparent and accessible for workers and pensioners.[2] Once in force, some of these changes could have a significant impact on the Canadian insolvency regime.

With respect to the CCAA, the Act will reduce the length of the initial stay of proceedings for companies that seek protection under that restructuring statute. It will also limit the scope of relief that companies can obtain at the outset of a CCAA proceeding, and will impose a duty of good faith on all participants in Court-supervised insolvency cases. Courts will be given powers to reverse certain compensation paid to management in the year before a company's bankruptcy, and parties can apply to the Court to obtain disclosure of the economic interests of other parties in a CCAA proceeding.

With respect to the CBCA, amendments now in force have codified judge-made law on the scope of the fiduciary duty owed by directors and officers to their corporations, and explicitly permit management to consider the interests of workers and pensioners in fulfilling their corporate duties.

More particulars of the changes and their implications are described below.

CHANGES TO FIRST DAY RELIEF IN CCAA PROCEEDINGS

The Act will reduce the length of the initial stay of proceedings upon a company's application for CCAA protection from the current 30 days to ten days. It will also limit the relief that a company can obtain from the Court during the initial ten day period to "relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business".

The new limits to the relief available to companies on the first day of a CCAA proceeding appear to be designed to curtail a common practice of requesting substantial relief from the Court with little or no notice to affected parties. For example, it is now common in CCAA proceedings for debtors to seek and obtain the approval of large DIP loans (interim financing), key employee retention plans, and even the approval of sale procedures on the initial application. However, the intended impact of the changes might be undermined by the reality that substantial relief is often required at the outset of a CCAA proceeding to allow the debtor to continue its normal course operations. Initial orders in CCAA provisions are already often subject to a "comeback" provision, allowing affected parties to challenge the propriety of relief ten days after it is granted. However, comeback provisions have been treated somewhat inconsistently by courts, especially in respect of the burden born by parties on a comeback motion.[3] The changes brought by the Act will likely impose greater discipline on the scope of relief that courts are willing to grant at the time that a CCAA application is approved.

A DUTY OF GOOD FAITH

The Act will amend the BIA and CCAA to require that all participants in insolvency proceedings "act in good faith", and give courts unfettered discretion to craft a remedy where this obligation is breached. Presumably, this could include the invalidation of a creditor's claim against a debtor's estate.

The Act does not provide guidance as to any specific requirements to meet the "good faith" standard, which is likely to be problematic. The concept of "good faith" exists in many areas of Canadian law and is notoriously imprecise. A leading Canadian insolvency commentator previously warned that the imposition of a duty of good faith on creditors may bring uncertainty, which could paralyze the efficient and expeditious administration of insolvency proceedings.[4] The CCAA and BIA both already impose duties of good faith on Court officers, including trustees in bankruptcy, receivers and monitors in CCAA proceedings, and also on companies seeking to obtain or extend a stay of proceedings.[5] Those duties have been the subject of some judicial consideration, but are different in kind from a general duty owed by all participants in an insolvency proceeding.

Other instances where the law imposes a duty of good faith are also not likely to be instructive. Part VII of the CBCA, entitled "Security Certificates, Registers and Transfer", defines "good faith", for that Part of the CBCA only, to mean "honesty in fact in the conduct of the transaction concerned".[6] In the performance of contracts, the Supreme Court of Canada has held that "good faith" is a broad "organizing principle" and specifically does *not* require a party to disclose material information to a counterparty.[7] This is probably not the same standard that is contemplated in the amendments in the Act for participants in insolvency proceedings.

Canadian courts have already recognized the duty of parties in a claims process to make "full disclosure"[8] or "full and frank disclosure"[9] of facts material to their claims against a debtor's estate. "Full and frank disclosure" is an extraordinary and exacting standard. It is imposed on parties in litigation who seek without-notice relief from the Court (*i.e.*, *ex parte* relief). It requires a party to disclose all of the material facts that the absent party could be reasonably expected to have relied upon if they were present.[10] The full and frank disclosure standard arguably puts claimants at a significant procedural disadvantage when they pursue their claims within an insolvency proceeding as compared to the normal litigation process that would otherwise apply. Courts have routinely held that insolvency proceedings should not prejudice any creditor's rights.[11] An overly burdensome disclosure standard could incentivize more claimants to seek a "lift stay" (permission to pursue their claim in the normal course despite a stay of proceedings) rather than participate in a Court-ordered claims process. While it may not be Parliament's intention, the simple "good faith" requirement that will result from the Act could relax the heavy burden of "full and frank disclosure" that has developed in insolvency case law.

Once in force, the new duty is likely to generate uncertainty and litigation over its scope and implications for participants in Canadian insolvency proceedings.

DISCLOSURE OF ECONOMIC INTERESTS IN CCAA PROCEEDINGS

The Act will also amend section 11 of the CCAA so as to promote transparency in a CCAA proceeding. The amendment will empower the Court, on application by any interested person, to order another party "to disclose any aspect of their economic interest" in the debtor. The party's "economic interest" would include a claim, eligible financial contract, or security interest, *as well as the consideration paid* for the interest.

In considering an application for such disclosure, the Court would consider the CCAA monitor's position on the proposed disclosure, whether disclosure would enhance the possibility of a successful compromise or arrangement, and material prejudice to any interested party. Interestingly, the prescribed factors for the Court's consideration do not include whether the disclosure is relevant to the merits of a party's claim against the estate. This new mechanism for compelling disclosure of economic interests will be a powerful tool potentially subject to tactical abuse by parties in CCAA proceedings.

COURT POWER TO REVERSE MANAGEMENT COMPENSATION

The Act will also amend Section 101 of the BIA. This section allows the Court to review dividends paid within one year of the company's bankruptcy to determine whether the company was insolvent at the time or was rendered insolvent by the dividend. This provision will be amended to add termination pay and other benefits paid to managers of the company to the list of reviewable transactions. It will also give the Court the power to grant judgment against the managers in respect of such pay or benefits where certain requirements are met.

STAKEHOLDER INTERESTS AND THE FIDUCIARY DUTY TO CBCA CORPORATIONS

Last, the Act has already amended the CBCA to specify certain stakeholder interests that a director or officer may consider when exercising their fiduciary duty to the corporation they serve. The fiduciary duty requires directors and officers to act "honestly and in good faith in the best interest of the corporation".[12] This is different from the "*Revlon* duty" applicable in the United States, which emphasizes attention that directors and officers must pay to maximizing shareholder value to satisfy their fiduciary duty. In a series of decisions culminating in *Re BCE*, the Supreme Court of Canada held that the fiduciary duty under the CBCA is owed to the corporation itself, and that directors and officers *may* (but are not required to) consider the interests of various stakeholders of the corporation when exercising that duty.[13]

The Act has amended the CBCA to specify that directors and officers *may* consider: (a) the interests of stakeholders such as shareholders, employees, <u>retirees and pensioners</u>, creditors, consumers and governments, (b) the environment and (c) the long-term interests of the corporation. Parts (a) and (b) of this list repeat the same examples of interests that the Supreme Court of Canada identified in *Re BCE*, but explicitly adds the interests of retirees and pensioners. The explicit addition of retirees and pensioners to the list in the statute may cause the directors and officers of troubled CBCA companies to give greater consideration to the implications of an insolvency proceeding for these stakeholders, and doing so will offer management some protection when exercising their powers with those interests in mind.

The addition of "the long-term interests of the corporation" to the list of stakeholder interests that officers and directors *may* consider is peculiar. In *Re BCE*, the Supreme Court of Canada held that when a corporation is an ongoing concern, the fiduciary duty "looks to the long-term interest of the corporation".[14] The Court then listed stakeholder interests that management *may* consider, "although *not mandatory*", including the interests of shareholders, employees, creditors, consumers, governments and the environment.[15] By folding the very object of the fiduciary duty — the long-term interests of the corporation — into the list of non-mandatory stakeholder interests that a director or officer *may* consider, the Act might have unintentionally reformulated the fiduciary duty that the Supreme Court of Canada articulated in the case law culminating in *Re BCE*.

CONCLUSION

The Act is intended to add transparency and fairness to Canada's corporate and insolvency regimes. Many of the changes to the BIA, CCAA and CBCA are an effort to codify recent developments in Canadian case law. However, the Act also brings significant changes to the substantive and procedural rights of corporations' stakeholders, especially in insolvency situations. We expect that it will introduce much uncertainty to Canada's principal corporate and insolvency statutes. The commercial and insolvency bar will be watching closely as the Courts engage these amendments and provide new guidance on central aspects of Canadian corporate and restructuring law.

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1 This article discusses some of the changes to Canadian corporate and insolvency statutes that are included in the Act. This is not an exhaustive review of the Act's provisions, which include amendments to the *Bank Act* and the Pension Benefits Standards Act among other things.

2 *Investing in the Middle Class: Budget 2019*, p. 67.

3 See for example *Canada North Group Inc. (Re)*, [2017] A.J. No. 930, 2017 ABQB 550 at 74–77.

4 McElcheran, Kevin: *Commercial Incolvency in Canada* (3d), ¶ 4.621.

5 See BIA sections 50.4(9), 50(12)(a), 65.12(2)(b), CCAA sections 11.02(3), 25(3), 33(3)(b) and 36(4)(a). See also Rogers, Linc et. al., "What Does 'Good Faith' Mean in Insolvency Proceedings?" (2015).

6 *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, Section 48(1), "good faith".

7 *Bhasin v. Hrynew*, [2014] S.C.J. No. 71, 2014 SCC 71 at 33 and 86.

8 *I. Waxman & Sons Ltd., (Re)*, [2010] O.J. No. 1847, 2010 ONSC 2369 at 18.

9 *Nortel Networks Corporation (Re)*, [2018] O.J. No. 643, 2018 ONSC 278 at 125.

10 *United States v. Friedland*, [1996] O.J. No. 4399 at 26.

11 *Redstone Investment Corp., (Re)*, [2015] O.J. No. 1203, 2015 ONSC 533 at 57.

12 *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, section 122(b).

13 *BCE Inc.* v. 1976 Debentureholders, [2008] S.C.J. No. 37, 2008 SCC 69 at 39–40.

14 *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, 2008 SCC 69 at 39.

15 *BCE Incv. 1976 Debentureholders*, [2008] S.C.J. No. 37, *Re*, 2008 SCC 69 at 40.