SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Terra Firma Development Corporation Limited (Re)*, 2026 NSSC 30

Date: 20260127
Docket: Hfx No. 44436
Registry: Halifax
Estate Number: 51-126302

In the Matter of: The Proposal of Terra Firma Development Corporation Limited

DECISION

Registrar:	Raffi A. Balmanoukian, Registrar in Bankruptcy
Heard:	May 22, 2025, in Halifax, Nova Scotia
Counsel:	John T. Shanks and Tyler White, for the Municipality of West Hants
	E. Patrick Shea, K.C., for the Proposal Trustee, MNP Ltd.
	Edward A. Gores, K.C., for the Attorney General of Nova Scotia (not appearing or participating)
	Mark Freeman, for the Attorney General of Canada (not appearing or participating)

By the Court:

[1] It is said that golf is a good walk spoiled. The litigation surrounding the insolvency of Terra Firma Development Corporation Limited ("Terra Firma") has taken would-be golfers, investors, other stakeholders, and Courts of various levels on a meandering path indeed. These proceedings follow the collapse of a multimillion dollar mixed residential and recreational development, which was to be centred around a Jack Nicklaus-designed golf course and populated by the game's aficionados and fellow-travelers. The project landed in the rough. Numerous reported and unreported decisions have ensued.

[2] Terra Firma has huge tracts of land. On them, it is taxed. They are substantially all in the Municipality of West Hants ("West Hants" or "the Municipality"). Given the long history of Terra Firma's insolvency, West Hants is owed a substantial sum. This is not disputed. What is contested is how and in what order payments on that outstanding and accruing tax debt will be allocated, and why. Also contested is whether West Hants should be permitted to proceed with the tax sale process now. A few properties are in East Hants, and that municipality did not participate in these proceedings.

[3] One of the current applications ostensibly is simply for the Court to approve a proposal, which has received the statutory threshold of creditor approval. However, its terms and the Trustee's obligations bring into focus what is said to be a contradiction between the requirements of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 as amended (the "BIA") and the provincial *Municipal Government Act*, SNS 1998, c. 18, as amended (the "MGA"). West Hants seeks to lift the stay of proceedings in place as a result of Terra Firma's bankruptcy (and current proposal). Terra Firma's Trustee, MNP Ltd. ("MNP," the "Trustee," or the "Proposal Trustee") says that the BIA and the MGA come into direct and irreconcilable conflict and, as a consequence, the relevant provisions of the MGA are constitutionally inoperative in these circumstances, and this Court should so declare accordingly. The Trustee and West Hants have made associated motions – the Trustee for a constitutional declaration, and West Hants to lift the stay of proceedings.

[4] All matters proceeded before me by consent pursuant to s. 192(1)(j) of the BIA. Notices of constitutional question were provided to the provincial and federal attorneys general as required by the *Constitutional Questions Act*, RSNS 1989, c. 89 as amended. Both declined to participate.

[5] For the reasons which follow, I conclude that it is appropriate to approve the proposal; that insofar as the BIA effects a stay of proceedings that binds the Municipality, the BIA prevails over but does not constitutionally conflict with the relevant provisions of the MGA; and that in the circumstances, it is not appropriate to lift that stay of proceedings. I also conclude that, as a consequence of the stay, the Municipality's claims are tolled during the currency of that stay, and do not lose their secured status.

Background

[6] Terra Firma has been in bankruptcy or insolvency since September 22, 2020. Justice McDougall succinctly characterized part of the company's history in *Project Forest Lakes Pte. Ltd. v. Terra Firma Development Corporation Limited,* 2021 NSSC 350. It gives a flavour of some of its complexity:

> [14] Terra Firma, the Defendant, is a property developer for a condominium project located at 311 Eagle View Drive, Ardoise, Nova Scotia (PID 45401965) ("Property"). Between 2015 and 2018, several companies and individuals located outside of Canada ("Encumbrancers") entered into written agreements of purchase and sale with Terra Firma to purchase condominium units that were being developed at the Property. Each of the Encumbrancers has paid substantial amounts or completed full payment for their respective units. Some of the Encumbrancers also purchased furniture and appliances for these units. The closing dates for these agreements ranged from September 30, 2016 to December 15, 2018.
>
> [15] The Plaintiff, Project Forest Lakes ("PFL"), issued four loans to Terra Firma for this project.[1] Two promissory notes, both dated November 15, 2018, evidenced a loan totalling $610,000, plus interest of 8% per annum, in Singapore Dollars. That loan would mature on November 15, 2019. Then, by agreement dated March 1, 2019, PFL and Terra Firma executed a financing agreement for SGD $750,000, plus 15% interest p.a., maturing

> in three years from the first advance. The financing agreement granted PFL a collateral mortgage over another property (PID 45406345) with a principal of SGD $2,250,000. A third agreement was executed as a bridging loan, dated April 22, 2019, in the amount of SGD $1,200,000, plus 5% interest per month, maturing 60 days after Terra Firma received the funds.
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> [16] On August 2, 2019, PFL and Terra Firma entered into a Refinancing Mortgage, supported by a promissory note dated August 6. The Refinancing Mortgage states that its purpose is to assist with "[r]efinancing of existing loans issued by [PFL]" and with Terra Firma's "working capital requirements and other general corporate purposes". PFL agreed to provide SGD $3,327,000 "to refinance the loans set out in Schedule B" and CAD $400,000, of which $300,000 was advanced. Schedule B lists the promissory notes, the financing agreement, and the bridging loan, referenced above, plus the interest accrued for each, respectively. The Mortgage was secured by "[a]ll security presently granted by [Terra Firma] to [PFL]", a first-ranking mortgage of $20,000,000 over the three PIDs now foreclosed upon (including the Property), and a first-ranking registered security interest in all present and after-acquired personal property of Terra Firma. The previous debts were consolidated, totalling SGD $3,327,000, plus 8% interest per year.[2]
>
> [17] Terra Firma had laid off most of its 23 employees in the summer of 2019 and by November, the remaining seven employees were terminated. On December 6, 2019, Terra Firma's debt to PFL came due, totalling CAD $3,415,720.[3] PFL then filed an *ex parte* motion requesting an order for default judgment and simple foreclosure against Terra Firma on February 7, 2020.

[7] On May 6, 2022, MNP filed a proposal on behalf of Terra Firma. The Trustee characterized Terra Firma as a company which "operated as a developer for a planed [sic] resort-style residential community called Forest Lakes Country Club." By then, there were over 500 creditors' claims, many outside Canada and many contested. MNP characterized many of these as "exceptionally complex involving multiple agreements, amending agreements, options, extensions, exchanges, and swaps. Several claims have been disallowed or adjusted…." Much litigation ensued. Some properties were sold. The proposal, explicitly, was

to stop tax sales on most of the remaining Terra Firma properties in West Hants scheduled for May 22, 2022.

[8] The essence of the proposal – I am oversimplifying considerably – is that the properties would be vested in the Trustee and sold. Secured claims (subject to challenge under ss. 95-101 of the BIA, but including taxes) and disposition costs would be paid, and the balance paid to the estate. The proposal specifically defines "Secured Claim" as "includes the indebtedness of Municipalities in regard to real property taxes." As of April 2025, the Trustee identified six properties with "proven mortgages exceed value. West Hants to sell," with an estimated total tax balance of $46,014.76. These are the only properties that do not contemplate a sale or conveyance by the Trustee1.

[9] The proposal lists 35 pages of creditors, totaling over $200 million, almost entirely unsecured (or unsecured deficiencies)2. Just under $50 million more are listed as contingent claims. Real property is listed at $8.5 million out of just under $9 million in assets.

1 Tab 7 of Trustee's report dated April 11, 2025 in response to West Hants' motion. Tab 9 contains an email from counsel for the Trustee indicating that it "will consent to the stay being lifted to permit those sales," which I take to mean these six properties. Given my conclusions herein, I may be presented with a consent order giving effect to this exception to my overall disposition, subject to jurisdictional authority which I will discuss as well.
2 West Hants is listed as an unsecured creditor for $453,799.44. This appears to be in error both in law and per the definition of "Secured Creditor" in the Proposal, cited above. The claims register lists West Hants as having secured, and admitted, claims.

[10] A widely-attended virtual first meeting of creditors, on May 25, 2022 was adjourned without date. It did not reconvene until April 16, 2025.

[11] Much occurred in the interim, not the least of which was resolution of competing claims to almost $50 million in debt (with the claimants holding different views as to how to vote on the proposal). This was at issue in *Re Terra Firma Corporation Development Limited*, 2023 NSSC 16, the merits of which were ultimately settled by the competing claimants, each obtaining half of the disputed debt and both voting in favour of the proposal.

[12] At the reconvened meeting, almost all participating unsecured creditors either voted for or abstained from voting on the proposal. Only CRA voted against. Of the participating secured creditors, all participating creditors voted for or abstained from voting on the proposal. West Hants participated as a secured creditor and abstained.

[13] In the meantime, West Hants and the Trustee had various exchanges surrounding the outstanding and accruing taxes. They did not achieve resolution; as will be seen, West Hants considered itself bound by the MGA's requirement to apply payments to "oldest accounts first," whereas the Trustee considered its

obligation to keep post-bankruptcy taxes up to date and to treat pre-bankruptcy taxes as part of the bankruptcy/proposal, to be paid later.

[14] It is important to pause at this point and outline that there is no material dispute on the following points:

- Both pre-and post-bankruptcy / proposal real property taxes are secured against the respective lots, up to the realizable value of that property (most, but perhaps not all, are considered to be fully secured insofar as West Hants' claim goes)

- Interest on overdue taxes does not stop nor is it subject to the *pari passu* rule.3 In other words, while West Hants' payment timeline may be affected by insolvency proceedings, or a deficiency may arise or increase as a result of tax and interest accrual, it is not prejudiced in the sense that it may not collect interest on overdue and unpaid accounts.

- While not strictly and formally agreed, it was not materially argued that the time limits under the MGA, under which taxes become unsecured

3 Briefly stated, this rule holds that "interest stops" on *unsecured* debt as of the date of bankruptcy. See *Re Nortel Networks Corporation et al*, 2015 ONCA 681. Although a CCAA case, the Court was clear that the principle applies to unsecured creditors in insolvency proceedings generally. Indeed, Nortel is authority that it extends to, and does not originate from, CCAA proceedings. See also *Easy Legal Finance Inc. v. Law Society of Alberta* 2025 ABCA 112.

after six years (s. 133(7) MGA), run during the bankruptcy / proposal stay period, unless that stay is lifted or does not apply. I will return to that point.

[15] It is also worth noting that, between the initial insolvency and now, some lots have been sold or conveyed and the proceeds distributed roughly in accordance with what the proposal contemplates – namely, payment of taxes and disposition costs, payment of resolved or admitted secured claims, and the balance (if any) to the estate.

The Legislative Regime – the BIA and the MGA

[16] First, the MGA.

[17] The MGA provides, among many other things, a real estate taxation regime, and collection mechanisms if they are not paid. Municipalities have a "super priority lien" for their real estate taxes, subject to a six year limitation after which the lien (but not the debt) expires (s. 133(7) MGA). It takes priority over other secured creditors, such as mortgagees. In default, the Municipality may (and, in some cases must) proceed to initiate and pursue a procedure to collect the debt through a complicated sales process. If the taxes and expenses are not paid with interest within six months following the sale, or if the property arrears are such that

the property is not eligible for redemption, ownership changes. A deficit is still collectible. A surplus may be claimed by other interest holders, such as a lender, a judgment creditor, or the former owner. There are limited circumstances under which a tax deed may be set aside.

[18] The details of that regime are not important to this case. What is important is to recognize that the legislature has provided municipalities with powerful tools to raise, securitize, enforce, and realize upon real estate taxation revenue in that municipality.

[19] Those tools are not, however, without limits. There is a complicated process to enforce collection, with substantial notice and opportunity for the landowner to square up. The MGA also mandates an "oldest first" attribution of receipts, and for the loss of priority for older taxes. These provisions say:

> 131 (1) Where a person, including a person paying on behalf of another person, pays only a portion of the taxes due, the treasurer shall apply and credit the amount
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> (a) firstly, to the payment of the taxes rated upon the person in respect of business occupancy assessment;
>
> (b) secondly, to the payment of any other taxes that are not a lien on any property;and
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> (c) thirdly, to the payment of accumulated interest and then the taxes longest in arrears with respect to any real property designated by the person.
>
> (2) Where no real property is designated, the treasurer shall, subject to the priorities listed in subsection (1), apply the amount received to the payment of the taxes longest in arrears.
>
> (3) The acceptance of part payment does not prevent the collection of any interest imposed in respect of non-payment of taxes or an installment of taxes.

> 133 (1) Taxes levied in respect of real property are a first lien upon the real property.
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> …
>
> (7) Taxes cease to be a lien on the property when six years have elapsed after the end of the fiscal year in which they were levied, but may be collected after they have ceased to be a lien.

[20] The BIA provides a comprehensive commercial regime for the "orderly and fair distribution of the property of a bankrupt among its creditors" (*Re Meredian Construction Inc.,* 2006 NSSC 17 at para. 17). In the case of a proposal, proceedings are stayed unless a Court says otherwise. Relevant provisions include:

> **61 (1)** The approval by the court of a proposal made after bankruptcy operates to annul the bankruptcy and to revest in the debtor, or in such other person as the court may approve, all the right, title and interest of the trustee in the property of the debtor, unless the terms of the proposal otherwise provide4.
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> **62 (1.2)** Except in respect of claims referred to in subsection 14.06(8), where a proposal is made in respect of a bankrupt, the time with respect to which the claims of creditors shall be determined is the date on which the bankrupt became bankrupt.
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> **62 (2)** Subject to subsection (2.1), a proposal accepted by the creditors and approved by the court is binding on creditors in respect of
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> > **(a)** all unsecured claims; and
> >
> > **(b)** the secured claims in respect of which the proposal was made and that were in classes in which the secured creditors voted for the acceptance of the proposal by a majority in number and two thirds in value of the secured creditors present, or represented by a proxyholder, at the meeting and voting on the resolution to accept the proposal.
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> **69.1 (1)** Subject to subsections (2) to (6) and sections 69.4, 69.5 and 69.6, on the filing of a proposal under subsection 62(1) in respect of an insolvent person,
>
> > **(a)** no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other

4 The Proposal provides for the continued vesting of the real property with the Trustee.

proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt;

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

(iii) the filing of a notice of intention under section 50.4 or of a proposal under subsection 62(1) in respect of the insolvent person,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as the insolvent person would otherwise have5, has any force or effect until the trustee has been discharged or the insolvent person becomes bankrupt;

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

71 On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

(emphases added throughout)

5 The Municipality conceded that its rights are stayed under the proposal, although its status as a secured creditor arises by operation of law, not by virtue of a "security agreement." I agree with Mr. Shea that 69.1(1)(a), not 69.1(1)(b) is the fountainhead of the applicable stay. As will appear, this is relevant to my treatment of whether, in a proposal, the MGA and the BIA can constitutionally co-exist, as 69.1(1)(a) relates to "remedy" on the filing of a proposal, as opposed to s. 69.1(1)(b) which relates to the force or effect of certain potential contractual arrangements upon the filing of a proposal.

[21] In this situation, the Trustee has told the Municipality repeatedly that it is prepared to (and has the resources to) pay post-bankruptcy taxes on its lands (with the exception of the six noted above which it says it will abandon and to which it will consent to a lift of the stay of proceedings). The Municipality has said "no," on the basis that it is statutorily required to abide by the "oldest first" MGA constraint. The Trustee has declined, saying that pre-bankruptcy debt must be addressed according to the Proposal (and BIA), which require it to keep post-bankruptcy taxes up to date, but to deal with pre-bankruptcy taxes in accordance with the general scheme of distribution: in this case, by paying such taxes when the lots are sold (or for a transferee to be responsible for them).

[22] The Trustee says, as a consequence, the BIA and the MGA are in conflict on the current facts, and as such says the MGA "oldest first" provisions are constitutionally inoperative in the current situation on the basis of paramountcy.

[23] As I will now explain, I have concluded that the two statutes conflict in the sense that it is not possible for the Trustee to comply with an obligation to pay post-bankruptcy taxes when the Municipality has said it will apply the "oldest first" MGA provisions; however, this provision is not inoperative because of constitutional conflict, but because of the general operation of the stay under the BIA without regard to constitutional paramountcy doctrine.

[24] Before doing so, however, I wish to acknowledge the extensive written and oral arguments submitted by the parties. Both parties were in fundamental agreement on the constitutional principles. Both also fundamentally agreed on two corollary notions: that insofar as possible, the statutes should be read with a view to their being able to operate in harmony and without constitutional conflict; but that I should not torture or rework the language of the legislature to force feed a resolution. The Supreme Court of Canada has emphasized that only in cases of operational conflict or frustration of federal objectives should paramountcy or a declaration of inoperativeness apply: *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3.

[25] Both litigants filed comprehensive constitutional briefs. Neither attorney general participated. Indeed, the parties did not differ terribly in their framework: that constitutional paramountcy means that federal legislation prevails in the event of an irresolvable conflict between otherwise valid provincial and federal legislation; that the burden is on the party asserting the conflict; and that conflict can arise when it's impossible to comply with both statutes at once, or if compliance with both frustrates federal purposes (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51).

Does the MGA Conflict with the BIA?

[26] It will be recalled that s. 69.1(1)(a) of the BIA reads:

> **69.1 (1)** Subject to subsections (2) to (6) and sections 69.4, 69.5 and 69.6, on the filing of a proposal under subsection 62(1) in respect of an insolvent person,
>
> > **(a)** no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt;

[27] Despite the attraction – indeed temptation – to delve into constitutional minutiae, in my view the operational effects of s. 131(1) and 131(2) MGA in the proposal context can and should be resolved on the basis of the general operation of s. 69.1(1)(a) and no declaration of inoperability on constitutional grounds is necessary or desirable.

[28] It is not disputed that in a true paramountcy situation, the federal legislation prevails. In this case, I believe that the federal regime operates to stay the "oldest first" s. 131(1) and 131(2) MGA regime not because of constitutional paramountcy, but because of the BIA's general legislative regime which stays the remedy s. 131(1) and 131(2) provide.

[29] In my view, the proper analysis is not whether the BIA and the MGA conflict by reason of operational conflict or federal frustration, but whether the ability under the MGA to collect taxes and allocate the priority of payment in a proposal is a "remedy" within the meaning of s. 69.1 of the BIA.

[30] In my view, it is. Put through that prism, the “oldest first” allocation, as a *remedy* to defray monies owing to the municipality, is stayed by virtue of the Proposal not as a matter of constitutional paramountcy, but by virtue of the general operation of the BIA in the same way as it stays any other remedy.

[31] The seminal decision which guides and binds me is *Vachon v. Canada Employment and Immigration Commission*, [1985] 2 SCR 417. In that case, the federal government allocated unemployment benefits that would otherwise have been payable to the bankrupt during his bankruptcy, to a pre-bankruptcy dischargeable debt to the same Crown agency, which it was permitted to do under s. 49 (3) of the then-*Unemployment Insurance Act*, SC 1970-71-72, c. 48. Beetz, J. found that by doing so, the Crown had taken for itself a “remedy” to which it was not entitled under the BIA.

[32] Beetz, J., for a unanimous Court, began by citing what was then s. 49 of the BIA, the relevant parts of which - as is currently the case with s. 69.1 - provided that “Upon the filing of a proposal….no creditor….shall have any remedy against the debtor….unless with the leave of the Court.” He stated: (my emphases throughout):

> 18. Appellant in my view properly relied upon the English version of s. 49(1) of the *Bankruptcy Act*, where the word *recours* is rendered by the word "remedy", giving to it and to the words "*autres procédures*" ("other proceedings") a very

broad meaning which covers any kind of attempt at recovery, judicial or extrajudicial. *Black's Law Dictionary* (5th ed. 1979), defines "remedy". The means by which a right is enforced or the violation of a right is prevented, redressed, or compensated. and below: Remedy means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

19. *Jowitt's Dictionary of English Law* (2nd ed. 1977), vol. 2, gives an almost identical definition:

> the means by which the violation of a right is prevented, redressed, or compensated. Remedies are of four kinds: (1) by act of the party injured . . .; (2) by operation of law . . .; (3) by agreement between the parties ...; (4) by judicial remedy, *e.g.* action or suit. The last are called judicial remedies, as opposed to the first three classes which are extrajudicial.

20. The courts have also interpreted the stay of proceedings imposed by s. 49(1) of the *Bankruptcy Act* very broadly.

21. Thus, in *In re Standard Pharmacy Ltd.* (1926), 1926 CanLII 260 (AB KB), 7 C.B.R. 424, the City of Edmonton wished to use a proceeding mentioned in its Charter to collect unpaid taxes, consisting alternatively of a distress of personal property or a simple notice to the trustee that there were taxes which had not been paid by the bankrupt. Tweedie J. of the Supreme Court of Alberta, sitting in bankruptcy, cited s. 8B of the *Bankruptcy Act*--now s. 49(1)--and wrote, at pp. 430-31:

> This section applies to both judicial and extra-judicial proceedings; and distress being a remedy within the meaning of that section the section is, in my opinion, an absolute bar to any proceedings judicial or otherwise to enforce payment of taxes without the leave of the Court, which was not granted to, nor applied for on behalf of, the city.

In regard to the notice to be given by "the collector or other person authorized to collect the taxes" to the trustee in bankruptcy as provided in sec. 376*a* of the Charter it is evident from the reading of that section that the notice is a substitute for the distress, and that it was intended that such simple method, instead of the actual physical seizure of the property, should be the remedy to be pursued. Notice is a remedy or proceeding within the meaning of sec. 8B of *The Bankruptcy Act* and what has been said in regard to distress applies with equal force in regard to the notice and the city is deprived of its right to enforce payment in priority by the provisions of sec. 8B of *The Bankruptcy Act*.

22. At page 430, he gave the reason underlying this decision:

> The city by reason of the authorized assignment was deprived of any opportunity of gaining priority in the distribution of the assets which it might have acquired in the enforcement of its remedies.

23. In *Hudson v. Brisebois Bros. Construction Ltd.* (1982), 42 C.B.R. (N.S.) 97, the Alberta Court of Appeal ordered that the trustee be repaid money distributed by

> the sheriff to certain creditors, in ignorance that the debtor was bankrupt at the time of the distribution. At page 103, Lieberman J. wrote in the unanimous reasons of the Court:
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> > Section 49(1) has the effect of staying the proceedings taken by the appellant prior to the payment out by the sheriff. Thus the payment out by the sheriff, although completely innocent, contravenes s. 49(1) and is without authority.

[33] He went on to cite examples of public utilities being precluded from "cutting off" services to a bankrupt on the basis of pre-bankruptcy debts under Quebec law and concluded:

> 25. This Court of course does not have to decide whether the conclusions of these judgments are correct, but in my opinion the courts were right to give, expressly or by implication, a broad meaning to the stay of proceedings imposed by s. 49(1) of the *Bankruptcy Act*. This broad meaning is confirmed by the fact that the legislator took the trouble to exclude actions against either the creditor or his property.
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> 26. As Houlden and Morawetz wrote in *Bankruptcy Law of Canada*, vol. 1, p. F-70.1, under s. 49 of the *Bankruptcy Act*:
>
> > An ordinary unsecured creditor with a claim provable in bankruptcy can only obtain payment of that claim subject to and in accordance with the terms of the Bankruptcy Act. The procedure laid down by that Act completely excludes any other remedy or procedure.
>
> 27. The *Bankruptcy Act* governs bankruptcy in all its aspects. It is therefore understandable that the legislator wished to suspend all proceedings, administrative or judicial, so that all the objectives of the Act could be attained.
>
> 28. Accordingly, I consider that s. 49(1) of the *Bankruptcy Act* is sufficiently broad to include recovery by retention from subsequent benefits, such as the recovery at issue here.

[34] Clearly, "remedies" that are subject to the Proposal Stay include legislative remedies, and means of "proceedings, administrative or judicial" to further such remedies, including "for compensation."

[35] In my view, the "oldest first" provisions of the MGA provide a "remedy" by which receipts pertaining to a property are allocated, such as (for example) to prevent expiry of the lien accorded to taxes under six years old or to prevent the expiration of any other applicable running limitation period, and to allow accounts to be aged in a way that may be more favourable to a reviewing authority6

[36] It is also worth noting that in a proposal, s. 69.1 stays a secured creditor's access to most enforcement remedies, subject to ss. 69.1(2) to 69.1(6), 69.4, 69.5, and 69.6. This is in contrast to a bankruptcy, in which s. 69.3(2) preserves most secured creditors' rights to realize or otherwise deal with its security. In my view, this provides further authority for the proposition that Parliament intended that an entity cloaked with statutory authority as a secured creditor, unless otherwise specified or permitted by a Court, is precluded in a proposal from exercising most of its "remedies," whereas in a bankruptcy (again subject to specified exceptions or Court order) such a secured creditor may proceed as usual.

[37] It follows, in my view, that s. 131 MGA's "oldest first" remedy for tax receipt attribution is stayed by the operation of s. 69.1 of the BIA. Receipts paid by the Proposal Trustee to post-bankruptcy taxes are accordingly attributed to

6 West Hants' Director of Finance, Ms. Rochon, filed evidence of such oversight by the Province. I will return to this when discussing material prejudice in the context of the application to lift the stay of proceedings.

those post-bankruptcy taxes, but for the reasons which follow in due course, neither the pre-bankruptcy debt nor its secured status is extinguished during the proposal as the running of the applicable time limits are tolled during that insolvency. As the remedy is stayed, so is the time limitation.

[38] For clarity, I make no comment under what, if any, circumstances a municipality may be precluded from exercising its "oldest first" mandate or its tax sale powers in a bankruptcy.

Does the Municipality lose its secured creditor status by passage of time?

[39] The short answer is 'no.' Neither party really argued otherwise, except by West Hants in support of its argument that it will be materially prejudiced if the stay of proceedings is not lifted. Because I place considerable importance on the continuing status of West Hants as a secured creditor during the proposal, I will canvass the tolling issue.

[40] It will be recalled that a real property tax creditor can lose its secured status in the normal course: MGA s. 133(7).

[41] West Hants says that, should this occur by virtue of losing its right to apply receipts to "oldest first" or by other passage of time, it will be prejudiced in the extent and years for which it may recover.

[42] I would agree that if either of these was the case, it would be prejudiced and materially so. Indeed, the Trustee concedes the point in para. 40 of its brief.

[43] But neither is the case.

[44] I agree with the following passage in the Trustee's brief, at para. 59:

> Whether or not s. 133(7) of the MGA is operative, the common law Suspension Rule operates to ensure that the Municipality is not prejudiced by the fact that it is prevented by s. 69.1 of the BIA from exercising its remedies as a secured creditor while the TFDC Proposal is implemented by interrupting or suspending the running of the six-year "sunset" period referenced in s. 133(7). The Suspension Rule suspends the operation of limitation periods and the running to time limits for the period a creditor is prevented from exercising its remedies against a debtor or the property of a debtor [citing authority].

[45] In *Dilollo Re*, 2013 ONCA 550, the Court stated:

> [45] The Trustee relies, however, on a line of cases under s. 69, which are summarized by the following quote from L.W. Houlden, G.B. Morawetz and Janis Sarra, *Bankruptcy and Insolvency Law in Canada*, 4th ed. rev., vol. 3, looseleaf (Toronto: Carswell, 2013), at p. 5-99:
>
> > When a bankruptcy occurs, the *Statute of Limitations* ceases to run against claims . . . The creditor's ability to take proceedings against the debtor is stayed by the *Act*, and the stay of proceedings suspends the operation of the limitation period . . . . The suspension ends when the trustee is discharged (s. 69.3(1)), and the *Statute of Limitations* commences to run again at that time.
> >
> > (Citations omitted)
>
> Cases that follow this principle include *Lakehead Newsprint (1990) Ltd. v. 893499 Ontario Ltd.*, 2001 CanLII 28443 (ON SC), [2001] O.J. No. 1, 23 C.B.R. (4th) 170 (S.C.J.), vard 2001 CanLII 32747 (ON CA), [2001] O.J. No. 3717, 155 O.A.C. 328

> (C.A.); *Canada (Attorney General) v. Fekete*, [1999] A.J. No. 384, 1999 ABQB 262, 242 A.R. 193; *Toronto-Dominion Bank v. Barry-Kays*, [2010] O.J. No. 2667, 2010 ONSC 3535, 69 C.B.R. (5th) 243 (S.C.J.); *Mawji (Re)*, [2011] O.J. No. 6535, 2011 ONSC 4259, 94 C.B.R. (5th) 77 (S.C.J.), affd [2012] O.J. No. 1048, 2012 ONCA 152, 94 C.B.R. (5th) 135; *Fimax Investments Group Ltd. v. Grossman*, [2012] O.J. No. 1821, 2012 ONSC 2436 (S.C.J.). [page 92]

[46] The common root of these authorities runs deep -- an 1887 decision of the English Chancery Division, *Crosley (Re); Munns v. Burn* (1887), 35 Ch. D. 266 (C.A.). In that case, Crosley, a broker, was adjudged bankrupt in February 1874. It was discovered that he had misappropriated securities that he had held for a customer, Captain Ayscough. Ayscough made a claim in the bankruptcy and received a small dividend. The administration of the bankrupt estate was completed in 1880, and an order was made annulling Crosley's bankruptcy.

[47] Crosley died in 1885 and in May 1896 an order was made for the administration of his estate. Captain Ayscough made a claim for the balance of what he was owed, on the basis that the debt was incurred by Crosley's fraud and therefore survived the bankruptcy.

[48] It was argued, however, that the claim was barred by the six-year statute of limitations. Lord Justice Cotton said this, at p. 270 Ch. D.:

> Then it is said that the claim is barred by the Statute of Limitations. But the fraud was not discovered till after the adjudication in bankruptcy. While the bankruptcy was in force no action could be brought, so the statute could not begin to run till the annulling of the bankruptcy, and within six years from that time an order for administration was made. The Statute of Limitations is therefore no defence, and the appeal must be dismissed.

[49] Lindley J. agreed, at p. 271 Ch. D., stating:

> The short answer to the argument founded on the Statute of Limitations is that the statute did not begin to run till the bankruptcy had been annulled.

[50] While the respondent argues that the court referred to no authority in support of the proposition that the statute of limitations did not run during the bankruptcy, the proposition was not new. In *Westby ex p. Lancaster Banking Corp. (Re)* (1879), 10 Ch. D. 776 (Ch. Div.), at p. 784 Ch. D., the bankruptcy commenced in 1870. After the estate had been realized, and the trustees determined that nothing more could be brought in, the bankruptcy was deemed to be closed. The bankrupt failed to pay his creditors the requisite ten shillings on the pound, which would have entitled him to a discharge, and he never obtained a discharge. Subsequently, in 1878, the bankrupt inherited a large amount of money. A creditor, whose debt had appeared on the statement of affairs, but who had not proven his debt before the close of the bankruptcy, sent a proof of claim to the receiver, who had taken over as trustee.

[51] It was held that the creditor was entitled to apply for leave to enforce his debt as a judgment debt against the debtor's property. In answer to the argument that the creditor's

> claim [page93]was time-barred, Sir James Bacon, the chief judge in bankruptcy, abruptly dismissed the assertion, at p. 272:
>
> > The argument founded on the *Statute of Limitations* as an answer to this claim is not tenable for a moment. *The Statute of Limitations has nothing to do with the bankruptcy laws*. When a bankruptcy ensues, there is an end to the operation of that statute, with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy, and the *Statute of Limitations* has no application at all to such a case, or to the principles by which it is governed.
> > (Emphasis added)
>
> [52] In my view, this proposition remains valid. Section 69 of the *BIA* is not, as such, a provision that extends, suspends or varies a limitation period. It takes away creditors' civil remedies and requires them to submit their claims through the bankruptcy process. The bar on commencing or continuing proceedings serves this end and preserves the integrity of the bankruptcy process. In most cases, the limitation period is of no further significance because creditors' claims are dealt with in the bankruptcy. In the rare case, where the bankrupt is not discharged or the claim survives bankruptcy, the limitation period may resume running. It also continues to run against a creditor who seeks to recover a debt in proceedings unconnected to the bankruptcy: see Houlden, Morawetz and Sarra, at 5-99, referring to *In re Benzon; Bower v. Chetwynd*, [1914] 2 Ch. 68 (C.A.).
>
> [emphases added except where noted in the original above]

[46] Although the Court spoke of the limitation not being "suspended," it clearly endorsed the principle that limitation periods do not run during the bankruptcy. Here, the time period that would render a secured claim unsecured after six years is similarly tolled.

[47] Similarly, in *Business Development Bank of Canada v. Quattro Exploration and Production Ltd*., 2021 ABQB 638, Justice Dario put it this way:

> [50] The case law considering the impact of stays of proceedings on limitation periods in the bankruptcy context suggests that the analysis depends on the circumstances of each case, including the nature of the claim and the type of creditor. Generally, the courts have held that *in bankruptcy* the limitation period ceases to run against claims when

a bankruptcy occurs: see ***Ex parte Lancaster Banking Corp.*** (1879), 10 Ch D. 776 at p 784; ***Munns v Burn*** (1887), 35 Ch D. 266 (CA) at 270 and 271 (dealing with a claim of fraud); ***Lakehead Newsprint (1990) Ltd. v 893499 Ontario Ltd.*** (2001), 2001 CanLII 28443 (ON SC), 23 CBR (4th) 170 (Ont Sup CtJ) at para 38 and 29, additional reasons at 2001 CarswellOnt 136 (Ont Sup CtJ); reversed on other grounds (2001), 2001 CanLII 32747 (ON CA), 28 CBR (4th) 53; ***Canada (Attorney General) v Fekete*** (1999), 1999 ABQB 269 (CanLII), 242 A.R. 196 (Alta. Master); see also Lloyd W Houlden, Geoffrey B Morawetz and Dr. Janis P Sarra, *Bankruptcy and Insolvency Law in Canada*, 4th ed (Toronto: Thomson Reuters Canada, 2009, loose-leaf), Provable Claims and Statute of Limitations at G§47and the cases cited therein. This principle may not apply to the rights and remedies of secured creditors relying on the security over their secured interests, even if the action is commenced after the bankruptcy occurs: see s 69.3(2) and Houlden, Morawetz & Sarra at G§47.

[51] Houlden, Morawetz & Sarra explain that a determining factor of whether the stay of proceedings suspends the limitation period is if the claim is in the bankruptcy or is independent of it:

> The creditor's ability to take proceedings against the debtor is stayed by the Act, and the stay of proceedings suspends the operation of the limitation period: *Canada (Attorney General) v. Fekete* (1999), 1999 ABQB 269 (CanLII), 10 C.B.R. (4th) 102, 242 A.R. 196, 1999 CarswellAlta 297 (Alta. Master). The suspension ends when the trustee is discharged (s. 69.3(1), s. 69.3(1.1)), and the *Statute of Limitations* commences to run again at that time: *Canada (Attorney General) v. Fekete, supra.*
>
> It is only in bankruptcy that time ceases to run and if a creditor seeks to recover a debt in proceedings not connected with bankruptcy, time does run: *Re Benzon; Bower v. Chetwynd,* [1914] 2 Ch. 68 (C.A.).

[52] While courts have generally held that the question of whether or not the stay stops the limitation period from running will be (at least in part) dependent on whether or not the claim is considered to be within or outside of the bankruptcy (see, for example, ***Re Forsyth***, 2011 BCSC 1203 at paras 14 and 15), the Ontario Court of Appeal expressed the same general principle somewhat differently in ***Re Diollo***, 2013 ONCA 550 at paras 44-52 (alternate name: ***msi Spergel Inc. v I.F. Propco Holdings (Ontario) 36 Ltd.***).

[53] In ***Re Diollo***, the Court was considering the effect of section 195 of the *BIA* and whether the stay of proceedings suspended the limitation period during the period of appeal. The Court concluded that once bankruptcy proceedings commence, the parties are effectively taken outside of the regular litigation process such that the statute of limitations is no longer relevant because the proceedings fall under the *BIA*. If, however, a claim survives bankruptcy for whatever reason, the limitation period *resumes,* meaning that during the bankruptcy, the limitation period is suspended. Meanwhile, for claims outside the bankruptcy, the limitations clock continues to run. The Court stated at para 52:

> In my view, this proposition remains valid. Section 69 of the *BIA* is not, as such, a provision that extends, suspends or varies a limitation period. It takes away

> creditors' civil remedies and requires them to submit their claims through the bankruptcy process. The bar on commencing or continuing proceedings serves this end and preserves the integrity of the bankruptcy process. In most cases, the limitation period is of no further significance because creditors' claims are dealt with in the bankruptcy. In the rare case, where the bankrupt is not discharged or the claim survives bankruptcy, the limitation period may *resume* running. It also continues to run against a creditor who seeks to recover a debt in proceedings unconnected to the bankruptcy… [Emphasis added.]
>
> [54] It would be tremendously burdensome on litigants and the Courts if every claim within the bankruptcy was subject to the continued running of the limitation period. It would force creditors to file claims with the court - in addition to filing their claim with the trustee in the bankruptcy - to preserve residual rights in the event the bankruptcy was not completed and the bankrupt not discharged. To address the running of the limitation period for those claims outside the bankruptcy process (as well as to reduce the circumstances in which it may be necessary to determine whether a claim falls within or outside the bankruptcy) the Receivership Orders in the present case (like the Alberta Template Receivership Order) allow a party to commence an action to preserve a limitation period without seeking leave of the court to lift the stay. In many cases, this may be sufficient to ameliorate the potential prejudice in cases where the stay does not suspend the limitation period.
>
> [emphases added except where noted in original]

[48] In other words, a limitation period may not cease to run if a creditor is not prevented from pursuing its remedies. Specifically, a secured creditor who is able to exercise its rights under its security during the insolvency process, either because it is exempt from the stay, or because the stay has been lifted. In *Forsyth (Re)*, 2011 BCSC 1203, the Court put it this way:

> [14] In my view, this argument fails to take into account the distinction between a claim in debt against a bankrupt estate, and the disposition of claims by a trustee in bankruptcy.
>
> [15] In the former circumstance, limitation periods may or may not run, as the case may be, depending on whether the *Bankruptcy and Insolvency Act* has imposed a stay of proceedings. In such a case, the expiry of a limitation period would provide a valid defence to an action. In the latter circumstance, however, I am satisfied on the authorities that the trustee is required to assess the claim as it stood at the time of the bankruptcy, regardless of whether the claimant is able to maintain an independent action. In Houlden, Morawetz and Sarra, *Bankruptcy and Insolvency Law of Canada*, vol. 2, 4th ed., (loose-leaf updated 2011, release 4), this distinction is explained as follows at 5-99:

> If the trustee receives the proceeds of the sale of property on which a secured creditor holds valid security, the *Statute of Limitations* has no application; the trustee holds the funds as constructive trustee for the secured creditor: *Re Sutton Tool & Die Manufacturing Co.* [(1990), [1990 CanLII 6862 (ON SC)](), 72 O.R. (2d) 142 (Ont. S.C.), aff'd (1993), [1993 CanLII 8674 (ON CA)](), 15 O.R. (3d) 125 (C.A.)].
>
> It is only in bankruptcy that time ceases to run and if a creditor seeks to recover a debt in proceedings not connected with bankruptcy, time does run: *Re Benzon; Bower v. Chetwynd*, [1914] 2 Ch. 68 (C.A.).
>
> [16] I am therefore satisfied that the trustee erred in law by taking account of the expiry of the one-year limitation period in s. 33 of the *Builders Lien Act* when that period elapsed only after the assignment into bankruptcy. The trustee was required to assess the validity of the claim as it stood on the date of the bankruptcy.

[49] Here, the proposal stays West Hants from pursuing its remedy of tax sale (or allocation of proceeds to oldest-first), unless and until the proposal is completed, or unless and until the Court lifts the stay. It follows that its statutory lien period of six years, also being part of its statutory remedy for collection of taxes or sale in default, does not run during the proposal. From that, as I will discuss in due course, the Municipality is not unduly prejudiced by the proposal or the stay that flows from it.

Should the Stay of Proceedings be lifted?

[50] For ease of reference, I repeat s. 69.4 of the BIA here:

> **69.4** A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> > **(a)** that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

(emphases added)

[51] The parties do not differ significantly on the applicable law. There must be material prejudice, or it must be "equitable on other grounds" to lift the stay. Having reached the conclusions that I have with respect to the following matters, I conclude that there is no such basis to lift the stay, save for the six lots previously mentioned:

(a) the intersect of s. 131 and 137 of the MGA and s. 69.1 of the BIA;

(b) the tolling of the lien expiration in s. 137(7) of the MGA during the period the stay is in place with respect to the Municipality,

(c) the acknowledgement that taxes and interest continue to accrue,

(d) the fact West Hants is likely to be paid in full on all lots as they sell, except to the extent that such taxes and interest exceed the value of the land,

(e) the Trustee has agreed that the stay may be lifted as against six lots in which it believes there is no equity; and

(f) the Proposal liquidation process will be superior to the tax sale process in terms of benefit to the estate.

[52] At its simplest, the tax sale process is a debt-realization model. Ms. Rochon gave evidence to that effect. In essence, West Hants goes through the statutory notification process, to stakeholders and to the public. There is no active marketing, *per se*, nor valuation. The Municipality is interested in recovering what it is due, and not in value optimization. It can only keep what it is owed, with costs. The rest is up to others to claim, so beyond collecting its debt, West Hants has no 'skin in the game' in maximizing outcome. Ms. Rochon indicated that tax sale properties typically get knocked down for "a bit" above the outstanding municipal debt.

[53] Ms. Rochon also provided a financial "snapshot" of the Municipality. It operates on a 30.2 million dollar budget (2021-2). Most of that comes from property taxes. Its expenses in that period were $27 million, and it had an accumulated consolidated surplus of $86.7 million. It had $14.6 million in debt. On every matrix save one used by the Province to evaluate financial health, the Municipality was in – and sometimes well within – the low risk category. The only "moderate" risk category was that of uncollected taxes, which was substantially impacted by the Terra Firma properties. As I have explained, this is fundamentally a timing issue by virtue of the proposal.

[54] There is no indication that municipal services are being impaired by this collection issue, and in every other measured respect that is in evidence, the financial health of West Hants is robust and even enviable.

[55] Against that backdrop, I turn to the test for lifting the stay. The parties did not differ substantially in their views on what that test is. West Hants relied primarily on *Great North Data Ltd. (Re)*, 2020 NLSC 105, which in turn incorporated *Re Advocate Mines Limited*. The Trustee cited *Janodee Investments Ltd. v. Pellegrini,* 2001 CanLii 28455 and *On the Vine Meat and Produce BIA Proposal (Re),* 2012 NBQB 86.

[56] In *Great North*, the Court stated:

> [7] *Re Advocate Mines Limited*, [1984] O.J. No. 2330 (O.S.C., in Bankruptcy) provides a useful synopsis of circumstances in which a Court may remove an automatic stay of proceedings under section 69.3 of the *BIA*. Registrar Ferron lists five circumstances that might be "appropriate cases" for lifting a stay:
>
> 1. Actions against the bankrupt for a debt to which a discharge would not be a defence.
> 2. Actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the Bankruptcy Act inappropriate.
> 3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.
> 4. Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation.

5. Actions in Ontario which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment.

(*Advocate Mines*, paragraphs 3-7)

[8] While Registrar Ferron's "list" is comprehensive and is frequently cited, it is generally recognized as a beginning and not the endpoint for discussing the issue. I note, for example, Adams, J.'s comments, in *Re Francisco*, 1995 CanLII 7371 (ON SC), [1995] O.J. No. 917 (O.C.J, General Division, in Bankruptcy):

> It should be understood that Re Advocate Mines Ltd., supra, is not an exhaustive codification of the policy underlying the *Bankruptcy and Insolvency Act*. It is but one thoughtful decision attempting to articulate the type of grounds which may provoke the exercise of a judicial discretion. To view Advocate Mines as a limiting or exhaustive instrument is an error in principle.
>
> (*Francisco*, paragraph 13)

[9] Adams, J. also stated how he thought a bankruptcy court should proceed on an application under section 69.4 of the *BIA*:

> In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, exist for relieving against the otherwise automatic stay of proceedings.

(*Francisco*, paragraph 1)

[10] In *Re Ma*, 2001 CanLII 24076 (ON CA), [2001] O.J. No. 1189 (OCA) the Ontario Court of Appeal endorsed Adams, J.'s approach. It quoted the preceding passage from Adams, J.'s judgment in its reasons and observed:

> As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in *Re Francisco*, the role of the court is to ensure that there are 'sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*' to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are 'sound reasons' for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.
>
> (*Ma*, paragraph 3)

[11] From my review of section 69.4 of the *BIA*, these are some of the principles that are relevant to its application:

- A creditor applying under section 69.4 of the *BIA* must meet at least one of the two criteria stated in the section, not both;
- A creditor applying under section 69.4 of the *BIA* does not have to show it has a *prima facie* case in its action against the bankrupt: *Re Ma*;
- The bankruptcy court need only consider the merits of the proposed action to see whether there are 'sound reasons' for lifting the stay: *Re Ma*;
- A bankruptcy court on a leave application must ensure that sound reasons exist for relieving against the automatic stay of proceedings: Re Francisco;
- It is an error of law to accept the five circumstances enumerated in *Re Advocate Mines Limited* as "a limiting or exhaustive instrument": *Re Francisco*;
- If the creditor satisfies the court that one or more of the grounds referred to in *Re Advocate Mines Limited* is present and that the creditor is likely to be materially prejudiced or that it is equitable on other grounds to make such a declaration then a court will lift the stay of proceedings: *Re Panorama Parkview Homes Ltd.*, 2017 BCSC 2071 (BCSC); and,
- Fraud alleged by a creditor to have been committed by the bankrupt is a complex matter which should not ordinarily be dealt with on a summary basis and without a full hearing: *Re Taylor Ventures Ltd.*, 2002 BCSC 82 (BCSC).

[57] *Janodee* put it succinctly:

> 28 Section 69.4(b) gives the court discretion to lift the stay if it is "equitable on other grounds" to do so. This subsection has been applied in circumstances where the creditor is able to demonstrate that the operation of the BIA would treat it unfairly or that it will be prejudiced to a greater degree than other creditors….

[58] And, in *On the Vine Meat and Produce*, the Court had this to say:

> [24] In *Cumberland Trading* (Re) 1994 CanLII 7458 (ON SC), 23 C.B.R. (3d) 225 at paragraph 11 Justice Farley states that there is an obligation on a creditor seeking to lift a stay to place a value on the amount of security that would be eroded during the period the stay is in place. In the present case RBC has provided no evidence that the value of its

security will be threatened by the continuing operation of the Debtor while the stay is in place. In fact the Trustee opines that it has a negative value.

[25] In *Ingles* (Re) 1997 CanLII 448 (BC SC), 46 C.B.R. (3d) 202, the Court concluded at paragraph 17:

> The Cumberland case means that material prejudice means significant harm or injury to the creditors in terms of the indebtedness or the security held by it.

[26] Section 69.4(b) of the *BIA* gives this Court discretion to lift the stay if it is "equitable on other grounds" to do so. This subsection has been applied in circumstances where the conduct of the Debtor is more consistent with a desire to delay and to frustrate the rights of creditors than with a desire to make serious efforts to resolve their financial difficulties. See *Janodee Investments Ltd. v. Pellegrini* 2001 CanLII 28455 (ON SC), 25 C.B.R. (4th) 47. There is no evidence before me in this case that the Debtor is trying to delay and frustrate the rights of creditors with respect to the making of a proposal.

[27] I must take into account the effect of the lifting of the stay for RBC would have on the administration of the estate and possible prejudice to other stakeholders. See *Re Acepharm* Inc. 4 C.B.R. (4th) 19 at paragraphs 7 and 15, *Toronto Dominion Bank and Ty (Canada) Inc.* 2003 CanLII 43355 (ON SC), 42 C.B.R. (4th) 142 at paragraph 22(c).

[27] [sic] In order for a stay to be lifted an applicant must demonstrate to the Court that there exists compelling reasons to do so. See *Toronto Dominion Bank v. Ty (Canada) Inc.* at paragraph 22.

[28] Even where there is no doubt that an applicant would suffer prejudice because of the stay of proceedings, the Court has refused to lift the stay for the creditor where it would have prevented the debtor from making a proposal which the Court believed would benefit the general body of creditors in the end. See: *Toronto Dominion Bank v. Ty (Canada) Inc.*, *supra*.

[30] [sic] I am not persuaded by the evidence advanced by RBC that it was materially prejudiced and is still materially prejudiced by the filing of a Notice of Intention and the granting of the extension. In my view the "material prejudice" referred to in section 69.4 of the *BIA* is an objective prejudice as opposed to a subjective one. See *Cumberland Trading Inc. (Re)* where Justice Farley (as he then was) concluded that material prejudice is objective. He refers to *"the degree of the prejudice suffered vis-á-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor qua person, organization or entity*." See also *Com/Mit Hitech Services Inc. (Re)* and *Re Heritage Flooring Ltd.* (2004) 23 C.B.R. (5th) 60.

[31] Accordingly, material prejudice under section 69.4 of the *BIA* is objective prejudice that refers to the degree of prejudice suffered in relation to the indebtedness and security

> held by the creditor. To succeed a creditor must be able to show quantitative or possible qualitative prejudice that would be suffered if the stay is not removed.
>
> …
>
> [34] Section 69.4 of the *BIA* provides as follows:
>
> > A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
> >
> > *(a)* that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
> >
> > (*b*) that it is equitable on other grounds to make such a declaration.
>
> [35] Thus this Court must be satisfied that only one of the two conditions listed above is met in order to grant the relief requested.
>
> [36] In *Re Jenkins (2005)*, 2005 NSSC 234 (CanLII), 13 C.B.R. (5th) 208, Register Cregan undertook a thorough analysis of the law relating to applications to lift a stay under s. 69.4 of the *BIA*. After reviewing the authorities he concluded as follows:
>
> > The practical result of these authorities is that the applicant in a section 69.4 application is not required to prove a prima facie case, or actually prove any facts respecting the case, rather it is for the applicant to satisfy the court either that it is likely to be materially prejudiced by the stay or that there are other equitable grounds for lifting it.

[59] Applying the above, and being mindful of the warning that *Advocate Mines* and its progeny are not to be applied in a formulaic fashion, I am not satisfied that West Hants has discharged the burden upon it to show material prejudice or other equitable grounds. Indeed, the evidence is that it will be paid in full, or almost so, and with interest as lots are sold. It is not a skint creditor at risk of being "put out of business" for want of working capital, or for its citizens to lose its municipal

services, or at need to ask its ratepayers to dig deeper into their own taxed pockets to make up for a shortfall. There is no evidence that it security position is wasting by virtue of eroding equity or deteriorating assets. To the contrary, an orderly liquidation through the proposal process rather than a "one and done" tax sale of numerous lots, potentially "flooding the market," benefits all. The evidence is that the Municipality's liquidation process would not benefit creditors as a whole and would not even benefit the Municipality beyond the scope of its claim through being able to "profit" on its realized security.

[60] To the contrary: West Hants stands to benefit from the proposal, when taken in conjunction with the clarification provided by this decision. It is understandable that it considered itself bound by the "oldest first" provisions of the MGA, pending binding authority to the contrary. For that reason, it has refused the Trustee's offers of partial, interim, or on-account payments that it has sought to make over time, accepting only those which constituted payment in full of taxes on a particular lot (generally if not always in the context of a transfer or sale). Once the proposal is implemented, under the rubric of this decision, the Municipality will be able to respond "sure" to the Trustee's offer to "take my money," should that occur; it will get the balance when lots are sold or transferred (subject to the six-lot

carve out I have mentioned). Its only risk is if a lot's value is less than its corresponding outstanding tax bill.

[61] I therefore decline to lift the stay of proceedings, overall.

[62] As noted, the Trustee has indicated that it consents to the lifting of the stay with respect to six specified lots in which it believes there is negative equity. These were not specifically argued before me. I hesitate as to whether s. 69.4 is broadly worded enough effectively to lift a stay only as against certain specific *assets*. The section allows me to lift a stay "in respect of that *creditor or person*," not an asset or class of assets.

[63] I am prepared to sign an order, within my jurisdiction, giving effect to the Trustee's willingness to allow the tax sale process to take place on these six lots. It may be that 69.4's permission for me to lift the stay "subject to any qualifications that the Court considers proper" will require something of a backwards solution, such as "I lift the stay provided that doing so only applies to the ability of West Hants to pursue its remedies against these six properties," or words to like effect. I invite the parties to submit language to each other, and to the Court, to this end.

Should the Proposal be Approved?

[64] In light of the above, the approval of the proposal is almost anticlimactic. Although the history is complex, at this stage the proposal essentially consists of liquidating the properties, paying the secured claims (including West Hants) to the extent of the security, paying what are expected to be significant professional fees, and distributing whatever is left. I am fully satisfied that it is "calculated to benefit the general body of creditors," (BIA s. 59(2)) and apparently after much wrangling, the participating creditors overwhelmingly think so too.

[65] I do note that the proposal anticipates Trustees fees of between one and two million dollars. That's quite a band. Much of it has already been incurred. It is generally understandable that the Trustee knows not how many more hooks and slices remain in its future, but I caution the Trustee, as always, to maintain careful management of its time and recording of same for taxation.

Costs

[66] Both the Trustee and West Hants sought costs. Neither argued the point robustly before me. Given the novelty of the situation, my provisional view is that both participants should bear their own costs. The Municipality was 'stuck' with its legislative mandate, absent a Court order. The Trustee had to have the proposal approved and it took some years to get to that point. In the meantime it was

stymied in moving the property tax element of the file forward. However, if the parties cannot agree, I will receive submissions on costs of no more than 10 double-spaced pages each, exclusive of authorities, within 30 days of release of this decision.

[67] To recap:

- The proposal is approved
- The application to lift the stay of proceedings is dismissed except insofar as it can be lifted with respect to the six specified lots identified by the Trustee
- Ss. 131(1), 131(2), and 133(7) of the MGA are not inoperative constitutionally as against the BIA, but provide for remedies which are stayed by operation of the BIA
- The six year time limit of West Hants' lien under s. 133(7) of the MGA does not run during the Proposal, except insofar as it is lifted against the six lots noted above, and then only upon it being so lifted; and
- I will receive submissions as to costs, if the parties cannot agree.

[68] I call upon Mr. Shea, K.C., to prepare and circulate a draft order. I thank all for their professional and courteous submissions, both written and oral.

Balmanoukian, R.