COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Williams Moving & Storage (B.C.) Ltd. v. Canada (Minister of National Revenue),* 2024 BCCA 160

Date: 20240426
Docket: CA48883

Between:

Williams Moving & Storage (B.C.) Ltd.

Appellant
(Applicant)

And

Attorney General of Canada on behalf of His Majesty the King in Right of Canada as Represented by the Minister of National Revenue

Respondent
(Respondent)

Before: The Honourable Chief Justice Marchand
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated February 10, 2023 (*Williams Moving & Storage (B.C.) Ltd. (Re)*, 2023 BCSC 205, Vancouver Docket B150075).

Counsel for the Appellant:	C. Dennis, K.C. O.J. James
Counsel for the Respondent:	C.L. Akey K.B. Baldwin
Place and Date of Hearing:	Vancouver, British Columbia January 25, 2024
Place and Date of Judgment:	Vancouver, British Columbia April 26, 2024

Written Reasons by:
The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Mr. Justice Abrioux

Summary:

This is an appeal from an order dismissing an application made by the appellant in respect of a proposal made to its creditors under the Bankruptcy and Insolvency Act [BIA]. An error was made in the drafting of the proposal. The error only came to light, however, when the Canada Revenue Agency re-assessed the appellant several years after the proposal had been approved and implemented. The appellant moved for relief, applying to rectify the proposal or, alternatively, to have the order approving it amended pursuant to s. 187(5) of the BIA. The chambers judge dismissed the application. The appellant contends the chambers judge erred in principle in the exercise of her discretion under s. 187(5) of the BIA, and in law in her application of the test for rectification.

Held: Appeal allowed. The chambers judge did not err in refusing to rectify the proposal. However, she erred in failing to adequately consider whether to exercise her discretion pursuant to s. 187(5) so as to vary the order approving the proposal. This is an appropriate case to exercise that discretion to correct the drafting error. Doing so does not constitute a substantive alteration to the proposal. An order is granted amending and correcting the order approving the proposal with retroactive effect.

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Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] In this case, an error was made in the drafting of a proposal to the creditors of an insolvent company, the appellant Williams Moving & Storage (B.C.) Ltd. (the "Proposal"). The creditors, unaware of the error and for the most part unaffected by it, approved the Proposal, as did the Supreme Court of British Columbia on an application made in accordance with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*].

[2] Years later, the Canada Revenue Agency concluded the appellant's debt to certain related parties had been discharged by the Proposal. As a result, the CRA took the position that the appellant could not access certain tax loss carry forwards. It re-assessed Williams Moving, triggering additional taxable income of about $9 million.

[3] When Williams Moving and its professional advisors investigated the reason for the re-assessment, they discovered the source of the problem: a drafting error in the definition of "Unaffected Creditors", those whose debts would not be discharged by the Proposal. Surplus words had been added to the definition. It was as a result of the insertion of those words that CRA read the Proposal in such a manner as to remove the related parties from those defined as "Unaffected Creditors".

[4] Williams Moving says the Proposal was intended to preserve its indebtedness to the related parties, who had contributed money to the plan embodied in the Proposal and received no distribution thereunder in return, but who wished to have

Williams Moving retain the tax advantages associated with the preservation of the related-party debt. Because the preservation of the appellant's debt to the related parties was key to their participation in and contribution to the Proposal, Williams Moving moved for relief from the error. It applied to rectify the Proposal or, in the alternative, sought to have the order approving the Proposal amended to correct the error pursuant to s. 187(5) of the *BIA*.

[5] The chambers judge, for reasons indexed at 2023 BCSC 205, held rectification of the Proposal was not available as a remedy because, unlike the appellant, the related parties and their professional advisors, and the court that approved it, the creditors were not under any misapprehension with respect to its terms. The terms, including the material error, were as set out in the written Proposal accepted by the creditors. Williams Moving had not established that the parties' true agreement differed from the Proposal voted upon.

[6] The appellant contends the judge erred in concluding rectification was not available as a remedy in the circumstances. However, its principal argument is that in dismissing the appellant's application, the judge erred by failing to differentiate her discretion to correct orders under s. 187(5) of the *BIA* with her discretion to employ the equitable remedy of rectification. It says the judge conflated the statutory remedy with the equitable one: holding that, because the test for rectification was not met, a remedy under s. 187(5) was not available.

[7] In my opinion, the judge did not err in law in concluding the appellant had not made out a case for rectification of the Proposal accepted by the creditors.

[8] However, s. 187(5) of the *BIA* permits the court to vary an order made under its bankruptcy jurisdiction, and, on an application made pursuant to s. 60(5) of the *BIA* to approve a proposal, the court may correct a clerical error contained in a proposal if the correction does not constitute an alteration in substance: see R. 92 of *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368, [*BIA Rules*]. Whether that is the case, and, if so, whether the discretion to vary the order should have been exercised, requires careful consideration of the particular circumstances of this case.

Background

[9] On January 21, 2015, Williams Moving filed for protection under the *BIA* by filing a notice of intention to make a proposal (the "NOI").

[10] Williams Holdings Ltd. ("Holdings") and Williams Transfer Ltd. ("Transfer") are companies related to Williams Moving. George S. Williams was a principal of these companies. He had died prior to the making of the Proposal, and Williams Moving was indebted to his estate. In these reasons, the estate of George S. Williams is referred to as the "Estate", and Holdings, Transfer and the Estate are referred to collectively as the "Williams Group".

[11] At the time of the filing of the NOI, Williams Moving was indebted to Transfer and the Estate in the total amount of $17,368,000. That debt was unsecured. The Williams Group did not make "Proof of Claims" pursuant to the Proposal.

[12] A draft proposal to creditors was prepared by solicitors acting for Williams Moving and the Williams Group. Its purpose was described as follows:

> 2.1 Purpose of this Proposal
>
> The purpose of this Proposal is to permit the Company to settle payment of its liabilities as at the Filing Date and to compromise the indebtedness owed to Affected Creditors of the Company on a fair and equitable basis.

Definition of Classes of Creditors

Unaffected Creditors

[13] Numerous draft proposals were prepared by the solicitors and circulated amongst themselves and the other professional advisors. In an early draft (perhaps version 1 as it is marked "v1" in the record), "Unaffected Creditors", those persons to whom Williams Moving owed debts that would not be compromised by the proposal, were defined as:

> ... Post Filing Creditors, and those creditors having a Security Interest in any assets of the Company and includes those creditors enumerated in Schedule "A" to this Proposal.

[14] Through many subsequent draft iterations, Schedule “A” to the proposal read as follows:

> SCHEDULE “A”
>
> UNAFFECTED CREDITORS
>
> Business Development Bank of Canada
>
> Dundarave Mortgage Investment Corporation
>
> BCMP Mortgage Investment Corporation by its administrative agent Pen-Cor Mortgage and Investments Advisors Ltd. and Pencor Capital Corp.
>
> Trailer Wizards Ltd.
>
> Williams Holdings Ltd.
>
> Williams Transfer Ltd.
>
> Any holder of a valid Repairer’s lien under the *Repairers Lien Act*, but only to the extent to which the value of the assets subject to their lien and to which they have priority, are sufficient to fully secure the lien.

[15] Although at least one draft proposal includes the Estate in Schedule “A”, the version of Schedule “A” appended to the final, approved Proposal does not. On one draft in evidence, a reference to the Estate is struck through. The appellant says it was intended that all members of the Williams Group would be listed on Schedule “A”. One of its solicitors deposed in these proceedings that he was not “specifically aware of the Estate, but given its status as a related Creditor it should have been listed on Schedule ‘A’.”

[16] In a redline version produced by one of the solicitors, which apparently compares version two of the Proposal to version one, “Unaffected Creditors” were defined as:

> ... Post -Filing Creditors~~, and those creditors having a Security Interest in any assets of the Company and includes~~ and those creditors enumerated in Schedule “A” to this Proposal.
>
> [Strikethrough emphasis reflecting deleted text in redline.]

[17] In subsequent draft Proposals, including one shared with the chief operating officer of Williams Moving on March 23, 2015, "Unaffected Creditors" were defined as follows:

> ... Post-Filing Creditors and Secured Creditors (but only to the extent that the value of the assets secured by their Security Interest and to which they have priority is equal to or greater than the value of their Claims, and includes, without limitation, those creditors enumerated in Schedule "A" to this Proposal.

[18] The erroneous definition of "Unaffected Creditors" appears in the final version of the Proposal, approved by Williams Moving on April 7, 2015, and subsequently accepted by its creditors and approved by the court, in which the definition includes the words I emphasise below:

> ... Post-Filing Creditors and Secured Creditors but only to the extent that the value of the assets secured by their Security Interest, and to which they have priority, is equal to or greater than the value of their Claims, and includes, without limitation, those creditors enumerated in Schedule "A" to this Proposal, but only to the extent that the value of the assets secured by their Security Interest, and to which they have priority, is equal to or greater than the value of their Claims.

[19] The appellant says the emphasised words (which I will refer to for ease of reference as the "duplicated text") were inserted in the Proposal by mistake. It says these words were intended to appear in the definition only once, so that only Secured Creditors would be Unaffected Creditors only to the extent that their debts were secured (and not both those Secured Creditors and the creditors listed in Schedule "A", who might be wholly unsecured). It says earlier drafts correctly used the emphasised words only in respect of Secured Creditors because, by definition, all persons who have a Security Interest fall within that category of creditors. By contrast, certain creditors included on Schedule "A" are Unsecured Creditors who, by definition, hold no Security Interest. It says it does not make sense for the duplicated text to have been included.

[20] Because the duplicated text may be read in a manner such that its effect is to remove all Unsecured Creditors from the definition of "Unaffected Creditors", its inclusion might defeat the plan of Williams Moving, the Williams Group and the

Trustee to draft a proposal that would preserve the related-party debt and thus not adversely limit the ability of Williams Moving to access certain tax loss carry forwards in the future.

Creditors

[21] Any other person to whom the Company was indebted (whether their claim was proven or not) fell within the Proposal's definition of "Creditor":

> ... any person that is not an Unaffected Creditor that has a Claim against the Company.
>
> [Emphasis added.]

Affected Creditors

[22] An "Affected Creditor" is defined in the Proposal as "any Unsecured Creditor having a Proven Claim and the Insurance Claimant".

[23] In turn, an "Unsecured Creditor" is defined to mean:

> ... a Creditor of the Company who has a Proven Claim, other than the Insurance Claimant, and includes a Creditor holding a Security Interest, but only to the extent that the value of the assets charged by their Security Interest to which they have priority is less than the full amount of their Claim.

[24] Therefore, leaving aside the Insurance Claimant (whose rights and status are irrelevant for the purposes of this appeal), the Proposal, in its final form, defined three categories of creditors:

a) Unaffected Creditors (meaning Post-Filing Creditors and Secured Creditors, and including those creditors enumerated in Schedule "A");

b) Creditors (every other person with a claim against Williams Moving); and

c) Affected Creditors (every Unsecured Creditor with a Proven Claim).

[25] Given the scheme of the Proposal, a single person could fall within more than one of the foregoing categories.

Effect of the Proposal on Classes of Creditors

[26] The Proposal differentiates between the treatment of creditors. Early drafts described the effect of the Proposal as follows:

> 2.3 Treatment of Unaffected Creditors
>
> Unaffected Creditors are not included under or in any way affected by this Proposal and will be paid in accordance with existing agreements between such creditors and the Company or in accordance with alternative arrangements to be negotiated concurrently with the filing and implementation of this Proposal.
>
> 2.4 Effect of this Proposal *on Affected Creditors*
>
> Subject to the Company and the Guarantors meeting their obligations to Affected Creditors under this Proposal, each *Affected Creditor* shall:
>
> (a) release the Company and the Guarantors from all Claims that arose before the Filing Date and that relate to the obligations of the Company and the Guarantors prior to the Filing Date, regardless of the date of crystallization of such Claims; …
>
> [Italic emphasis added.]

[27] In its final form, the Proposal provided:

> 2.3 Treatment of Unaffected Creditors
>
> Unaffected Creditors are not included under or in any way affected by this Proposal and will be paid in accordance with existing agreements between such creditors and the Company or in accordance with alternative arrangements to be negotiated concurrently with the filing and implementation of this Proposal.
>
> 2.4 Effect of this Proposal on *Creditors*
>
> Effect of this Proposal on Creditors other than the Insurance Claimant
>
> Subject to the Company and the Guarantors meeting their obligations to Affected Creditors under this Proposal, *each Creditor* … shall:
>
> (a) release the Company and the Guarantors from all Claims that arose before the Filing Date and that relate to the obligations of the Company and the Guarantors prior to the Filing Date, regardless of the date of crystallization of such Claims …
>
> [Italic emphasis added.]

[28] While the purpose of the Proposal is "to compromise the indebtedness owed to Affected Creditors" (my emphasis), Section 2.4, in its final form, releases the claims of all Creditors. The appellant does not suggest that the widened scope of the

release was a result of a drafting error, as opposed to an intentional revision of the drafts.

[29] "Williams Transfer Ltd. and Williams Holdings Ltd." were described as "Guarantors" in all drafts of the Proposal. Section 2.6, titled "Waiver of Guarantors' claims", provides:

> It is a term of this Proposal that the Guarantors and any Related Person shall not be entitled to any distribution hereunder, and shall not vote on this Proposal.

[30] Recovery in a bankruptcy scenario for Williams Moving's Unsecured Creditors would have been minimal. The Proposal, however, provided for a distribution to Affected Creditors sufficient to pay them $0.20 per dollar on their proven debt. The Williams Group contributed to the economic viability of the Proposal as ultimately structured. The distribution was funded by a loan from Transfer and Holdings to Williams Moving and the value of the distribution to Affected Creditors was "not … significantly diluted", in the words of the Trustee's report, because the Williams Group agreed not to accept any distribution.

[31] The Williams Group agreed to the Proposal and contributed to it, despite the fact they would be paid nothing under it, because the Proposal was structured so that it did not adversely limit the ability of Williams Moving to access tax loss carry forwards in the future or otherwise adversely impact the overall tax position of the Williams Group. The chambers judge described the structure of the Proposal from the Williams Group's perspective:

> [17] … Williams Transfer and Williams Holdings would agree to fund the proposal to allow the unsecured creditors to be paid something and the Williams Group would have access to the tax attributes. The Williams Group's debt would not be compromised, as they would have access to the tax attributes in exchange for providing funds as necessary to create a proposal that would be acceptable to the other creditors. … Preserving the tax losses for the Williams Group was, in the view of Williams Moving and the professional advisors, a fundamental underpinning for the basis of the proposal and the basis upon which Williams Holdings and Williams Transfer agreed to fund the proposal.

[32] The appellant says that, to achieve the tax objectives, the members of the Williams Group were to be deemed to be “Unaffected Creditors”.

Creditor Acceptance and Court Approval

[33] Deloitte Restructuring Inc., the Trustee, considered many iterations of the proposal drafted and revised by the solicitors acting for Williams Moving between January and April 2015. It understood that Holdings, Transfer and the Estate were all to be treated as Unaffected Creditors, and the debts owed to them preserved under the Proposal. The Trustee’s representative deposes that the Trustee was not aware of the error in the definition of Unaffected Creditors in the final version.

[34] On April 15, 2015, a package, including the final Proposal and the Trustee’s report to creditors, was distributed to the creditors with notice of a meeting of creditors. The Trustee’s report, dated April 14, 2015, indicated the Trustee’s view that the Proposal was in the best interests of Affected Creditors because it provided for a return significantly in excess of any recovery from a bankruptcy or liquidation scenario. On this basis, the report contained a recommendation from the Trustee that Affected Creditors vote to approve the Proposal.

[35] The Trustee’s report identified the entities listed on Schedule “A”, other than Holdings and Transfer, as parties having some security against the assets of Williams Moving.

[36] The Trustee expressly recognized, in the report, that a person may be both an “Unaffected Creditor” and an “Affected Creditor”:

> It is of note that some Unaffected Creditors, may also be Affected Creditors for that portion of their debt which is not covered or secured by the value of the assets of the Company that they hold as security.

And, later in the report, the Trustee explained the funding arrangement:

> Payments under the Proposal shall be made from funds held by the Company and from the proceeds of a Loan Agreement being entered into with Transfer and Holding, who are defined in the Proposal as the “Guarantors”.

[37] At a meeting of the creditors held on April 28, 2015, creditors in attendance were advised the Williams Group were not going to participate in the distribution "in order to not swamp the other creditors" and, as a result, the value of the Proposal was $0.20 on the dollar, rather than $0.02 on the dollar. However, the third-party creditors were not expressly advised that Williams Moving's debt to the Williams Group would survive. The erroneous definition of "Unaffected Creditors" and the omission of the Estate from Schedule "A" in the Proposal were not noted or discussed at the meeting.

[38] The Proposal passed by 99.5 percent under the unsecured creditor class, being the voting class comprised of all Unsecured Creditors who had a Proven Claim.

[39] The Proposal was approved in accordance with the *BIA* by order of the Supreme Court of British Columbia on May 19, 2015 (the "Order").

[40] Unaware of the fact the Proposal and the Order as entered did not include members of the Williams Group as "Unaffected Creditors", Williams Moving and the Williams Group conducted their affairs thereafter as if the related-party debt had been preserved.

[41] This is evidenced by the treatment of that debt by the Williams Group in their accounting. In December 2014, Williams Moving owed approximately $10.9 million to Transfer. As of December 2015, that debt had been reduced to $3.3 million by inter-corporate loan repayments to Transfer of approximately $7.6 million. Williams Moving's 2015 financial statements identify the remaining debts owed to Transfer ($3.3 million) and the Estate ($2.2 million) as liabilities. Its 2016 financial statements similarly identify the debts owed to Transfer (now reduced to approximately $425,000) and the Estate ($2.2 million) as liabilities. Correspondingly, Transfer's financial statements continued to record the debt (in the form of an outstanding advance) as an asset.

CRA Interpretation and Audit

[42] In a letter dated May 29, 2019, a CRA auditor informed Williams Moving that its 2015–2017 corporate income tax returns had been selected for audit, and that certain adjustments to its reported income were being proposed by the CRA. A section of the May 29 letter concerned forgiven debt; the CRA wrote:

> According to the Statement of Affairs filed by the trustee in the Supreme Court of British Columbia in the matter of the proposal (the "Proposal") of Williams Moving & Storage (B.C.) Ltd. on April 9, 2015, the following liabilities are identified:
>
> Unsecured Creditors as per List "A" $23,571,375.34
>
> …
>
> It is our view that the Schedule "A" *Unaffected Creditors* of the Proposal does not expand the meaning of Unaffected Creditors defined in Section 1.1 *Definitions* of the Proposal. To qualify as "Unaffected Creditors", the following two conditions have to be met:
>
> > *... "Unaffected Creditors" means Post-Filing Creditors and Secured Creditors* …; and
> >
> > … *and includes, without limitation, those creditors enumerated in Schedule "A" to this Proposal, but only to the extent that the value of the assets secured by their Security Interest, and to which they have priority, is equal to or greater than the value of their claims.*
>
> The Unsecured Creditors as per List "A", do not meet the meaning of "Post-Filing Creditors" or "Secured Creditors" defined in Section 1.1 *Definitions* of the Proposal. The $23,571,375.34 liabilities relating to Unsecured Creditors as per List "A" do not meet the meaning of "Secured Interest" or "Post-Filing Claim" defined in Section 1.1 *Definitions* of the Proposal. In other words, the Unsecured Creditors as per List "A" do not meet the definition of "Unaffected Creditors".
>
> …
>
> Therefore, neither the Unsecured Creditors as per List "A" nor the Preferred Creditors as per List "C" are eligible for treatment under Section 2.3 *Treatment of Unaffected Creditors* of the Proposal.
>
> [Emphasis added.]

[43] The CRA auditor continued:

> According to an Order Made After Application in the Supreme Court of British Columbia on May 19, 2015, the proposal was approved by the creditors and the court. The releases set forth in Section 2.4 *Effect of this Proposal on Creditors* of the Proposal were confirmed and Williams Moving & Storage (B.C.) Ltd. and its directors and officers were released and discharged from all claims of any creditors other than the Insurance Claimant and Pencor. …

> I have determined that the liabilities owing to unsecured creditors as per List "A" and the liabilities owing to preferred creditors as per List – "C" have been settled or extinguished by the Proposal under subsection 62(2) of the BIA on the NOI effective day.
>
> [Emphasis added.]

[44] In the Statement of Affairs of Williams Moving, the "Estate of George S. Williams" is listed as an Unsecured Creditor on List "A" with an unsecured claim of $2,107,108. Transfer is listed as an Unsecured Creditor on List "A" with an unsecured claim of $15,260,910. Holdings does not appear on List "A". The sum of the unsecured debt of Transfer and the Estate is $17,368,018, equal to the value of the related-party debt referred to in the Trustee's report ($17,368,000).

[45] In summary, the CRA's position as set out in the May letter appears to have been:

a) Schedule "A" does not expand the meaning of "Unaffected Creditors". To be an "Unaffected Creditor", an entity must be *either* a Post-Filing Creditor or a Secured Creditor.

b) The Unsecured Creditors on List "A" of the Statement of Affairs—including Transfer and the Estate—do not meet the definition of either "Post-Filing Creditors" or "Secured Creditors" (at least in respect of their unsecured claims listed on List "A"). Thus, none are "Unaffected Creditors" (again, at least in respect of those claims).

c) The liabilities owing to Unsecured Creditors as per List "A"—including the $17,368,018 in debt owing to Transfer and the Estate—were extinguished by operation of Section 2.4 of the Proposal.

[46] The CRA seemingly reasoned that, in respect of their pre-filing debt, neither Transfer nor the Estate were Unaffected Creditors because, in respect of that debt, they were neither Post-Filing Creditors nor Secured Creditors. While Transfer appears on Schedule "A", this did not impact the CRA's reasoning.

[47] After communicating with Williams Moving's representatives and considering its position, the CRA again wrote to the appellant on July 5, 2019. It advised that, as a result of the audit, Williams Moving had been reassessed to include additional taxable income of $5,839,375 in 2015, $3,124,046 in 2016, and $313,147 in 2017. The July CRA letter described a slightly changed interpretation of the Proposal:

> Please note that the definition of "Unaffected Creditor" of Article 1.1 of the proposal has to be read as a whole in conjunction with all the other terms and wordings found within Article 1 *Definitions and Interpretation* of the Proposal.
>
> The term of "Unaffected Creditor" includes,
>
> > *…, and without limitation, those creditors enumerated in Schedule "A" to this Proposal, but only to the extent that the value of the assets secured by their Security Interest, and to which they have priority, is equal to or greater than the value of their Claims.*
>
> It is our view that any claim of "Unaffected Creditors" is limited to the value of the assets secured by their Security Interest, and to which they have priority.
>
> …
>
> [Because of s. 62(2) of the *BIA*] the releases set forth in Article 2.4 *Effect of This Proposal On Creditors* is binding on all unsecured claims, regardless whether the proof of claim was filed or not.
>
> …
>
> The Unsecured Creditors as per List "A" and the Preferred Creditors as per List "C" did NOT register any valid and enforceable mortgage, charge or encumbrance in your assets regarding their unsecured claims.
>
> Therefore, it is our view that the releases set forth in Article 2.4 *Effect of This Proposal on Creditors* are binding on the claims of the Unsecured Creditors as per List "A" …
>
> [Emphasis added.]

[48] This second opinion appears to be founded upon the view that Schedule "A" describes a third category of Unaffected Creditors: not only (1) Post-Filing Creditors, and (2) Secured Creditors, but also (3) creditors listed on Schedule "A". Clearly relying upon the duplicated text, however, CRA determined that creditors listed on Schedule "A" are only Unaffected Creditors to the extent they have Security Interests. Accordingly, the Claims of Schedule "A" Unsecured Creditors without any Security Interests were entirely compromised by operation of Section 2.4.

[49] The appellant was advised:

> Once you receive your notices of reassessment, if you think we misinterpreted the facts or applied the law incorrectly, you can file an objection within 90 days after the date of the notice of reassessment. Explain why you disagree with the reassessment and include all relevant facts, reasons, and supporting documents.

[50] Following the re-assessment, Williams Moving applied to correct the errors in the Proposal incorporated in the Order and to vary the Order. It sought an order correcting the definition of "Unaffected Creditors" in the Proposal by striking out the duplicated text, and adding the Estate to Schedule "A" with retroactive effect (*nunc pro tunc*).

[51] It did not file an objection to the notice of re-assessment.

Judgment Under Appeal

[52] The chambers judge considered whether a case for rectification of the Proposal incorporated in the Order could be made out. Her enquiry therefore addressed whether the Proposal, as voted upon by the creditors, accurately reflected the agreement between the creditors and the debtor.

[53] She found there was no evidence those casting votes at the meeting of creditors were aware of the intention of Williams Moving regarding the tax attributes (i.e., its intention to structure the Proposal in a manner which would enable it to access tax loss carry forwards in the future, as described above), or of the alleged errors the Proposal contained: at para. 45. Further, there was no evidence that "the result for the creditors would have been the same even if the final proposal accurately reflected the intention of the debtor": at para. 46.

[54] Following *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, she noted a court cannot modify an instrument merely because a party discovers its operation generates an adverse and unplanned tax liability. She referred to the description of rectification in *Fairmont Hotels* as "a potent remedy" to be used "with

great caution". She also referred to the Court's description in that case of situations where rectification is available:

> [12] If by mistake a legal instrument does not accord with the true agreement it was intended to record — because a term has been omitted, an unwanted term included, or a term incorrectly expresses the parties' agreement — a court may exercise its equitable jurisdiction to rectify the instrument so as to make it accord with the parties' true agreement. ...

[55] The judge noted that in both *Fairmont Hotels* and *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para. 31, the Court had described the court's task in a rectification case as restoring the parties to their original bargain and "not to rectify a belatedly recognized error of judgment by one party or the other".

[56] She pointed out that, in this case, there is "no prior draft proposal and no prior agreement with the creditors with definite and ascertainable terms": at para. 53. While she accepted the evidence with respect to Williams Moving's intention to take advantage of the tax attributes, she adopted the view expressed by Lord Denning in *Frederick E. Rose (London) Ltd. v. William H. Pim Junior & Co.*, [1953] 2 Q.B. 450 at 461, [1953] 2 All E.R. 739 (C.A.), that "to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties …".

[57] She concluded that, applying the test from *Fairmont Hotels*, Williams Moving's application for rectification had to fail as:

> [57] … There is no prior agreement whose terms are definite and ascertainable. There was no agreement between the debtor and the creditors that was still in effect at the time the instrument was executed. It cannot be said that the instrument failed to accurately record the agreement between the parties, nor can it be said that the final proposal, if rectified, would carry out the parties' prior agreement.

[58] The chambers judge appears to have concluded that she was unable to vary the Order pursuant to s. 187(5) of the *BIA* if a case for rectification of the Proposal was not made out. The appellant says its entitlement to relief under s. 187(5) should

have been examined as a distinct question and that the enquiry ought not to have come to an end when the judge concluded that rectification was not available.

[59] The appellant says the judge should have turned to its alternate s. 187(5) argument if she was correct to conclude that rectification was not available as a remedy. However, when the judge turned to consider the availability of a remedy under s. 187(5) she wrote:

> [65] In the event that I am wrong, I will go on to consider whether Williams Moving is entitled to relief under the *BIA*.
>
> [Emphasis added.]

[60] This suggests the judge was considering what relief would be available to the appellant *if a case for rectification had been made out*, rather than what alternative relief was available in the event the test for rectification was not met.

[61] The judge dismissed the claim to relief under s. 187(5) because the Order "reflects the final proposal, and Williams Moving has not met the requirements for rectification of the final proposal": at para. 73.

Discussion

Rectification

[62] The appellant's argument in support of rectification is essentially that the judge erred in interpreting the terms of the Proposal. The appellant says "the judge failed to interpret the *true proposal* in accordance with accepted principles of contractual interpretation" (my emphasis) and, by doing so, "elevated a typographical error evident on the face of the Final Proposal (which was the very term sought to be rectified) to a term of the proposal itself".

[63] The appellant says the judge's analysis was self-fulfilling, arguing that "[i]f looking only at the very term sought to be rectified were all there were to the rectification analysis, then there never could be rectification: the mistake prevails because, on that approach, the mistaken words are the agreement" (emphasis in original).

[64] The appellant is not arguing that there was an antecedent agreement between the debtor and its creditors prior to the April 28, 2015 meeting of creditors. Nor is it arguing that the creditor parties to the Proposal (as opposed to Williams Moving and the Williams Group) agreed from the outset and always intended to permit Williams Moving to access tax loss carry forwards in the future (except insofar as their intentions can be discerned from the Proposal they approved). It is, rather, arguing that the common understanding of the parties in respect of the Proposal, evidenced by the approved document itself, is apparently defeated by a composition error that should be corrected.

[65] In my view, the appellant's "rectification" argument does not sit well with the jurisprudence that describes rectification as a "potent remedy" which should be used "with great caution" so as to not undermine the confidence of the commercial world in written contracts: see *Fairmont Hotels* at para. 13; *Performance Industries Ltd.* at para. 31.

[66] In *Fairmont Hotels*, the Court was clear in emphasising that "rectification is limited solely to cases where a written instrument has incorrectly recorded the parties' antecedent agreement": at para. 13. Despite this limitation, it is true that, for the purposes of rectification, the law does not require a prior agreement between the parties which is concluded and legally binding or which contains all of the relevant terms of a complete agreement: see *2484234 Ontario Inc. v. Hanley Park Developments Inc.*, 2020 ONCA 273 at para. 46; *5551928 Manitoba Ltd. v. Canada (Attorney General)*, 2019 BCCA 376 at para. 11; *Fairmont Hotels* at para. 28.

[67] However, it is "normally necessary (when seeking rectification) … to show a common understanding on the matter in dispute": see S.M. Waddams, *The Law of Contracts*, 8th ed (Toronto: Thomson Reuters, 2022) at §342. That common understanding must be ascertainable and certain. See, for instance, *5551928 Manitoba Ltd.* at para. 11, where Justice Newbury referred to the following passage from *Halsbury's Laws of England* (4th ed., 1992), vol. 16:

> It is unnecessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify; it is sufficient

> to find a common continuing intention in regard to a particular provision or aspect of the agreement. There must, however, be some outward expression of their continuing common intention in relation to the provision in dispute, and that common intention must be formulated with certainty.
>
> [Emphasis added.]

[68] As Justice Brown reasoned in *Fairmont Hotels*, that rectification may be available even where the agreement antecedent to the written instrument sought to be rectified was unenforceable, or in "situations in which there may not have been agreement on all essential terms before the written instrument was executed", does not detract from the fact that "rectification requires the parties to show an antecedent agreement with respect to the term or terms for which rectification is sought": at paras. 28–29.

[69] In the circumstances of this case, where the error alleged is in the composition of the Proposal presented to creditors, and nothing in the Trustee's report is inconsistent with the Proposal, it is difficult to see how it can be said that the creditors would have understood the Proposal to be anything other than what was presented to them. Thus, it is difficult to understand how the creditors and Williams Moving would have had any prior common understanding, or "antecedent agreement", in respect of a particular provision or aspect of the Proposal which was not accurately recorded in the Proposal as written, as required to ground a grant of rectification.

[70] The appellant is, in effect, saying the Proposal, read in accordance with accepted principles of interpretation, defines "Unaffected Creditors" so as to include the Williams Group. It argues the duplicated text in that definition is contradictory, serves no purpose and should be read out of the agreement.

[71] This argument blurs the distinction between construction and rectification. In *Simic v. New South Wales Land and Housing Corporation*, [2016] HCA 47, Chief Justice French of the High Court of Australia explained that, while there is a close

connection in their practical operation, at a conceptual level, construction and rectification are different processes:

> 18. At a conceptual level, construction and rectification of a contract are different processes. The first involves determination of the meaning of the words of the contract defined by reference to its text, context and purpose. Resort to extrinsic circumstances and things external to the contract may be necessary to identify its purpose and in determining the proper construction where there is a constructional choice. The question for constructional purposes is not about the real intentions of the parties, not what the parties meant to say, but what they actually said.

Justice Kiefel elaborated:

> 48. … Rectification is an equitable remedy which is concerned with a mistake as to an aspect of what an instrument records and with the conscience of the parties. The common law, on the other hand, deals with the interpretation of the words chosen by the parties to reflect their agreement …

[72] In my view, the chambers judge did not err in concluding that a case for rectification could not be founded upon the evidence that the Proposal presented to the creditors was not that which the appellant intended to proffer.

[73] There was insufficient evidence of a common understanding amongst the appellant and its creditors on the matter in dispute, i.e., whether the Williams Group would release the appellant from all claims, which was not accurately recorded in the written Proposal. That does not, however, answer the appellant's construction argument, an argument that should be addressed, in my view, in the context of s. 187(5) of the *BIA*.

Resort to s. 187(5) of the BIA

Applicable law

[74] Does s. 187(5) of the *BIA* permit "correction" of the Order in the circumstances of this case? The provision reads as follows:

> 187
>
> (3) Subject to this Act and to the General Rules, the judge of a court may exercise in chambers the whole or any part of his jurisdiction.
>
> …

> (5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

[75] In *Re Garritty (Proposal)*, 2006 ABQB 238, a contingent creditor applied to rescind two orders approving *BIA* proposals. The creditor did not have notice of the proposals until well after the creditors' meetings, contrary to certain notice requirements under the *BIA*.

[76] Justice Topolniski was called upon to consider whether the orders could be rescinded pursuant to s. 187(5), or whether it would be more appropriate to annul the proposals pursuant to s. 63(1) of the *BIA*. Section 63 contemplates annulment of a proposal, and therefore deemed bankruptcy, if there is default in the performance of any provision in a proposal, if it appears to the court that the proposal cannot continue without injustice or undue delay, or because the court's approval was obtained by fraud.

[77] At the outset of her analysis, Topolniski J. observed that bankruptcy courts often are called on to be pragmatic problem-solvers and, to that end, many decisions are made by taking an approach sensitive to commercial realities and business efficacy, rather than one which is "legalistic". In that vein:

> [56] … Where necessary to effect a remedy or to fill gap in the *BIA*, courts will exercise their inherent jurisdiction. However, pragmatism must yield to a principled approach if prejudice to creditors or third parties may result or if *stare decisis* so demands.

[78] After cautioning against "twist[ing] s. 187(5) out of shape", Topolniski J. comprehensively reviewed s. 187(5) cases with a view toward determining when resort should be had to the provision. She noted:

> [65] A review of the jurisprudence indicates that s. 187(5) is sometimes used as a multi-purpose tool, notwithstanding the availability of an alternate remedy such as annulment or appeal. <u>The rationale appears to be that s. 187(5) provides an expedient means to advance the ends of justice and avoid the costs of appeal</u>.
>
> [Emphasis added.]

[79] She also noted that s. 187(5) is available to revoke an order of discharge, and is often resorted to in bankruptcy discharge cases concerning *procedural non-compliance*, because annulment of a bankrupt's discharge is not available, except for cases of fraud or non-compliance with the bankrupt's duties under the *BIA*. She commented, however, that this same observation was inapplicable in the context of *annulment of a proposal*, as s. 63 is broadly drafted to allow annulment where injustice is created by continuing the proposal, thereby capturing procedural flaws like notice non-compliance: at para. 69.

[80] Ultimately, Topolniski J. was not prepared to make the order sought, concluding:

> [70] In my view, s. 187(5) is not available for rescission here of the Orders approving the Debtors' Proposals because of statutory notice non-compliance. First, it would expose post-Proposal creditors and other innocent third parties with whom the Debtors have transacted business to unnecessary risk; and, second, because the *BIA* provides for a specific alternate remedy in s. 63. In the final analysis, despite the harsh result of annulment, it is the proper recourse.

[81] In my opinion, *Garritty* is a good example of reading s. 187(5) as a provision that is complementary to the more specific provisions of the *BIA*, not one which serves to create an exception to them. This approach to the application of the provision is consistent with the direction of the Supreme Court of Canada in *Schreyer v. Schreyer*, 2011 SCC 35, discussed further below.

[82] In *HOJ National Leasing Corp. (Re)*, 2008 ONCA 390, Borins J.A. comprehensively reviewed s. 187(5) jurisprudence. At paras. 27–28, he summarized his views as follows: (a) no conditions apply before resort can be had to s. 187(5); (b) a motion under s. 187(5) cannot be brought as a substitute for an appeal, and the court should not hear a motion under s. 187(5) if its only purpose is to obtain an opportunity to appeal where the time to appeal has elapsed; (c) for the provision to apply, there must be a fundamental change in circumstances between the original hearing and the time of the motion to vary, or evidence must have been discovered that was not known at the time of the original hearing and which could have led to a different result; (d) the jurisdiction given by s. 187(5) should be sparingly exercised;

(e) although s. 187(5) contains no time limit, because bankruptcy proceedings often take place in real time, a motion to vary should be made promptly; and (f) as the court should not consider a motion to vary an earlier order on the record, the moving party should bring forward new evidence of a substantial nature that was not available at the original hearing.

[83] The appellant cites *Schreyer* and *Melanson (Re),* 2018 NSSC 279, as authorities for the propositions that s. 187(5) is "unique to insolvency law", and that it "overrides", to some extent, the principle of finality in bankruptcy proceedings.

[84] The Court in *Schreyer* considered, among other things, whether a discharge order could be suspended pursuant to s. 187(5). In the course of considering the scope of the provision, LeBel J., writing for the Court, observed:

> [36] … Would the circumstances of this case be sufficient to justify suspending the discharge? Would such a remedy be available under 187(5) *BIA*? In such matters, judges must exercise a broad discretion, but they must also bear in mind the underlying policies of the *BIA*. Several years have gone by since the discharge. Would it be appropriate to review it now? What might be the condition of the property itself, which was heavily mortgaged at the time of separation of the parties? Given that the appellant has not taken this approach, I will refrain from expressing any view about the practicality or the soundness of following such a procedure in this case. Nevertheless, it bears mentioning that any interpretation of the scope of the bankruptcy court's discretion under s.187(5) *BIA* must be consistent with the policies underlying the provisions that specifically set out the circumstances in which a court may suspend or annul a discharge or grant a conditional discharge. It should be noted that s.187(5) *BIA* is a residual section that applies to all orders made by the bankruptcy court. As such, it serves to complement the more specific provisions of the *BIA*, not to create an exception to them.
>
> [Emphasis added.]

[85] Two important principles emerge from this passage. The first is that the court's discretion under s. 187(5) is broad and should be exercised in a purposive manner. The second, which tempers the exercise of that broad and purposive discretion, is that s. 187(5) is intended to complement, rather than displace or create exceptions to, the other provisions of the *BIA.* Hence, the provision giving the court broad and continuing jurisdiction to revisit orders does not empower a court to make an order that could not have been made in the first instance, such as an order

including terms in a proposal that have not been accepted by the creditors, and thereby effecting a substantive change to that proposal. In my view, the provision does, however, permit a court to review and vary an order approving a proposal where it is satisfied that the order sought would properly have been made in the first instance if the evidence now before the court had been available.

[86] In *Melanson (Re)*, a creditor applied to reopen and amend an order approving a proposal or, in the alternative, an order annulling the order and proposal. After referring to the jurisprudence, Moir J. concluded, at para. 20, that the "central point of the jurisprudence" had been expressed by Justice Schwann in *Vince v. Cinezeta Internationale Filmproduktionsgesellschaft Mhb & Co. Kg*, 2013 SKQB 423 (at para. 32), as follows:

> The rescission remedy contemplated by s. 187(5) has been recognized as conceptually different from other remedies available under the *BIA.* Unlike an appeal (ss. 192 and 193) which seek[s] to reverse the decision-maker for reversible error, or an annulment (s. 181) to set aside a receiving order or bankruptcy assignment which ought not to have been made, s. 187(5) is designed to vary or rescind orders in circumstances where new evidence has come to light subsequent to the initial order. It permits courts to deal with an ongoing bankruptcy by adjusting to a changed circumstance.

[87] Justice Moir concluded:

> [21] The conception of s. 187(5) as a discretion for use in an ongoing bankruptcy (or proposal) proceeding to adjust previous orders only in changed circumstances is in line with the remark in *Schreyer*. By distinguishing changed circumstances from appeals and annulments, this conception serves the principle of internal coherence, particularly
>
> > To say that each component of a statute must be considered in the light of the means that it is necessary to refer to other provisions of the statute in question and avoid interpretations which would render these latter ineffective or useless.

[88] These general propositions are restated in *Cornell (Re)*, 2021 ONSC 7427, as follows:

> [23] The jurisdiction given by s. 187(5) should be "sparingly exercised. It is a matter of indulgence and must be carefully guarded": *Campoli Electric Ltd. v. Georgian Clairlea Inc.*, 2017 ONSC 2784, 77 C.L.R. (4th) 70, at para. 181;

> see also *Re HOJ National Leasing Corp*., 2008 ONCA 390, 293 D.L.R. (4th) 455, at para. 28.
>
> [24] In *Re HOJ*, at para. 27, Borins J.A. observed: s. 187(5) is "unique to insolvency" in that it allows the court to review, rescind or vary an order made by a court of co-ordinate jurisdiction; no conditions apply before resort can be had to s. 187(5); and a motion under s. 187(5) cannot be brought as a substitute for an appeal, such as when the time to appeal has expired.
>
> [Emphasis added.]

[89] From the foregoing cases, I extract the following propositions:

a) Section 187(5) is "unique to insolvency law", it overrides the principle of finality in bankruptcy proceedings.

b) The provision provides an expedient means to advance the ends of justice.

c) Judges have a broad discretion, and no conditions apply before resort can be had to s. 187(5). However, the discretion should be "sparingly exercised".

d) A motion under s. 187(5) cannot be brought as a substitute for an appeal, or if its only purpose is to obtain an opportunity to appeal where the time to appeal has elapsed.

e) For the provision to apply, there must have been a fundamental change in circumstances between the original hearing and the time of the motion to vary, or evidence must have been discovered that was not known at the time of the original hearing and which could have led to a different result.

f) The discretion must be exercised in a manner consistent with the policies underlying the provisions of the *BIA*, including specific provisions that set out the circumstances in which a court may suspend or annul an order.

g) Pragmatism in the application of the provision must yield to a principled approach if prejudice to creditors or third parties may result or if *stare decisis* so demands.

The Power of a Court to Vary a Proposal Accepted by Creditors

[90] Because the jurisdiction to vary an order under s. 187(5) must be exercised in a manner consistent with the policies underlying the provisions of the *BIA*, the scope of the court's discretion under s. 187(5) does not exceed that which a judge can exercise on an application for the court's approval of a proposal in the first instance.

Applicable law

[91] The *BIA* sets out the procedure by which a proposal may be prepared, voted upon by creditors and approved by the court. It describes a process leading to a court-sanctioned contract. As Registrar Hill noted in *Cosmic Adventures Halifax Inc. v. 3021072 Nova Scotia Inc.* (1999), 13 C.B.R. (4th) 22, 1999 CanLII 1844 (N.S.S.C.):

> A proposal filed under s.50 of the B.I.A. is not simply, when approved, an agreement between debtor and creditors. Rather it is the result of an elaborate mechanism designed to enable debtors, under certain circumstances and under some degree of supervision, to reach accommodations with creditors in order to avoid bankruptcy.

[92] Part III of the *BIA* sets forth a comprehensive scheme for commercial proposals. After the proposal is made, the trustee is called upon to file the proposal with the official receiver (s. 62), to give notice of the proposal to all creditors, and to call a meeting of creditors (s. 51). If the proposal is accepted at the creditors' meeting, the trustee must apply promptly to the court for a hearing to approve the proposal, and must serve notice of the hearing and a report on the proposal upon creditors (s. 58).

[93] A judge's powers on the hearing of the application to approve the proposal are limited. The judge may approve the proposal, provided certain requirements are met. In certain circumstances, the judge is required, or empowered, to refuse to approve a proposal. The appropriate enquiry is described as follows:

> 59
>
> (2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to

> approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

[94] Further, subsections 60(1) to 60(1.7) describe particular circumstances in which a proposal may not be approved. Subsection 60(5) provides:

> Subject to subsections (1) to (1.7), the court may either approve or refuse to approve the proposal.
>
> [Emphasis added.]

[95] However, there is no express provision in Part III of the *BIA*, or elsewhere in the *Act*, which permits the court to approve a proposal on terms that differ from those accepted by creditors. As stated in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Thomson Reuters) (loose-leaf updated 2024, release 2), at §4:64:

> … the power to make alterations and amendments at the meeting of creditors is very wide; the power of the court to make alterations and amendments, on the other hand, is very limited.
>
> [Emphasis added.]

[96] At §4:68, the authors elaborate: "The court, on the application for approval of the proposal, has only a very limited power to make alteration or amendments in a proposal. Rule 92 provides that the court, when approving a proposal, may correct any error or omission that does not constitute an alteration of substance". The rule referred to, R. 92 of the *BIA Rules*, permits simple corrections:

> 92 When approving a proposal, the court may correct any clerical error or omission in it, if the correction does not constitute an alteration in substance.
>
> [Emphasis added.]

[97] With respect to R. 92's requirement that a correction made pursuant thereto not constitute "an alteration in substance", Houlden, Morawetz and Sarra note at §4:68:

> In deciding whether an error or omission is one of form or substance, the cases on section 187(9) are helpful …
>
> Under the power conferred by Rule 92, the court cannot add a clause to a proposal: *Hotel du Lac St. Joseph v. Grosleau* (1928), 10 C.B.R. 14 (Que. C.A.); or make changes of substance in it: *Martin v. Riman* (1930), 12 C.B.R.

> 152 …; or delete parts that are objectionable: *Re Kern Agencies Ltd.* (No. 2), 13 C.B.R. 11, [1931] 2 W.W.R. 633 (Sask. C.A.).

[98] In *Martin v. Riman*, [1931] 1 D.L.R. 773, 12 C.B.R. 152 (Ont. S.C.), Wright J. observed that the *Bankruptcy Act*, as it then stood, contained a provision allowing a proposal to be amended at a creditors' meeting, but no comparable provision for the modification of a proposal by a court on an application for approval. There, the Registrar in chambers had approved a proposal but deleted one paragraph, thereby materially varying the original agreement.

[99] Rule 92 codified the court's limited authority to correct clerical errors on an application for approval.

[100] Houlden, Morawetz and Sarra refer to *Cosmic Adventures Halifax Inc.* as an example of an amendment of a proposal on an application for approval found to be permissible. In that case, two related companies filed proposals to their creditors which were subsequently accepted. Both accepted proposals contained a term releasing a third party (Phoenix) from creditors' claims in terms that were overly broad. The Registrar permitted the proposals to be amended by adding the underlined words to the impugned clause:

> All creditors who have a claim against Phoenix will waive all rights and remedies against this company and its principles, <u>provided their rights and remedies would have been discharged on the discharge of the debtor in bankruptcy</u>.

[101] The Registrar justified approving the proposals as amended in the following terms:

> In my view, acceptance of a proposal by a creditor is personal to the debtor making the proposal. It does not, in law, create any express or voluntary release of any third party even where that third party may be a guarantor of the principal debtor's obligation … Indeed, where a proposal contains a composition or release of claims against persons other than the debtor making the proposal, it is not one which the Court may approve …
>
> The power of this Court to make alterations or modifications to proposals brought forward for approval is severely limited. B.I.A. Rule 92 makes it clear only clerical errors or omissions may be corrected, provided the correction does not constitute an alteration in substance.

> While the correction approved in this case lies very close to the boundary of what is appropriate I note that creditors may not compromise claims against third parties in accepting a proposal. Thus the words in the proposal were misleading insofar as there was an omission to clarify that only claims discharged by the discharge of the debtor would be effected. I have corrected that omission.
>
> [Citations omitted.]

[102] The Registrar thus concluded that the creditors could not have intended to approve a proposal in the form in which it was drafted. Further, the amendment was unambiguously favourable to the creditors. The debtors, the trustee, the objecting creditor and the third party all consented to have the proposal approved in its amended form, recognizing that the original wording was inappropriate.

[103] Similarly, in *W.R.T. Equipment (Bankruptcy of)*, 2003 SKQB 93, the proposal accepted by creditors included an "inappropriate" term: an indemnity of directors and officers of the debtor that was "too widely cast". The proponents of the proposal acceded to a "clerical" amendment that was unambiguously favourable to the creditors. The court held that the proposal could be approved as amended:

> [9] Since there will be no prejudice to the creditors in accepting and treating it as such the Court authorizes the amendment of the Proposal as set out in the revised para. 2 of the draft order filed upon this application pursuant to Rule 92 of the BIA Rules (see *Re Cosmic Adventures Halifax Inc.* (1999), 13 C.B.R. (4th) 22 (N.S.S.C.)). In the result the proposed amended … Proposal is now consistent with the provisions of ss. 50(13) of the BIA and it is ordered accordingly.

[104] This was also a case where the proposal in its original form was not consistent with the *BIA*, and the court, again, appears to have implicitly inferred that the creditors could not have intended to approve the proposal without the amendment.

Application of Rule 92 to this case

[105] If the appellant had sought to have the judge amend the Proposal before approving it on May 19, 2015, I see no basis upon which the Court could have concluded that the omission of *the Estate* from Schedule "A" was the result of a clerical error.

[106] On the other hand, I have no doubt the appellant could have established that the duplicated text in the definition of “Unaffected Creditors” was a “clerical error”. That is manifestly the case on the evidence before us.

[107] Does correcting the erroneous definition of Unaffected Creditors by removing the duplicated text effect a substantive change to the Proposal? This question governs whether the judge could have resorted to R. 92 to amend the Proposal by removing the duplicated text on the initial application for approval of the Proposal.

[108] If the Proposal is read, as it is by the CRA, so as to exclude Holdings and Transfer from the definition of Unaffected Creditors, then amending that definition so as to include them effects a substantive change. A court would not have authority to make such a substantive change to a proposal on an application for approval of that proposal pursuant to the *BIA.* It follows that employing the discretion afforded by s. 187(5) to effect such a change at this juncture would not be consistent with the policies underlying the provisions of the *BIA*, and would thus be an inappropriate exercise of the jurisdiction conferred on the court by that provision.

[109] The CRA’s interpretation of the Proposal turns upon the definition of Unaffected Creditors in Section 1.1 of the Proposal. Initially, its conclusion the related-party debt had been compromised by the Proposal was founded upon the view that the Williams Group were not Post-Filing Creditors or Secured Creditors, and the view that Schedule “A” “does not expand the definition of ‘Unaffected Creditors’” (the opinion expressed in the May 29, 2019 letter). If that interpretation of the Proposal is correct, varying the Order by removing the duplicated text would not have a substantive effect.

[110] Ultimately, as I have observed, the CRA concluded that Schedule “A” describes a third category of Unaffected Creditors. However, it appears to have read the definition of “Unaffected Creditors”, and in particular the duplicated text, so as to limit the unaffected claims of those creditors listed on Schedule “A” to the value of the assets secured by their Security Interest and to which they have priority (the opinion expressed in the July 5, 2019 letter). If that is a correct interpretation of the

Proposal, then removing the duplicated text would effect a substantive change, as it would remove the operative language which effects this limitation. However, if the duplicated text must be disregarded as a matter of interpretation—because the inclusion of Holdings and Transfer (who are *Unsecured* Creditors) on Schedule "A" must be given some effect—then an amendment which merely removes duplicated text which must be disregarded when the Proposal is properly construed would effect no substantive change to the Proposal. The question is thus whether, on a proper interpretation of the Proposal, the duplicated text is to be "disregarded" or "read out".

[111] In interpreting the Proposal, we should take the approach to contractual interpretation described in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 at paras. 47–48. Justice Rothstein, writing for the Court, explained that the overriding concern of contractual interpretation is to determine "the intent of the parties and the scope of their understanding". Contracts must be read "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract." The meaning of the words used in a contract "is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement".

[112] Holdings and Transfer appear to be the only Unsecured Creditors included on Schedule "A". Insofar as they are Post-Filing Creditors, they need not be included on Schedule "A". Insofar as they are Unsecured Creditors, the duplicated text renders their inclusion "meaningless and non-sensical".

[113] The interpretation of the Proposal requires us to attempt to give effect to all of its words: *Duncan v. Sherman*, 2006 BCCA 14 at para. 14; *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365 at paras. 39–41. In an often-cited passage, Bull J.A. described this imperative in *Marquest Industries Ltd. v. Willows Poultry Farms Ltd.* (1968), 1 D.L.R. (3d) 513 at 517–518 (B.C.C.A.):

> In the first place, consideration must be given to the duty of a Court and the rules it should apply, where a claim is made that a portion of a commercial

> agreement between two contracting parties is void for uncertainty or, to put it another way, is meaningless. The primary rule of construction has been expressed by the maxim, *ut res magis valeat quam pereat* or as paraphrased in English, "a deed shall never be void where the words may be applied to any extent to make it good". The maxim has been basic to such authoritative decisions as *Scammell v. Ouston*, [1941] 1 All E.R. 14; *Wells v. Blain*, [1927] 1 D.L.R. 687, [1927] 1 W.W.R. 223; *Ottawa Electric Co. v. St. Jacques* (1902), 31 S.C.R. 636, as well as many others, which establish that every effort should be made by a Court to find a meaning, looking at substance and not mere form, and that difficulties in interpretation do not make a clause bad as not being capable of interpretation, so long as a definite meaning can properly be extracted. In other words, every clause in a contract must, if possible, be given effect to. Also, as stated as early as 1868 in *Gwyn v. Neath Canal Navigation Co.* (1868), L.R. 3 Ex. 209, that if the real intentions of the parties can be collected from the language within the four corners of the instrument, the Court must give effect to such intentions by supplying anything necessarily to be inferred and rejecting whatever is repugnant to such real intentions so ascertained.
>
> [Emphasis added.]

[114] Here, we appear to be left with the choice of deciding that the inclusion of Holdings and Transfer on Schedule "A" has no purpose or effect, or deciding that the duplicated text should be read out of the Proposal, so as to give practical effect to their inclusion. It seems to me that we must approach that task in the manner suggested in *Djukastein v. Warville* (1981), 28 B.C.L.R. 301, 1981 CanLII 440 (C.A.), leave to appeal to SCC ref'd, [1981] 2 S.C.R. xii. There, Hinkson J.A., when considering how to deal with patently inconsistent provisions in a contract (at paras. 9–10), referred with approval to the following passage from Chitty on Contracts, General Principles, 23rd ed. (1968), p. 294, para. 627:

> Where the different parts of an instrument are inconsistent, effect must be given to that part which is calculated to carry into effect the real intention of the parties as gathered from the instrument as a whole, and that part which would defeat it must be rejected. Where two clauses in a contract are so totally repugnant to each other that they cannot stand together, the old rule was that the earlier was to be received and the later rejected. This rule, however, was a mere rule of thumb, totally unscientific, and out of keeping with the modern construction of documents. In any event, an effort should be made to give effect to every clause in the agreement and not to reject a clause unless it is manifestly inconsistent with or repugnant to the rest of the agreement.

[115] Where inept phrasing makes it impossible to reconcile all of the words used in a contract, we can look to the "dominating concept" of the contract, insofar as it can be discerned: see *Ginter v. Sawley Agency Ltd. et al.*, [1967] S.C.R 451, 1967 CanLII 75; *Skoko et al. v. Chychrun Construction Ltd.* (1982), 23 R.P.R. 262, [1982] B.C.J. No. 9 (C.A.).

[116] In my view, the most common-sense reading of the Proposal, and that which does the least violence to its words, is to read out the duplicated text so as to resolve the inconsistency in the definition of Unaffected Creditors (arising from the inclusion of Unsecured Creditors on Schedule "A", but preserving the debts owed to them only insofar as they are secured). In the result, just as the words "but only to the extent that the value of the assets secured by their Security Interest and to which they have priority is equal to or greater than the value of their Claims" do not limit the extent to which *Post-Filing Creditors* are unaffected, so too do they not limit the extent to which those listed on Schedule "A" are unaffected.

[117] In my opinion, the appellant is correct to say that that the common understanding of the parties to the Proposal, evidenced by the document itself, (the "dominating concept"), is that the persons listed on Schedule "A" were to be unaffected by the Proposal. As I have concluded, the Proposal can be read that way by reading out the duplicated text.

[118] Nevertheless, the presence of the duplicated text in the Proposal as written risks the introduction of unnecessary confusion in respect of the scope and effect of the Proposal. For that reason, I am of the view that, on an application for an order approving the Proposal, as a means of pre-emptively mitigating the risk of such confusion, the court could have corrected what may be characterized as a typographical error—the erroneous inclusion of the duplicated text in the definition of "Unaffected Creditors"—by removing that text from the Proposal, pursuant to its authority under R. 92 of the *BIA Rules*.

[119] Further, I am of the opinion that the judge erred in failing to consider whether she should exercise her discretion pursuant to s. 187(5) of the *BIA* so as to vary the Order approving the Proposal.

Exercise of the Discretion

[120] That resort could have been had to R. 92 at first instance does not resolve the question whether it is appropriate for the court to now exercise the discretion under s. 187(5) to vary the Order. While it means that it *may* be appropriate to exercise that discretion, it remains for us to consider the factors identified above that should be weighed in determining whether to do so. That is, whether varying the Order:

a) is justified by either a fundamental change in circumstances between the original hearing and the time of the motion to vary, or the discovery of evidence that was not known at the time of the original hearing and which could have led to a different result;

b) is likely to prejudice creditors or third parties; and

c) can be exercised in a manner consistent with the policies underlying the provisions of the *BIA*, and should be exercised as an expedient means to advance the ends of justice.

Fundamental change or new evidence

[121] In my view, the CRA's 2019 interpretation of the Proposal approved by the Order effected a fundamental change in circumstances. It gave rise, not only to the re-assessment of Williams Moving's tax liability, but to uncertainty with respect to the existence of the related-party debt. That change in circumstances warranted an application under s. 187(5) to vary the Order to remove the uncertainty.

[122] Having said that, it is inaccurate, in my view, to portray this as a case where Williams Moving is seeking to modify an instrument merely because it has discovered its operation generates an adverse and unplanned tax liability. The material before us amply demonstrates that the appellant seeks to confirm the

instrument in fact operates as it was intended to: by treating Transfer and Holdings as “Unaffected Creditors”, and thereby preserving the ability of Williams Moving to access tax loss carry forwards in the future without adversely impacting the overall tax position of it and the Williams Group.

Prejudice

[123] Creditors were not given notice of these proceedings because the chambers judge was of the view that they were not necessary parties. In my view, while they may have been unlikely to take an interest in these proceedings, it would have been preferable to give them notice. However, no party now before us takes issue with the fact creditors are not represented.

[124] For reasons I have given, variation of the Order in the manner I have described does not prejudice the creditors or third parties.

[125] The creditors of Williams Moving who were entitled to vote accepted a Proposal that, on Schedule “A”, listed Transfer and Holdings as “Unaffected Creditors” and, at section 2.3, provided that Unaffected Creditors would be “paid in accordance with existing agreements between such creditors and the Company or in accordance with alternative arrangements to be negotiated concurrently with the filing and implementation of this Proposal”. They were advised by the Trustee that Transfer and Holdings would not be paid the amounts due to Affected Creditors and that as “Guarantors” they had waived the right to vote on the Proposal. In my view, no prejudice to creditors arises from variation of the Order so as to remove ambiguity arising from a close reading of the duplicated text.

[126] For the same reason, third parties will suffer no prejudice by variation of the Order. Not only would those aware of the Proposal be unlikely to interpret it as the CRA has (because, on its face, the Proposal appears to define Transfer and Holdings as Unaffected Creditors), but third parties dealing with the appellant who might have been interested in its financial circumstances and who made appropriate enquiries would see in its financial statements that it had, in the period after the

Proposal was implemented, considered the related-party debt to have been preserved by the Proposal.

The interests of justice

[127] It is in the interests of justice to vary the Order approving the Proposal. I am satisfied the duplicated text appeared in the version of the Proposal accepted by creditors as a result of a clerical error which the Court may correct. The correction does not constitute an alteration in substance. It will not prejudice creditors or third parties. While the appellant's principal objective in seeking to correct the Order approving the Proposal is to contest the CRA re-assessment, I am satisfied that this is not a collateral attack upon a decision that should be challenged elsewhere.

[128] I reach that conclusion for reasons underlying this Court's decisions in *Roeder v. Lang Michener Lawrence & Shaw*, 2007 BCCA 152; *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2018 BCCA 214; and very recently in *British Columbia (Workers' Compensation Board) v. D & G Hazmat Services Ltd.*, 2024 BCCA 127. The appellant attacks the findings underlying the CRA assessment, and not the assessment itself. The doctrine of collateral attack does not go so far as to prevent Williams Moving from pursuing a s. 187(5) remedy because the essential character of its application for relief is not a claim for judicial review.

[129] Finally, while the application to vary the Order comes almost a decade after the approval of the Proposal, the application for a variance of the Order was brought reasonably promptly after the CRA re-assessment. There is no suggestion that delay should stand as a bar to variation of the Order pursuant to s. 187(5).

Conclusion

[130] I would allow the appeal and grant an order pursuant to s. 187(5) of the *BIA* that the Order be varied such that the definition of "Unaffected Creditors" contained

in the Proposal of Williams Moving approved by the Order be amended and corrected *nunc pro tunc* to read:

> "Unaffected Creditors" means Post-Filing Creditors and Secured Creditors but only to the extent that the value of the assets secured by their Security Interest, and to which they have priority, is equal to or greater than the value of their Claims, and includes, without limitation, those creditors enumerated in Schedule "A" to this Proposal. ~~, but only to the extent that the value of the assets secured by their Security Interest and to which they have priority is equal to or greater than the value of their Claims~~
>
> (The amended portion to be struck out.)

[131] I would dismiss the appeal insofar as I would decline to vary the Order by adding the Estate to Schedule "A" of the Proposal.

[132] As the appellant was substantially successful, I would award the appellant costs of the appeal.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Chief Justice Marchand"

I agree:

"The Honourable Mr. Justice Abrioux"