Supreme Court

Atlantic Sea Cucumber Ltd. (Re)

Court:	Supreme Court
Date:	2025-07-04
Citation:	2025 NSSC 234
Docket:	Hfx No. 45461
Judge/Registrar/Adjudicator:	Balmanoukian, Raffi (Registrar)
Document Type:	Decision

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Atlantic Sea Cucumber Ltd. (Re)*, 2025 NSSC 234

Date: 20250704
Docket: Hfx No. 45461
Registry: Halifax
Estate Number: 51-2939212

In the Matter of: The bankruptcy of Atlantic Sea Cucumber Ltd.

DECISION

Registrar:	Raffi A. Balmanoukian, Registrar in Bankruptcy
Heard:	November 22, 2024, in Halifax, Nova Scotia
Final Written Submissions:	January 8, 2025
Counsel:	Joshua J. Santimaw, for the Applicant trustee, msi Spergel Inc.
	Darren D. O'Keefe, for the bankrupt, Atlantic Sea Cucumber Ltd.
	Christopher D.J. Isnor and Mel Norton, for Atlantic Golden Age Holdings Inc.

Gavin D.F. MacDonald and Meaghan Kells, for the creditor Weihai Taiwei Haiyang Aquatic Food Co. Ltd.

By the Court:

[1] The internet is a lousy lawyer. The central issue in this case is whether it was so lousy as to render worthless purported security by Atlantic Sea Cucumber Ltd. (“ASC,” the “Bankrupt,” or “the Company”) in favour of a common-control company, Atlantic Golden Age Holdings Inc. (“AGAH”).

[2] Formally, this is an application under s. 38 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 as amended (the “*BIA*”). msi Spergel Inc., as ASC’s Trustee (the “Trustee”) asks the Court to “determine the validity and enforceability of the security” In reality, the Trustee makes the application to keep a judgment creditor from doing so.

[3] That judgment creditor, Weihai Taiwei Haiyang Aquatic Food Co. Ltd. (“WTH”) says the security is not security at all. It also says AGAH is not even a creditor but instead an equity holder. AGAH, predictably, says the opposite. ASC, AGAH, and the Trustee hold generally common views. The upshot of their submissions is that while (as counsel for ASC candidly admitted) the “optics have never been on our side,” AGAH holds valid and enforceable security over most or all of ASC’s undertaking and as a result, the other creditors will get little or nothing. They also say, to a certain extent, that this Court should defer to the Trustee who, having made its call, should carry persuasive if not determinative weight.

A Brief Synopsis – How We Got Here

[4] Although these proceedings have had a long and complex litigation history, the facts needed to resolve the present issue are fairly straightforward and, for the most part, are not even

in dispute. A brief procedural summary will suffice to bring the reader up to speed on how we got to be where we are.

[5] In February 2023, WTH became a seven-figure judgment creditor of ASC, pursuant to a judgment reported at 2023 NSSC 27. That judgment remains unpaid.

[6] In May 2023, ASC filed a Notice of Intention to Make a Proposal under the *BIA*.

[7] The timeline to that point is:

- January 2, 2018 – original unregistered security. It purports to secure "$2.174M." It is not disputed that this represents, however casually expressed, the sum of $2,174,000. It is also not disputed that at some time prior to November 25, 2020, it was repaid in full.

Between 2021 and early 2023, ASC was under pressure from the Toronto-Dominion Bank. By February 10, 2023, TD was paid out and its mortgage released[1]. AGAH says it was the primary if not exclusive source of funds to do so. Farm Credit Corporation was also paid out during this timeframe.

- February 2, 2023 – Decision of Justice Coughlan in 2023 NSSC 27.
- March 14, 2023 – registration of GSA dated March 5, 2023[2].
- April 13, 2023 – registration of collateral mortgage, dated April 13, 2023.
- May 1, 2023 – filing of Notice of Intention to Make a Proposal under the *BIA*. The amount said to be owing to AGAH as of this date is $2,163,190. WTH says it is $1,598,423.05.[3] The proof of claim dated April 17, 2024 says $2,990,979.62. The quantum of the claim was not argued in the current application.

[8] After a contested but successful extension under s. 50.4(9) of the *BIA*, the Company decided to convert the proceedings to the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

[9] The conversion process sought by the Company included an application for abridgment of time. That abridgment application was dismissed by Justice Rosinski (2023 NSSC 232). The Court of Appeal dismissed an appeal at 2024 NSCA 35; the Supreme Court of Canada denied leave to appeal (SCC 41310 on December 5, 2024; 2024 CanLII 120272 (SCC)).

[10] After Justice Rosinski's decision, ASC returned to me on an expedited basis seeking a further extension under s. 50.4(9) *BIA*. I dismissed that application orally on July 17, 2023 (reported at 2023 NSSC 238). It, too, was appealed and eventually dismissed by Bodurtha, J. as moot in light of the developments in the CCAA litigation noted above. ASC accordingly is, and remains, bankrupt.

[11] ASC then sought to engage in a sales process, to which WTH objected. WTH successfully obtained a stay from this Court, reported at 2024 NSSC 214, which was not appealed. I provided the Trustee with the opportunity to file an application under s. 38(4) *BIA* to determine the validity of the security, failing which WTH could pursue its challenge under s. 38. The Trustee elected to make the application; this proceeding is the result.

[12] There were also applications to remove Gavin MacDonald as counsel for WTH, and as an inspector under s. 116(2) *BIA*. The first of these was dismissed by consent; the second, adjourned without day and also by consent.

[13] The parties filed extensive argument and further affidavits, although much of the factual underpinnings were on file from prior proceedings. The matter proceeded before me by consent pursuant to s. 192(1)(j) *BIA*. Although there were interrogatories (primarily in relation to the

disqualification of counsel/inspector motions), there was no cross-examination of any affiant. As has been notable throughout this protracted and contentious litigation, the professionalism of counsel to each other and to the Court, and their efforts towards maximum efficiency are commendable.

[14] The current upshot is this: ASC says it borrowed money from AGAH, a common-control company. It says it did so under documentation not prepared by counsel, said to be downloaded from some unspecified online resource[4], and signed (perhaps literally) on the dining room table in 2018. It purported to secure most, but not all, of ASC's assets, a scope which I will discuss in due course. The fact and time of execution are not disputed.

[15] On at least one occasion subsequent to 2018, AGAH was repaid in full. ASC says that the intention was that this purported security would secure revolving facilities, which would wax and wane as cash flow demanded. After encountering financial difficulties, ASC issued "new and improved" security with the assistance of counsel which generally, but not precisely, purports to encumber the same assets. These were lodged in the appropriate land and personal property registries.

[16] WTH, predicably, looks at this arrangement with jaundiced eyes and says first, that AGAH is not a creditor at all and second, that if it is, it is unsecured.

[17] The Trustee, AGAH, and ASC all say that the security, if not pretty, is adequate to secure at least the assets noted in the original documentation, and that this Court should rule accordingly. As a supplemental argument, ASC submits that this Court should defer to the Trustee's decision to recognize AGAH as a secured creditor, particularly as the Trustee (at WTH's request) submitted the security to respected counsel for a validity opinion, and received an affirmative reply - twice.[5]

[18] As well, AGAH says that the intention of the security, regardless of its precise wording, was to collateralize revolving credit advances and repayments. I invited post-hearing submissions on whether I should consider this under the parol evidence rule. AGAH and WTH made such submissions; predictably, they adopt diametrically opposed positions.

[19] In many respects, the parties agree on the statutory references and leading cases to which I should direct my attention. It is the application of those authorities to the facts on which the primary and deeply-held divergences arise.

Issues

[20] And so the issues, as I see them and placed in some logical sequence, are:

1. Are the funds provided by AGAH debt, or equity for which AGAH cannot be paid until everyone else is, pursuant to s. 140.1 *BIA*?
2. If debt, is it a debt captured by s. 137 *BIA* as a non-arm's length transaction that is not a "proper transaction?"
3. If debt and a "proper transaction," is the unrecorded security, insofar as later recorded, valid as against the Trustee?
4. If it is, are there any aspects of the recorded security that should be disregarded as not included in the original unrecorded security, under s. 95 *BIA* or otherwise?
5. If the security is valid as against the Trustee, is parol evidence admissible to explain the scope of what obligations were to be secured?
6. On admissible evidence, does the security extend (as against the scope of assets found to be secured) to the amount of AGAH's advances as of the date of bankruptcy, and does it constitute past consideration?

7. Is any of the foregoing analysis subject to deference by the Court to the conclusions reached by the Trustee?

8. Does the *Statute of Elizabeth* or the *Assignments and Preferences Act* affect the answer to any of these questions?

9. Given the conclusions of this Court, what is the proper order as to costs?

Issues one and two: Debt or equity, and "proper transaction"

[21] For the reasons which follow, I am satisfied that the amounts advanced by AGAH to ASC are debts which are not subject to ss. 137 and 140.1 of the *BIA*.

[22] WTH submits that these sums are captured by these sections; if it is correct, AGAH is subsumed to all creditors; for practical purposes, it means it will receive nothing.

[23] These sections read:

> **137 (1)** A creditor who, at any time before the bankruptcy of a debtor, entered into a transaction with the debtor and who was not at arm's length with the debtor at that time is not entitled to claim a dividend in respect of a claim arising out of that transaction until all claims of the other creditors have been satisfied, unless the transaction was in the opinion of the trustee or of the court a proper transaction.
>
> **140.1** A creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied. [emphases added]

[24] "Equity claim" is defined, non-exhaustively, in s. 2:

> ***equity claim*** means a claim that is in respect of an equity interest, including a claim for, among others,
>
> **(a)** a dividend or similar payment,
>
> **(b)** a return of capital,
>
> **(c)** a redemption or retraction obligation,
>
> **(d)** a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

> **(e)** contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); [emphasis added]

[25] "Equity interest" is also defined in s.2; for current purposes, it means a share in the corporation.

[26] It is not disputed that AGAH and ASC are "related persons" within the meaning of the *BIA*, and as such deemed for the purposes of the current discussion to be at non-arm's length (*BIA*, s. 4(5)[6]). The question therefore becomes whether (a) the Court considers the purported security to be a "proper transaction" and (b) whether the advances were, in the current circumstances, debt or equity.

[27] The stakeholders focused on the "debt or equity" question in s. 140.1. However, I begin with the characterization of whether the transaction is a "proper" transaction within the meaning of s. 137. If it is, we move on to a consideration of its scope and priority; if it is not "proper," AGAH is out of luck and for practical purposes that is the end of the inquiry.

[28] I read the disjunctive qualifier of the impugned transaction being proper, in the opinion of "the Trustee or the Court," as meaning that both the Court and the Trustee serve a gatekeeping purpose when s. 137 is triggered. If the Trustee does not consider it to be proper, it issues a disallowance and is subject to Court intervention s. 135 or by granting leave under s. 38 as the case may be. It does not mean that the Trustee, being the first to review the claim, binds the Court with its determination. In other words, if (as here) the Trustee considers the claim to be a "proper transaction," the Court is not powerless to intervene and, if appropriate, reverse that determination (subject, perhaps, to the deference argument to be addressed later in these reasons).

[29] I would have no hesitation in saying that the 2023 securities, if they were stand-alone, would not satisfy me as being "proper transactions." They were clearly following ASC's

litigation loss and ensuing financial difficulties. To the extent that they expand upon the 2018 purported security, I also have no hesitation in finding that the "extra" security is not a proper transaction and does not to that extent entitle AGAH to a dividend "in respect of that transaction." Indeed, ASC's counsel appeared not seriously to contest that proposition, in oral argument. I will return to the scope of security later in these reasons.

[30] However, the 2023 documentation is said not to "stand alone." AGAH and its allies submit that it is inextricably tied to the 2018 documentation, and that the 2018 transaction is perfectly in order.

[31] For the purposes of the 2018 security, I agree with AGAH with respect to its "propriety." It is not unusual for a related party to seek to secure funds advanced; the evidence before me is that AGAH was advised by its accountant to do so. It did, which must be distinguished from the form and scope of that security, or its continuing nature. As I will discuss when considering whether the advance is "debt or equity," many (but not all) of the hallmarks of an intention and an act to effect an intercorporate loan rather than investment, and to secure it (on professional advice) were present in 2018. In and of itself, there is nothing at the time either improper or even suspicious about this.

[32] Counsel for WTH cites *Re Tudor Sales Ltd*, 2017 BCCS 119 for the proposition that, despite security documentation, one must look to the substance rather than the form of related-party transactions to determine debt versus equity, and that the burden of proving "propriety" is on the person seeking to uphold the security. I agree. However, with respect to s. 137, the Court in *Tudor Sales* briefly dismissed the notion that the security was a "proper" transaction, at para. 47 by saying there was "simply no justification for allowing Mr. Eggertson the luxury of security his investment….and thereby defeat the legitimate interests of trade creditors." Notably, although the advances were quite dated, the financial statements (signed by the noted

principal, Mr. Eggerston) stated that the (otherwise undocumented) shareholder loans were "unsecured, non-interest bearing…."

[33] At least as significantly in the eyes of the Court in *Tudor*, the repayment regime (and interest) was directly tied to the profitability of the company. Although the Court focused on this as an equity analysis, it appears that it also influenced the Court's thinking on s. 137 "propriety." I agree with AGAH that this distinguishes *Tudor* from the case at bar.

[34] I find that the 2018 transaction, so far as it pertains to 2018 events and advances, was a "proper transaction" for the purposes of s. 137 *BIA*.

[35] As I have noted, the parties at this stage focused on s. 140.1 *BIA*. They generally agree that the seminal case in Canada is *Syndic de Societe de velo en libre service*, 2023 QCCA 368, which in turn adopts *Alberta Energy Regulator v. Lexin Resources Ltd,* 2018 ABQB 590[7]. That case formulates the objective-subjective test, and considerations, of *Re US Steel Canada Inc*., 2016 ONSC 569.

[36] At para. 40 *et seq*. of *Alberta Energy*, the Court said:

> [40] While the characterization of the claim must be analyzed at the date of advance, subsequent behavior, rather than subsequent stated intention, may be relevant if it illuminates the intentions of the parties at the date of advance although it cannot on its own justify a re-characterization of such advance: ***U.S. Steel*** at para 195; ***Canadian Deposit Insurance*** at para 52. The determination is not based on inequitable behaviour, but on the underlying substantive reality of the transaction.
>
> [41] ***U.S. Steel*** sets out a helpful two-part test in to be followed in situations involving parent-subsidiary relationships at paras 186-190:
>
> > (a) subjectively, did the alleged lender actually expect to be repaid the principle amount of the loan with interest out of the cashflows of the alleged borrower; and
> >
> > (b) objectively, was the expectation reasonable under the circumstances?
>
> [42] The Court in ***U.S. Steel*** referred to various factors used by American courts to aid in determining appropriate characterization, including the following:

(a) the names given to the instruments, if any, evidencing the indebtedness;

(b) the presence or absence of a fixed maturity date and schedule of payments. The American cases suggest that the absence of a fixed maturity date and a fixed obligation to repay is an indication that the advances were capital contributions and not loans;

(c) the presence or absence of a fixed rate of interest and interest payments. Again, it is suggested that the absence of a fixed rate of interest and interest payments is a strong indication that the advances were capital contributions rather than loans;

(d) the source of repayments. If the expectation of repayment depends solely on the success of the borrower's business, the cases suggest that the transaction has the appearance of a capital contribution;

(e) the adequacy or inadequacy of capitalization. Thin or inadequate capitalization is strong evidence that the advances are capital contributions rather than loans;

(f) the identity of interest between the creditor and the shareholder. If shareholders make advances in proportion to their respective stock ownership, an equity contribution is indicated;

(g) the security, if any, for advances;

(h) the corporation's ability to obtain financing from outside lending institutions. When there is no evidence of other outside financing, some cases indicate that the fact no reasonable creditor would have acted in the same manner is strong evidence that the advances were capital contributions rather than loans;

(i) the extent to which the advances were subordinated to the claims of outside creditors;

(j) the extent to which the advances were used to acquire capital assets. The use of the advance to meet the daily operating needs for the corporation, rather than to purchase capital assets, is arguably indicative of bona fide indebtedness; and

(k) the presence or absence of a sinking fund to provide repayments.

[43] However, these and other factors are no more than an aid in determining substantive reality and should not be used in a "score-card" manner: supra para 181.

[37] What has been characterized as the "US Steel" test (and series of "non-score card" factors) has also recently been exhaustively canvassed by Associate Justice Ilchenko in *Re Organic Garage*, 2025 ONSC 2476. In doing so, at paras. 81 *et seq*, he brings the *Alberta Energy, Tudor Sales*, and *US Steel* cases in concert with each other, all circling back to the fact

that "equity claim" is a non-exhaustive definition in the *BIA*, and must be assessed on its own facts properly in evidence, and not as a mechanical or "rubber stamp" exercise (*Organic Garage*, paras. 87-88). He also cites, with approval, *US Steel* at para. 183:

> [183] An appropriate starting point is the definition of debt and equity for financial purposes set out in paragraphs 32 and 34 of the Finnerty Report:
>
> > At its heart, the difference between equity and debt lies in the fundamental nature of their respective claims on the assets and cash flow of the company. <u>Debt involves borrowing funds subject to a legal commitment to repay the borrowed money with interest at an agreed rate by a stated maturity date. This commitment is embodied in a contract, and this contract is implemented by the borrower</u>. Lenders receive a contractually agreed set of cash flows, typically through periodic interest payments and one or more principal repayments, the last of which occur on the maturity date. … <u>In contrast to debt, an equity claim entitles the holder to a share of the company's profits and residual cash flows after the company has made all the contractually required debt service payments</u>. That is, the debt ranks senior to the equity with respect to the company's cash flows. Similarly, the debt ranks senior to the equity in the event the company must be liquidated and its assets sold to repay its debt obligations. The equityholders get what is left after the holders of the debt have been paid in full; if the debtholders can't get paid in full, then the equityholders get nothing.
>
> [Emphases added by Associate Justice Ilchenko]

[38] So what do we have here? I begin by citing the non-exhaustive list of items that *are* equity claims in s. 2. I repeat it here:

> ***equity claim*** means a claim that is <u>in respect of</u> an equity interest, including a claim for, among others,
>
> > **(a)** a dividend or similar payment,
> >
> > **(b)** a return of capital,
> >
> > **(c)** a redemption or retraction obligation,
> >
> > **(d)** a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
> >
> > **(e)** contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); [emphasis added]

[39] And I state at the outset that I agree with the comments of the Ontario Court of Appeal in *Re Sino-Forest Corporation*, 2012 ONCA 816 at paras. 37 *et seq*. that "in respect of" is to be given the "widest possible scope" and include "in relation to," "with reference to," or "in connection with." In making these comments, the Court in *Sino-Forest* relied on authorities from the Supreme Court of Canada such as *R. v. Nowegijick*, [1983] 1 SCR 29 and which are accordingly binding upon me.

[40] The only specified item in the examples provided by the *BIA* that could apply here is a "return of capital." Although it is clear that AGAH and ASC have common control, and AGAH holds preferred shares in ASC, there is no indication that the advances and repayments either were on account of, or tied to, capital or even that the sum in question is the result of dividends declared on the preferred shares. I do not consider the sum in issue to be on account of a "return of capital."

[41] Turning to the non-exhaustive list in *US Steel*, and being cognizant of the warnings in the cited caselaw not to do so mechanically, I note:

- The 2018 instrument is referred to as a "loan agreement."

- There is an open (and important) question of whether the 2018 instrument contained a fixed maturity date. It does contain a "box" for the advance to be paid in a lump sum "by 31st Dec 2019" but that box is not checked. AGAH and ASC submit this is consistent with it being a revolving facility. No other payment box (such as for installments) is checked either.

- Although like all advances, the ability of ASC to repay would depend on its profitability, the obligation is not continent on or calculated as a function of profitability (unlike *Tudor, supra*).

- The capitalization of ASC in 2018, at a minimum, appears also to have included financing from TD[8].

- Relationship between the creditor and the shareholder: As noted, AGAH is a preferred, but not a common, shareholder of ASC; AGAH and ASC are both under the control of the Gao Family Trust.

- Security for advances: This is stated as "building, land and equipment," and shall be discussed separately.

- Ability to obtain outside financing: As noted, TD and FCC were lenders; while I do not have 2018's financial statements, the 2020 ASC statements show TD as holding a secured line of credit with $3,935,000 drawn down as of November 30, 2020 and $1,420,000 as of November 30, 2019. Both years also show debt to ACOA, and a term loan to TD. The FCC loan appears to originate during the 2020 tax year. The later advances from AGAH appear to have been primarily to "cash out" TD and FCC.

- These statements show related company and shareholders' accounts for each year, notably in my view as separate line items and notes to statements.

- Subordination to outside creditors: In 2018, the advances were subordinate to TD's 2017 mortgage.

- Capital acquisition: It is unclear what the 2018 advances were used for; Mr. Gao refers to the advance to ASC "for its use in its operations."[9]

- Presence or absence of sinking fund to provide repayments: There is no evidence of such a fund; to the contrary, it appears that AGAH was paid or drawn upon as cash flow dictated, or later as lender demands required.

[42] At its core, *Alberta Energy* reminds us that *US Steel* and its progeny is an objective/subjective test: Did the related company *reasonably expect* to be repaid, and did it *actually expect* to be repaid "with interest out of the cashflows?" And, in making this evaluation, we are reminded to look to substance over form.

[43] Here, I find that AGAH not only reasonably expected to be repaid for its 2018 transactions, it actually was. As of November 25, 2020 it was in fact slightly overpaid. In late 2020 and in subsequent years, AGAH advanced funds in various amounts, and received sporadic and widely variable repayments; but overall the balance said to be owing to AGAH increased over time. Despite this overall increase, I find that it was neither unreasonable nor unexpected that AGAH would receive funds over time, as circumstances permitted.

[44] Additionally, I note that AGAH is not the only related company that advanced funds to ASC, although it is the most prominent and only alleged secured one. This is consistent with a common control group providing cash where needed from where it exists, rather than a fixed investment that is equity to remain in place *ad infinitum*.

[45] In light of the above and the discussion of the *US Steel* indicia, I find that this case is closer to *Re Provost Shoes* (1992), 123 NSR (2^{nd}) 302 (S.C., T.D.), 1993 CanLii 4591, a decision of Justice MacLellan, than to the cases relied on by WTH.

[46] *Provost Shoes* involved a series of dividends which were declared during the companies' successful years, and entered into the accounts as payables to shareholders. As resources and working capital allowed, various amounts were paid out but there were balances remaining when the companies became insolvent.

[47] Justice MacLellan found that these transactions were not captured by s. 137 *BIA*, and were loans rather than capital in nature. He said:

In **Canada Deposit Insurance Corporation v. Canadian Commercial Bank** (1990), 74 Alberta Law Reports L.R. 2nd p. 69, the Alberta Court of Appeal dealt with the issue of how a Trial Judge should look at a transaction to determine its true nature. The Court held:

> "The cases considered, and in particular **Sukloff**, supra, lead me to consider that where, as in this case, the evidence indicated that moneys advanced to a business are to be repaid, and particularly when the terms of repayment are specified, the transaction is classified as a loan. It is clear that careful consideration must be given to the true nature of the agreement upon which the moneys were advanced."

I find that this test is the proper one to apply here and I find that the transaction in 1983 when the dividends paid to all shareholders of all three companies were returned to each company, this was in fact a valid loan to each company.

This finding is based on the fact that the transactions were clearly recorded on the books of each company as a loan and that it continued to be so described up to the time of the bankruptcy. More importantly, however, is the fact that substantial payments were made on these loans. The fact that no documents were prepared to show the existence of the loan and that no interest was payable does not satisfy me that this was anything other than a loan arrangement. It is also significant that the loan arrangements were made on the advice of the companies' accountants and lawyers. There appears to be nothing improper with the arrangement as entered into in 1983. At that time the companies were prospering and taking advantage of a procedure to save taxes cannot be described as being improper on its face.

I find, therefore, that these transactions were proper transactions and should not be disallowed under Section 137(1) of the Bankruptcy Act.

[48] WTH submits that *Provost Shoes* has been supplanted by the addition of s. 140.1 of the *BIA*. I disagree. S. 140.1 is only triggered if there is an "equity claim," which in turn begs the analysis of whether the advance from the related party is debt or equity. It will be noted that *Provost Shoes* was cited with approval in the post-140.1 decision in *Syndic*.

[49] There is nothing inherently suspect about advances to or from common control entities; in fact in many cases it may be a laudable attempt to keep a company afloat. It is how those advances are characterized objectively and subjectively which matters. Here, it is clear that the 2018 transactions contemplated – on professional advice – a secured transaction at least as between the parties[10] and not only was there an expectation of repayment, it actually occurred. There was documentation, after a fashion (and which is its own issue); repayment was

not tied to performance in the sense of being tied to a percentage or formula; the corporate structure involves preferred shares which appear not to have come into play in the accounting; the funds appear to have been treated for accounting purposes as loans and reported on the corporate balance sheets as such; there was more than one such company making these advances; they were not the exclusive source of capital, although they later were used at least in part to replace outside capital; and although AGAH and ASC are under common control, AGAH is not a common shareholder of ASC.

[50] Although the advance is without interest, this is not uncommon for funds provided by related entities. I do not disregard that a commercial "loan" would be interest bearing, but I place minimal weight upon it. It may be equally apropos to observe that AGAH, as holder of preferred shares, could equally have sought to have its capital returned or dividends paid in priority to the payments as-accounted for, depending on what tax situation it found itself in and what professional advice it received.

[51] On the civil standard of a balance of probabilities, and in considering all of the evidence, I am satisfied that the 2018 transactions were both a "proper transaction" within the meaning of s. 137, and not an "equity claim" within the meaning of the *BIA*.

[52] I further find that the post-2019 advances were debt, not equity, for the same reasons as in 2018; this is, for clarity, distinct from whether they are currently secured in law, and if so against what assets. I'll get to that.

Issues 3 and 4: Validity of the unrecorded security as against the Trustee as later recorded, and scope of security

[53] I will treat these in reverse order. I have concluded that the 2018 security is valid as between the parties, but that only the items noted in it are covered; and to the extent the 2023

documentation purports to extend the security's reach, it is of no effect as against the Trustee. I have also, with difficulty, reached the conclusion that the 2023 documentation should not be considered a perfection of the 2018 transactions, and as such the 2018 security is void as against the Trustee for want of perfection; however, I am prepared to proceed with the next steps of the analysis in the event I am incorrect on this point.

[54] This is analytically distinct from whether the 2018 agreements extend to cover advances after December 31, 2019. The current issues under discussion are only whether the 2018 agreements have inherent validity as against the Trustee, and to what assets they extend.

[55] It is common ground that only the items captured in the 2018 documentation are potentially secured. To the extent that the 2023 security expands on it, AGAH and ASC concede that they are void as against the Trustee, pursuant to S. 95 of the *BIA*. That said, some parties argued that the 2018 language is broad enough to cover the items contained in the 2023 security and so the two sets of documents really amount to the same thing.

[56] Section 95 of the *BIA* reads:

> **95 (1)** A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person
>
> > **…**
> >
> > **(b)** in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy[11].

[57] The 2018 documentation purported to secure "building, land and equipment," none of which are more particularly specified.

[58] The 2023 collateral mortgage describes the (only) real property owned by ASC[12]; the general security agreement purports to secure (in second position behind Royal Bank) an extensive description of collateral which includes both tangibles and intangibles, which I would include such items as accounts receivables and potentially fishing licenses.

[59] The 2023 security was issued and recorded in March/April 2023. ASC filed its Notice of Intention to Make a Proposal on May 1, 2023. The Company was deemed bankrupt at the expiration of the extension of time to make a proposal, pursuant to s. 50.4(8) *BIA*[13]. The filings were thus well within 12 months of the "date of the initial bankruptcy event" as defined in s. 2 *BIA*[14] and as used in s. 95 *BIA*.

[60] Counsel for ASC quite frankly stated that the securitization argument would be "DOA" (dead on arrival) but for the 2018 documentation. He agreed that the 2023 security, standing alone, would be void as against the Trustee under s. 95 *BIA*, but that in conjunction with the 2018 documentation it is is operative and the 2023 documentation merely puts the 2018 security in recordable form.

[61] AGAH takes a broader view, that a layperson-prepared document in 2018 would not have addressed intangible personal property and that I should look to conduct and intention. It says that AGAH has an "equitable interest" in all of ASC's personal property, as of 2018. It further says that the presumption raised in s. 95(2) has been rebutted since I should look back to 2018, not 2023.

[62] The Trustee takes a more equivocal view, submitting that the security was "given" in 2018 (and thus outside the 12 month timeframe in s. 95) but not "recorded" until 2023. It concedes that accounts receivable, other intangibles, and inventory "may" not be secured, but again that I should look to the context of a layperson-prepared document.

[63] ASC agrees that intangibles “may” not be captured.

[64] WTH, predictably, submits that if anything is secured, it is limited to the 2018 documentation.

[65] In this respect, I fundamentally agree with WTH and disagree with the spectrum of possibilities expressed by the others. ASC was, although unrepresented by counsel, by 2018 an established and commercially sophisticated entity with sophisticated accounting advice. In particular, ASC and AGAH were well aware that in addition to tangible assets, a significant portion of ASC’s value was in the form of commercial licenses, accounts receivable, and other such inchoates. It was also perfectly open to the parties to use the uncomplicated language of “all present and after-acquired personal property,” or similar. Instead, they specifically chose to use the word “equipment,” which is a defined term under the *Personal Property Security Act*, SNS 1995-96 c. 13 (“*PPSA*”), and which corresponds to what I consider to be a reasonable lay interpretation. I believe a reasonable layperson would generally contemplate capital items such as machinery, furniture, and the like; but not consumables, work in progress, inventory, cash or intangibles such as licenses, receivables, rights, or intellectual property. The definition I accept, as contained in the *PPSA*, is:

> “equipment” means goods that are held by a debtor other than as inventory or consumer goods;

[66] I accept “equipment” within the meaning of the *PPSA* as being what is covered in the 2018 agreement; all other personal property, including any personal property that is required to be described by serial number so as to be valid as against the Trustee (referred to in the *PPSA* as “serial numbered goods”) is not.

[67] And in turn, “goods,” although by no means phrased in layperson’s terms, is also what I believe a person-on-the-street would consider common sense, and which I accept as being “goods” that are included in “equipment,” above (other than, again, serial numbered goods):

> (u) "goods" means tangible personal property, fixtures, crops and the unborn young of animals but does not include a document of title, chattel paper, investment property, an instrument, money or trees, other than crops, until they are severed or minerals until they are extracted;

[68] For clarity: I am not 'importing' the *PPSA* definitions because AGAH or ASC would have had these definitions at hand at the time of the 2018 documentation; I am importing them because they are consistent with common sense in the context of the case at bar. The parties were well immersed in their industry; they could have said "all property," or some other such term. They did not. I must be satisfied, to a civil standard, that they intended to include something other than "equipment" as I have accepted that term, when they used that word. I am not.

[69] Additionally, there is no reference or contemplation to "future equipment." Anything acquired by ASC after January 2, 2018 is not included in the 2018 security.

[70] Conversely, it is clear that ASC owned only two pieces of real estate, and associated buildings, and these did not change after 2018. Although the 2018 descriptions would not have been acceptable for recording (even if the instrument was otherwise recordable in the parcel registers), it is clear that ASC and AGAH intended to encumber ASC's only real estate, being the two PIDs against which the 2023 instruments were recorded (PIDs 41075649 and 41211806).

[71] I disagree that the scope of security that is <u>added</u> by the 2023 agreements do not fall within the presumption contained in s. 95(2) *BIA*. <u>To the extent that these are not contained in the 2018 agreements</u>, they are clearly a preference in favour of a related party, and there has been no evidence to refute it.

[72] Accordingly, I find that the 2018 agreements secure the two noted PIDs, and "equipment," other than serial numbered goods, as defined in the *PPSA*, and are not captured by s. 95 *BIA*. I do not understand anyone to take the position that the 2023 recording takes priority

to Royal Bank's 2022 recording in the personal property registry, but this was not argued before me nor did Royal Bank appear at the hearing.

[73] For the same reasons, I do not find that the 2018 transactions are vitiated by the Statute of Elizabeth or the *Assignments and Preferences Act*, RSNS 1989 c. 25.

[74] And so I turn to whether the delay in registration, or the fact that a different instrument was what was registered on the eve of ASC's Notice of Intention, renders the 2018 security void as against the Trustee.

[75] I reiterate at the outset that the existence of security and to what assets they extend, are analytically distinct from what advances are secured by them.

[76] AGAH, ASC, and the Trustee are essentially in concert that the 2023 documentation are "bolt ons" to the 2018 security, prepared for registration purposes and that the operative date for my analysis should be January 2018, not March-April 2023. WTH takes the view that these are distinct and separate transactions and, as such, the 2018 transactions are and remain unregistered, void as against the Trustee, and the 2023 transactions are void under s. 95 *BIA* (or potentially the *Statute of Elizabeth* and/or the *Assignments and Preferences Act*).

[77] I have struggled with this. I agree with the ASC/AGAH/Trustee view that a delay in registration, in itself, does not vitiate the security (as opposed to its priority), nor must the as-registered documentation mirror the language of the agreement provided that it does not change the commercial terms or property charged. The evidence is that the 2018 documentation was lost or misplaced and then again found at some later indeterminate time. That, coupled with the fact that the 2018 material was not registerable in the Land Registry as drafted, may well explain the 2023 "replacements."

[78] I also share WTH's suspicions. The 2023 materials were prepared and perfected well after its litigation was in process and shortly after Justice Coughlan's decision. There was clearly an attempt in 2023 to encumber the ASC assets on the public record, rather than merely as between ASC and AGAH *inter se*, and to relate this back to the 2018 transactions.

[79] I have very considerable doubt that I can "link" the 2018 and 2023 transactions in the way ASC, AGAH, and the Trustee seek. On a balance of probabilities, I find that they are separate transactions and, as such, the 2023 transactions are captured by s. 95 *BIA* and the 2018 transactions are, as unrecorded, void as against the Trustee. However, because of my ultimate finding on the scope of the 2018 transaction, I am prepared to proceed with my analysis on the basis that I am incorrect and that the 2023 recordings are capable of being read as recorded notice of the 2018 loans.

[80] In making these comments, I observe:

- The 2023 collateral mortgage refers to the loan agreement of 2 January 2018.
- The 2023 collateral mortgage refers to an interest rate of 14.5% but the loan agreement provides for 0%.
- The 2023 collateral mortgage purports to secure indebtedness under the loan agreement (ie 2018) but to a limit of $2,748,183.00. The loan agreement refers to "$2.174M."
- I have already discussed the scope of assets purported to be secured by the 2023 versus the 2018 documents.
- The 2023 collateral mortgage purports to secure all debts and obligations, present and future; as I will discuss, there are opposing views as to whether this was what the

2018 obligations in fact accomplished.

- The legal opinion of Burchell Wickwire Bryson, on which the Trustee heavily relies (and to which I am urged to defer) defines the "Security" on which it renders its opinion as being (only) the 2023 documents. That opinion specifically provides that

    - The Security is "enforceable against the parties thereto" (as opposed to the Trustee)

    - The opinion is qualified as being "subject to applicable law, including bankruptcy, insolvency….and other laws of general application limiting the enforcement of creditors' rights in general;"

    - The opinion states that "[w]e are not aware of facts that would permit annulment of the Security under s. 95 of the *BIA*. In particular, we are not aware of information indicating that the persons granting the Security were insolvent at the time they purported to grant security or that the Security was otherwise entered into in fraud of creditor's [sic] rights." In other words, the opinion states that nothing came to counsel's attention that the Security – meaning the 2023 documentation – was issued at a time when the grantor was insolvent. That is clearly not the case with the defined 2023 documentation, and vitiates the opinion as a whole.

    - The Court was advised that, at WTH's request, the Burchell Wickwire Bryson firm was asked to reconsider its opinion in light of representations made by WTH. Its reply was not in evidence, but the Court was advised that it took the form of a brief email in which the opinion was confirmed.

[81] To be clear: I conclude that the 2023 purported security does not reflect the 2018 transactions, and as such the 2018 transactions remain unperfected and void as against the Trustee. The 2023 transactions are void as against the Trustee under s. 95 *BIA*. Accordingly, it is not necessary to consider the *Statute of Elizabeth* or the *Assignments and Preferences Act*, neither of which were argued robustly before me.

[82] However, I proceed to next steps in the event that I am incorrect and it is only *the added security* in the 2023 documentation that is void as against the Trustee, and in case I am incorrect in finding that the 2023 transactions do not merely "paper and perfect" the 2018 transactions.

Issues 5 and 6: Parol evidence, and whether the security 'covers' the indebtedness as of ASC's bankruptcy

[83] Much of the evidence, and the oral and written argument, focused on ASC/AGAH's purported intention that the 2018 transactions were intended to securitize (to a specified limit) a revolving line of credit that would ebb and flow as circumstances required. After oral argument, I wrote to counsel seeking submissions on how (if at all) the parol evidence rule applied. AGAH and WTH provided submissions. Once again, ASC and the Trustee agreed with AGAH that I could and should hear such evidence. WTH begs to differ.

[84] I have concluded that I can admit and consider such evidence; but that it does not help AGAH. I conclude that the 2018 security was 'spent' when the advances were paid and reduced to zero, and that subsequent advances were not secured by the 2018 agreements. *A fortiori*, they are also not secured by the 2023 agreements, either because they do not "connect" with each other in the way that AGAH advocates, or because even if they do, they do not secure advances made in or after 2020.

[85] Why is the issue of parol evidence important? The 2018 agreement provides for an advance of "$2.174M". No box is checked either for lump sum or periodic installments; however, the lump sum option is populated as "The Borrower shall repay the Borrowed Money as a lump sum, in full, in the amount of $2.174M (principal) by 31st Dec 2019 ("Due Date")."

[86] Although no payment option is checked, there is a checked provision for a substantial ($10,000) late fee for each "occurrence payment is late." The loan is prepayable without penalty.

[87] AGAH, Mr. Gao, and AGAH's accountant (Rong Lu), all take the view that this is to securitize revolving advances; AGAH argues that the fact the December 31, 2019 box is not "checked" is corroborative of that (or that the option of a term loan was considered and discarded in favour of revolving facilities).

[88] The evidence is uncontradicted that at some time after December 31, 2019, ASC's indebtedness to AGAH was zero. In fact, as of November 25, 2020, there was a small negative balance. As noted above, between 2020 and 2023, there were a series of advances, and some repayments, from AGAH to ASC. I have found these to be debt, not equity, as discussed above. I also found that the 2018 agreements were a "proper transaction."

[89] What I did <u>not</u> find was whether the post-2019 advances were, as a matter of law, pursuant to the 2018 agreement or not. So, the question of what if any evidence I should hear about what the parties were trying to do in 2018, as opposed to what they did.

[90] AGAH (with ASC and Trustee support) and WTH both referred to *Sattva Capital Corp v. Creston Moly Corp*, 2014 SCC 53. It is, of course, binding on me. They effectively agree, as *Sattva* states at para. 60, that the parol evidence rule does not exclude evidence of surrounding circumstances. It can and should be admitted to interpret an agreement, but not to contradict or

"….to deviate from the text such that the Court effectively creates a new agreement." (*Sattva*, para. 57). I am to consider only "objective evidence of the background facts at the time of execution…." (*Sattva*, para. 58), and this is "….not to change or overrule the meaning of those words." (para. 60). These paragraphs were wholly or partially referred to by both counsel and the words of our Apex Court bear repeating here:

> [59] It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and Hall, at p. 53). <u>To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties</u> (Hall, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, 1998 CanLII 791 (SCC), [1998] 2 S.C.R. 129, at paras. 54-59, *per* Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, <u>and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract</u> (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, 1993 CanLII 88 (SCC), [1993] 2 S.C.R. 316, at pp. 341-42, *per* Sopinka J.).
>
> [60] <u>The parol evidence rule does not apply to preclude evidence of the surrounding circumstances</u>. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties <u>at or before the date of contracting</u>; therefore, the concern of unreliability does not arise.
>
> [61] Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 2002 CanLII 45017 (ON CA), 63 O.R. (3d) 63 (C.A.), at paras. 19-20; and Hall, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parol evidence rule <u>does not apply to preclude evidence of surrounding circumstances</u> when interpreting the words of a written contract. [emphases added]

[91] WTH says the 2018 agreement is clear: It secures a fixed amount, at zero interest, and is payable by the end of 2019. After that, it is spent; and anything AGAH did after that for ASC is either equity (a position I have rejected) or unsecured. WTH also says that since the 2018 agreement provides that it is the "entire agreement," I should not look further.

[92] AGAH points to its concert of voices which say that however inelegantly expressed, what AGAH did was provide a secured line of credit. It submits I should treat it as such, and that not checking the maturity box is an indication that they did not intend it to have a maturity.

[93] I begin with WTH's "entire agreement" argument. I agree with AGAH that this was addressed by Jamal, JA (as he then was) in *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporation*, 2021 ONCA 592:

> [61] Third, Ontario and OLG assert that the appeal judge and majority erred in law by admitting the pre-contractual negotiations into evidence — especially evidence of Ontario's negotiator, former Minister Bryant, to the effect that Ontario and OLG's diversion of the non-gaming revenue stream and the termination of the payment of an amount equal to Comps, two of the three revenue streams referred to in the Agreement, conflicted with the parties' shared understanding. Ontario and OLG also argue that an "entire agreement" clause, s. 1.10, precludes reliance on any pre-contractual warranty, representation, opinion, advice, or assertion of fact.
>
> [62] I do not agree with this submission. An entire agreement clause alone does not prevent a court from considering admissible evidence of the surrounding circumstances at the time of contract formation. As already noted, the surrounding circumstances are relevant in interpreting a contract exactly because "words alone do not have an immutable or absolute meaning": *Sattva*, at para. 47. Relevant background and context are often essential to understand contractual language. I therefore agree with the following observations of Fraser C.J. for a majority of the Court of Appeal of Alberta in *IFP Technologies (Canada) v. EnCana Midstream and Marketing*, 2017 ABCA 157, 53 Alta. L.R. (6th) 96, at para. 124, leave to appeal refused, [2017] S.C.C.A. No. 303:
>
>> The mere existence of an "entire agreement" provision does not mean that the words chosen beyond that entire agreement provision admit of one interpretation only. The purpose of considering the surrounding circumstances is not to add to, contradict or vary the terms of the agreement but rather use them as an interpretive aid to determine the meaning of the words in dispute. Where parties have concluded an agreement and a court is left to sort out the parties' objective intentions, it cannot be prevented from considering the surrounding circumstances by a provision that is itself based on the assumption that the agreement is clear — when it is not. [emphases added]

[94] So how do I discern the "objective evidence of the background facts" from the "surrounding circumstances?" The evidence of the 2018 transaction tells me:

- The documentation was prepared on accounting, not legal, advice.

- ASC was in growth mode with financing from both related parties and commercial lenders.

- AGAH was providing liquidity for various purposes, and not at that time under pressure from outside lenders or WTH.

- The documentation was obtained from some internet source and signed on a social occasion, (to repeat) perhaps literally at the dining room table.

- It is a sloppy document. One need look no further than "$2.174M" for the casual treatment afforded this substantial sum.

- It is not in registerable form, or one generally appropriate for this jurisdiction. It suggests to me that the parties' real intention in 2018 was "to do what the accountant was telling them," rather than to effect anything that would come to commercial consequences some day.

- The imposition of a 'late fee' is inconsistent with there being neither a lump sum nor an installment amount; there is a reference to what is considered to be late after a payment due date. There is no provision (aside from an "acceleration on default" clause) for any payment, other than the unchecked but populated box for payment by December 31, 2019. That date had to have been populated by the parties, rather than part of the boilerplate. While it is capable of being argued (and was argued) that all of this is consistent with an ongoing line of credit, I find it is more consistent with a contemplated advance that would carry ASC through a growth phase, but which based on accounting advice would be (and in fact was) paid back during a temporal timeframe.

- The agreement is said to have been lost or misplaced at some time. One would think that however casual the relationship, if there was in 2018 an intent for over two million dollars to be "papered and secured" on an ongoing basis by that agreement, it would be kept readily available, particularly after commercial creditors and WTH put ASC's prospects under pressure.

[95] I remind myself again that the issue is the "objective evidence of the surrounding facts," not subjective intent: *Sattva*, para. 59; *Thornridge Holdings Ltd. v. Ryan*, 2023 NSSC 11 at para. 39, per Jamieson, J.

[96] The burden is on AGAH (or the applicant Trustee, to the same effect) to satisfy me to a civil standard that the 2018 loan agreement secures revolving and ongoing post-2019 advances, and that this was the objective intent in 2018, not an intention formed after-the-fact. I am not so satisfied. I find that the current statement of "intentions" is convenient and after-acquired and not what the parties contemplated in 2018. The 2023 asymmetrical documentation is further evidence of an attempt to "paper over and back date" AGAH's subsequent advances and to take "security" out of the s. 95 *BIA* timeframe.

[97] I find that AGAH's claim as of bankruptcy is not secured by the 2018 documentation. It is an unsecured creditor and may share in any dividend as such.

[98] In light of this conclusion, it is not necessary nor do I think it appropriate to discuss whether the doctrine of past consideration applies to the impugned transactions.

Issue 7: Deference

[99] ASC argues that I owe deference to a considered determination by the Trustee. It says that the Trustee has given due regard to WTH's arguments, and submitted the purported security

not once, but twice, to counsel for an opinion; and that, the Trustee having done so and arrived at its conclusions, this Court should stick to its knitting.

[100] In doing so, counsel for ASC cites Justice Bodurtha's decision in *Re South Wind Properties Limited*, 2020 NSSC 8. In that decision, his Lordship begins by reminding us that Trustees are officers of the Court, who are licensed and regulated and who have duties of neutrality. It follows that they are afforded deference by the Court, "coincidental" with their august responsibilities.

[101] One of these responsibilities, the Justice continues, is to review and finalize claims against the bankrupt. He concludes that consistent with the duties of honesty, integrity, and "reasonable business judgment," that "….the Court will show deference to the Trustee's <u>business judgment</u>." (para. 8, my emphasis).

[102] All of this is beyond question. However, he goes on (para. 72) to say that

> While the Court must show deference to a Trustee's <u>business judgment</u> acting under the BIA, Trustees are not immune from review. They must examine proofs submitted by creditors and must only allow claims or securities that are reasonable. <u>The Court may assess Trustees' conduct for both its reasonableness and correctness in fact</u>. [emphases added]

[103] The same Justice has also expressed the Court's oversight role in *BDO v. Carrigan-Warner*, 2022 NSSC 16. In that decision, he made it clear that Trustees do not have an unfettered discretion to do as they please – in that case by using an in-house valuation matrix that was contrary to direction of the Court known to the Trustee. He upheld a reduction in the Trustee's fees accordingly.

[104] It is therefore clear that deference has its limits. It presumes that the Trustee is acting in accord with its licensing, regulatory, and Court obligations (to be clear, there is no suggestion in the case at bar that the Trustee has done anything to the contrary). It is subject to Court

oversight for "reasonableness and correctness in fact." If there are binding Judicial pronouncements relevant to the file that are known (or should be known) to the Trustee, compliance is expected. But with those safeguards in place and respected, the Trustee's business judgment is entitled to a degree of deference.

[105] In the case at bar, the Trustee's decisions to admit the claim and to submit the security to counsel's evaluation are not contested, although the quantum *may* be disputed and the results of that evaluation *are* disputed.

[106] In my view, deference is on a continuum. On one end of the scale are pure questions of law. On the other are pure questions of business judgment unfettered by any binding judicial authority or regulatory constraint. It is not a single standard.

[107] In *Organic Garbage, supra*, Associate Justice Ilchenko conducted an exhaustive analysis of standards of review and concluded:

> [76] To synthesize the above jurisprudence, the tests set out in *Housen*, *Galaxy Sports*, *Charlestown*, *Broer*, *DBDC Spadina* and *De Beers*, require the Bankruptcy Court in hearing the appeal from the Trustee's disallowance to:
>
> > 1) assess each subcomponent of the Trustee's decision making for the disallowance to determine, in each case,
> >
> > 2) where the specific decision to disallow was the determination of a question of pure law, and applying a correctness standard to the decision made, or
> >
> > 3) in the case of a question of pure fact, or mixed fact and law, applying the palpable and overriding error standard to the decision made.

[108] In my view, the same considerations apply to this case. Although not strictly a disallowance, I am faced with similar issues of validity and priority. As these reasons have illustrated, they have involved multiple questions of law, for which a correctness standard

applies. It is not a case of “business judgment” for which there has been no judicial or regulatory guidance or direction. It follows that deference is not a consideration.

[109] I return to at least a cornerstone, if not the entire, basis on which the Trustee made its validity and priority decisions. It quite rightly obtained a legal opinion. It did so from experienced and respected counsel. But that opinion contains numerous caveats, which I have outlined above. It is subject to laws of general application in bankruptcy situations, at least insofar as it relates to enforceability. It is limited to the 2023 “Security” as defined, although they also had the 2018 documentation as part of its review. The opinion professes that it is “unaware” of s. 95 *BIA* facts or that ASC was insolvent at the time of granting the (2023) “Security,” which is demonstrably not the case. A request for review appears to have met with a perfunctory reply by email.

[110] As such, while I am reluctant to criticize either the Trustee or review counsel, a close reading of the opinion reveals that the Trustee and counsel were in effect talking at cross-purposes. As such, the conclusions reached by both are built on faulty premises in fact and in law, and are not conclusions which compel Court deference.

Issue 8: Statute of Elizabeth and Assignments and Preferences Act

[111] Although both of these were cited, neither were robustly argued. Given my conclusions, I believe it is both unnecessary and undesirable to consider these secondary arguments.

Issue 9: Costs

[112] Each party has had a degree of success. AGAH has been successful in resisting an attempt to characterize its debt as equity, in which case it would have received nothing. It has been successful in defending its 2018 security as between debtor and creditor, although not in making it of practical consequence for the 2023 debt. WTH has been successful in “decoupling”

the 2018 and 2023 transactions, and in its position that the 2018 security is spent. It has also been successful, in the event I am incorrect on these points, in segregating non-equipment personal property, and serial numbered goods, from the 2018 security.

[113] Great treasure has been spilt on this and related litigation, to and including the Supreme Court of Canada. I would urge the parties to attempt to agree on costs. If they cannot, I will hear them in no less than 30 nor more than 60 days from the date of this decision, with each party seeking to so to provide submissions of no more than 10 pages, double-spaced and exclusive of authorities.

[114] I will leave it to the parties as to who shall take the initiative in preparing and circulating a draft order.

Summary and Conclusion

[115] A recapitulation is in order:

- AGAH's claim is for debt, not equity.
- The 2018 transactions were "proper" within the meaning of s. 137 of the *BIA*.
- The 2018 transactions are valid as between debtor and creditor; however, they
    - Secure less property than the 2023 transactions, namely real property and "equipment" only (save for serial numbered goods), as that "equipment" and real property existed as of January 2, 2018.
    - Are not "brought forward" by the 2023 documentation, or recordings and as such are void as against the Trustee;

- Or, if I am incorrect in this last point, are 'spent' as the 2018 advances were repaid in full.

- As a result, AGAH is an unsecured creditor of ASC. The amount of that claim is not part of the application before me.

- While there are circumstances in which a Court may owe deference to a business-judgment determination by the Trustee which is not fettered by any judicial pronouncement or regulatory authority, this is not one of them.

- It is unnecessary, given these conclusions, to consider the *Statute of Elizabeth* or the *Assignments and Preferences Act*.

- I will hear the parties on costs if they cannot agree.

Balmanoukian, R.

---

[1] The second report of the Proposal Trustee, dated July 11, 2023 shows on p. 16 that by November 30, 2021 TD's line of credit had been paid out although replaced in part by an increased term loan; that loan was paid out by November 30, 2022. That loan, which was $1,453,989 as of November 30, 2021, appears to be offset in part by a $1,107,196 increase in the amount said to be due to AGAH.
[2] AGAH's brief says registration was March 13. This is in error.
[3] WTH brief of November 15, 2024, para. 44.
[4] Although the instrument is said to be governed by Nova Scotia law, it is not in a form that would be familiar to any Nova Scotia commercial counsel. For example, it provides for the option for monthly or "other" compounding without conforming with the requirement of the *Interest Act* to provide an annual or semi-annual equivalent; it refers to "attorneys'" fees and notices by "certified mail…return receipt requested." To my ear, such an instrument may not even be of domestic origin.
[5] The first opinion is in evidence. The second is not, but I am advised it took the form of an email confirming that review counsel "stood by" its original opinion as to validity and enforceability.
[6] Section 4(5) deems the parties to be at non arm's length for the purposes of ss. 137 and 140.1. They are presumed but not deemed to be so for the purposes of s. 95(1)(b) and 96(1)(b).
[7] At para. 16 of its November 20, 2024 submissions and in discussing this topic, AGAH refers to WTH as "WTF." I infer this is typographical.
[8] See Exhibit A of affidavit of Gavin MacDonald dated September 3, 2024 referring to a 2017 mortgage. Although the exact amount outstanding is unclear, that exhibit refers to facilities well in advance of $1.5 million. AGAH also states that at least part of its current claim arises out of advances to ASC to "pay out" TD after 2021 and prior to 2023.
[9] Gao affidavit of November 5, 2024, para. 17.
[10] As opposed, potentially, as against third parties, a topic for later in these reasons.
[11] As noted above, AGAH and ASC, as related persons, are presumed but not deemed to be at non arm's length for the purposes of s. 95(1)(b). No evidence to refute the presumption was presented to me and indeed, in argument no party attempted to argue that s. 95 did not apply by reason only of the parties being at arm's length.

[12] The copy of the mortgage in evidence did not have anything in Schedule "A" as a description, nor is it witnessed or accompanied by a matrimonial property affidavit or certificate of attesting witness. By consent, an as-recorded copy was provided to me during oral argument which is complete in all of these respects, including the metes and bounds descriptions of the lands purported to be secured.

[13] The actual effective date of bankruptcy was, according to the Certificate of Assignment, March 24, 2024 following the Court of Appeal's decision at 2024 NSCA 35.

[14] This definition, for current purposes, means the "date of the initial bankruptcy event" was the date of the notice of intention ie May 1, 2023.