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**Insolvency Institute of Canada (Articles)**

# — This is an Intervention: Reflections on the Interventions Brought by the Insolvency Institute of Canada between 2013-2020

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——Steve Weisz, Pat Corney and **Shaun Parsons** [*]

## 1. INTRODUCTION

Interventions are appearances in court proceedings, usually at the appellate level, and most commonly at the Supreme Court of Canada, by third parties rendering assistance to the court by way of argument. [1]

Interventions allow interested entities who are not direct parties to litigation to inform the court of their interest in the case, take a position as to its outcome, and advance arguments in support of their preferred position. In doing so, third-party interveners are able provide a unique perspective from which to consider the issues at hand, which may impact them. For example, interventions can provide additional legal authorities not addressed by the parties, alternative interpretations of the facts surrounding a dispute, treatments of relevant statutes and case law, discussions of the broader policy implications of a decision, and technical information. [2]

There is a long-standing history of courts accepting submissions made by third parties: "[i]n the early common law, any person in court could apparently step forward as an *amicus curiae* to advise the court. The Year Book cases from 1353 show this to be an accepted practice." [3] Since 1353, the common law has evolved, setting out a principled basis under which a party can intervene during a proceeding. In more recent times, the Insolvency Institute of Canada (the "IIC") has sought to intervene in certain cases of importance to Canadian insolvency practice.

At the time of writing, the IIC has intervened in seven proceedings: *Re Indalex Ltd.*, [4] *Callidus Capital Corp. v. Canada*, [5] *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [6] *Canada v. Canada North Group Inc.*, [7] *9354-9186 Québec inc. v. Callidus Capital Corp.*, [8] *Chandos Construction Ltd. v. Deloitte*, [9] and *Re Séquestre de Media5 Corporation*. [10] In granting the ability to intervene, the courts in these proceedings determined that the IIC has an important perspective distinct from those of the parties, which would assist in rendering a just decision. In light of this, the review and comparison of the arguments advanced by the IIC to the final disposition of these cases can guide future interventions by highlighting arguments that courts are receptive to addressing in their decisions.

This article has two goals:

1. to summarize the leading academic literature regarding the functions performed by an intervener; and

2. to analyse six of the interventions brought by the IIC by applying this academic framework.

## 2. JUDICIAL RATIONALE FOR INTERVENTION

There is no unqualified right to intervene. A proposed intervener is expected to make different and useful submissions that will further the court's determination of the issues raised by the parties, but refrain from raising new issues or driving up the costs of the existing litigants. [11] Granting intervener status is ultimately a discretionary decision made by the court. [12]

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In considering intervention applications, courts must balance the benefit of hearing additional views and perspectives with managing the court's time efficiently. [13] Judicial economy is paramount. Courts benefit from the input of those most directly affected by the dispute, but do not want to be burdened by duplicative submissions. [14] While an intervener's submissions may support the relief sought by one of the litigants, as a friend of the court an intervener should not make "me too" submissions. Interventions that propose to duplicate parties' arguments or fail to meaningfully supplement the legal analysis will be denied in the interest of preserving judicial economy. Further, courts will not allow intervention where the result would be an imbalance or the appearance of an imbalance as between the parties to the dispute. [15]

Academic scholarship has analyzed the purposes and justification of intervention in judicial decision making. In their article "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance", Alarie and Green discuss three functions that intervention might perform: accuracy, affiliation, and acceptance. [16] Although Alarie and Green employ this framework to explain the motivation and consequences of interventions, which has been subject to some debate, it is the authors' view that these three functions can provide a helpful tool in evaluating how an intervention may assist a court. [17]

Alarie and Green's framework defines "accuracy" in this context as: "the court will allow a party to intervene if it believes that the party has some information or arguments that would enable the court to make a better or more accurate decision." [18] Under the accuracy justification, a court, on being exposed to the submissions of an intervener, will learn information or confront arguments not otherwise advanced, which would have the effect of heightening the probability that an optimal disposition will be reached. [19] Under this function, the value of the intervener's materials is grounded in the assistance that can be provided to a court by giving information that is relevant and non-duplicative. [20] This rationale is best illustrated by the typical requirement that an intervener make submissions that do more than mirror those already presented. [21]

There is wide support for the accuracy justification of interveners, both academically and judicially. Collins and McCarthy note that although the "presence of these briefs does not guarantee democratically accountable decisions, [intervener] briefs have the potential to improve the quality of judicial decision making by enabling judges to consider a wider range of perspectives in their deliberations than those presented by the litigants." [22] Further, frequent appearances from certain institutional interveners can circulate certain ideas or a distinct point of view not traditionally advanced by litigants, resulting in far-reaching effects and potentially directing the development of the law. [23]

The second function of an intervener as described by Alarie and Green is "affiliation." Under this rationale, courts may allow interventions to ensure that certain policy preferences held by a certain judge, or the full court, are represented during a proceeding. [24] The affiliation explanation "posits that a version of the well-known psychological phenomenon of confirmation bias applies to judges considering whether or not to hear from would-be interveners." [25] This is an instrumental approach where interveners work to further a decision-maker's own policy perspectives. [26] As an instrumental approach, Alarie and Green note that under the affiliation approach, "another important reason to allow interventions is to permit interveners to communicate the strongest possible legal arguments for judges to justify their preferred outcome from a policy preference perspective." [27]

"Acceptance" is Alarie and Green's final function of intervention. [28] Under the acceptance role, intervention is justified because it increases judicial legitimacy. The authors argue that parties who participate in a judicial process they perceive as fair are more likely to accept a particular decision, regardless of whether the result conflicts with their interests. [29]

Reported decisions routinely invoke the acceptance function. In utilizing the acceptance rationale, courts have demonstrated a desire that the legal process be seen as fair to outsiders (in addition to actually being fair). [30] These safeguards of fairness have been described by Justice Stratas of the Federal Court of Appeal, who relies on ensuring both the appearance and existence of fairness in the court process, as:

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> A court that allows several interveners supporting one side of the case — especially those that have partisan leanings and advocate political positions — with none or very few on the other side gives the appearance of a court-sanctioned gang-up against one side, an appearance that can be enhanced by the ultimate result and reasoning in the case. [31]

Unlike under the accuracy function, where, theoretically, several interveners supporting one side of the case would be justifiable as producing a better-reasoned decision, courts relying on acceptance consider the underlying fairness of a proceeding prior to granting intervener status. Non-governmental organizations will often participate as interveners in appellate proceedings, which not only may affirm the judicial process to the organizations themselves and the communities they serve, but other affected parties who are able to see that the court is willing to consider certain outside interests. [32]

### 3. THE INSOLVENCY INSTITUTE OF CANADA

The IIC is Canada's premiere private sector insolvency organization. A non-profit organization, the IIC is dedicated to improving the insolvency process and enhancing the professional quality of, and public respect for, the insolvency and bankruptcy practice in Canada.

The IIC is a non-profit, non-partisan and non-political organization. Their mission is to promote excellence and thought leadership in the policy and practice of commercial insolvency and restructuring. [33] The IIC's membership consists of experienced legal, accounting, and financial professionals in Canada, all of whom have been admitted to the IIC by invitation following peer review. In addition, the IIC has granted special membership status to representatives of regulatory bodies, major financial institutions and prominent members of the academic community. The IIC also sponsors and supports conferences on insolvency related topics, publishes papers on insolvency issues, grants awards to students and academics at Canadian universities, provides fellowships for postgraduate studies in insolvency-related subjects at Canadian universities, and commissions research projects on important issues in Canada's insolvency and restructuring system.

### 4. THE IIC INTERVENTION: ARGUMENTS AND DISPOSITION

The IIC has consistently intervened in certain cases considered of importance, advocating to ensure that Canada's insolvency regime remains robust and conducive to restructuring distressed businesses.

Canadian courts have been receptive in allowing intervention where an organization's knowledge and experience allow it to address the broader or systematic implications of a decision. [34] The IIC has an interest in significant insolvency appeals, through both its members and its mission. [35] By virtue of its broad membership and institutional expertise, the IIC is able to advance a considered view of how an issue will reverberate through the national insolvency community. [36]

IIC's applications to intervene emphasize that its members collectively possess decades of experience in the Canadian insolvency industry. As a multi-disciplinary organization, the IIC employs its institutional expertise and broad membership base to assist the court in developing the law in a manner that properly considers all interests. [37]

When bringing a motion to intervene, the IIC consistently argues that it is able to provide independent and objective submissions on the appeal's effect on future insolvency proceedings and the underlying societal and remedial nature of Canada's restructuring legislation and regime. [38] This submission reflects both the accuracy and acceptance aims of intervention identified by Alarie and Green. The IIC submits that it is in best position to provide the court with a "unique and objective perspective about the potential consequences [that the decision] may have on Insolvency Professionals, the insolvent estates they administer and the Canadian insolvency regime as a whole." [39]

To illustrate the unique submissions offered by the IIC, the case studies below highlight the position advanced by the IIC in comparison to the final disposition of the case. These case studies are not intended to be a robust analysis of the proceedings, but rather, focus on the interventions of the IIC and the resulting decision to guide future interventions by public interest interveners.

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**(i) Sun Indalex Finance c. Syndicat des Métallos**

*Indalex* was the IIC's first intervention. In this case, the Supreme Court of Canada, in a 3-2-2 decision held, among other conclusions, that an employer's pension contributions are subject to a deemed trust to ensure that available pension funds are sufficient to cover liabilities when an organization is wound up.[40]

At the appellate court below, the Court of Appeal for Ontario determined, in part, that pension beneficiaries under certain pension plans sponsored and administered by the debtor were the beneficiaries of a deemed trust over the proceeds of the sale of the company, which ranked in advance priority to a debtor-in-possession financing charge.[41]

At the Supreme Court of Canada, the IIC was granted leave to intervene, a first for the organization. The IIC's interest in the appeal related specifically to:

• the broader implications of any findings that may be made by the court on the scope of the deemed trust under section 57(4) of the *Pension Benefits Act* (Ontario)[42] as it affects the underlying restructuring regime in Canada; and

• uncertainty that could be created by the application if equitable remedies can alter the priority amongst creditors. This uncertainty could inhibit the restructuring of insolvent companies.[43]

The Supreme Court of Canada overturned portions of the Ontario Court of Appeal decision as it related to the priority of the deemed trust ranking ahead of the court-ordered charge. In doing so, the decision of Justice Cromwell agreed with the IIC's argument that equitable remedies may inhibit the restructuring of insolvent companies and found that a remedial constructive trust is only appropriate if the wrongdoer's acts give rise to an identifiable asset unjust for the wrongdoer, or third-party, to retain.[44]

The engagement of Justice Cromwells' decision with the IIC's submissions can be seen as reflecting the accuracy rationale. His Honour's analysis primarily addressed the legal requirements of a constructive trust, but concluded by referencing the IIC's argument that the imposition of a constructive trust would destabilize the certainty essential for well-functioning commercial affairs.[45] As a result of the IIC's intervention, the court had the benefit of submissions beyond the scope of the immediate interests of the parties. In appealing to these wider systematic factors advanced by the IIC, despite it being not necessarily required for the ultimate disposition of the case, the consideration of the intervener's arguments here can be seen as enabling the court to provide a deeper analysis.

**(ii) Callidus Capital Corp. v. Canada**

The issue before the Supreme Court of Canada in *Callidus* was whether the bankruptcy of a tax debtor and subsection 222(1.1) of the *Excise Tax Act* (Canada)[46] would render a deemed trust ineffective as against a secured creditor who received, prior to the bankruptcy, proceeds from the assets of the tax debtor that were deemed to be held in trust for the plaintiff.[47]

In a split decision, a majority of the Federal Court of Appeal held that a deemed trust arising prior to a bankruptcy applied to a secured creditor's proceeds of the realization of assets, which also occurred prior to the bankruptcy, notwithstanding the bankruptcy.[48]

In its intervention materials, the IIC submitted that the majority decision of the Federal Court of Appeal interpreted the ETA in a manner creating uncertainty in the insolvency regime regarding the amount and relative priority of creditor claims.[49] The IIC argued that the appellate decision undermined the scheme of priorities under the *Bankruptcy and Insolvency Act*[50] by indirectly elevating the priority of the Crown's otherwise unsecured claim on bankruptcy into a secured claim after the point in time that the amount and priority of creditor claims should be fixed.[51]

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In a three-paragraph bench decision, Justice Gascon allowed the appeal and adopted the reasons of the dissenting judge of the Federal Court of Appeal, who relied primarily on the text of the ETA. [52] Justice Gascon confirmed that the Crown's super-priority over unremitted Goods and Services Tax and Harmonized Sales Tax is ineffective as against a secured creditor who received, prior to a tax debtor's bankruptcy, proceeds from that taxpayer's assets. [53]

The three-paragraph bench decision granting the appeal for the reasons of the dissenting judge in the Federal Court of Appeal in *Callidus* did not offer much room to the Supreme Court to engage with the submissions of the IIC. As the IIC did not intervene in the Federal Court of Appeal decision, their arguments relating to the uncertainty that would result if the appeal was not granted were not addressed.

***(iii) Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.***

The IIC intervened in *Third Eye* after the Ontario Court of Appeal requested additional submissions on whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third-party's interest in land using a vesting order. [54] The IIC sought, and was granted, leave to intervene due to the implications that the decision may have on the practice of insolvency. [55]

The IIC's submitted that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. [56] They argued that the court has inherent and equitable jurisdiction to extinguish third-party proprietary interests through a vesting order where the applicable statutory instrument is silent or not exhaustively addressed. [57] This discretion was conceptualized as a narrow but necessary power requiring a valid and independent entitlement to possession or ownership and a consideration of the equities. [58]

Justice Pepall found that the following two factors determine whether an interest in land should be extinguished:

1. the nature of the interest in land; and

2. whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency. [59]

In analyzing the nature of the interest in land, the court found that a key inquiry is whether the interest is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale, or whether the interest is more similar to a fee simple that is in substance an ownership interest in some ascertainable feature of the property itself. [60] In doing so, the decision retains the flexible approach advocated by the IIC, and the court notes: "[i]f these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case." [61]

Further, the court adopted the IIC's point that amendments to the *Bankruptcy and Insolvency Act* [62] can be seen as permitting the court to do not only what "justice dictates" and also what "practicality demands." [63] In doing so, the court relied on the historical and political background advanced by the IIC in interpreting the relevant sections of the *BIA*. [64]

In *Third Eye*, the Ontario Court of Appeal can be seen as applying a muted affiliation rationale, where they appeal to the both the academic literature, but also the commercial realties presented by the IIC. "I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency . . . This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the [IIC] . . . " [65] By noting that the decision is consonant with the submissions of the IIC, the court highlights the expertise of the intervener in order to further justify the decision rendered.

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***(iv) 9354-9186 Québec Inc. v. Callidus Capital Corp.***

In *Bluberi*, the Supreme Court of Canada addressed two issues arising in proceedings under the *Companies' Creditors Arrangement Act*[66] (the "CCAA"): (i) when can a supervising judge have the discretion to bar a creditor from voting on a plan of arrangement and (ii) whether a supervising judge can approve a third-party litigation funding agreement (an "LFA") as interim financing under the CCAA.[67]

The Québec Court of Appeal held that a certain creditor should have been permitted to vote on a plan of arrangement and, as such, has a right to vote in their own self-interest, and that as the LFA was not interim financing connected to the debtor's commercial operations, it was akin to a plan of arrangement and needed to be brought to the creditors for a vote.[68]

Here, the IIC submitted a joint intervention with the Canadian Association of Insolvency and Restructuring Professionals ("CAIRP"), another public interest organization whose membership includes the vast majority of the Licensed Insolvency Trustees who act as receivers and trustees in Canada.[69] The joint intervention advanced the following arguments:

1. the appellate decision failed to consider the factors prescribed by subsection 22(2) of the CCAA or the principles underpinning the commonality of interest test when approving creditor classes under a plan of arrangement; and

2. the court should clarify that the appeal decision does not create a new rule of universal application requiring creditor approval of an LFA.

Here, the Supreme Court of Canada granted the appeal in a rare bench decision. Its subsequent written reasons agreed with the submissions of the IIC and CAIRP.

On the first issue, the Supreme Court of Canada concluded that a supervisory judge has the discretion to bar a creditor from voting on a plan of arrangement where they find that the creditor is acting for an improper purpose.[70] An improper purpose is defined by the court as one that frustrates, undermines, or runs counter to the CCAA's remedial objectives.[71] In doing so, the decision touched on the commonality of interest principles argued by the interveners.[72] As the creditor attempted to manipulate the vote, Chief Justice Wagner and Justice Moldaver found an "inescapable inference" that the creditor did not act with due diligence which was contrary to the expectation that parties act with appropriateness and good faith in an insolvency proceeding.[73] Despite the court's focus on the improper purpose of a creditor in this case, the court acknowledged the submissions of the IIC in their decision, noting "[a]dditionally, creditors who do not share a sufficient commonality of interest may be forced to vote in separate classes."[74]

On the second issue, the Supreme Court of Canada agreed that an LFA aimed at extending financing does not necessarily constitute a plan of arrangement, which requires at least some compromise of the creditors' rights.[75] Rather, depending on the circumstances, an LFA can qualify as interim financing under the CCAA.[76] The decision mirrors the arguments of the IIC and CAIRP, which submitted that: "LFAs may have an impact on the eventual recovery by creditors, whether under a plan or otherwise, but the CCAA and the relevant authorities are clear that an impact on recovery alone is insufficient to constitute a compromise of rights."[77]

On the first issue of the manipulation of a creditors' vote in *Bluberi*, the Supreme Court of Canada rendered its decision on grounds not advanced by the IIC, who argued there was a lack of commonality of interest in the vote. However, the Supreme Court of Canada acknowledged that the commonality of interest test is a "mechanis[m] that attenuate[s] the concern" of a creditor with conflicting legal interests with respect to a plan it posits may distort the creditors' vote.[78] This adoption of an intervener's submission can show how diverse arguments raised by interveners can be included into a decision, which ultimately produces a more thoroughly-reasoned decision and, therefore, a richer body of law.

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***(v) Chandos Construction Ltd. v. Deloitte***

In *Chandos* the Supreme Court of Canada was required to determine whether the anti-deprivation rule forms part of Canadian common law and, if so, what test should govern its application. [79]

The Court of Appeal of Alberta found that the anti-deprivation rule remained in existence as it had not been eliminated by decisions of the court or legislative enactment. [80] In his dissent, Justice Wakeling found that without Parliamentary action, courts must respect party autonomy and freedom of contract, and that the anti-deprivation rule did not form part of Canadian law. [81]

In argument before the Supreme Court of Canada, the IIC characterized the anti-deprivation rule as an integral feature of provincial common law and argued for its application in a robust fashion, based on the following submissions:

1. the anti-deprivation rule was adopted into provincial common law from England through the doctrine of reception, regardless of the relative volume of Canadian cases that subsequently applied it;

2. the existence of the anti-deprivation rule in Canadian common law is confirmed by the fact that it reflects the well-established doctrine of statutory illegality, under which courts will decline to enforce contracts that are contrary to legislation, particularly public interest statutes like the BIA;

3. section 84.2(1) of the BIA, which applies an enlarged version of the anti-deprivation rule to consumer bankruptcies, did not eliminate the anti-deprivation rule in corporate bankruptcies. The court should be slow to conclude that Parliament intended to exclude a long-standing common law doctrine like the anti-deprivation rule through a limited statutory amendment, based on negative implication; and

4. the anti-deprivation rule should apply to any *ipso facto* clause that has the effect of removing value from a bankrupt's estate to the prejudice of creditors on insolvency. Such an effects-based, rather than purpose-based, test reflects how the contractual doctrine of statutory illegality applies generally. [82]

In an 8-1 decision, the Supreme Court of Canada upheld the decision of the majority of the Alberta Court of Appeal and recognized that the anti-deprivation rule continues to exist in Canadian law. [83] In reaching its decision, the Supreme Court of Canada engaged with concepts advanced by the IIC, including that section 84.2 of the BIA did not eliminate the anti-deprivation rule. [84] The court found that the anti-deprivation rule protects third-party creditors, whereas Parliament's changes were directed toward protecting debtors. [85] Further, the decision reflects the IIC's argument that the anti-deprivation rule is an established exception to contractual freedom and that an effects-based approach is appropriate in the circumstances. [86]

*Chandos* highlights an intervener's ability to leverage their subject matter expertise in making submissions to the court, allowing the court to engage with additional concepts and perspectives. The court did not directly address two of the arguments raised by the IIC: that the anti-deprivation rule was adopted in Alberta through the doctrine of reception and that the anti-deprivation rule reflects the well-established doctrine of statutory illegality. As noted in the IIC's factum, there was ample Canadian jurisprudence recognizing the anti-deprivation rule prior to the decision, which was recognized by the court and, as such, the court did not need address these arguments. [87]

***(vi) Canada v. Canada North Group Inc.***

In the Canada North litigation, the IIC appeared before both the Alberta Court of Appeal and the Supreme Court of Canada.

At first-instance, the chambers judge held that the CCAA provides the court with the ability to rank court-ordered priority charges ahead of the Crown's interest arising from statutory deemed trusts. [88] The sole issue in the appeals was the priority of

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certain deemed trusts arising under the *Income Tax Act*, the *Employment Insurance Act*, and the *Canadian Pension Plan Act* in relation to priority charges. [89]

In seeking leave to intervene, the IIC submissions addressed, among others:

1. when a deemed trust is created, the Crown is a both a holder of a "security interest" under the *Income Tax Act* and a floating charge over the debtor's assets in accordance with the common law;

2. if priority charges no longer provide priority over other claims, there is no certainty that lenders will continue to provide interim financing nor is there any certainty that insolvency professionals will agree to act in certain instances; and

3. as such, fewer restructurings would result if the Crown's arguments are accepted. [90]

On appeal, a majority of the Alberta Court of Appeal agreed with the submissions of the IIC that the Crown's interest under certain statutory deemed trusts falls squarely within the definition of a "secured interest" in both the *Income Tax Act* and the CCAA. [91] Further, Justice Rowbotham accepted the IIC's position that the Crown's argument would result in fewer restructurings and an overall reduced tax base, as secured creditors are unlikely to fund a liquidation proceeding where the proceeds of the estate may be insufficient to meet the claims of the Crown, pay the costs of administration and provide a return on their security. [92]

The IIC also sought leave to intervene in this proceeding when it was heard before the Supreme Court of Canada. In seeking leave to intervene, the IIC, in discussing the underlying purposes, history, and practice of the insolvency regime, proposed that its submissions would address the following:

1. that uncertainty undermines the effectiveness of the insolvency regime. All parties must have confidence that they are entitled to act in good faith in reliance upon orders issued by the court; and

2. the certainty of priority charges for insolvency professionals, directors and officers and interim financing is critical for a properly functioning restructuring regime. [93]

At the time of writing, the Supreme Court of Canada has not yet rendered a decision regarding the IIC's proposed intervention.

The Canada North appeal demonstrates that the IIC, as an intervener, has the ability to present the systematic effects of a decision based on their multidisciplinary membership. This ability is shown in Justice Rowbotham's acceptance of the argument that the Crown's position runs contrary to the objectives of the insolvency regime and would result in fewer restructurings. [94] The IIC's presentation of certain policy implications in the insolvency sphere allows the court to more fulsomely weigh the systematic impact of their decisions beyond the arguments advanced by the moving parties.

## 5. TAKEAWAYS FROM THE IIC'S INTERVENTIONS

The purpose of this article was to employ the pre-existing academic framework to analyze six interventions brought by the IIC. In the case studies above, the submissions of the IIC generally aligned with the resulting disposition of the appellate court.

The accuracy rationale is apparent in every instance where a decision references the IIC's submissions, as the distinct point of view advanced by the IIC was evaluated by the court when writing their decision. This is visible in *Bluberi* and *Chandos*, where the court engaged with the IIC's submissions, despite these submissions not being determinative to the decision's outcome. In these two decisions, the perspectives contained within the intervening submissions work to produce richer analysis. When the Ontario Court of Appeal referenced the underlying policy considerations brought by the IIC in *Third Eye*, it resulted in the decision ensuring that practicality remains at the forefront of Canadian insolvency law.

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In considering the value of practically in the "real-time" nature of insolvency litigation, the IIC is well situated to bring submissions and advance unique points of view in order to align a decision with commercial realities.[95] By supplementing the parties' arguments, advancing different or novel approaches, and providing a diverse point of view, the IIC has contributed to the development of insolvency law in Canada.

It is a limitation of this article that the use of interventions by a court is evaluated based on the written decisions alone. Most notably, the acceptance rationale in the case studies above is difficult to ascertain as efforts to promote fairness in a proceeding generally does not enter into the written decision itself. Despite this, courts may consider whether their decision aligns with the prevalent views of the bar in a specialized legal practice area when deciding a case, bearing in mind that a court does not render a decision on the grounds that it is popular or widely accepted.

Future interventions brought by the IIC should continue to focus on the procedural and commercial consequences at stake during a proceeding. In doing so, the IIC can focus on providing the courts with the systematic realities facing the insolvency bar, which may result in more fulsome decisions. The case studies above illustrate that courts are receptive to arguments relating to the proper functioning of the insolvency process and the commercial realities therein. In advancing these principles through intervention, the IIC can continue being a source of valuable and practical information and a thought leader shaping the future of insolvency law.

Footnotes

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1 For example, there was a 63% intervention rate at the Supreme Court of Canada between the years 2015-2018, see Geoffrey D. Callaghan, "Intervenors at the Supreme Court of Canada" (2020) 43 Dal. L.J. 33 at 34; Rebecca Jaremko Bromwich, "Networking the Rule of Law: The Canadian Bar Association's Abandoned Intervention in Chevron v. Yaiguaje" (2017) 26 J. L. & Soc. Pol'y 159 at 167.

2 Paul M. Collins and Lauren A. McCarthy, "Interest Group Litigation in a Comparative Context" (2017) 17 L. & Courts J. 55 at 58.

3 S. Chandra Mohan, "The Amicus Curiae: Friends No More?" (2010) Sing. J.L.S. 352 at 356. See also Vicki Tickle, "A Friend in Times of Need: Monitors in Conflict and How Amici Curiae Can Help Courts Protect the Integrity of CCAA Proceedings" (2020) 9 J.I.I.C. 1.

4 *Sun Indalex Finance, LLC v. United Steelworkers*; *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.) [*Indalex*].

5 2018 SCC 47, [2018] 3 S.C.R. 186 (S.C.C.) [*Callidus*].

6 2019 ONCA 508, 70 C.B.R. (6th) 181 (Ont. C.A.); additional reasons 2019 CarswellOnt 13563 (Ont. C.A.) [*Third Eye*].

7 2019 ABCA 314, 72 C.B.R. (6th) 161 (Alta. C.A.) [*Canada North*], ; leave to appeal allowed 2020 CarswellAlta 549 (S.C.C.).

8 2020 SCC 10, 78 C.B.R. (6th) 1 (S.C.C.) [*Bluberi*].

9 2020 SCC 25, 83 C.B.R. (6th) 1 (S.C.C.) [*Chandos*].

10 2020 QCCA 942 (C.A. Que.); 2020 QCCA 943 (C.A. Que.). These decisions of the Court of Appeal of Québec were written in French, and, as such, this proceeding is not included in the case analysis below.

11 *City of Ottawa v. Clublink Corporation ULC*, 2019 ONSC 7470 (Ont. S.C.J.) at para. 24; *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 13, 2021 CarswellNat 511 (F.C.A.) [*CCR*] at para. 6; *Jones v. Tsige* (2011), 106 O.R. (3d) 721 (Ont. C.A. [In Chambers]) at paras. 20-26 [*Tsige*]; *Reference re Workers' Compensation Act, 1983 (Newfoundland)*, [1989] 2 S.C.R. 335, [1989] S.C.J. No. 113 (S.C.C.) [*Reference re Workers' Compensation Act*] at p. 339.

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12 *Reference re Workers' Compensation Act*, *ibid.* at 339; *Edmonton (City) v. Urban Development Institute*, 2014 ABCA 340 (Alta. C.A.) at footnote 6.

13 Supreme Court of Canada, News Release, "News Release" (2 August 2017), online: <scc-csc.lexum.com/scc-csc/news/en/item/5590/index.do>.

14 *Reference re Workers' Compensation Act*, *supra* note 11 at paras. 12-14; *Schuyler Farms Limited v. Dr. Nesathurai*, 2020 ONSC 4454 (Ont. Div. Ct.) at para. 35.

15 *Tsige*, *supra* note 11 at para. 36.

16 Benjamin Alarie and Andrew Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48 Osgoode Hall L.J. 381 at 381.

17 See, *e.g.*, Callaghan, *supra* note 1.

18 Alarie and Green, *supra* note 16 at 386.

19 Alarie and Green, *ibid.*

20 Alarie and Green, *ibid.* at 387.

21 See, *e.g.*, *Baldwin v. Imperial Metals Corporation*, 2021 ONCA 114 (Ont. C.A.) [*Baldwin*] at para. 3 where Justice Roberts notes: "No useful contribution can be offered by an intervenor who essentially repeats the position advanced by a party, even with a different emphasis."

22 Collins and McCarthy, *supra* note 2 at 57.

23 Collins and McCarthy, *ibid.*

24 Alarie and Green, *supra* note 16 at 388.

25 Alarie and Green, *ibid.*

26 Callaghan, *supra* note 1 at 40-42.

27 Alarie and Green, *supra* note 16 at 389.

28 Alarie and Green, *ibid.* at 388.

29 Alarie and Green, *ibid.* at 389-390.

30 *CCR*, *supra* note 11 at para. 14.

31 *Zaric v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 36 (F.C.A.) at para. 12; see also *Baldwin* at para. 8: "In these circumstances, granting intervenor status to the Clinic would create an imbalance or the appearance of an imbalance between the parties" and *CCR*, *ibid.* at para. 14.

32 Bromwich, *supra* note 1 at 167.

33 *Canada North*, *supra* note 7; Evidence, Affidavit of Pamela L.J. Huff sworn September 30, 2020 [*Canada North affidavit*].

34 See, in the immigration context, *Canada (Public Safety and Emergency Preparedness) v. Lopez Gaytan*, 2020 FCA 133 (F.C.A.) at paras. 8-9.

35 *Bluberi*, *supra* note 8; Evidence, Affidavit of Pamela L.J. Huff sworn November 22, 2019 at para. 13 [*Bluberi affidavit*].

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36 *Bluberi* affidavit, *ibid.* at para. 15.

37 *Canada North* affidavit, *supra* note 33 at para. 20; *Bluberi* affidavit, *ibid.* at para. 8.

38 Evidence, Letter from K. Bourassa to the registrar of the Supreme Court of Canada dated October 15, 2020 [Canada North letter].

39 Evidence, Memorandum of Argument on Motion for Leave to Intervene filed by the Proposed Intervener, the Insolvency Institute of Canada at para. 20 [Canada North MoA].

40 *Indalex*, *supra* note 4 at para. 2.

41 *Re Indalex Ltd.*, 2011 ONCA 265 (Ont. C.A.); additional reasons 2011 CarswellOnt 16279 (Ont. C.A.); additional reasons 2011 CarswellOnt 9077 (Ont. C.A.); reversed (2013), 96 C.B.R. (5th) 171 (S.C.C.).

42 R.S.O. 1990, c. P.8.

43 *Indalex*, *supra* note 4 (Evidence, Condensed Brief of the Intervener, Insolvency Institute of Canada).

44 *Indalex*, *ibid.* at paras. 224 and 240.

45 *Indalex*, *ibid.* at para. 240.

46 R.S.C. 1985, c. E-15, at s. 222(1) [*ETA*].

47 *Callidus*, *supra* note 5 at para. 2.

48 *Canada v. Callidus Capital Corporation*, 2017 FCA 162, 51 C.B.R. (6th) 15 (F.C.A.); reversed 2018 CarswellNat 6687 (S.C.C.) [*Callidus* appeal].

49 *Callidus* appeal, *ibid.*; Factum of the Intervener, Insolvency Institute of Canada at para. 2 [*Callidus* IIC factum].

50 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*].

51 *Callidus* IIC factum, *supra* note 49 at para. 7.

52 *Callidus*, *supra* note 5 at paras. 1-3.

53 *Callidus*, *ibid.* at paras. 1-2; *Callidus* appeal, *supra* note 48 at para. 46.

54 *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2018 ONCA 253, 57 C.B.R. (6th) 171 (Ont. C.A.) at para. 121 [*Third Eye*].

55 *Third Eye*, *ibid.* (Factum of the Intervener, Insolvency Institute of Canada at paras. 4-5) [*Third Eye* IIC factum].

56 *Third Eye*, *supra* note 6 at para. 24.

57 *Third Eye*, *ibid.*

58 *Third Eye* IIC factum, *supra* note 55 at para. 37.

59 *Third Eye*, *supra* note 6 at para. 109.

60 *Third Eye*, *ibid.* at para. 105.

61 *Third Eye*, *ibid.* at para. 110.

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62 *BIA*, *supra* note 50 at s. 47(2)(c).

63 *Third Eye*, *supra* note 6 at paras. 53-54 and 57; *Third Eye* IIC factum, *supra* note 55 at para. 15.

64 *Third Eye*, *ibid.* at paras. 53-58.

65 *Third Eye*, *ibid.* at para. 86.

66 R.S.C. 1985, c. C-36.

67 *Bluberi*, *supra* note 8 at para. 2.

68 *Bluberi*, *ibid.* at paras. 32-35.

69 *Bluberi*, *ibid.*; Evidence, Joint Notice of Motion of the Proposed Interveners, IIC and CAIRP at 3.

70 *Bluberi*, *supra* note 8 at paras. 57, 64 and 70.

71 *Bluberi*, *ibid*.

72 *Bluberi*, *ibid*.

73 *Bluberi*, *ibid.* at paras. 70 and 80.

74 *Bluberi*, *ibid.* at para. 64.

75 *Bluberi*, *ibid.* at paras. 102 103 and 109.

76 *Bluberi*, *ibid.* at para. 84.

77 *Bluberi*, *ibid.* (Evidence, Factum of the Intervener, the Insolvency Institute of Canada at para. 23) [*Bluberi* IIC factum].

78 *Bluberi*, *supra* note 8 at para. 64.

79 *Bluberi*, *ibid.* at para. 1; *Chandos*, *supra* note 9 at para. 1.

80 *Capital Steel Inc. v. Chandos Construction Ltd.*, 2019 ABCA 32, 70 C.B.R. (6th) 1 (Alta. C.A.); affirmed 2020 CarswellAlta 1754 (S.C.C.) [Chandos appeal].

81 *Chandos* appeal, *ibid.* at paras. 339 and 424.

82 *Chandos*, *supra* note 9; Factum of the Intervener, the Insolvency Institute of Canada at paras. 2-5 [*Chandos* IIC factum].

83 *Chandos*, *supra* note 9 at para. 25.

84 *Chandos*, *ibid.* at para. 17; *Chandos* IIC factum, *supra* note 82 at paras. 4 and 19-27.

85 *Chandos*, *ibid.* at para. 17.

86 *Chandos*, *ibid.* at paras. 35 and 37; *Chandos* IIC factum, *supra* note 82 at paras. 12 and 29.

87 *Chandos*, *ibid.* at paras. 25-27; *Chandos* IIC factum, *ibid.* at para. 6.

88 *Canada North*, *supra* note 7 at para. 4.

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89 *Canada North*, *ibid.* at para. 2. The priority charges included administrative charges, interim financing charges and directors' and officers' charges.

90 *Canada North*, *supra* note 7 (Evidence, Factum of the Intervener, the Insolvency Institute of Canada, at paras. 6, 15 and 19) [*Canada North* IIC factum].

91 *Canada North*, *supra* note 7 at para. 37; *Canada North* IIC factum, *ibid.* at paras. 21-22.

92 *Canada North*, *ibid.* at para. 48; *Canada North* IIC factum, *ibid.* at para. 31.

93 *Canada North*, *supra* note 7; Notice of Motion of the Proposed Intervener, Insolvency Institute of Canada at para. 9; *Canada North* affidavit, *supra* note 33 at para. 13.

94 *Canada North*, *supra* note 7 at para. 48.

95 *Indalex*, *supra* note 4 at para. 218.

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