Tantalaus & Mandamus

Exploring possible justifications for *mandamus* relief in insolvency proceedings and whether jurisdiction exists to grant it.

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Introduction

The *Bankruptcy and Insolvency Act*[1] grants broad discretion to superior courts in order to support the single-proceeding model, a collective proceeding model "intended to mitigate the inefficiency and chaos that would result if each stakeholder in an insolvency initiated a separate claim to enforce its rights."[2] The exercise of this discretion in consistent ways is fundamental to creating certainty and predictability within the insolvency regime; conversely, varying interpretations of this discretion will lead to unpredictable and uneven applications of the law in insolvency proceedings. On a broader level, inconsistent exercise of judicial discretion under the BIA has the potential to undermine the rule of law and create uncertainty within the insolvency regime.[3]

This paper will show that the recent case of *Tantalus Labs Ltd. (Re)* ("***Tantalus***")[4] illustrates this potential. It will argue that in *Tantalus*, an insolvency court overruled an administrative decision of the Canada Revenue Agency (the "**CRA**") without having clear jurisdiction to do so. In an effort to optimize creditor recovery, the court granted what was effectively *mandamus* relief by overturning the CRA's decision to not renew the company's cannabis excise license (the "**Excise License**"), allowing the company time to sell its cannabis inventory. The provision of this relief in *Tantalus* revealed significant uncertainties regarding the circumstances under which insolvency courts may overrule administrative decisions and whether the ability to do so falls within the broad judicial discretion granted by the BIA or whether it surpasses its jurisdictional limits.

In the cannabis industry, licenses are among the most valuable assets of a company.[5] From the legalization of cannabis in October 2018 to June 2023, there were fifty-one BIA or *Companies'*

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ["**BIA**"].

[2] *Peace River Hydro Partners v Petrowest Corp*.2022 SCC 41 at 55 ["***Peace River***"]:"…This Court has held that s. 183(1) of the *BIA* confers a 'broad scope of authority' on superior courts to deal with most bankruptcy disputes…"; *Peace River* at para 66: "… Indeed, the BIA and the CCAA both accord broad judicial discretion to, among other things, authorize the assignment and disclaimer of contracts and the sale of assets, impose and lift stays of proceedings, grant extensions of time, terminate proceedings, and approve creditor proposals".

[3] See Bish, David, "In Search of the Limits of Judicial Discretion in Insolvency Law", (2018) 7-9 J IIC Art.

[4] *Tantalus Labs Ltd. (Re)*, 2023 BCSC 1450, 2023 CarswellBC 2465 ["***Tantalus***"].

[5] *Endorsement Of Justice Osborne* in the Matter Of A Plan of Compromise or Arrangement of BZam Ltd. et al., dated February 28, 2024, Court File No. Cv-24-00715773-00CL ["***BZAM***"] at para 49.

Creditors Arrangement Act[6] proceedings,[7] and this number continues to grow. This recent surge of cannabis-related insolvency proceedings has made *mandamus*-style relief increasingly attractive to applicants and courts.

Mandamus is defined as "[a] writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, [usually] to correct a prior action or failure to act."[8] Originally, *mandamus* allowed a court to "order a court or an administrative body to do its duty",[9] that is to force an administrative decision maker to make a decision,[10] to mitigate injustices caused by delay or discrimination of a particular group.[11] More recently, courts have issued *mandamus* orders to *"*direct that a certain result be reached",[12] instead of simply remitting a decision back to the administrative body.

While the most cited authority on *mandamus*, the Federal Court of Appeal decision of *Apotex Inc. v. Canada (Attorney General)*[13] (affirmed by the Supreme Court in 1994)[14] set out the criteria that must be met to permit *mandamus* relief,[15] it held that in cases where an administrative decision maker had "fettered" discretion, *mandamus* would be unavailable to compel the exercise of that discretion in a particular way–that is, to direct a specific result be

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[6] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36. ["**CCAA**"].

[7] Tamie Dolny and Samantha Hans, "In the Weeds: A Quantitative Summary of Canadian Cannabis Insolvency Filings from Legalization to 2023", (2023) 21 Annual Review of Insolvency Law.

[8] Black's Law Dictionary (11th ed. 2019) mandamus.

[9] *Blencoe v. British Columbia (Human Rights Commission)* 2000 SCC 44 ["***Blencoe***"] at 148.

[10] *Ibi*d at para 149.

[11] *Ibid* at para 148.

[12] *D'Errico v. Canada (Attorney General)*, 2014 FCA 95 at para 16 to 17: " the Court exceptionally may direct that a certain result be reached…. …The word 'exceptionally' recognizes that administrative tribunals should be allowed another chance to decide the merits of the matter and not have the reviewing court do it for them. But in certain cases, the circumstances support resort to the latter option."

[13] *Apotex Inc. v. Canada (Attorney General)* (C.A.) [1994] 1 FC 742 ["***Apotex***"] at 766-70.

[14] *Apotex Inc. v. Canada (Attorney General)* [1994] 3 SCR 1100.

[15] The *Apotex* criteria were summarized by *Abdolkhaleghi v. Canada (Minister of Citizenship & Immigration) 2005 FC 729* at para 12:*"*…there must be a public legal duty to act; the duty must be owed to the applicant; there is a clear right to the performance of the duty; no other adequate remedy is available to the applicant; the order sought is of some practical value or effect; no equitable bar exists; the balance of convenience favours the issues; and, where the duty sought to be enforced is discretionary, consideration must be given to the nature and manner of exercise of the discretion".

reached.[16] However, it also left the door open for exceptions to this rule to be made in cases where the decision maker did not enjoy significant discretionary power. In the case of *Apotex, mandamus* was used to force the issuance of a Notice of Compliance ("**NOC**") for a pharmaceutical drug[17] against the minister's will, because the scope of his discretion was "narrow"[18] and he relied on irrelevant considerations.[19] On the one hand *Apotex* stated *mandamus* could not mandate a specific outcome in cases where discretion was "fettered", but it created an exception for itself to do so in a case where discretion was "narrow". The distinction between narrow and fettered discretion was not explained and courts have struggled to apply the *Apotex* framework since.

Certain courts have ordered this type of *mandamus* relief (to mandate a specific result) where "the case is straightforward and the decision of the Court on the judicial review would be dispositive of the matter",[20] where there is only one lawful exercise of discretion, in instances of severe maladministration of justice, or where delay would result in harm,[21] none of which were exceptions discussed in *Apotex*. Because the exceptions were not delineated in *Apotex* (or later

[16] *Apotex*, *supra* note 13 at 767-8: *Apotex* added limitations on the relief available where decision makers enjoy discretionary power: "(a) in exercising a discretion the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith"; (b) mandamus is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered"; (c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", consideration; (d) mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way; and (e) mandamus is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty." [emphasis added by author].

[17] *Ibid* at 783.

[18] *Ibid* at 783: "…the Minister's discretion in the instant case was narrowly circumscribed…"

[19] *Ibid* at 784: "Returning to the facts before us, in my view it cannot be said that in the exercise of his statutory power under the FDA Regulations the Minister was entitled to have regard to the provisions of Bill 091 after they were enacted but before they were proclaimed in effect. In the circumstances of this case, pending legislative policy is not a relevant consideration which can be unilaterally invoked by the Minister."; a similar justification was used to justify overruling an administrative decision in *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 at para 43.

[20] *Xie v. Canada (Minister of Employment & Immigration)* 1994 CarswellNat 484 at para 18, referred to in *Rafuse v. Canada (Pension Appeals Board)*, 2002 FCA 31 at para 14.

[21] *Lebon v. Canada (Minister of Public Safety and Emergency Preparedness)* 2013 FCA 55 at para 14; see additional example of exceptional cases in *D'Errico, supra* note 12 at para 16.

Supreme Court decisions) judges have been quick to categorize their cases as exceptional and to justify their use of *mandamus* on public policy grounds.[22]

Courts may order *mandamus* relief to overrule an administrative bodies' decision, such as a decision to refrain from extending or renewing an expiring or cancelled license. This is precisely what the court did in *Tantalus,* and there have been multiple similar decisions since that cite *Tantalus* as authority for ordering *mandamus*.[23] This trend highlights an urgent need for clarity regarding when such relief is legally justified.

This essay first reviews the unique circumstances in *Tantalus* that resulted in a *mandamus* order. It then critiques the legal basis relied on to justify the order using the authorities cited in *Tantalus* and in relation to other decisions concerning *mandamus* relief. Finally, it argues that the court in *Tantalus*, and generally in BIA proceedings, lacks proper jurisdiction to issue *mandamus* orders.

1. The "Status *Quo"* order in *Tantalus*

Tantalus Labs Ltd. ("**TLL**") was a British Columbia based producer of cannabis products incorporated in 2012.[24] TLL held a cannabis license issued by Health Canada pursuant to the *Cannabis Act*[25] and a cannabis Excise License issued by the CRA pursuant to the *Excise Act,*[26] allowing the company to sell its products.[27]

Beginning in February 2021, TLL entered into payment plans with the CRA to make payments towards substantial arrears in excise tax.[28] On June 12, 2023, TLL's major secured creditor

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[22] See the discussion of *PHS Community Services Society v. Canada (Attorney General)* 2011 SCC 44 ["***Insite***"] and *Canada (Prime Minister) v. Khadr* 2010 SCC 3 ["**Khadr**"] in Colter, Irwin, "The Decisive Moment of (In)Decision: Insite and Ministerial Discretion" (March 2012) 6:225 *Parliamentary & Pol*: *Insite* and *Khadr* did not rely on Apotex to order *mandamus*, but justified the relief mainly on public policy bases.

[23] See *BZAM*, *supra* note 5 at paras 47-48; see also *Endorsement Of Justice Conway* in the Matter of Aleafia Health Inc. et al*.,* dated August 22, 2023, Court File No. Cv-23-00703350-00CL ["***Aleafia***"].

[24] *Notice of Application (Enforcing Stay of Proceedings)* in the Matter of the Notice of Intention to Make a Proposal of Tantalus Labs Ltd. dated July 7, 2023, Court File No. B-230269 ["**Tantalus Stay Application**"] at part 2 para 4.

[25] *Cannabis Act* SC 2018, c. 16 as amended ["**Cannabis Act**"]

[26] *Excise Act* 2001, S.C. 2002, c. 22. ["**Excise Act**"]

[27] *Tantalus, supra* note 4 at para 7.

[28] Tantalus Stay Application, *supra* note 24 at part 2 para 14.

issued a demand letter for $5.5 million in amounts owing and a notice of intention to enforce its security against TLL's property,[29] further indicating it would no longer continue to fund the business.[30] On June 16, 2023, TLL and the CRA agreed to a renewed payment plan requiring TLL to pay $35,000 by June 30, 2023.[31]

On June 28, 2023, TLL filed a Notice of Intention to Make a Proposal (the "**proceedings**") pursuant to Section 50.4 of the BIA.[32] Because of the proceedings, TLL elected not to make the agreed upon June 30th payment to the CRA in order to "maintain the status *quo* with respect to its pre-filing indebtedness" per the proposal trustee's advice.[33] On July 7, 2023 the CRA indicated to TLL that it would not extend its Excise License as TLL did not meet the requirements for renewal under the *Excise Act*'s regulations (the "**Regulations**")[34] which included maintaining "sufficient financial resources".[35] The CRA determined that TLL's inability to comply with the payment plan and because it had become an "insolvent person" disqualified them on this basis.[36] On the same day TLL applied to the court requesting relief in the form of staying the CRA's refusal to renew the Excise License,[37] extending the Excise License,[38] and various other measures enabling TLL to continue selling its cannabis inventory.[39]

At trial, TLL and the proposal trustee argued that TLL was eligible for renewal of the Excise License. They maintained that despite missing the agreed upon payment, they had adequate cash flow to operate for the duration of the proceedings and they satisfied the remaining requirements of the Regulations.[40] They stressed that being forced to sell their inventory before the expiry of

[29] *Tantalus, supra* note 4 at paras 4, 11.
[30] *Ibid* at para 2.
[31] *Ibid* at para 9; Tantalus Stay Application, *supra* note 24 at part 2 para 16;
[32] *Tantalus, supra* note 4 at para 2.
[33] *Ibid* at para 13.
[34] *Regulations Respecting Excise Licenses and Registrations,* SOR/2003-115 ["**Regulations**"].
[35] *Ibid* at ss 2(c)(ii), 2(e).
[36] *Tantalus, supra* note 4 at para 14.
[37] Tantalus Stay Application, *supra* note 24 at part 1 para 2(a).
[38] *Ibid* at part 1 paras 2(a), 2(c).
[39] *Ibid* at part 1 paras 2 (a), (b), (d), (e) and 3.
[40] *Ibid* at part 2 para 18.

the Excise License on July 10 would result in a recovery of $1.7 to 2.0 million less for TLL's creditors than selling the inventory on a typical timeline.[41]

TLL argued that the extension of the Excise License benefitted all creditors, including the CRA, a fact Justice Shelley Fitzpatrick acknowledged.[42] The CRA had several arguments. First, it defended its refusal to extend the Excise License on the basis that the *Excise Act* gives the Minister (and the CRA as delegate)[43] limited discretion to grant renewals, based on specific statutory criteria including the financial requirements, and according to the CRA, TLL did not meet these criteria. Second, the CRA argued that the Minister only had the statutory mandate to consider whether TLL could meet the specific statutory criteria, and not whether greater proceeds would accrue to creditors in making renewal decisions.[44] Third, the CRA argued that even if TLL did meet the criteria the CRA's decision to renew could only be reviewed by the Federal Court, as it held exclusive review power over the CRAs' decision. Finally, the CRA noted that the Excise License was set to expire, so the decision not to renew could not be "stayed."[45]

Despite these objections, and to allow TLL sufficient time to sell its cannabis inventory, Justice Fitzpatrick exercised her discretion to grant TLL a stay and renewal order.[46] Justice Fitzpatrick characterized the order as a "status *quo* order"[47] (and not explicitly as a *mandamus* order), but relied on two cases, *Arrangement relatif à Rising Phoenix International Inc*[48] and *Mignault Perrault (Succession de) c. Hudson (Ville d')*[49], which both expressly contemplated the circumstances under which *mandamus* is justified. She also used the term *mandamus* in her

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[41] Tantalus Stay Application, *supra* note 24 at part 2 para 21; *First Report of the Trustee* in the Matter of the Notice of Intention to Make a Proposal of Tantalus Labs Ltd. dated July 7, 2023, Court File No. B-230269, at paras 54-55.

[42] Tantalus Stay Application, *supra* note 24 part 2 para 22; *Tantalus*, *supra* note 4 at para 20.

[43] *Application Response of the Attorney General of Canada on behalf of the Minister of National Revenue* in the Matter of the Notice of Intention to Make a Proposal of Tantalus Labs Ltd. dated July 9, 2023, Court File No. B-230269 ["**CRA Application Response**"] at part 5 para 9.

[44] *Ibid* at part 5 paras 13-15.

[45] *Ibid* at part 5 para 7.

[46] *Tantalus, supra* note 4 at para 39.

[47] *Ibid* at para 33.

[48] *Arrangement relatif à Rising Phoenix International Inc.* 2022 QCCS 1670 ["***Rising Phoenix****"*].

[49] *Mignault Perrault (Succession de) c. Hudson (Ville d') 2010 QCCA 2108 [*"***Mignault"***].*

commentary of each case.[50] It therefore appears that despite not expressly using the term "*mandamus*" in relation to the TLL case, the judge treated the order substantively as one, particularly because the effect of the status *quo* order was to overturn the CRA's decision not to renew the Excise License and to mandate it be renewed, the same effect a *mandamus* order would have. Overturning an administrative body's decision is an exceptional measure.[51] The next section explores whether ordering such exceptional relief–the *mandamus* order in *Tantalus*–was legally justified.

2. Questions remain regarding the justification for *mandamus* in *Tantalus*

In *Tantalus*, Justice Fitzpatrick effectively granted *mandamus* by overturning the CRA's decision to not renew the Excise License, justifying the order in part by relying on two Québec cases. First, she cited *Rising Phoenix*, a CCAA case where the Superior Court of Québec refused to grant *mandamus*. The debtor company's private colleges requested the order to extend study and residency permits following the colleges' insolvency to allow students to complete their studies. Although the court refused to order *mandamus*, Justice Fitzpatrick relied on the portion of the decision contemplating exceptional circumstances where a court may order a public official to "exercise their discretion in a particular manner, or with a view to a particular outcome…".[52] *Rising Phoenix* held this was only available "in exceptional cases…such as in cases where where the public decision-maker enjoys little discretion, has already exercised their discretion, or is unlikely to exercise their discretion reasonably or in a timely fashion."[53] *Rising Phoenix* relied heavily on *Mignault* in its analysis. In *Tantalus*, Justice Fitzpatrick provided excerpts from *Mignault* to explain the circumstances where a court may exceptionally order public bodies to act in a specific direction, even when the decision was a result of a discretionary power conferred by law.[54] *Mignault* held this would only be the case where "the discretion is restricted or it has in

[50] *Tantalus supra* note 4 at para 29: "In *Rising Phoenix*, the federal and Quebec authorities argued that the court did not have jurisdiction to grant *mandamus* orders with respect to the renewal of the student's permits…"; *Tantalus supra* note 4 at para 32: "As to the ability of the court to issue *mandamus* against the public authority, the Quebec appeal court stated…"; see also CRA Application Response *supra* note 43 part 5 para 5 where the CRA argues the status quo order would overturn the decision and mandate the result.

[51] *D'Errico, supra* note 12 at paras 16-17.

[52] *Rising Phoenix*, *supra* note 48 at para 15 (paraphrased in *Tantalus* at para 29).

[53] *Ibid* at para 16 (excerpted in *Tantalus* at para 29).

[54] *Tantalus, supra* note 4 at para 32.

fact been exercised, the body has exhausted its jurisdiction, the body is unlikely to act in accordance with the rules of natural justice, or the return will cause undue delay" [55]

Both *Rising Phoenix* and *Mignault* consider when *mandamus* may be used to direct a particular result, a more heavy-handed order than to simply remit a decision back to an administrative body. The excerpts selected from both decisions, and the emphasis added to the *Mignault* excerpt by Justice Fitzpatrick,[56] suggest she justified granting *mandamus* to affect a specific outcome because: (1) discretion of the decision maker was restricted, (2) their discretion had been exercised, and (3) returning the decision to the decision maker would cause undue delay. Relying on these factors from *Rising Phoenix* and *Mignault* (the former having been presented by the CRA in support of jurisdiction-based arguments, discussed below)[57] suggests *mandamus* was sufficiently justified in *Tantalus*.

While *Tantalus* may be justified based on the Québec line of cases, the decision would have been strengthened by a clearer analysis regarding the significance of the CRA's discretion being restricted and a connection between the criteria noted in *Mignault* and the facts of the case. However, the real issue, more generally, is that the relevance of a decision maker's discretion in determining the appropriateness of *mandamus* is unclear: *Apotex* and the cases following it have failed to clarify how it impacts the court's ability to override and replace an administrative decision, as discussed above. Further clarity in the law is greatly needed. It is understandable that Justice Fitzpatrick was not in a position to reconcile inconsistent interpretations of *Apotex* and its exceptions, to situate *Tantalus* amongst the jurisprudence on such an urgent basis. However, a brief discussion of the relevant decisions relating to *mandamus*, including *Apotex*, would have strengthened her analysis.

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[55] *Tantalus, supra* note 4 at para 32 [emphasis in *Tantalus*].

[56] *Ibid.*

[57] CRA Application Response, *supra* note 43 at part 5 para 11: "This Court does not have the jurisdiction to overturn the Minister's refusal to renew the Excise License or to require a particular result for Tantalus' renewal application under the *Excise Act, 2001*. To seek such declaratory or injunctive relief, Tantalus must seek recourse in the Federal Court."; CRA Application Response, *supra* note 43 at footnote 26, citing *Rising Phoenix*, *supra* note 33 at para 20: "Moreover, another legal impediment exists: the Superior Court of Québec has no jurisdiction to make an order of mandamus, or other injunctive order, against the federal minister, since this prerogative is reserved exclusively to the Federal Court of Canada under s. 18 (1) of the Federal Courts Act."

Because the decision was made on an urgent basis, its reliance on *Rising Phoenix*–a case presented by the CRA itself–was reasonable. However, even if the use of *mandamus* relief was justified based on the exceptions carved out *Rising Phoenix* and *Mignault*, a more substantive hurdle to granting *mandamus* remained largely unaddressed: jurisdiction.

3. The jurisdictional basis for ordering *mandamus* in BIA proceedings is tenuous

Justice Fitzpatrick cited 183(1)(c) of the BIA, which grants courts power to exercise "original, auxiliary, and ancillary jurisdiction in bankruptcy matters" and provides a jurisdictional basis for granting *mandamus.*[58] The issue in *Tantalus* highlighted by the CRA[59] was that s 18(1) of the *Federal Courts Act* (the "**FCA**")[60] grants *exclusive* original jurisdiction to the Federal Court to issue a writ of *mandamus*, to issue an injunction, or to grant declaratory or injunctive relief against any federal board, commission, or other tribunal.[61] Section 18(3) further requires that these remedies be obtained only through an application for judicial review to the Federal Court. The question is whether the Federal Court's claimed exclusive jurisdiction prevents superior courts from issuing *mandamus* pursuant to the BIA against a federal body.

In *Rising Phoenix*, the court held that superior courts lack jurisdiction to order *mandamus* against federal decision makers due to the exclusive jurisdiction of the Federal Court, stating clearly "this prerogative is reserved exclusively to the Federal Court of Canada under Section 18(1) of the Federal Courts Act".[62] *Rising Phoenix* refused *mandamus* relief for this reason, despite a strong public policy rationale to grant it.[63] This jurisdictional impediment was explicitly acknowledged by Justice Fitzpatrick in *Tantalus*[64], but was not rebutted, nor was *Tantalus* distinguished from *Rising Phoenix*.

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[58] *Tantalus supra* note 4 at para 27.

[59] CRA Application Response*, supra* note 43 at part 5 para 16.

[60] *Federal Courts Act* RSC 1985, c F-7 [the "**FCA**"].

[61] *Ibid* at s 18(1)(a).

[62] *Rising Phoenix*, *supra* note 4 at para 20.

[63] *Ibid* at paras 3-4.

[64] *Tantalus*, *supra* note 4 at para 29: "In Rising Phoenix, the federal and Quebec authorities argued that the court did not have jurisdiction to grant *mandamus* orders with respect to the renewal of the student's permits. Justice Collier agreed with this argument but he also stated…" [emphasis added].

Justice Fitzpatrick simultaneously relied on *Rising Phoenix* to justify granting the status *quo* order, but did not comment on the jurisdictional issue it highlighted. Had she done so, the *Tantalus* court would have arguably been unable to grant *mandamus* relief as both courts had the same jurisdiction under the BIA.[65]

Despite the wording of s 18(1), some might suggest that concurrent jurisdiction between the BIA and FCA is possible. Decisions such as *Canada (Human Rights Commission) v Canadian LibertyNet*[66] and *Canada (Attorney General) v TeleZone Inc*[67] have found that the Federal Court and provincial courts of inherent jurisdiction share concurrent jurisdiction for certain types of relief which are not expressly excluded by FCA s 18(1). These cases are consistent with the determination in *Ordon Estate v. Grail*[68] that "the complete ouster of jurisdiction from the provincial superior courts in favour of vesting exclusive jurisdiction in a statutory court (rather than simply concurrent jurisdiction with the superior courts) requires clear and explicit statutory wording to this effect."[69] What differs between *Tantalus* and *Canadian Liberty Net* or *TeleZone* is that there *is* clear and explicit statutory language in the FCA to oust the provincial court's inherent jurisdiction in relation to *mandamus* orders.

There is limited case-law dealing with BIA-FCA conflicts. One case, *Canada v. Canada North Group Inc,*[70] dealt with conflict between the *Income Tax Act*[71] and the CCAA. Although the case was decided on other grounds, in dissent, Justice Moldaver used statutory interpretation to resolve the conflict between the acts. He first reviewed the ITA's supremacy language[72] which states that "[n]otwithstanding . . . any other enactment of Canada" the Crown's claim would have priority.[73] He contrasted this with s 11 of the CCAA which states the legislation operates

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[66] *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 ["***Liberty Net***"] (confirmed concurrent jurisdiction to grant injunctions in support of the same Act).

[67] *Canada (Attorney General) v TeleZone Inc.* 2010 SCC 62 ["***TeleZone***"] (confirmed concurrent jurisdiction to hear claims against the Crown).

[68] *Ordon Estate v. Grail* [1998] 3 SCR 437 ["***Ordon Estate***"].

[69] *Ibid* at para 46 [emphasis added].

[70] *Canada v. Canada North Group Inc.*, 2021 SCC 30 ["***Canada North***"].

[71] *Income Tax Act*, RSC 1985, c 1 (5th Supp). [the "**ITA**"].

[72] *Ibid* at s 227(4.1)

[73] Canada North, *supra* note 70 at para 259.

"[d]espite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*", but not despite other federal acts. Due to the more narrowly constructed supremacy clause of the CCAA, Justice Moldaver determined that the ITA would prevail in a conflict.[74] No supremacy clause exists in the BIA that contemplates conflict with other federal acts, however Parliament did consider potential conflict with provincial acts.[75] If the statutory interpretation analysis from *Canada North* was applied to *Tantalus*, the FCA would prevail to grant exclusive jurisdiction to order *mandamus*.

The FCA contains specific language granting Federal Court's exclusive jurisdiction to order *mandamus* against a federal body,[76] whereas the BIA simply grants broad, general powers to superior courts. Due to the specific-versus-general language and the absence of a supremacy clause in the BIA, it appears s 18(1) of the FCA gives Federal Courts exclusive jurisdiction over *mandamus* relief.

Conclusion

The *mandamus* order in *Tantalus* was relatively uncontentious as it benefitted all of its creditors. However, it is unclear in *Tantalus* exactly what made the CRA's decision to not renew TLL's Excise License exceptional, thus capable of being overturned *and* replaced with a decision of the Court. More concerning is the lack of consideration given to the jurisdictional issue put forth by the CRA and determinative in *Rising Phoenix*, where the court reached an opposite result.

The trend towards seeking *mandamus* orders in proceedings involving industries such as cannabis, education, and pharmaceuticals, highlights a pressing need for higher courts to clarify when *mandamus* relief is available and what circumstances, if any, may allow a specific result to be mandated. Furthermore, Parliament should add supremacy clauses to the BIA and CCAA to clarify how they prevail in conflict with other federal acts, especially with respect to *mandamus*, given its potential impact on creditor recovery.

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[74] Canada North, *supra* note 70 at para 259.

[75] Section 72 of the BIA relates to potential conflicts with laws or statues relating to property and civil rights (i.e. those under a provincial head of power).

[76] FCA, *supra* note 60 at s 18(1)(a).

In *Tantalus* the legal reasoning, especially regarding jurisdiction, did not justify the decision. Judicial clarification and statutory amendments can reduce the likelihood of this reoccurring, upholding predictability, fairness, and integrity within the insolvency regime.

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