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Secured or postponed: Where does the secured lender who shares?

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On April 4, 2011, the Honourable Benoît Morin, speaking for the Court of Appeal, with Justices Michel Robert and Jacques A. Léger concurring, issued a judgment confirming the decision of the Superior Court rendered on April 22, 2009 by the Honourable Jean-Yves Lalonde. The case arose out of the bankruptcy of Stonehaven Country Club Resort & Spa L.P.; the Court had to rule on the validity of Investissement Québec's claim against the bankrupt company. More specifically, the Court of Appeal reviewed the scope of section 139 of the *Bankruptcy and Insolvency Act*, which provides that in the event of the bankruptcy of a borrower, the claim of a lender who has contracted to receive a rate of interest varying with the profits, or a share of the profits arising from carrying on the trade or business, cannot be recovered until the claims of all other creditors have been satisfied. The Court had to determine whether this rule applied to Investissement Québec, whose hypothecary loan contained a clause whereby a premium was payable to it according to the profits of the business.

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