Court of Appeal File No. M44126
Sup Court of Justice File No. CV-14-10518-00CL

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

BOOK OF AUTHORITIES OF TRIMOR ANNUITY FOCUS LIMITED PARTNERSHIP #5

(Motion for Leave to Appeal in writing returnable week of September 8, 2014)

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In the Matter of the Companies' Creditors Arrangement Act, R.S.C., c. C-36, as amended

And In the Matter of a proposed plan of compromise or arrangement with respect to Stelco Inc. and the other Applicants listed in Schedule "A"

Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Goudge, Feldman, Blair JJ.A.

Heard: March 18, 2005
Judgment: March 31, 2005
Docket: CA M32289

Proceedings: reversed *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 742, [2005] O.J. No. 729, 7 C.B.R. (5th) 307 ((Ont. S.C.J. [Commercial List])); reversed *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 743, [2005] O.J. No. 730, 7 C.B.R. (5th) 310 ((Ont. S.C.J. [Commercial List])); additional reasons to *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 742, [2005] O.J. No. 729, 7 C.B.R. (5th) 307 ((Ont. S.C.J. [Commercial List]))

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Peter Griffin for Board of Directors of Stelco Inc.
K. Mahar for Monitor
David R. Byers (Agent) for CIT Business Credit, DIP Lender

Subject: Corporate and Commercial; Insolvency; Property; Civil Practice and Procedure

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APPEAL by potential board members from judgments reported at *Stelco Inc., Re* (2005), 2005 CarswellOnt 742, 7 C.B.R. (5th) 307 (Ont. S.C.J. [Commercial List]) and at *Stelco Inc., Re* (2005), 2005 CarswellOnt 743, 7 C.B.R. (5th) 310 (Ont. S.C.J. [Commercial List]), granting motion by employees for removal of certain directors from board of corporation under protection of *Companies Creditors' Arrangement Act*.

***Blair J.A.*:**

Part I — Introduction

1 Stelco Inc. and four of its wholly owned subsidiaries obtained protection from their creditors under the *Companies' Creditors Arrangement Act*[1] on January 29, 2004. Since that time, the Stelco Group has been engaged in a high profile, and sometimes controversial, process of economic restructuring. Since October 2004, the restructuring has revolved around a court-approved capital raising process which, by February 2005, had generated a number of competitive bids for the Stelco Group.

2 Farley J., an experienced judge of the Superior Court Commercial List in Toronto, has been supervising the CCAA process from the outset.

3 The appellants, Michael Woollcombe and Roland Keiper, are associated with two companies — Clearwater Capital Management Inc., and Equilibrium Capital Management Inc. — which, respectively, hold approximately 20% of the outstanding publicly traded common shares of Stelco. Most of these shares have been acquired while the CCAA process has been ongoing, and Messrs. Woollcombe and Keiper have made it clear publicly that they believe there is good shareholder value in Stelco in spite of the restructuring. The reason they are able to take this position is that there has been a solid turn around in worldwide steel markets, as a result of which Stelco, although remaining in insolvency protection, is earning annual operating profits.

4 The Stelco board of directors ("the Board") has been depleted as a result of resignations, and in January of this year Messrs. Woollcombe and Keiper expressed an interest in being appointed to the Board. They were supported in this request by other shareholders who, together with Clearwater and Equilibrium, represent about 40% of the Stelco common shareholders. On February 18, 2005, the Board appointed the appellants directors. In announcing the appointments publicly, Stelco said in a press release:

> After careful consideration, and given potential recoveries at the end of the company's restructuring process, the Board responded favourably to the requests by making the appointments announced today.
>
> Richard Drouin, Chairman of Stelco's Board of Directors, said: "I'm pleased to welcome Roland Keiper and Michael Woollcombe to the Board. Their experience and their perspective will assist the Board as it strives to serve the best interests of all our stakeholders. We look forward to their positive contribution."

5 On the same day, the Board began its consideration of the various competing bids that had been received through the capital raising process.

6 The appointments of the appellants to the Board incensed the employee stakeholders of Stelco ("the Employees"), represented by the respondent Retired Salaried Beneficiaries of Stelco and the respondent United Steelworkers of America ("USWA"). Outstanding pension liabilities to current and retired employees are said to be Stelco's largest long-term liability — exceeding several billion dollars. The Employees perceive they do not have the same, or very much, economic leverage in what has sometimes been referred to as 'the bare knuckled arena' of the restructuring process. At the same time, they are amongst the most financially vulnerable stakeholders in the piece. They see the appointments of Messrs. Woollcombe and Keiper to the Board as a threat to their well being in the restructuring process, because the appointments provide the appellants, and the shareholders they represent, with direct access to sensitive information relating to the competing bids to which other stakeholders (including themselves) are not privy.

7 The Employees fear that the participation of the two major shareholder representatives will tilt the bid process in favour of maximizing shareholder value at the expense of bids that might be more favourable to the interests of the Employees. They sought and obtained an order from Farley J. removing Messrs. Woollcombe and Keiper from their short-lived position of directors, essentially on the basis of that apprehension.

8 The Employees argue that there is a reasonable apprehension the appellants would not be able to act in the best interests of the corporation — as opposed to their own best interests as shareholders — in considering the bids. They say this is so because of prior public statements by the appellants about enhancing shareholder value in Stelco, because of the appellants' linkage to such a large shareholder group, because of their earlier failed bid in the restructuring, and because of their opposition to a capital proposal made in the proceeding by Deutsche Bank (known as "the Stalking Horse Bid"). They submit further that the appointments have poisoned the atmosphere of the restructuring process, and that the Board made the appointments under threat of facing a potential shareholders' meeting where the members of the Board would be replaced en masse.

9 On the other hand, Messrs. Woollcombe and Keiper seek to set aside the order of Farley J. on the grounds that (a) he did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test applied by the motion judge has no application to the removal of directors, (c) the motion judge erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) the facts do not meet any test that would justify the removal of directors by a court in any event.

10 For the reasons that follow, I would grant leave to appeal, allow the appeal, and order the reinstatement of the applicants to the Board.

Part II — Additional Facts

11 Before the initial CCAA order on January 29, 2004, the shareholders of Stelco had last met at their annual general meeting on April 29, 2003. At that meeting they elected eleven directors to the Board. By the date of the initial order, three of those directors had resigned, and on November 30, 2004, a fourth did as well, leaving the company with only seven directors.

12 Stelco's articles provide for the Board to be made up of a minimum of ten and a maximum of twenty directors. Consequently, after the last resignation, the company's corporate governance committee began to take steps to search for new directors. They had not succeeded in finding any prior to the approach by the appellants in January 2005.

13 Messrs. Woollcombe and Keiper had been accumulating shares in Stelco and had been participating in the CCAA proceedings for some time before their request to be appointed to the Board, through their companies, Clearwater and Equilibrium. Clearwater and Equilibrium are privately held, Ontario-based, investment management firms. Mr. Keiper is the president of Equilibrium and associated with Clearwater. Mr. Woollcombe is a consultant to Clearwater. The motion judge found that they "come as a package".

14 In October 2004, Stelco sought court approval of its proposed method of raising capital. On October 19, 2004, Farley J. issued what has been referred to as the Initial Capital Process Order. This order set out a process by which Stelco, under the direction of the Board, would solicit bids, discuss the bids with stakeholders, evaluate the bids, and report on the bids to the court.

15 On November 9, 2004, Clearwater and Equilibrium announced they had formed an investor group and had made a capital proposal to Stelco. The proposal involved the raising of $125 million through a rights offering. Mr. Keiper stated at the time that he believed "the value of Stelco's equity would have the opportunity to increase substantially if Stelco emerged from CCAA while minimizing dilution of its shareholders." The Clearwater proposal was not accepted.

16 A few days later, on November 14, 2004, Stelco approved the Stalking Horse Bid. Clearwater and Equilibrium opposed the Deutsche Bank proposal. Mr. Keiper criticized it for not providing sufficient value to existing shareholders. However, on November 29, 2004, Farley J. approved the Stalking Horse Bid and amended the Initial Capital Process Order accordingly. The order set out the various channels of communication between Stelco, the monitor, potential bidders and the stakeholders. It provided that members of the Board were to see the details of the different bids before the Board selected one or more of the offers.

17 Subsequently, over a period of two and a half months, the shareholding position of Clearwater and Equilibrium increased from approximately 5% as at November 19, to 14.9% as at January 25, 2005, and finally to approximately 20% on a fully diluted basis as at January 31, 2005. On January 25, Clearwater and Equilibrium announced that they had reached an understanding jointly to pursue efforts to maximize shareholder value at Stelco. A press release stated:

> Such efforts will include seeking to ensure that the interests of Stelco's equity holders are appropriately protected by its board of directors and, ultimately, that Stelco's equity holders have an appropriate say, by vote or otherwise, in determining the future course of Stelco.

18 On February 1, 2005, Messrs. Keiper and Woollcombe and others representatives of Clearwater and Equilibrium, met with Mr. Drouin and other Board members to discuss their views of Stelco and a fair outcome for all stakeholders in the proceedings. Mr. Keiper made a detailed presentation, as Mr. Drouin testified, "encouraging the Board to examine how Stelco might improve its value through enhanced disclosure and other steps". Mr. Keiper expressed confidence that "there was value to the equity of Stelco", and added that he had backed this view up by investing millions of dollars of his own money in Stelco shares. At that meeting, Clearwater and Equilibrium requested that Messrs. Woollcombe and Keiper be added to the Board and to Stelco's restructuring committee. In this respect, they were supported by other shareholders holding about another 20% of the company's common shares.

19 At paragraphs 17 and 18 of his affidavit, Mr. Drouin, summarized his appraisal of the situation:

> 17. It was my assessment that each of Mr. Keiper and Mr. Woollcombe had personal qualities which would allow them to make a significant contribution to the Board in terms of their backgrounds and their knowledge of the steel industry generally and Stelco in particular. In addition I was aware that their appointment to the Board was supported by approximately 40% of the shareholders. In the event that these shareholders successfully requisitioned a shareholders meeting they were in a position to determine the composition of the entire Board.
>
> 18. I considered it essential that there be continuity of the Board through the CCAA process. I formed the view that the combination of existing Board members and these additional members would provide Stelco with the most appropriate board composition in the circumstances. The other members of the Board also shared my views.

20 In order to ensure that the appellants understood their duties as potential Board members and, particularly that "they would no longer be able to consider only the interests of shareholders alone but would have fiduciary responsibilities as a Board member to the corporation as a whole", Mr. Drouin and others held several further meetings with Mr. Woollcombe and Mr. Keiper. These discussions "included areas of independence, standards, fiduciary duties, the role of the Board Restructuring Committee and confidentiality matters". Mr. Woollcombe and Mr. Keiper gave their assurances that they fully understood the nature and extent of their prospective duties, and would abide by them. In addition, they agreed and confirmed that:

> a) Mr. Woollcombe would no longer be an advisor to Clearwater and Equilibrium with respect to Stelco;
>
> b) Clearwater and Equilibrium would no longer be represented by counsel in the CCAA proceedings; and
>
> c) Clearwater and Equilibrium then had no involvement in, and would have no future involvement, in any bid for Stelco.

21 On the basis of the foregoing — and satisfied "that Messrs. Keiper and Woollcombe would make a positive contribution to the various issues before the Board both in [the] restructuring and the ongoing operation of the business" — the Board made the appointments on February 18, 2005.

22 Seven days later, the motion judge found it "appropriate, just, necessary and reasonable to declare" those appointments "to be of no force and effect" and to remove Messrs. Woollcombe and Keiper from the Board. He did so not on the basis of any actual conduct on the part of the appellants as directors of Stelco but because there was some risk of anticipated conduct in the future. The gist of the motion judge's rationale is found in the following passage from his reasons (at para. 23):

> In these particular circumstances and aside from the Board feeling coerced into the appointments for the sake of continuing stability, I am not of the view that it would be appropriate to wait and see if there was any explicit action on behalf of K and W while conducting themselves as Board members which would demonstrate that they had not lived up to their obligations to be "neutral". They may well conduct themselves beyond reproach. But if they did not, the fallout would be very detrimental to Stelco and its ability to successfully emerge. What would happen to the bids in such a dogfight? I fear that it would be trying to put Humpty Dumpty back together again. The same situation would prevail even if K and W conducted themselves beyond reproach but with the Board continuing to be concerned that they not do anything seemingly offensive to the bloc. The risk to the process and to Stelco in its emergence is simply too great to risk the wait and see approach.

Part III — Leave to Appeal

23 Because of the "real time" dynamic of this restructuring project, Laskin J.A. granted an order on March 4, 2005, expediting the appellants' motion for leave to appeal, directing that it be heard orally and, if leave be granted, directing that the appeal be heard at the same time. The leave motion and the appeal were argued together, by order of the panel, on March 18, 2005.

24 This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30, [2002] O.J. No. 1377 (Ont. C.A. [In Chambers]), at para. 15. This criterion is determined in accordance with a four-pronged test, namely,

> a) whether the point on appeal is of significance to the practice;
>
> b) whether the point is of significance to the action;
>
> c) whether the appeal is *prima facie* meritorious or frivolous;
>
> d) whether the appeal will unduly hinder the progress of the action.

25 Counsel agree that (d) above is not relevant to this proceeding, given the expedited nature of the hearing. In my view, the tests set out in (a) - (c) are met in the circumstances, and as such, leave should be granted. The issue of the court's jurisdiction to intervene in corporate governance issues during a CCAA restructuring, and the scope of its discretion in doing so, are questions of considerable importance to the practice and on which there is little appellate jurisprudence. While Messrs. Woollcombe and Keiper are pursuing their remedies in their own right, and the company and its directors did not take an active role in the proceedings in this court, the Board and the company did stand by their decision to appoint the new directors at the hearing before the motion judge and in this court, and the question of who is to be involved in the Board's decision making process continues to be of importance to the CCAA proceedings. From the reasons that follow it will be evident that in my view the appeal has merit.

26 Leave to appeal is therefore granted.

Part IV — The Appeal

The Positions of the Parties

27 The appellants submit that,

> a) in exercising its discretion under the CCAA, the court is not exercising its "inherent jurisdiction" as a superior court;
>
> b) there is no jurisdiction under the CCAA to remove duly elected or appointed directors, notwithstanding the broad discretion provided by s. 11 of that Act; and that,
>
> c) even if there is jurisdiction, the motion judge erred:
>
> > (i) by relying upon the administrative law test for reasonable apprehension of bias in determining that the directors should be removed;
> >
> > (ii) by rejecting the application of the "business judgment" rule to the unanimous decision of the Board to appoint two new directors; and,
> >
> > (iii) by concluding that Clearwater and Equilibrium, the shareholders with whom the appellants are associated, were focussed solely on a short-term investment horizon, without any evidence to that effect, and therefore concluding that there was a tangible risk that the appellants would not be neutral and act in the best interests of Stelco and all stakeholders in carrying out their duties as directors.

28 The respondents' arguments are rooted in fairness and process. They say, first, that the appointment of the appellants as directors has poisoned the atmosphere of the CCAA proceedings and, secondly, that it threatens to undermine the even-handedness and integrity of the capital raising process, thus jeopardizing the ability of the court at the end of the day to approve any compromise or arrangement emerging from that process. The respondents contend that Farley J. had jurisdiction to ensure the integrity of the CCAA process, including the capital raising process Stelco had asked him to approve, and that this court should not interfere with his decision that it was necessary to remove Messrs. Woollcombe and Keiper from the Board in order to ensure the integrity of that process. A judge exercising a supervisory function during a CCAA proceeding is owed considerable deference: *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.), at para. 8.

29 The crux of the respondents' concern is well-articulated in the following excerpt from paragraph 72 of the factum of the Retired Salaried Beneficiaries:

> The appointments of Keiper and Woollcombe violated every tenet of fairness in the restructuring process that is supposed to lead to a plan of arrangement. One stakeholder group — particular investment funds that have acquired Stelco shares during the CCAA itself — have been provided with privileged access to the capital raising process, and voting seats on the Corporation's Board of Directors and Restructuring Committee. No other stakeholder has been treated in remotely the same way. To the contrary, the salaried retirees have been completely excluded from the capital raising process and have no say whatsoever in the Corporation's decision-making process.

30 The respondents submit that fairness, and the perception of fairness, underpin the CCAA process, and depend upon effective judicial supervision: see *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen.

Div.); *Ivaco Inc., Re* (2004), 3 C.B.R. (5th) 33 (Ont. S.C.J. [Commercial List]), at para.15-16. The motion judge reasonably decided to remove the appellants as directors in the circumstances, they say, and this court should not interfere.

Jurisdiction

31 The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the *CCAA*". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

32 The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd., Re*, [2000] O.J. No. 786 (Ont. S.C.J. [Commercial List]), at para. 11. See also, *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at p. 320; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]). Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]); and *Westar Mining Ltd., Re* (1992), 70 B.C.L.R. (2d) 6 (B.C. S.C.).

33 It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent Jurisdiction

34 Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law", permitting the court "to maintain its authority and to prevent its process being obstructed and abused". It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner". See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28. In Halsbury's Laws of England, 4th ed. (London: Lexis-Nexis UK, 1973 -) vol. 37, at para. 14, the concept is described as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

35 In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the Legislature has acted. As Farley J. noted in *Royal Oak Mines Inc.*, *supra*, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play" (para. 4).

See also, *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), [1976] 2 S.C.R. 475 (S.C.C.) at 480; *Richtree Inc., Re*, [2005] O.J. No. 251 (Ont. S.C.J. [Commercial List]).

36 In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in *Skeena Cellulose Inc., Re*, [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (B.C. C.A.) at para. 46, that:

> . . . the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. . . . This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above,[2] rather than the integrity of their own process.

37 As Jacob observes, in his article "The Inherent Jurisdiction of the Court", *supra*, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

38 I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however — difficult as it may be to draw — between the *court's* process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the *company's* process, on the other hand. The court simply supervises the latter process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose".[3] Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

The Section 11 Discretion

39 This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, the s. 11 discretion — in spite of its considerable breadth and flexibility — does not permit the exercise of such a power in and of itself. There may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the CBCA, and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA. However, this was not argued in the present case, and the facts before the court would not justify the removal of Messrs. Woollcombe and Keiper on oppression remedy grounds.

40 The pertinent portions of s. 11 of the CCAA provide as follows:

Powers of court

11. (1) Notwithstanding anything in the *Bankruptcy* and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

Initial application court orders

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days.

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Other than initial application court orders

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose.

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Burden of proof on application

(6) The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfied the court that the applicant has acted, and is acting, in good faith and with due diligence.

41 The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as *R. v. Sharpe*, [2001] 1 S.C.R. 45 (S.C.C.), at para. 33, and *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21 is articulated in E.A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) as follows:

> Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at page 262.

42 The interpretation of s. 11 advanced above is true to these principles. It is consistent with the purpose and scheme of the CCAA, as articulated in para. 38 above, and with the fact that corporate governance matters are dealt with in other statutes. In addition, it honours the historical reluctance of courts to intervene in such matters, or to second-guess the business decisions made by directors and officers in the course of managing the business and affairs of the corporation.

43 Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparagraphs 11(3)(a)-(c) and 11(4)(a)-(c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. I agree.

44 What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff General Partner Ltd.*, *supra*, at para 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance *the company's* restructuring efforts.

45 With these principles in mind, I turn to an analysis of the various factors underlying the interpretation of the s. 11 discretion.

46 I start with the proposition that at common law directors could not be removed from office during the term for which they were elected or appointed: *London Finance Corp. v. Banking Service Corp.* (1922), 23 O.W.N. 138 (Ont. H.C.); *Stephenson v. Vokes* (1896), 27 O.R. 691 (Ont. H.C.). The authority to remove must therefore be found in statute law.

47 In Canada, the CBCA and its provincial equivalents govern the election, appointment and removal of directors, as well as providing for their duties and responsibilities. Shareholders elect directors, but the directors may fill vacancies that occur on the board of directors pending a further shareholders meeting: CBCA, ss. 106(3) and 111.[4] The specific power *to remove* directors is vested in the shareholders by s. 109(1) of the CBCA. However, s. 241 empowers the court — where it finds that oppression as therein defined exists — to "make any interim or final order it thinks fit", including (s. 241(3)(e)) "an order appointing directors in place of or in addition to all or any of the directors then in office". This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of

misconduct required to trigger oppression remedy relief: see, for example, *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2004] O.J. No. 4722 (Ont. S.C.J.).

48 There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment, *and removal* of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, *supra*, at p. 480; *Royal Oak Mines Inc. (Re)*, *supra*; and *Richtree Inc. (Re)*, *supra*.

49 At paragraph 7 of his reasons, the motion judge said:

> The board is charged with the standard duty of "manage[ing], [*sic*] or supervising the management, of the business and affairs of the corporation": s. 102(1) CBCA. *Ordinarily the Court will not interfere with the composition of the board of directors. However, if there is good and sufficient valid reason to do so, then the Court must not hesitate to do so to correct a problem.* The directors should not be required to constantly look over their shoulders for this would be the sure recipe for board paralysis which would be so detrimental to a restructuring process; thus interested parties should only initiate a motion where it is reasonably obvious that there is a problem, actual or poised to become actual.
>
> [emphasis added]

50 Respectfully, I see no authority in s. 11 of the CCAA for the court to interfere with the composition of a board of directors on such a basis.

51 Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power — which the courts are disinclined to exercise in any event — except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

The Oppression Remedy Gateway

52 The fact that s. 11 does not itself provide the authority for a CCAA judge to order the removal of directors does not mean that the supervising judge is powerless to make such an order, however. Section 20 of the CCAA offers a gateway to the oppression remedy and other provisions of the CBCA and similar provincial statutes. Section 20 states:

> The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

53 The CBCA is legislation that "makes provision for the sanction of compromises or arrangements between a company

and its shareholders or any class of them". Accordingly, the powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances.

54 I do not accept the respondents' argument that the motion judge had the authority to order the removal of the appellants by virtue of the power contained in s. 145(2)(b) of the CBCA to make an order "declaring the result of the disputed election or appointment" of directors. In my view, s. 145 relates to the procedures underlying disputed elections or appointments, and not to disputes over the composition of the board of directors itself. Here, it is conceded that the appointment of Messrs. Woollcombe and Keiper as directors complied with all relevant statutory requirements. Farley J. quite properly did not seek to base his jurisdiction on any such authority.

The Level of Conduct Required

55 Colin Campbell J. recently invoked the oppression remedy to remove directors, without appointing anyone in their place, in *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, *supra* The bar is high. In reviewing the applicable law, C. Campbell J. said (para. 68):

> Director removal is *an extraordinary remedy* and certainly should be *imposed most sparingly*. As a starting point, I accept the basic proposition set out in Peterson, "Shareholder Remedies in Canada"[5]:
>
> > SS. 18.172 *Removing and appointing directors to the board is an extreme form of judicial intervention.* The board of directors is elected by the shareholders, vested with the power to manage the corporation, and appoints the officers of the company who undertake to conduct the day-to-day affairs of the corporation. [Footnote omitted.] It is clear that the board of directors has control over policymaking and management of the corporation. *By tampering with a board, a court directly affects the management of the corporation.* If a reasonable balance between protection of corporate stakeholders and the freedom of management to conduct the affairs of the business in an efficient manner is desired, altering the board of directors should be *a measure of last resort*. The order could be suitable where the continuing presence of the incumbent directors is harmful to both the company and the interests of corporate stakeholders, and where the appointment of a new director or directors would remedy the oppressive conduct without a receiver or receiver-manager.
> >
> > [emphasis added]

56 C. Campbell J. found that the continued involvement of the Ravelston directors in the *Hollinger* situation would "significantly impede" the interests of the public shareholders and that those directors were "motivated by putting their interests first, not those of the company" (paras. 82-83). The evidence in this case is far from reaching any such benchmark, however, and the record would not support a finding of oppression, even if one had been sought.

57 Everyone accepts that there is no evidence the appellants have conducted themselves, as directors — in which capacity they participated over two days in the bid consideration exercise — in anything but a neutral fashion, having regard to the best interests of Stelco and all of the stakeholders. The motion judge acknowledged that the appellants "may well conduct themselves beyond reproach". However, he simply decided there was a risk — a reasonable apprehension — that Messrs. Woollcombe and Keiper would not live up to their obligations to be neutral in the future.

58 The risk or apprehension appears to have been founded essentially on three things: (1) the earlier public statements made by Mr. Keiper about "maximizing shareholder value"; (2) the conduct of Clearwater and Equilibrium in criticizing and opposing the Stalking Horse Bid; and (3) the motion judge's opinion that Clearwater and Equilibrium — the shareholders represented by the appellants on the Board — had a "vision" that "usually does not encompass any significant concern for the long-term competitiveness and viability of an emerging corporation", as a result of which the appellants would approach their directors' duties looking to liquidate their shares on the basis of a "short-term hold" rather than with the best interests of Stelco in mind. The motion judge transposed these concerns into anticipated predisposed conduct on the part of the appellants as directors, despite their apparent understanding of their duties as directors and their assurances that they would act in the best interests of Stelco. He therefore concluded that "the risk to the process and to Stelco in its emergence [was] simply too great to risk the wait and see approach".

59 Directors have obligations under s. 122(1) of the CBCA (a) to act honestly and in good faith with a view to the best interest of the corporation (the "statutory fiduciary duty" obligation), and (b) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the "duty of care" obligation). They are also subject to control under the oppression remedy provisions of s. 241. The general nature of these duties does not change when the company approaches, or finds itself in, insolvency: *People's Department Stores Ltd. (1992) Inc., Re*, [2004] S.C.J. No. 64 (S.C.C.) at paras. 42-49.

60 In *Peoples* the Supreme Court noted that "the interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders" (para. 43), but also accepted "as an accurate statement of the law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" (para. 42). Importantly as well — in the context of "the shifting interest and incentives of shareholders and creditors" — the court stated (para. 47):

> In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders.

61 In determining whether directors have fallen foul of those obligations, however, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. Although the motion judge concluded that there was a risk of harm to the Stelco process if Messrs Woollcombe and Keiper remained as directors, he did not assess the level of that risk. The record does not support a finding that there was a sufficient risk of sufficient misconduct to warrant a conclusion of oppression. The motion judge was not asked to make such a finding, and he did not do so.

62 The respondents argue that this court should not interfere with the decision of the motion judge on grounds of deference. They point out that the motion judge has been case-managing the restructuring of Stelco under the CCAA for over fourteen months and is intimately familiar with the circumstances of Stelco as it seeks to restructure itself and emerge from court protection.

63 There is no question that the decisions of judges acting in a supervisory role under the CCAA, and particularly those of experienced commercial list judges, are entitled to great deference: see *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 (Ont. C.A.) at para. 16. The discretion must be exercised judicially and in accordance with the principles governing its operation. Here, respectfully, the motion judge misconstrued his authority, and made an order that he was not empowered to make in the circumstances.

64 The appellants argued that the motion judge made a number of findings without any evidence to support them. Given my decision with respect to jurisdiction, it is not necessary for me to address that issue.

The Business Judgment Rule

65 The appellants argue as well that the motion judge erred in failing to defer to the unanimous decision of the Stelco directors in deciding to appoint them to the Stelco Board. It is well-established that judges supervising restructuring proceedings — and courts in general — will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in *Peoples*, *supra*, at para. 67:

> Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making . . .

66 In *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (Ont. C.A.) at 320, this court adopted the following statement by the trial judge, Anderson J.:

> Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority.[6]

67 McKinlay J.A then went on to say:

> There can be no doubt that on an application under s. 234[7] the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not meant that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.

68 Although a judge supervising a CCAA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind. See also *Skeena Cellulose Inc., Re*, *supra*, *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]); *Olympia & York Developments Ltd. (Re)*, *supra*; *Alberta-Pacific Terminals Ltd., Re* (1991), 8 C.B.R. (3d) 99 (B.C. S.C.). The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.

69 Here, the motion judge was alive to the "business judgment" dimension in the situation he faced. He distinguished the application of the rule from the circumstances, however, stating at para. 18 of his reasons:

> With respect I do not see the present situation as involving the "management of the business and affairs of the corporation", but rather as a quasi-constitutional aspect of the corporation entrusted albeit to the Board pursuant to s. 111(1) of the CBCA. I agree that where a board is actually engaged in the business of a judgment situation, the board should be given appropriate deference. However, to the contrary in this situation, I do not see it as a situation calling for (as asserted) more deference, but rather considerably less than that. With regard to this decision of the Board having impact upon the capital raising process, as I conclude it would, then similarly deference ought not to be given.

70 I do not see the distinction between the directors' role in "the management of the business and affairs of the corporation" (CBCA, s. 102) — which describes the directors' overall responsibilities — and their role with respect to a "quasi-constitutional aspect of the corporation" (i.e. in filling out the composition of the board of directors in the event of a vacancy). The "affairs" of the corporation are defined in s. 1 of the CBCA as meaning "the relationships among a corporation, it affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate". Corporate governance decisions relate directly to such relationships and are at the heart of the Board's business decision-making role regarding the corporation's business *and* affairs. The dynamics of such decisions, and the intricate balancing of competing interests and other corporate-related factors that goes into making them, are no more within the purview of the court's knowledge and expertise than other business decisions, and they deserve the same deferential approach. Respectfully, the motion judge erred in declining to give effect to the business judgment rule in the circumstances of this case.

71 This is not to say that the conduct of the Board in appointing the appellants as directors may never come under review by the supervising judge. The court must ultimately approve and sanction the plan of compromise or arrangement as finally negotiated and accepted by the company and its creditors and stakeholders. The plan must be found to be fair and reasonable before it can be sanctioned. If the Board's decision to appoint the appellants has somehow so tainted the capital raising process that those criteria are not met, any eventual plan that is put forward will fail.

72 The respondents submit that it makes no sense for the court to have jurisdiction to declare the process flawed only after the process has run its course. Such an approach to the restructuring process would be inefficient and a waste of resources. While there is some merit in this argument, the court cannot grant itself jurisdiction where it does not exist. Moreover, there are a plethora of checks and balances in the negotiating process itself that moderate the risk of the process becoming irretrievably tainted in this fashion — not the least of which is the restraining effect of the prospect of such a consequence. I do not think that this argument can prevail. In addition, the court at all times retains its broad and flexible supervisory jurisdiction — a jurisdiction which feeds the creativity that makes the CCAA work so well — in order to address fairness and process concerns along the way. This case relates only to the court's exceptional power to order the removal of directors.

The Reasonable Apprehension of Bias Analogy

73 In exercising what he saw as his discretion to remove the appellants as directors, the motion judge thought it would be useful to "borrow the concept of reasonable apprehension of bias . . .with suitable adjustments for the nature of the decision making involved" (para. 8). He stressed that "there was absolutely no allegation against [Mr. Woollcombe and Mr. Keiper] of any actual 'bias' or its equivalent" (para. 8). He acknowledged that neither was alleged to have done anything wrong since their appointments as directors, and that at the time of their appointments the appellants had confirmed to the Board that they understood and would abide by their duties and responsibilities as directors, including the responsibility to act in the best interests of the corporation and not in their own interests as shareholders. In the end, however, he concluded that because of

their prior public statements that they intended to "pursue efforts to maximize shareholder value at Stelco", and because of the nature of their business and the way in which they had been accumulating their shareholding position during the restructuring, and because of their linkage to 40% of the common shareholders, there was a risk that the appellants would not conduct themselves in a neutral fashion in the best interests of the corporation as directors.

74 In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.

75 Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants — including the respondents in this case — but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.

76 If the respondents are correct, and reasonable apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 (S.C.C.) at para. 35, "persons are assumed to act in good faith unless proven otherwise". With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

Part V — Disposition

77 For the foregoing reasons, then, I am satisfied that the motion judge erred in declaring the appointment of Messrs. Woollcombe and Keiper as directors of Stelco of no force and effect.

78 I would grant leave to appeal, allow the appeal and set aside the order of Farley J. dated February 25, 2005.

79 Counsel have agreed that there shall be no costs of the appeal.

***Goudge J.A.*:**

I agree.

***Feldman J.A.*:**

I agree.

Appeal allowed.

Footnotes

1 R.S.C. 1985, c. C-36, as amended.

2 The reference is to the decisions in *Dyle, Royal Oak Mines, and Westar*, cited above.

3 See paragraph 43, *infra*, where I elaborate on this distinction.

4 It is the latter authority that the directors of Stelco exercised when appointing the appellants to the Stelco Board.

5 Dennis H. Peterson, Shareholder Remedies in Canada (Markham: LexisNexis — Butterworths — Looseleaf Service, 1989) at 18-47.

6 Or, I would add, unpopular with other stakeholders.

7 Now s. 241.

TAB 2

2012 ONCA 552
Ontario Court of Appeal

Timminco Ltd., Re

2012 CarswellOnt 9633, 2012 ONCA 552, 219 A.C.W.S. (3d) 11

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Proposed Plan of Compromise or Arrangement with Respect to Timminco Limited and Becancour Silicon Inc. Applicants

Simmons, Juriansz, Epstein JJ.A.

Judgment: July 20, 2012
Docket: CA M41062, M41085

Proceedings: refused leave to appeal *Timminco Ltd., Re* (2012), 2012 CarswellOnt 1466 , 2012 ONSC 948, 2012 CarswellOnt 1466, 95 C.C.P.B. 222, 86 C.B.R. (5th) 171 ((Ont. S.C.J. [Commercial List]))

Counsel: Ashley J. Taylor, Erica Tait for Applicants
Douglas J. Wray, Jesse Kugler for Communications, Energy and Paperworkers Union of Canada
Charles E. Sinclair for United Steelworkers

Subject: Insolvency; Corporate and Commercial

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Cases considered:

Indalex Ltd., Re (2011), 2011 CarswellOnt 2458, 2011 ONCA 265, 2011 C.E.B. & P.G.R. 8433, 104 O.R. (3d) 641, 75 C.B.R. (5th) 19, 17 P.P.S.A.C. (3d) 194, 331 D.L.R. (4th) 352, 276 O.A.C. 347, 89 C.C.P.B. 39 (Ont. C.A.) — considered

Stelco Inc., Re (2005), 2005 CarswellOnt 6818, 204 O.A.C. 205, 78 O.R. (3d) 241, 261 D.L.R. (4th) 368, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307 (Ont. C.A.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8
Generally — referred to

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22
Generally — referred to

APPLICATION for leave to appeal a decision reported at *Timminco Ltd., Re* (2012), 2012 CarswellOnt 1466 , 2012 ONSC 948, 2012 CarswellOnt 1466, 95 C.C.P.B. 222, 86 C.B.R. (5th) 171 ((Ont. S.C.J. [Commercial List])).

***Per curiam*:**

1 Leave to appeal is denied.

2 In the CCAA context, leave to appeal is to be granted sparingly and only where there are serious and arguable grounds that are of real and significant interest to the parties. In determining whether leave ought to be granted, this Court is required to consider the following four-part inquiry:

- whether the point on the proposed appeal is of significance to the practice;
- whether the point is of significance to the action;
- whether the proposed appeal is *prima facie* meritorious or frivolous; and
- whether the appeal will unduly hinder the progress of the action.

See *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.)

3 In our view, the proposed appeals lack sufficient merit to meet this stringent test.

4 This court's decision in *Indalex Ltd., Re* (2011), 104 O.R. (3d) 641 (Ont. C.A.), affirms that a CCAA court may invoke the doctrine of paramountcy to override conflicting provisions of provincial statutes where the application of provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy.

5 Here, the motion judge recognized that in the circumstances of this case there was a conflict between the federal CCAA and the provincial PBA and SPPA. He found that, "[i]n the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated". Further, he concluded that "to ensure that the objectives of the CCAA are fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of the QSPPA and the OPBA".

6 We see no basis on which this court could interfere with the motion judge's decision, including his unassailable findings of fact that: (1) without DIP financing, Timminco would be forced to cease operating; (2) bankruptcy would not be in the interests of anyone, including members of the pension plan; (3) if the DIP lender did not get super priority, it would not have agreed to provide financing; and (4) there was insufficient liquidity or unfavourable terms associated with the rejected DIP proposals. In short, he found that there was "no real alternative" to approving the DIP facility and DIP super priority charge.

7 The motion judge also addressed the union's fiduciary arguments, primarily in his earlier reasons released February 2, 2012, that are incorporated by reference into his February 9, 2012 reasons. He concluded that it was in the best interests of all parties to proceed with the restructuring. We see no basis on which this court could interfere with this finding.

8 Costs are to the responding parties on the motions on a partial indemnity scale fixed in the amount of $1,500 per motion inclusive of disbursements and applicable taxes.

Application dismissed.

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TAB 3

2012 QCCA 665
Cour d'appel du Québec

Homburg Invest Inc., Re

2012 CarswellQue 3445, 2012 QCCA 665, 230 A.C.W.S. (3d) 357, J.E. 2012-824, EYB 2012-205048

In the matter of the plan of compromise or arrangement of:Statoil Canada Ltd., Petitioner-Impleaded party, and Homburg invest inc., Respondent-debtor-petitioner, v. The Cadillac Fairview Corporation Limited, Bos Solutions Ltd., Canadian Tubular Services Inc., Keywest Projects Ltd., Mhi Fund Management Inc., SPT Group Canada Ltd. formerly Neotechnology Consultants Ltd., Premier Petroleum Corp., Tucker Wireline Services Canada Inc., Surge Energy Inc., Moe Hannah Mcneil LLP, Logan Completion Systems Inc. and CE Franklin Ltd., Impleaded third parties-Impleaded third parties, and Samson Belair/Deloitte & Touche, Impleaded party-Monitor

Hilton J.C.A.

Heard: 1 march 2012
Judgment: 12 april 2012
Docket: C.A. Qué. Montréal 500-09-022267-116

Counsel: *Me Gerald N. Apostolatos, Me Stefan Chripounoff*, for Petitioner
Me Éric Préfontaine, Me Martin Desrosier, Me Alexandre Fallon, for Respondent
Me Mark Meland, for Cadillac Fairview Corporation Limited
Me Mathieu Lévesque, for Canadian Tubular services inc.; Premier Petroleum Corp.; Moe Hannah McNeil LLP
Me Louis Dumont, for Tucker Wireline Services Canada Inc.
Me Michael John Hanlon, for Surge Energy Inc.
Me Jocelyn Perreault, for Samson Belair/Deloitte & Touche

Subject: Insolvency

Allan R. Hilton, J.A.:

1 The Debtor Homberg Invest Inc. applied for relief under the *Companies' Creditors Arrangement Act*, [1] and an initial order was issued on September 9, 2011. The supervising judge, the Honourable Mr. Justice Louis J. Gouin, rendered judgment on December 5, 2011 granting Homburg's application for an order confirming the re-assignment and assignment of certain agreements relating to its position as a debtor with respect to commercial real estate premises in Alberta, and Homberg's release from obligations it had contracted thereunder. The effect of the order was to immediately enforce the obligations of Statoil Canada Ltd. under those agreements with respect to the landlord and subtenants of the premises. Statoil now seeks leave to appeal that judgment pursuant to sections 13 and 14 of the *CCAA*.

2 Statoil urges a barrage of reasons why leave should be granted, [2] which are conveniently summarized in paragraph 52 of its motion:

a) Did the motions judge have the power and jurisdiction to grant the orders sought in the Motion?

b) Did Homburg have the legal standing and interest to seek the conclusions of the Motion?

c) Could the motions judge exercise his powers so as to interfere with the contractual rights of third parties (Statoil, Cadillac Fairview and subtenants) in the manner that he did in the judgment?

3 A threshold issue is the criteria to be considered upon such an application for leave. Based on the judgment of Wittman, J.A., as he then was, in *Resurgence Asset Management LLC v. Canadian Airlines Corp.*,[3] there are four such criteria:

whether the point on appeal is of significance to the practice;

whether the point raised is of significance to the action itself;

whether the appeal is prima facie meritorious, or, on the other hand, whether it is frivolous, and;

whether the appeal will unduly hinder the progress of the action.

4 Judges of this Court to whom such applications have been addressed have held unanimously that the four criteria are cumulative; with the result that an applicant's failure to establish any one of them will result in the dismissal of the application.[4] In addition, it is also generally understood that an applicant carries a heavy burden in order to obtain leave, and that appellate courts will only grant such applications sparingly.

5 Without disputing the applicability of these four criteria, Statoil urges me to consider that they need not be cumulative, but weighed together, even if one or more of them are not established. In this respect, it points to the reasons of Yamauchi, J., of the Alberta Court of Queen's Bench in *Royal Bank of Canada v. Cow Harbour Construction Ltd.*,[5] who was hearing a *CCAA* leave application of the type before me. In doing so, Yamauchi, J. referred to reasons given in Alberta that advocate a different approach than the one that has been unanimously followed by judges of this Court. Here is what he said:

For DLL to obtain leave to appeal under the CCAA, it must meet the test set out by the Alberta Court of Appeal in Fairmont Resort Properties Ltd. (Re), 2009 ABCA 360 at para. 10, where the court said:

The test for leave involves a single criterion subsuming four factors. The single criterion is that there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are (1) whether the point on appeal is of significance to the practice; (2) whether the point raised is of significance to the action itself; (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; (4) whether the appeal will unduly hinder the progress of the action.

Before this Court considers the factors involved in the « test for leave, » it is worthwhile to outline the applicable standard of review that the Court of Appeal will apply if leave were to be granted. In Canadian Airlines Corp. (Re), 2000 ABCA 149 at paras. 28-29, the court held that:

28 The elements of the general criterion cannot be properly considered in a leave application without regard to the standard of review that this Court applies to appeals under the CCAA. If leave to appeal were to be granted, the applicable standard of review is succinctly set forth by Fruman, J.A. in *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) where she stated for the Court at p. 95:

.... this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the Chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

In Smoky River Coal Ltd. (Re) (1999), 237 A.R. 326 (Alta. C.A.), Hunt, J.A., speaking for the unanimous Court, extensively reviewed the CCAA's history and purpose, and observed at p. 341:

> The fact that an appeal lies only with leave of an appellate court (s. 13 CCAA) suggests that Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.
>
> The standard of review of this Court, in reviewing the CCAA decision of the supervising judge, is therefore one of correctness if there is an error of law. Otherwise, for an appellate court to interfere with the decision of the supervising judge, there must be a palpable and overriding error in the exercise of discretion or in findings of fact.
>
> [...]
>
> 29 *Fairmont Resort* provides us with the « test for leave. » The test is but one test, in which « there must be serious and arguable grounds that are of real and significant interest to the parties. » To determine whether DLL has met its onus, we must consider the four factors that *Fairmont Resort* outlines. The question then becomes whether DLL must satisfy all the factors. In other words, if it fails on one (or more), does fail to meet the test? The answer to this question lies in the decision of O'Brien J.A. in *Ketch Resources Ltd. v. Gauntlet Energy Corp. (Monitor of)*, 2005 CarswellAlta 1527, 15 C.B.R. (5th) 235 (C.A.). In that case, Justice O'Brien went through and applied the four factors to the facts with which he was dealing. The applicant in that case had met some of the factors, but not others. Justice O'Brien at para. 15, made his decision not to grant leave after « weighing all the factors. » In other words, success or failure to prove one or more of the factors does not guarantee that the applicant has met the « test for leave. » The court must weigh all the factors.
>
> [Emphasis added.]

6 In analyzing whether I should follow what was suggested in the foregoing extract or the judicial history that has prevailed in this province, I am mindful that the Supreme Court of Canada granted leave to appeal [6] the judgment of my colleague Chamberland, J.A. in *Newfoundland and Labrador v. AbitibiBowater* [7] in which he dismissed an application for leave to appeal. I can only assume the Court decided to hear the appeal to look at the merits of the Superior Court judgment of Gascon, J., as he then was, [8] rather than to decide whether Chamberland, J.A. had erred by refusing leave. Only time will tell once the Court's judgment on the merits is released. [9]

7 That being said, unless and until the Supreme Court determines a different test to apply by an appellate judge hearing a *CCAA* leave application, or until a panel of this Court holds that the test articulated in the extract I have quoted in paragraph [5] above is the one that should be followed, I believe that the better course for me is to apply the principles that have been repeatedly stated by judges of this Court. Counsel in Quebec are entitled to stability in knowing what test they will need to satisfy in bringing a *CCAA* leave application. The parameters of that test should not depend on who, as a matter of chance, happens to be the judge in chambers on the day they present their motion. I will therefore consider Statoil's application on the basis that the four recognized criteria are cumulative.

8 I turn now to the three grounds of appeal mentioned in paragraph [2] above.

9 With respect to the jurisdictional issue, Statoil argues that the motions judge overstepped the limits to which he was subject in a *CCAA* application of the type with which he was seized because the orders issued were not « necessary » [10] to facilitate Homburg's reorganization and to achieve the *CCAA* objectives. Instead, it says that he adopted what it characterizes as a « broad and result-driven » approach that is reflected in paragraph [114] of the judgment to the effect that granting the orders sought in Homburg's motion is a « fair, equitable, practical and efficient solution to HII's [11] default under the Head Lease ».

10 To this argument, Homburg replies that Statoil misstates the law, and notes that section 11 *CCAA* refers not to necessity but to the power of a supervising judge « to make any order that it considers appropriate in the circumstances ». It adds that by releasing Homburg from financial obligations under the agreements, the judgment promotes the remedial purpose of the *CCAA* by enhancing the possibility of a successful restructuring.

11 Next is the issue of standing.

12 Statoil argues that Homburg had no legal standing, with the exception of one conclusion that it does not contest, to seek declarations that relating to the enforcement of its obligations to Cadillac Fairview under the Head Lease between it and Statoil, the effect of which is to remove Homburg from the line of fire. Statoil contends that only Cadillac Fairview had the required standing, and that Gouin, J. misconstrued the identity of the proper party before him.

13 As for Homburg, it says that it is at the centre of the various agreements whereby Statoil undertook to step into its shoes in the event of its default under the agreements, which has now happened. All that it sought by the conclusions of the motion, therefore, is a declaration that Statoil live up to the obligations it had contractually undertaken, and acknowledged subsequently in writing.

14 Finally, there is the issue of the interference with the contractual rights of third parties by the effect of the orders, in this case not only Statoil, but also Cadillac Fairview and the subtenants of the premises. All of them are third party non-debtors, and Statoil says that Gouin, J. simply lacked the authority to interfere with the exercise of their respective contractual rights between themselves. Statoil acknowledges what it describes as a « certain jurisprudential controversy on this issue », but says the controlling case is that of the Ontario Court of Appeal in *Stelco Inc. (Re)*. [12] Blair, J.A., for the Court, remarked that the *CCAA* contains « no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves », [13] and that the trial judge had been « very careful to say that nothing in his reasons should be taken to determine or affect the relationship between (categories of debenture holders). » [14]

15 I note immediately that the issue in *Re Stelco* arose in a very different context, namely, the classification of categories of debenture holders for voting purposes on a proposed plan of arrangement or compromise of a debtor company. The proposed classification was dismissed at trial and confirmed on appeal by the same panel that granted leave. The ratio of the judgment does not appear to be of much significance to the resolution of the issues that were before Gouin, J.

16 In a nutshell, while at the same time disputing Statoil's interpretation of the contractual agreements, Homburg argues that the issue is not, in and of itself, of any relevance to the ongoing *CCAA* proceedings, nor likely to be of any precedential value to insolvency practice in Canada.

17 In my view, whether individually or collectively, I do not consider that Statoil has satisfied the test incumbent upon it to be granted leave.

18 Any appeal would have to proceed based on the trial judge's findings of fact. Whatever may be said of them, Statoil's motion does not satisfy me that they could be found to be manifestly unfounded with the necessary determinative effect if the Court were to intervene. Moreover, the great latitude given *CCAA* supervising judges would weigh heavily against any appeal succeeding given the apparent novelty of some of the questions raised. In addition, although some of the legal issues appear interesting from an objective standpoint, they fall short of being significant to the action in the overall scheme of things, nor do they appear to be *prima facie* meritorious, although I would hesitate to characterize them as frivolous.

19 One final point, which is in and of itself dispositive, leads to the motion failing.

20 The judgment of Gouin, J. granted the relief claimed with provisional effect notwithstanding appeal, and no attempt was made to suspend provisional execution of the judgment. To the extent the terms of the judgment may already have been implemented, it would be akin to unscrambling scrambled eggs to put matters back where they were before the orders were implemented, not to mention the uncertainty that would be created by the mere fact of leave being granted.

21 Statoil's motion is accordingly dismissed with costs.

Footnotes

1 R.S.C. c.-36.

2 I omit from consideration any grounds that essentially argue questions of interpretation of fact, which, even in the context of complicated commercial real estate transactions, would be highly unlikely to persuade a judge in chambers to grant leave. I also take no account of its argument that it was more or less bulldozed into a hearing that occurred 13 days after the service of the proceeding, thus, it says, preventing it from adequately conducting pre-trial discovery, since it seeks no relief, such as a new trial, that is directly related to the expedited process about which it complains.

3 [2000] A.J. No. 610, 2000 ABCA 149, at paras. 6 and 7.

4 See, for example, *4370422 Canada inc. (Davie Yards inc.) (Arrangement relatif à)*, J.E. 2012-159, 2011 QCCA 2442, at paras. 11 and 12 per Pelletier, J.A.; *Newfoundland and Labrador v. AbitibiBowater inc.*, , 68 C.B.R. (5th) 57, 2010 QCCA 965, at paras. 25-29 per Chamberland, J.A.; *Papiers Gaspésia inc. (Arrangement relative à)*, 9 C.B.R. (5th) 103, per Bich, J.A. at para. 5; *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, J.E. 2010-568, 2010 QCCA 403, per Bich, J.A., at para 9; and, *Imprimerie Mirabel inc. v. Ernst & Young inc.*, J.E. 2010-1256, 2010 QCCA 1244, per Dufresne, J.A., at para. 5.

5 72 C.B.R. (5th) 261, 2010 ABQB 637.

6 Supreme Court of Canada file 33797.

7 *Supra* note 3.

8 2010 QCCS 1061.

9 The appeal was heard by the full bench on November 16, 2011, after which judgment was reserved.

10 Relying on *Century Services Inc. v. Canada (A.G.)*, [2010] 3 S.C.R. 379, 2010 SCC 60.

11 For ease of understanding, I am using the first name of the company, Homburg, rather than its initials, HII, to identify the respondent.

12 261 D.L.R. (4th) 368; [2005] O.J. No. 4883.

13 *Ibid.*, para. 32.

14 *Ibid.*, para. 33.

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TAB 4

2005 CarswellOnt 6283
Ontario Court of Appeal

Stelco Inc., Re

2005 CarswellOnt 6283, [2005] O.J. No. 4733, 15 C.B.R. (5th) 288, 204 O.A.C. 216, 78 O.R. (3d) 254

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. c-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. c-36, AS AMENDED

Laskin, Rosenberg, LaForme JJ.A.

Heard: November 2, 2005
Judgment: November 4, 2005
Docket: CA M33099, C44332

Proceedings: affirming *Stelco Inc., Re* (2005), 2005 CarswellOnt 5023 (Ont. S.C.J. [Commercial List])

Counsel: Robert W. Staley, Alan P. Gardner for Appellants, Informal Committee of Senior Debentureholders
Michael E. Barrack, Geoff R. Hall for Respondent, Stelco Inc.
Robert I. Thornton, Kyla E.M. Mahar for Respondent, Monitor
John R. Varley for Respondents, Salaried Active Employees
Michael C.P. McCreary, David P. Jacobs for Respondents, USW Locals 8782 and 5328
George Karayannides for Respondent, EDS Canada Inc.
Aubrey E. Kauffman for Respondents, Tricap Management Ltd.
Ben Zarnett, Gale Rubenstein for Respondents, Province of Ontario
Murray Gold for Respondents, Salaried Retirees
Kenneth T. Rosenberg for Respondents, USW International
Robert A. Centa for Respondents, USWA
George Glezos for Respondents, AGF Management Ltd.

Subject: Insolvency

Table of Authorities

Cases considered by *Rosenberg J.A.*:

Bargain Harold's Discount Ltd. v. Paribas Bank of Canada (1992), 10 C.B.R. (3d) 23, 4 B.L.R. (2d) 306, 7 O.R. (3d) 362, 1992 CarswellOnt 159 (Ont. Gen. Div.) — considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136, 1990 CarswellBC 394 (B.C. C.A.) — considered

Inducon Development Corp., Re (1991), 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.) — considered

Stelco Inc., Re (2005), 2005 CarswellOnt 743, 7 C.B.R. (5th) 310 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142 (Ont. C.A.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — considered

s. 6 — referred to

s. 11 — referred to

s. 11(4) — considered

s. 13 — pursuant to

APPEAL by certain creditors from judgment reported at *Stelco Inc., Re* (2005), 2005 CarswellOnt 5023, 15 C.B.R. (5th) 279 (Ont. S.C.J. [Commercial List]), granting motions by creditor for extension of stay granted under *Companies' Creditors Arrangement Act*, permission to enter plan, and order for meeting regarding plan to convene.

***Rosenberg J.A.*:**

1 This appeal is another chapter in the continuing attempt by Stelco Inc. and four of its wholly-owned subsidiaries to emerge from protection from their creditors under the *Companies' Creditors Arrangement* Act, R.S.C. 1985, c. C-36. The appellant, an Informal Committee of Senior Debenture Holders who are Stelco's largest creditor, applies for leave to appeal under s. 13 of the *CCAA* and if leave be granted appeals three orders made by Farley J. on October 4, 2005 in the *CCAA* proceedings. These orders authorize Stelco to enter into agreements with two of its stakeholders and a finance provider. The appellant submits that the motions judge had no jurisdiction to make these orders and that the effect of these orders is to distort or skew the *CCAA* process. A group of Stelco's equity holders support the submissions of the appellant. The various other players with a stake in the restructuring and the court-appointed Monitor support the orders made by the motions judge.

2 Given the urgency of the matter it is only possible to give relatively brief reasons for my conclusion that while leave to appeal should be granted, the appeal should be dismissed.

The Facts

3 Stelco Inc. and the four wholly-owned subsidiaries obtained protection from their creditors under the *CCAA* on January 29, 1994. Thus, the *CCAA* process has been going on for over twenty months, longer than anyone expected. Farley J. has been managing the process throughout. The initial order made under s. 11*of* the *CCAA* gives Stelco sole and exclusive authority to propose and file a plan of arrangement with its creditors. To date, attempts to restructure have been unsuccessful. In particular, a plan put forward by the Senior Debt Holders failed.

4 While there have no doubt been many obstacles to a successful restructuring, the paramount problem appears to be that stakeholders, the Ontario government and Stelco's unions, who do not have a formal veto (*i.e.* they do not have a right to vote to approve any plan of arrangement and reorganization) have what the parties have referred to as a functional veto. It is unnecessary to set out the reasons for these functional vetoes. Suffice it to say, as did the Monitor in its Thirty-Eighth Report, that each of these stakeholders is "capable of exercising sufficient leverage against Stelco and other stakeholders such that no restructuring could be completed without that stakeholder's support".

5 In an attempt to successfully emerge from *CCAA* protection with a plan of arrangement, the Stelco board of directors has negotiated with two of these stakeholders and with a finance provider and has reached three agreements: an agreement with the provincial government (the Ontario Agreement), an agreement with The United Steelworkers International and Local 8782 (the USW Agreement), and an agreement with Tricap Management Limited (the Tricap Agreement). Those agreements are intrinsic to the success of the Plan of Arrangement that Stelco proposes. However, the debt holders including this appellant have the ultimate veto. They alone will vote on whether to approve Stelco's Plan. The vote of the affected debt holders is scheduled for November 15, 2005.

6 The three agreements have terms to which the appellant objects. For example, the Tricap Agreement contemplates a break fee of up to $10.75 million depending on the circumstances. Tricap will be entitled to a break fee if the Plan fails to obtain the requisite approvals or if Tricap terminates its obligations to provide financing as a result of the Plan being amended without Tricap's approval. Half of the break fee becomes payable if the Plan is voted down by the creditors. Another example is found in the Ontario Agreement, which provides that the order sanctioning the Final Plan shall name the members of Stelco's board of directors and such members must be acceptable to the province. Consistent with the Order of March 30, 2005 and as required by the terms of the agreements themselves, Stelco sought court authorization to enter into the three agreements. We were told that, in any event, it is common practice to seek court approval of agreements of this importance. The appellant submits that the motions judge had no jurisdiction to make these orders.

7 There are a number of other facts that form part of the context for understanding the issues raised by this appeal. First, on July 18, 2005, the motions judge extended the stay of proceedings until September 9, 2005 and warned the stakeholders that this was a "real and functional deadline". While that date has been extended because Stelco was making progress in its talks with the stakeholders, the urgency of the situation cannot be underestimated. Something will have to happen to either break the impasse or terminate the *CCAA* process.

8 Second, on October 4, 2005, the motions judge made several orders, not just the orders to authorize Stelco to enter into the three agreements to which the appellant objects. In particular, the motions judge extended the stay to December and made an order convening the creditors meeting on November 15th to approve the Stelco Plan. The appellant does not object to the orders extending the stay or convening the meeting to vote on the Plan.

9 Third, the appellant has not sought permission to prepare and file its own plan of arrangement. At present, the Stelco Board's Plan is the only plan on the table and as the motions judge observed, "one must realistically appreciate that a rival financing arrangement at this stage, starting from essentially a standing start, would take considerable time for due diligence and there is no assurance that the conditions will be any less onerous than those extracted by Tricap".

10 Fourth, in his orders authorizing Stelco to enter into these agreements, the motions judge made it clear that these authorizations, "are not a sanction of the terms of the plan ... and do not prohibit Stelco from continuing discussions in respect of the Plan with the Affected Creditors".

11 Fifth, the independent Monitor has reviewed the Agreements and the Plan and supports Stelco's position.

12 Finally, and importantly, the Senior Debenture Holders that make up the appellant have said unequivocally that they will not approve the Plan. The motions judge recognized this in his reasons:

> The Bondholder group has indicated that it is firmly opposed to the plan as presently constituted. That group also notes that more than half of the creditors by $ value have advised the Monitor that they are opposed to the plan as presently constituted. ... The present plan may be adjusted (with the blessing of others concerned) to the extent that it, in a revised form, is palatable to the creditors (assuming that they do not have a massive change of heart as to the presently proposed plan).

Leave to Appeal

13 The parties agree on the test for granting leave to appeal under s. 13 of the *CCAA*. The moving party must show the following:

(a) the point on appeal is of significance to the practice;

(b) the point is of significance to the action;

(c) the appeal is *prima facie* meritorious; and

(d) the appeal will not unduly hinder the progress of the action.

14 In my view, the appellant has met this test. The point raised is a novel and important one. It concerns the jurisdiction of the supervising judge to make orders that do not merely preserve the *status quo* but authorize key elements of the proposed plan of arrangement. The point is of obvious significance in this action. If the motions judge's approvals were to be set aside, it is doubtful that the Plan could proceed. On the other hand, the appellant submits that the orders have created a coercive and unfair environment and that the Plan is doomed to fail. It was therefore wrong to authorize Stelco to enter into agreements, especially the Tricap Agreement, that could further deplete the estate. The appeal is *prima facie* meritorious. The matter appears to be one of first impression. It certainly cannot be said that the appeal is frivolous. Finally, the appeal will not unduly hinder the progress of the action. Because of the speed with which this court is able to deal with the case, the appeal will not unduly interfere with the continuing negotiations prior to the November 15th meeting.

15 For these reasons, I would grant leave to appeal.

Analysis

Jurisdiction generally

16 The thrust of the appellant's submissions is that while the judge supervising a *CCAA* process has jurisdiction to make orders that preserve the *status quo*, the judge has no jurisdiction to make an order that, in effect, entrenches elements of the proposed Plan. Rather, the approval of the Plan is a matter solely for the business judgement of the creditors. The appellant submits that the orders made by the motions judge are not authorized by the statute or under the court's inherent jurisdiction and are in fact inconsistent with the scheme and objects of the *CCAA*. They submit that the orders made in this case have the effect of substituting the court's judgment for that of the debt holders who, under s. 6, have exclusive jurisdiction to approve the plan. Under s. 6, it is only after a majority in number representing two-thirds in value of the creditors vote to approve the plan that the court has a role in deciding whether to sanction the plan.

17 Underlying this argument is a concern on the part of the creditors that the orders are coercive, designed to force the creditors to approve a plan, a plan in which they have had no input and of which they disapprove.

18 In my view, the motions judge had jurisdiction to make the orders he did authorizing Stelco to enter into the agreements. Section 11 of the *CCAA* provides a broad jurisdiction to impose terms and conditions on the granting of the stay. In my view, s. 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the *status quo*. The point of the *CCAA* process is not simply to preserve the *status quo* but to facilitate restructuring so that the company can successfully emerge from the process. This point was made by Gibbs J.A. in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at para. 10:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo *and to move the process along to the point*

> *where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.* Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11. [Emphasis added.]

19 In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary jurisdiction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and do not unduly interfere with the business judgement of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

20 The argument that the orders are coercive and therefore unreasonably interfere with the rights of the creditors turns largely on the potential $10.75 million break fee that may become payable to Tricap. However, the motions judge has found as a fact that the break fee is reasonable. As counsel for Ontario points out, this necessarily entails a finding that the break fee is not coercive even if it could to some extent deplete Stelco's assets.

21 Further, the motions judge both in his reasons and in his orders made it clear that he was not purporting to sanction the Plan. As he said in his reasons, "I wish to be absolutely clear that I am not ruling on or considering in any way the fairness of the plan as presented". The creditors will have the ultimate say on November 15th whether this plan will be approved.

Doomed to fail

22 The appellant submits that the motions judge had no jurisdiction to approve orders that would facilitate a Plan that is doomed to fail. The authorities indicate that a court should not approve a process that will lead to a plan that is doomed to fail. The appellant says that it has made it as clear as possible that it does not accept the proposed Plan and will vote against it. In *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), at 310 Farley J. said that, "It is of course, ... fruitless to proceed with a plan that is doomed to failure at a further stage."

23 However, it is important to take into account the dynamics of the situation. In fact, it is the appellant's position that nothing will happen until a vote on a Plan is imminent or a proposal from Stelco is voted down; only then will Stelco enter into realistic negotiations with its creditors. It is apparent that the motions judge is of the view that the Plan is not doomed to fail; he would not have approved steps to continue the process if he thought it was. As Austin J. said in *Bargain Harold's Discount Ltd. v. Paribas Bank of Canada* (1992), 7 O.R. (3d) 362 (Ont. Gen. Div.), at 369:

> The jurisprudence is clear that if it is obvious that no plan will be found acceptable to the required percentages of creditors, then the application should be refused. *The fact that Paribas, the Royal Bank and K Mart now say there is no plan that they would approve, does not put an end to the inquiry.* All affected constituencies must be considered, including secured, preferred and unsecured creditors, employees, landlords, shareholders, and the public generally.... [Emphasis added.]

24 It must be a matter of judgment for the supervising judge to determine whether the Plan is doomed to fail. This Plan is supported by the other stakeholders and the independent Monitor. It is a product of the business judgment of the Stelco board as a way out of the *CCAA* process. It was open to the motions judge to conclude that the plan was not doomed to fail and that the process should continue. Despite its opposition to the Plan, the appellant's position inherently concedes the possibility of success, otherwise these creditors would have opposed the extension of the stay, opposed the order setting a date for approval of the plan and sought to terminate the *CCAA* proceedings.

25 The motions judge said this in his reasons:

> It seems to me that Stelco as an ongoing enterprise is getting a little shop worn/shopped worn. It would not be helpful to once again start a new general process to find the ideal situation [sic solution?]; rather the urgency of the situation requires that a reasonable solution be found.

He went on to state that in the month before the vote there "will be considerable discussion and negotiation as to the plan which will in fact be put to the vote" and that the present Plan may be adjusted. He urged the stakeholders and Stelco to "deal with this

question in a positive way" and that "it is better to move forward than backwards, especially where progress is required". It is obvious that the motions judge has brought his judgment to bear and decided that the Plan or some version of it is not doomed to fail. I can see no basis for second-guessing the motions judge on that issue.

26 I should comment on a submission made by the appellant that no deference should be paid to the business judgment of the Stelco board. The appellant submits that the board is entitled to deference for most of the decisions made in the day-to-day operations during the *CCAA* process except whether a restructuring should proceed or a plan of arrangement should proceed. The appellant submits that those latter decisions are solely the prerogative of the creditors by reason of s. 6. While there is no question that the ultimate decision is for the creditors, the board of directors plays an important role in the restructuring process. Blair J.A. made this clear in an earlier appeal to this court concerning Stelco reported at (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 44:

> What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. *The company's role in the restructuring*, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff, supr*a, at para. 5, "to make order[s] so as to effectively maintain the *status quo* in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.* [Emphasis added.]

27 The approvals given by the motions judge in this case are consistent with these principles. Those orders allow the company's restructuring efforts to move forward.

28 The position of the appellant also fails to give any weight to the broad range of interests in play in a *CCAA* process. Again to quote Blair J.A. in the earlier Stelco case at para. 36:

> In the *CCAA* context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, *thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders*. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. [Emphasis added.]

29 For these reasons, I would not give effect to the submissions of the appellant.

Submissions of the equity holders

30 The equity holders support the position of the appellant. They point out that the Stelco *CCAA* situation is somewhat unique. While Stelco entered the process in dire straits, since then almost unprecedented worldwide prices for steel have boosted Stelco's fortunes. In an endorsement of February 28, 2005 [2005 CarswellOnt 743 (Ont. S.C.J. [Commercial List])], the motions judge recognized this unusual state of affairs:

> In most restructurings, on emergence the original shareholder equity, if it has not been legally "evaporated" because the insolvent corporations was so for under water, is very substantially diminished. For example, the old shares may be converted into new emergent shares at a rate of 100 to 1; 1,000 to 1; or even 12,000 to 1. ... Stelco is one of those rare situations in which a change of external circumstances ... may result in the original equity having a more substantial "recovery" on emergence than outline above.

31 The equity holders point out that while an earlier plan would have allowed the shareholders to benefit from the continued and anticipated growth in the Stelco equity, the present plan does not include any provision for the existing shareholders. I agree

with counsel for Stelco that these arguments are premature. They raise issues for the supervising judge if and when he is called upon to exercise his discretion under s. 6 to sanction the Plan of arrangement.

Disposition

32 Accordingly, I would dismiss the appeal. On behalf of the court, I wish to thank all counsel for their very helpful written and oral submissions that made it possible to deal with this appeal expeditiously.

***Laskin J.A.*:**

I agree.

***LaForme J.A.*:**

I agree.

Appeal dismissed.

TAB 5

2000 ABCA 149
Alberta Court of Appeal [In Chambers]

Canadian Airlines Corp., Re

2000 CarswellAlta 503, 2000 ABCA 149, [2000] A.W.L.D. 563, [2000] A.J. No. 610, 19 C.B.R. (4th) 33, 225 W.A.C. 120, 261 A.R. 120, 80 Alta. L.R. (3d) 213

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of the Business Corporations Act (Alberta) S.A. 1981, c.B-15., as amended, Section 185

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

Resurgence Asset Management LLC, Applicant and Canadian Airlines Corporation and Canadian Airlines International Ltd., Respondents

Wittmann J.A.

Heard: May 18, 2000
Judgment: May 29, 2000
Docket: Calgary Appeal 00-18816

Proceedings: (May 12, 2000), Doc. Calgary 0001-05071 [Alta. Q.B.]

Counsel: *D. Haigh, Q.C.*, and *D. Nishimura*, for Applicant.
A.L. Friend, Q.C., and *H.M. Kay, Q.C.*, for Respondents.
S. Dunphy, for Air Canada.
A.J. McConnell, for Bank of Nova Scotia Trust Company of New York and Montreal Trust Co. of Canada.
P.T. McCarthy, Q.C., for Price Waterhouse Coopers.

Subject: Corporate and Commercial; Insolvency

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Multitech Warehouse Direct Inc., Re (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 72 C.R. (N.S.) 20 (Alta. Q.B.) — referred to

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Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, 34 B.C.L.R. (2d) 122, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363 (B.C. C.A.) — referred to

NsC Diesel Power Inc., Re (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (N.S. T.D.) — referred to

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s. 2 "secured creditor" — considered

s. 2 "unsecured creditor" — considered

s. 4 — considered

s. 5 — considered

s. 6 — considered

s. 6(a) — considered

s. 6(b) — considered

s. 13 — considered

APPLICATION for leave to appeal from judgment reported at (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.).

Memorandum of decision. ***Wittmann J.A.*****:**

Introduction

1 This is an application for leave to appeal the decision of Paperny, J. made on May 12, 2000, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (*CCAA*). The applicant, Resurgence Asset Management LLC (Resurgence), is an unsecured creditor by virtue of its holding 58.2 per cent of U.S. $100,000,000.00 unsecured notes issued by Canadian Airlines Corporation (CAC)

2 CAC and Canadian Airlines International Ltd. (CAIL) (collectively Canadian) commenced proceedings under the *CCAA* on March 24, 2000.

3 A proposed Plan of Compromise and Arrangement (the Plan) has been filed in this matter regarding CAC and CAIL, pursuant to the CCAA.

4 The decision of Paperny, J. May 12, 2000 (the Decision) ordered, among other things, that the classification of creditors not be fragmented to exclude Air Canada as a separate class from Resurgence in terms of the unsecured creditors; that Air Canada should be entitled to vote on the Plan pursuant to s. 6 of the *CCAA* at the creditors' meeting to be held May 26, 2000; that there be no separation of unsecured creditors of CAC from unsecured creditors of CAIL for voting purposes; and that votes in respect of claims assigned to Air Canada, be recorded and tabulated separately, for the purpose of consideration in the application for court approval of the Plan (the Fairness Hearing).

Leave to Appeal Under the CCAA

5 The section of the *CCAA* governing appeals to this Court is as follows:

> 13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

6 The criterion to be applied in an application for leave to appeal pursuant to the *CCAA* is not in dispute. The general criterion is embodied in the concept that there must be serious and arguable grounds that are of real and significant interest to the parties: *Re Multitech Warehouse Direct Inc.* (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) at 63; *Re Smoky River Coal Ltd.* (1999), 237 A.R. 83 (Alta. C.A.); *Re Blue Range Resource Corp.* (1999), 244 A.R. 103 (Alta. C.A.); *Re Blue Range Resource Corp.* (2000), 15 C.B.R. (4th) 160 (Alta. C.A. [In Chambers]); *Re Blue Range Resource Corp.* (2000), 15 C.B.R. (4th) 192 (Alta. C.A. [In Chambers]).

7 Subsumed in the general criterion are four applicable elements which originated in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C. C.A.), and were adopted in *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279 (B.C. C.A.). McLachlin, J.A. (as she then was) set forth the elements in *Power Consolidated* as follows at p.397:

(1) whether the point on appeal is of significance to the practice;

(2) whether the point raised is of significance to the action itself;

(3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) whether the appeal will unduly hinder the progress of the action.

These elements have been considered and applied by this Court, and were not in dispute before me as proper elements of the applicable criterion.

Facts

8 On or about October 19, 1999, Air Canada announced its intention to make a bid for CAC and to proceed to complete a merger subject to a restructuring of Canadian's debt. On or about November 5, 1999, following a ruling by the Quebec Superior Court, a competing offer by Airline Industry Revitalization Co. Inc. was withdrawn and Air Canada indicated that it would proceed with its offer for CAC.

9 On or about November 11, 1999, Air Canada caused the incorporation of 853350 Alberta Ltd. (853350), for the sole purpose of acquiring the majority of the shares of CAC. At the time of incorporation, Air Canada held 10 per cent of the shares of 853350. Paul Farrar, among others, holds the remaining 90 per cent of the shares of 853350.

10 On or about November 11, 1999, Air Canada, through 853350, offered to purchase the outstanding shares of CAC at a price of $2.00 per share for a total of $92,000,000.00 for all of the issued and outstanding voting and non-voting shares of CAC.

11 On or about January 4, 2000, Air Canada and 853350 acquired 82 per cent of CAC's outstanding common shares for approximately $75,000,000.00 plus the preferred shares of CAIL for a purchase price of $59,000,000.00. Air Canada then replaced the Board of Directors of CAC with its own nominees.

12 Substantially all of the aircraft making up the fleet of Canadian are held by Air Canada through lease arrangements with various lessors or other aircraft financial agencies. These arrangements were the result of negotiations with lessors, jointly conducted by Air Canada and Canadian.

13 In general, these arrangements include the following:

(i) the leases have been renegotiated to reflect contemporary fair market value (or below) based on two independent desk top valuations; and

(ii) the present value of the difference between the financial terms under the previous lease arrangements and the renegotiated fair market value terms was characterized as "unsecured deficiency," reflected in a Promissory Note payable to the lessor from Canadian and assigned by the lessor to Air Canada.

14 In the result, Air Canada has acquired or is in the process of acquiring all but eight of the deficiency claims of aircraft lessors or financiers listed in Schedule "B" to the Plan in the total amount of $253,506.944.00. Air Canada intends to vote those claims as an unsecured creditor under the Plan.

15 The executory contracts claims listed in Schedule "B" to the Plan total $110,677,000.00, of which $108,907,000.00 is the claim of Loyalty Management Group Canada Inc. (Loyalty), an entity with a long term contract with Canadian to purchase air

miles. The claim is subject to an agreement of settlement between Loyalty, Canadian and Air Canada. Air Canada was assigned the Loyalty unsecured claim.

16 In the Plan, all unsecured creditors of both CAC and CAI are grouped in the same class for voting purposes.

17 Pursuant to the Plan, unsecured creditors will receive a payment of $0.12 on the dollar for each $1.00 of their claim unless the total amount of unsecured claims exceeds $800 million, in which case, they will receive less. Air Canada will fund this Pro Rata Cash Amount. As a result of the assignments of the deficiency amounts in favour of Air Canada, if the Plan is approved, Air Canada will notionally be paying a substantial proportion of the Pro Rata Cash Amount to itself.

18 The Plan further contemplates Air Canada becoming the 100 per cent owner of Canadian through 853350.

19 On April 7, 2000, an Order was granted by Paperny, J., directing that the Plan be filed by the Petitioners; establishing a claims dispute process; authorizing the calling of meetings for affected creditors to vote on the Plan to be held on May 26, 2000; authorizing the Petitioners to make application for an Order sanctioning the Plan on June 5, 2000; and providing other directions.

20 The April 7, 2000 Order established three classes of creditors: (a) the holders of Canadian Airlines Corporation 10 per cent Senior Secured Notes due 2005 (the Secured Noteholders); (b) the secured creditors of the Petitioners affected by the Plan (the Affected Secured Creditors); and (c) the unsecured creditors affected by the Plan (the Affected Unsecured Creditors).

21 On April 25, 2000, the Petitioners filed and served the Plan, in accordance with the Order of April 7, 2000. By Notice of Motion dated April 27, 2000, Resurgence brought an application, among other things, seeking "directions as to the classification and voting rights of the creditors ... (and) the quantum of the 'deficiency claims' assigned to Air Canada." Resurgence sought to have Air Canada excluded from voting as an unsecured creditor unless segregated into a separate class. Resurgence also sought to have the holders of the unsecured notes vote as a separate class.

22 The result of the April 27, 2000 motion by Resurgence is the Decision.

The Decision

23 In the Decision, the supervising chambers judge referred to her order of April 14, 2000, wherein she approved transactions involving the re-negotiation of the aircraft leases. She referred to "about $200,000,000.00 worth of concessions for CAIL" as "concessions or deficiency claims" which were quantified and reflected in promissory notes which were assigned to Air Canada in exchange for its guarantee of the aircraft leases. The monitor approved of the method of quantifying the claims and Paperny, J. approved the transactions, reserving the issue of classification and voting to her May 12 Decision.

24 The Plan provides for one class of unsecured creditor. The unsecured class is composed of a number of types of unsecured claims including executory contracts (e.g. Air Canada from Loyalty) unsecured notes (e.g. Resurgence), aircraft leases (e.g. Air Canada from lessors), litigation claims, real estate leases and the deficiencies, if any, of the senior secured noteholders.

25 In seeking to have Air Canada vote the promissory notes in a separate class Resurgence argued several factors before Paperny, J., as set out at pp. 4-5 of the Decision as follows:

> 1. The Air Canada appointed board caused Canadian to enter into these ***CCAA*** proceedings under which Air Canada stands to gain substantial benefits in its own operations and in the merged operations and ownership contemplated after the compromise of debts under the plan.
>
> 2. Air Canada is providing the fund of money to be distributed to the Affected Unsecured Creditors and will, therefore, end up paying itself a portion of that money if it is included in the Affected Unsecured Creditors' class and permitted to vote.
>
> 3. Air Canada gave no real consideration in acquiring the deficiency claims and manufactured them only to secure a 'yes' vote.

26 She then recited the argument made by Air Canada and Canadian to the effect that the legal rights associated with Air Canada's unsecured claims are the same as those associated with the other affected unsecured claimants, and that the matters raised by Resurgence relating to classification are really matters of fairness more appropriately dealt with in a Fairness Hearing scheduled to be held June 5, 2000.

27 After observing that the *CCAA* offers no guidance with respect to the classification of claims, beyond identifying secured and unsecured categories and the possibility of classes within each category, and that the process has developed in case law, Paperny, J. embarked on a detailed analysis and consideration of the case law in this area including *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.); *Sovereign Life Assurance Co. v. Dodd* (1891), [1892] 2 Q.B. 573 (Eng. C.A.); *Re Fairview Industries Ltd.* (1991), 11 C.B.R. (3d) 71 (N.S. T.D.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.); *Re Woodward's Ltd.* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.); *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.) at 626; *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.); *Re Wellington Building Corp.*, [1934] O.R. 653, 16 C.B.R. 48 (Ont. S.C.). Paperny, J. also referred to an oft-cited article "Reorganization under the Companies Creditors Arrangement Act" by S. E. Edwards (1947), 25 Can. Bar Rev. 587. She concluded her legal analysis at pp.12-13 by setting forth the principles she found to be applicable in assessing commonality of interest as an appropriate test for the classification of creditors:

> 1. Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test;
>
> 2. The interests to be considered are the legal interests the creditor holds qua creditor in relationship to the debtor company, prior to and under the plan as well as on liquidation;
>
> 3. The commonality of these interests are to be viewed purposively, bearing in mind the object of the ***CCAA***, namely to facilitate reorganizations if at all possible;
>
> 4. In placing a broad and purposive interpretation on the ***CCAA***, the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans.
>
> 5. Absent bad faith, the motivations of the creditors to approve or disapprove are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

The Standard of Review and Leave Applications

28 The elements of the general criterion cannot be properly considered in a leave application without regard to the standard of review that this Court applies to appeals under the *CCAA*. If leave to appeal were to be granted, the applicable standard of review is succinctly set forth by Fruman, J.A. in *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) where she stated for the Court at p.95:

> .... this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the Chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

In another recent *CCAA* case from this Court, *Re Smoky River Coal Ltd.* (1999), 237 A.R. 326 (Alta. C.A.), Hunt, J.A., speaking for the unanimous Court, extensively reviewed the history and purpose of the *CCAA*, and observed at p.341:

> The fact that an appeal lies only with leave of an appellate court (s. 13 ***CCAA***) suggests that Parliament, mindful that ***CCAA*** cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.

29 The standard of review of this Court, in reviewing the *CCAA* decision of the supervising judge, is therefore one of correctness if there is an error of law. Otherwise, for an appellate court to interfere with the decision of the supervising judge, there must be a palpable and overriding error in the exercise of discretion or in findings of fact.

Statutory Provisions

30 The *CCAA* includes provisions defining secured creditor, unsecured creditor, refers to classes of them, and provides for court approval of a plan of compromise or arrangement in the following sections:

> **2. Interpretation**
>
> .....
>
> "secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds;
>
> .....
>
> "Unsecured creditor" means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issue under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.
>
> **Compromises and Arrangements**
>
> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such a manner as the court directs.
>
> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the courts directs.
>
> .....
>
> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the ***Bankruptcy and Insolvency Act*** or is in the course of being wound up under the ***Winding-up and Restructuring Act***, on the trustee in bankruptcy or liquidator and contributories of the company.

Classes of Creditors

31 It is apparent from a review of the foregoing sections that division into classes of creditors within the unsecured and secured categories may, in any given case, materially affect the outcome of the vote referenced in section 6. Compliance with section 6 triggers the ability of the court to approve or sanction the Plan and to bind the parties referenced in s. 6(a) and 6(b) of the *CCAA*. In argument before me, it was conceded by the applicant that Resurgence would not have the ability to ensure approval of the Plan by casting its vote if Air Canada were to be excised from the unsecured creditor category into a separate class. Conversely, counsel for Resurgence candidly admitted that Resurgence would effectively have a veto of the Plan if Air Canada were segregated into a separate class of unsecured creditor.

Application of the Criteria for Leave to Appeal

32 The four elements of the general criterion are set out in paragraph [7]. The first and second elements are satisfied in this case. The points raised on appeal are of significance to the action. If Resurgence succeeds, it obtains a veto. If it does not succeed, and it votes as a member of the unsecured creditors class with Air Canada, Air Canada can control the vote of the unsecured creditors.

33 In terms of the points on appeal being of significance to the practice, it may be that an appellate court's views in this province on the classification of unsecured creditors issue is desirable, there being no appellate authority from this Court on this issue. Although I have doubt as to the significance of this element of the general criterion in the context of the facts of this case, I am prepared for the purposes of this application to treat this element as having being satisfied.

34 The third element is whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous. In my view, the proper interpretation of this element is not a mutually exclusive application of an appeal being either meritorious or frivolous. Rather, the appeal must be *prima facie* meritorious; if it is not *prima facie* meritorious, this element is not satisfied.

35 I find that the appeal on the points raised from the Decision is not *prima facie* meritorious. In the plain ordinary meaning of the words of this element, on first impression, there must appear to be an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way. It is precisely this kind of a factor which breathes life into the modifier "*prima facie*" meritorious.

36 I have carefully reviewed all of the cases referred to by the supervising chambers judge and the principles she derived from them. In my view, she made no error in law.

37 In the exercise of her discretion, she decided neither to allow the applicant's motion to excise Air Canada from the unsecured creditors class nor to prohibit Air Canada from voting. She also declined, on the facts established before her, to separate creditors of CAC from creditors of CAIL for voting purposes. She did, however, order that Air Canada's vote be recorded and tabulated and indicated that this will be considered at the Fairness Hearing.

38 It was strenuously argued before me by the applicant, that deferring classification and voting issues to the Fairness Hearing was an error of law or principle in and of itself.

39 The argument was put in terms that if, on a proper classification of unsecured creditors, Air Canada was removed from the unsecured class, and Resurgence vetoed the Plan, the matter of a Fairness Hearing would never arise. While that may be true, it does not follow that there is any error in law in what the supervising judge did. She concluded that the separate tabulation of the votes will allow the voice of the unsecured creditors to be heard, while, at the same time, permit, rather than rule out the possibility, that the Plan might proceed. This approach is consistent with the purpose of the *CCAA* as articulated in many of the authorities in this country.

40 The supervising chambers judge also refused to exclude Air Canada from voting on the basis that the legal rights attached to the notes held by Air Canada were valid. Resurgence argued that because Air Canada had other interests in the outcome of the Plan, it should be excluded from voting as an unsegregated secured creditor. Paperny, J. held that this was an issue of

fairness, as was the fact that Air Canada was really voting on its own reorganization. She did not err in principle. She expressly acknowledged the authorities that, on different facts, either allowed different classes or excluded a vote. See, for example, *Re Woodward's Ltd.* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.); *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 166 (B.C. S.C.); *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.).

41 The fourth element of the general criterion is whether the appeal will unduly hinder the progress of the action. In other words, will the delay involved in prosecuting, hearing and deciding the appeal be of such length so as to unduly impede the ultimate resolution of the matter by a vote or court sanction? The approach of the supervising judge to the issues raised by the applicant is that its concerns will be seriously addressed at the Fairness Hearing scheduled for June 5, 2000, pursuant to s.6 of the *CCAA*, provided the creditors vote to adopt the Plan.

42 This element has at its root the purpose of the *CCAA*; the role of the supervising judge; the need for a timely and orderly resolution of the matter; and the effect on the interests of all parties pending a decision on appeal. The comments of McFarlane, J.A. in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) are particularly apt where he stated as follows at p.272:

> Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this Court on discreet questions of law. But I am of the view that this Court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial Court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.
>
> A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory or proceedings for which he has no further responsibility.
>
> Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

43 In that case, it appears that McFarlane, J.A. was satisfied that the first three elements of the criteria had been met, i.e. that there "may be an arguable case for the petitioners to present to a panel of this court on discrete [sic] questions of law".

44 It was argued before me that an appeal would give rise to an uncertainly of process and a lack of confidence in it; that the creditors, or some of them, may be inclined to withdraw support for the Plan that would otherwise be forthcoming, but for the delay. None of the parties tendered affidavit evidence on this issue.

45 Nowhere in any of the authorities has the issue of onus in meeting the elements the general criterion been prominent. I am of the view that the onus is on the applicant. That onus would include the applicant producing at least some evidence on the fourth element to shift the onus to the respondents, even though it involves proving a negative, i.e. that there will not be any material adverse impact as the result of the delay occasioned by an appeal. That evidence is lacking in this case. It is lacking on both sides but the respondents do not have an initial onus in this regard. Therefore, I find that the fourth element has not been established by the applicant.

46 The last step in a proper analysis in the context of a leave application is to ascribe appropriate weight to each of the elements of the general criterion and decide over all whether the test has been met. In most cases, the last two elements will be more important, and ought to be ascribed more weight than the first two elements. The last two elements here have not been met while the first two arguably have. In the result, I am satisfied that the applicant has not met the threshold for leave to appeal on the basis of the authorities, and I am therefore denying the application.

Conclusion

47 The application for leave to appeal the Decision is dismissed on the basis that there is no *prima facie* meritorious case and that the granting of leave would likely unduly hinder the progress of the action.

Application dismissed.

End of Document

TAB 6

2005 ABCA 357
Alberta Court of Appeal (In Chambers)

Ketch Resources Ltd. v. Gauntlet Energy Corp. (Monitor of)

2005 CarswellAlta 1527, 2005 ABCA 357, [2005] A.J. No. 1400, 15 C.B.R. (5th) 235, 360 W.A.C. 95, 376 A.R. 95

In the Matter of the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And In the Matter of the Business Corporations Act, R.S.A. 2000, c,. B-9, as amended

And In the Matter of Gauntlet Energy Corporation

Ketch Resources Ltd. (Applicant / Appellant) and PricewaterhouseCoopers Inc., in its capacity as monitor of Gauntlet Energy Corporation (Respondent / Respondent)

O'Brien J.A.

Heard: October 6, 2005
Judgment: October 25, 2005
Docket: Calgary Appeal 0501-0241-AC

Counsel: M.R. Lindsay for Applicant / Appellant
J.G.A. Kruger, C. Hustwick for Respondent / Respondent

Subject: Civil Practice and Procedure; Insolvency

Table of Authorities

Cases considered by *O'Brien J.A.*:

Blue Range Resource Corp., Re (1999), 1999 CarswellAlta 809, 244 A.R. 103, 209 W.A.C. 103, 12 C.B.R. (4th) 186, 1999 ABCA 255 (Alta. C.A.) — distinguished

Liberty Oil & Gas Ltd., Re (2003), 44 C.B.R. (4th) 96, 2003 ABCA 158, 2003 CarswellAlta 684 (Alta. C.A.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 13 — pursuant to

s. 14 — pursuant to

APPLICATION by company for leave to appeal from order affecting post-closing capital.

O'Brien J.A.:

1 The applicant, Ketch Resources Ltd. ("Ketch") seeks leave to appeal an Order granted by Mr. Justice LoVecchio on August 8, 2005. The application is made pursuant to ss. 13 and 14 of the *Companies Creditors' Arrangement Act*, R.S.C. 1985 c. C.-36, as amended ("*CCAA*"). The application is opposed by PricewaterhouseCoopers Inc. in its capacity as Monitor of Gauntlet Energy Corporation ("Gauntlet").

2 In June 2003, Gauntlet was granted an order making it subject to the *CCAA*. On October 31, 2003, Ketch and Gauntlet entered into a Subscription Agreement pursuant to which, in general terms, Ketch would become sole owner of Gauntlet for a price of $44.6 million. The Monitor is a party to that Agreement for certain limited purposes.

3 The closing under the Subscription Agreement occurred on December 8, 2003. In the interim between the execution of that agreement and the closing, Gauntlet's management and personnel continued to operate the company subject to certain covenants and restrictions contained in the Subscription Agreement.

4 A dispute has arisen between Ketch and Gauntlet as to the allocation of certain Gas Cost Allowance credits. The allocation of these credits significantly impacts the post closing "working capital" adjustment. The dispute was adjudicated by Mr. Justice LoVecchio. He allocated 75 per cent of the benefit of the accelerated Gas Cost Allowance attributable to the gas production up to the closing date to the creditors of Gauntlet as part of the Final Adjustment Statement under the Subscription Agreement. He allocated the remaining 25 per cent to Ketch. Ketch is displeased. It seeks the whole of the benefit of accelerated allowance prior to the closing. It is estimated that something exceeding a million dollars is at stake.

Test for Leave

5 The parties are in general agreement as to the test for leave to appeal an order or a decision made in the course of *CCAA* proceeedings. Counsel for Ketch cites the following passages from the judgment of Wittmann, J.A. (as he then was) in *Liberty Oil & Gas Ltd., Re*, 44 C.B.R. (4th) 96, 2003 ABCA 158 (Alta. C.A.) at paragraphs 15 and 16:

> 15. The test for granting leave, as articulated in this Court, involves a single criterion subsuming four factors. The single criterion is that there must be serious and arguable grounds that are of real and significant interest to the parties: ***Resurgence Asset Management LLC v. Canadian Airlines Corporation***, (2000), 261 A.R. 120, 2000 ABCA 149 ("***Resurgence #1***") at para 6; ***Luscar Ltd. v. Smoky River Coal Ltd.***, 1999 ABCA 62 at para. 22; ***Resurgence Asset Management LLC v. Canadian Airlines Corporation*** (2000) 266 A.R. 131, 2000 ABCA 238 ("***Resurgence #2***") at para. 19; ***Re Multitech Warehouse Direct*** (1995) A.J. No. 663 at para. 3; 32 Alta. L.R. (3d) 62 at 63 (C.A.).
>
> 16. The four factors subsumed in an assessment whether the criterion is present are:
>
> (1) Whether the point on appeal is of significance to the practice;

(2) Whether the point raised is of significance to the action itself;

(3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) Whether the appeal will unduly hinder the progress of the action: ***Resurgence #1*** at para. 7; ***Resurgence #2*** at para. 19.

Errors Alleged by Ketch

6 Ketch alleges that Gauntlet committed breaches of three covenants within the Subscription Agreement when it filed a Remaining Useful Life (RUL) Form with Alberta Energy on December 8, 2003, immediately prior to the closing. This filing ultimately resulted in the accelerated gas cost allowance credits. The chambers judge found only two breaches, namely:

(i) that Gauntlet failed to disclose its filing of the RUL to Ketch as Gauntlet was required to do when a change was made in its accounting principles or practices. Here the basis on which the credits were used was changed from a 10-year straight line basis to something much shorter; and

(ii) that Gauntlet failed to provide Ketch with a copy of the RUL filing which it had covenanted to do.

Ketch makes no complaint about these findings of breach but says that Mr. Justice LoVecchio erred in his assessment of damages flowing therefrom.

7 Ketch argues that in making his assessment of damages, the chambers judge misapprehended the evidence in concluding that Ketch would have closed even if it had been made aware of the RUL filing. Ketch submits that the allocation of the Gas Cost Allowance credits made to it by the court (25 per cent) does not put Ketch in the position it would have been but for the breach.

8 Ketch says that the chambers judge should have found, as a third breach of the Subscription Agreement, that the filing was made by Ketch outside the usual course of business. Mr. Justice LoVecchio did not accept that the filing of the RUL form by Gauntlet to obtain accelerated gas credits was out of the ordinary for a gas production company whose reserves had been drastically reduced in an updated engineering Reserve Report.

Application of Test in this case

9 Having regard to the amount of monies at stake, the issue is clearly of some significance both to Ketch and to the creditors of Ketch. Further, the re-organization is in place so that an appeal will not delay any corporate processes or proposals although it will delay distribution of funds to the creditors if the appeal does not succeed. I do not consider the delay to be of significance in this case as it may be compensated through an award of interest.

10 The factor that I have most struggled with in this application is whether, in the words of Wittmann, J.A. in *Liberty Oil & Gas Ltd.*, *supra*, the appeal is *prima facie* meritorious. I say at the outset that the appeal is not frivolous in the sense of not being reasonably arguable. The points are arguable and were advanced very skillfully by Mr. Lindsay, counsel for Ketch.

11 The essential complaints of Ketch are that Mr. Justice LoVecchio erred in his finding that the RUL filing was made in the ordinary course and that if Ketch had known of the RUL filing before closing, it would merely have attempted to negotiate a reduction in the subscription price but would have closed in any event. Here the standard of review that will govern any appeal must be considered.

12 Ketch suggests that an error of law can be extricated in the application of the test for ordinary course of business. Ketch also points to a passage of evidence which may have been misapprehended by the court. In my view, it is likely that the applicant will be faced with demonstrating palpable and overriding error if it is to succeed in overturning the findings of the chambers judge. Moreover, from my review of the materials, there appears to be at least some evidence in support of the findings in question, quite apart from the evidence which Ketch argues was misapprehended by the chambers judge. Further, the reported decisions referred to herein show that considerable deference is to be given to the supervising judge under the *CCAA*.

13 In the result, I do not think that the appeal is hopeless but it is not likely to succeed and thereby, cannot be categorized to be *prima facie* meritorious. Moreover, I do not consider my task at this stage is simply to weed out frivolous or hopeless cases. There is more to the criteria than that. This leads to the fourth factor, namely, the significance of the case to the practice.

14 If I were persuaded that there were any precedential or other significant value of the case to the practice, I would be inclined to grant the application and permit the case to go forward even though the appeal, in my view, is difficult and merely reasonably arguable. I have concluded, however, that this case lacks precedential value. It essentially involves the interpretation of portions of a subscription agreement which was tailored to the particular situation. I contrast that with the question raised in *Blue Range Resource Corp., Re* (1999), 244 A.R. 103 (Alta. C.A.), wherein Fruman, J.A. granted leave on the issue of whether contracts for delivery of natural gas were "eligible financial contracts", an issue of significant impact not only to the parties, but to the oil and gas industry generally.

15 Weighing all the factors, I have concluded that this is not an instance where leave should be granted. Accordingly, the application is dismissed. I should add that I am indebted to counsel their helpful briefs and oral submissions.

Application dismissed.

TAB 7

2008 SKCA 73
Saskatchewan Court of Appeal

Stomp Pork Farm Ltd., Re

2008 CarswellSask 358, 2008 SKCA 73, [2008] 8 W.W.R. 607, 169 A.C.W.S. (3d) 947, 311 Sask. R. 186, 428 W.A.C. 186, 43 C.B.R. (5th) 42

National Bank of Canada (Appellant) and Stomp Pork Farm Ltd. (Respondent) and Farm Credit Canada, Cargill Limited and Meyers Norris Penny Limited, Monitor (Respondents)

Sherstobitoff, Lane, Jackson JJ.A.

Heard: May 13, 2008
Judgment: May 22, 2008
Written reasons: June 5, 2008
Docket: 1627

Proceedings: reversing in part *Stomp Pork Farm Ltd., Re* (2008), 2008 SKQB 179, 2008 CarswellSask 267 (Sask. Q.B.); additional reasons to *Stomp Pork Farm Ltd., Re* (2008), 41 C.B.R. (5th) 126, 2008 SKQB 152, 2008 CarswellSask 207 (Sask. Q.B.)

Counsel: Jeffrey Lee, Linda Widdup for National Bank of Canada
Kim Anderson for Stomp Pork Farm Ltd.
Joel Hesje, Q.C. for Farm Credit Canada
Ian Sutherland for Cargill Limited
Gary Meschishnick for Meyers Norris Penny Limited

Subject: Insolvency

Table of Authorities

Cases considered by *Jackson J.A.*:

Algoma Steel Inc., Re (2001), 25 C.B.R. (4th) 194, 147 O.A.C. 291, 2001 CarswellOnt 1742 (Ont. C.A.) — referred to

Blue Range Resource Corp., Re (1999), 244 A.R. 103, 209 W.A.C. 103, 1999 CarswellAlta 809, 12 C.B.R. (4th) 186, 1999 ABCA 255 (Alta. C.A.) — considered

Canadian Airlines Corp., Re (2000), 80 Alta. L.R. (3d) 213, 2000 ABCA 149, 2000 CarswellAlta 503, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — referred to

Cavendish Shopping Centre Co. v. Bertrand (May 18, 1993), Doc. C.A. Montreal 500-09-000761-932 (Que. C.A.) — referred to

Charles Osenton & Co. v. Johnston (1941), [1942] A.C. 130, [1941] 2 All E.R. 245, 110 L.J.K.B. 420, 57 T.L.R. 515 (U.K. H.L.) — referred to

Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce (2005), 11 C.B.R. (5th) 72, 2005 SKCA 78, 2005 CarswellSask 416 (Sask. C.A. [In Chambers]) — referred to

Hunters Trailer & Marine Ltd., Re (2001), 2001 CarswellAlta 1636, 2001 ABQB 1094, 30 C.B.R. (4th) 206, 305 A.R. 175 (Alta. Q.B.) — considered

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKCA 72, 2007 CarswellSask 324, [2007] 9 W.W.R. 79, (sub nom. *Bricore Land Group Ltd., Re)* 299 Sask. R. 194, (sub nom. *Bricore Land Group Ltd., Re)* 408 W.A.C. 194, 33 C.B.R. (5th) 50 (Sask. C.A.) — referred to

Minister of National Revenue v. Temple City Housing Inc. (2008), 2008 ABCA 1, (sub nom. *Temple City Housing Inc., Re)* 415 W.A.C. 4, (sub nom. *Temple City Housing Inc., Re)* 422 A.R. 4, (sub nom. *R. v. Temple City Housing Inc.)* 2008 G.T.C. 1128 (Eng.), [2008] G.S.T.C. 2, [2008] 2 C.T.C. 67, 2008 CarswellAlta 2 (Alta. C.A.) — referred to

Multitech Warehouse Direct Inc., Re (1995), 32 Alta. L.R. (3d) 62, 1995 CarswellAlta 331 (Alta. C.A.) — referred to

New Skeena Forest Products Inc., Re (2005), 7 M.P.L.R. (4th) 153, [2005] 8 W.W.R. 224, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 210 B.C.A.C. 247, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 348 W.A.C. 247, 2005 BCCA 192, 2005 CarswellBC 705, 9 C.B.R. (5th) 278, 39 B.C.L.R. (4th) 338 (B.C. C.A.) — considered

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to

Stelco Inc., Re (2005), 204 O.A.C. 216, 78 O.R. (3d) 254, 2005 CarswellOnt 6283, 15 C.B.R. (5th) 288 (Ont. C.A.) — referred to

Temple City Housing Inc., Re (2007), 2007 CarswellAlta 1806, 2007 ABQB 786, [2007] G.S.T.C. 188, [2008] 2 C.T.C. 61 (Alta. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, Act to amend the, S.C. 2007, c. 36
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — referred to

s. 13 — considered

Wage Earner Protection Program Act, S.C. 2005, c. 47
Generally — referred to

APPEAL from judgment reported at *Stomp Pork Farm Ltd., Re* (2008), 2008 SKQB 179, 2008 CarswellSask 267 (Sask. Q.B.), ruling on cost allocation of debtor-in-possession financing between current and fixed assets.

***Jackson J.A.*:**

I. Introduction

1 The broad issue in this appeal is the extent to which a Chambers judge has the authority to allocate priority among the assets of pre-filing creditors for debtor in possession ("DIP") financing early in the process of proceedings under the *Companies' Creditors Arrangement Act* [1] ("the *CCAA*"). In the result, the Court left in place the Chambers judge's decision with respect to an allocation of priority for DIP financing that had already been advanced, but set aside the allocation of priority with respect to future and, as yet not required, DIP financing, with reasons to follow. These are those reasons.

II. Facts and Decisions under Appeal

2 The facts are well set out in the two decisions of the Honourable Madam Justice A.R. Rothery under appeal such that I will provide a brief sketch only.

3 Stomp Pork Farm Ltd. ("Stomp") is the second largest commercial hog producer in Saskatchewan owning 27,000 breeding sows. [2] Its two principal lenders are National Bank of Canada ("NBC") and Farm Credit Canada ("FCC").

4 As of March 24, 2008, Stomp owed NBC approximately $20.5 million secured on Stomp's current assets, which comprise livestock inventory and accounts receivable (the "Current Assets"). NBC has priority over the Current Assets to the extent of $18 million and thereafter shares priority with FCC, with NBC's share, over and above the $18 million, being 15%.

5 As of March 27, 2008, Stomp owed FCC approximately $28.5 million secured on Stomp's land, buildings and improvements (the "Fixed Assets"). NBC also holds a security interest in 15% of the Fixed Assets.

6 Due to a variety of factors including high feed prices and currency rate challenges, Stomp became insolvent. On March 27, 2008, it applied *ex parte* and received an initial order under the *CCAA* for a stay of proceedings until April 25, 2008. The *ex parte* initial order was amended on March 28, 2008. This amended order will be called the "Initial Order." [3]

7 The Initial Order directs FCC to provide a DIP financing facility of $3 million to Stomp repayable in 30 days to be secured in the following manner: (i) an administration charge to a maximum of $100,000 to be allocated on a basis of a 50% charge on Current Assets and a 50% charge on Fixed Assets; and (ii) the balance to be secured 100% on the Current Assets including an expected payment of $1.5 million from the Canadian Agricultural Income Stabilization Program — AgriStability Targeted Payment. Paragraph 34 of the Order reads:

> 34. This Court Orders that the DIP Lender shall be entitled to the benefits of and is hereby granted a charge (the "DIP Lender's Charge") on the inventory (including all livestock and breeding livestock) and accounts receivable of the Applicant, and the Canadian Agricultural Income Stabilization Program-Agri-Stability Targeted Payment (the "Security"), which charge shall not exceed the aggregate amount owed to the DIP Lender under the Commitment Letter, filed. The DIP Lender's Charge shall have the priority set out in paragraphs 45 and 48 hereof. [4]

8 On April 2, 2008, NBC applied for an order substituting it as the DIP lender and allocating the DIP financing equally between the Current Assets and Fixed Assets as initially proposed by Stomp on March 27, 2008 and supported by NBC. In the alternative, NBC asked that the DIP lender's charge be allocated against Stomp's assets according to the recommendation of the Monitor in a formal written report to be prepared.

9 Rothery J. agreed to adjourn the reconsideration application pending completion of a report by the Monitor analyzing Stomp's situation [5] and providing its recommendations on the fair and equitable allocation of the DIP lender's charge and any future DIP financing. [6] As part of this exercise, the Monitor was directed to consider the proportionate amounts of total

aggregate indebtedness of Stomp to each of NBC and FCC and the relative liquidation values and fair market values of Stomp's Current Assets and Fixed Assets. [7]

10 On April 23, 2008, Rothery J. confirmed her original decision to secure the super-priority for the DIP financing on the Current Assets and directed that any future DIP financing be secured 75% on the Current Assets and 25% on the Fixed Assets (the "April 23 Order"). [8] The April 23 Order reads:

> 1. The application by National Bank for an Order varying the Initial Order so as to modify the allocation of the DIP Lender's Charge provided for in the Initial Order as it pertains to the FCC DIP Facility shall be and is hereby dismissed.
>
> 2. Any future DIP financing will be on the basis that the DIP Lender is granted a superpriority charge on the assets of Stomp Pork Farm Ltd. on a cost allocation of 75% to current assets of Stomp Pork Farm Ltd. and 25% to fixed assets of Stomp Pork Farm Ltd. [9]

11 NBC applied immediately for leave to appeal both decisions relating to the Initial and April 23 Orders and for an order that the application for leave to appeal be expedited and heard by a panel of three judges of the Court, who would go on to hear the appeal proper if leave were granted. Chief Justice Klebuc granted such an order on April 28, 2008 directing that the leave application be expedited and added to the list of appeals to be heard during the regular sittings of the Court on May 13, 2008.

12 On May 13, 2008, the Court refused the application for leave to appeal the Initial and April 23 Orders insofar as they pertain to the initial DIP financing. The Court granted leave to appeal the April 23 Order as it pertained to an allocation of priority for future DIP financing. Upon announcing these decisions, counsel for NBC indicated that he wished to consult with his client. On May 14, 2008, counsel advised that NBC's position was that the appeal be allowed and the April 23 Order be amended by substituting para. 2 of that order with the following:

> 2. Any future DIP financing will be on the basis that the DIP Lender is granted a superpriority charge on the assets of Stomp Pork Farm Ltd. on a cost allocation of 50% to current assets of Stomp Pork Farm Ltd. and 50% to fixed assets of Stomp Pork Farm Ltd. [10]

In the alternative, NBC submitted that if the Court were prepared to allow the appeal but were not prepared to grant this form of relief, the appropriate course of action would be that para. 2 of the April 23 Order be vacated in its entirety.

13 On May 22, 2008, the Court advised the parties that it was allowing the appeal from the April 23 Order, as it pertained to future DIP financing, and vacating para. 2 of the April 23 Order in its entirety with reasons to follow.

III. Reasons

1. Reasons for Refusing Leave Pertaining to the Interim Order

14 The Court's jurisdiction to hear this appeal is found in s. 13 of the *CCAA*:

> 13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs. [11]

15 In a series of cases emanating first from British Columbia [12] and then from Quebec, [13] Alberta [14] and Ontario, [15] there has developed a consensus among the Courts of Appeal that leave to appeal an order or decision made under the *CCAA* should be granted only where there are serious and arguable grounds that are of real significance and interest to the parties and to the practice in general. [16] The test is often expressed as a four-part one:

> 1. whether the issue on appeal is of significance to the practice;

2. whether the issue raised is of significance to the action itself;

3. whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and,

4. whether the appeal will unduly hinder the progress of the action. [17]

16 There can be no question that the issues raised in this appeal are of significance to the practice. The general question of the allocation of priority between the DIP financer, which is a pre-filing creditor, and the other existing creditors has been little explored by the existing jurisprudence. The particular questions of whether the restructuring judge can allocate priority before the outcome of the restructuring is known, and whether he or she may do so with respect to certain assets and not others, appear to be matters of first instance.

17 Nor can it be questioned that the appeal is of significance to the action. By the decision pertaining to interim financing, NBC has had its priority position significantly affected. Beyond the impact on NBC, however, given the large amount of funding involved, whichever decision the Court were to make on this appeal would be significant to the restructuring. Given the procedure that has been followed, it also cannot be seriously contested that the appeal would unduly hinder the action.

18 It is the third factor, however, that is determinative in deciding whether leave to appeal should be granted in relation to the initial DIP financing.

19 Notwithstanding the fact that the leave application and the appeal proper were heard together, the parties were advised at the commencement of the appeal that the Court would consider the question of leave independently from the merits of the appeal. Admittedly, in a case such as this one, where leave to appeal and the appeal proper are heard together, the line between when a judge grants leave and when a court decides the appeal blurs as the court turns more quickly to questioning counsel on the merits of the appeal and the impact on the restructuring than might otherwise occur in Chambers. There can be no question, however, but that the procedure followed in this case provided a rapid result for the parties.

20 With respect to the initial financing, these factors became controlling for the Court. Rothery J. had before her an application made by the debtor requesting a $3 million facility to be provided by NBC to be secured as a super-priority charge allocated 50% against Current Assets and 50% against Fixed Assets. NBC made its position clear that it was prepared to advance the funds if a priority allocation were made in this manner only. FCC opposed this motion. All parties before the Court, however, agreed that it was imperative funds be advanced within hours if arrangements were to be made for Cargill Ltd. to supplement dwindling food stocks to permit the animals to be fed. It appeared to Rothery J. that the only other possible DIP financer before the Court was FCC. Rothery J. ordered FCC to make a $3 million facility available by the next morning, which facility was to be secured primarily on the Current Assets, but in the event that FCC refused to provide that facility, NBC would be permitted to become the DIP financer, in accordance with its proposal, with a 50/50 allocation against Current and Fixed Assets. In sum, Rothery J. was required to make an order, on extremely short notice, with submissions from all parties including NBC, that immediate financing was required.

21 That brings us to the proceedings adjourned to April 23, 2008 wherein Rothery J. agreed to reconsider the allocation following receipt of full argument and the Monitor's Report. Rothery J. reconsidered her decision and confirmed it. On this occasion, she wrote:

> [1] In my fiat of April 7, 2008, cited at 2008 SKQB 152, I directed the Monitor to file a report with the court "to provide its recommendations on the fair and equitable allocation of any future DIP financing," as stated in paragraph 16 of that fiat. National Bank of Canada ("NBC") had brought a motion for me to vary the debtor-in-possession ("DIP") financing charge, and takes the position that the DIP financing provided by Farm Credit Canada ("FCC") may retroactively be allocated in accordance with the Monitor's recommendations.
>
> [2] With respect to FCC's DIP facility, which expired April 22, 2008, my conclusion remains the same as it was when I initially granted the order for FCC's DIP facility. That is, as stated in para. 15 of the April 7, 2008, fiat, "the initial order

> placed the risk with the security that immediately benefitted from it, that is, the current assets." My conclusions on the risk allocation for that first DIP facility have not been changed by the Monitor's report. Oppositely, the Monitor's report supports my assessment that most of the FCC DIP facility was used to ensure that the pigs continued to be fed and that they were prepared for market. This short term DIP facility was equitably allocated among the creditors to the CCAA application. Any application to vary my original order pertaining to the FCC DIP facility is hereby dismissed.
>
> [3] The issue of risk allocation among the secured creditors at such an early stage in a CCAA proceeding is unique. Indeed, it was the focus of much argument by counsel at the initial order proceeding. Any DIP financing proposed was on the basis of a specific allocation between current and fixed assets. The court was required to decide prior to the initial order being made. The factual background is outlined in my April 7, 2008, fiat. [18]

22 We accept these reasons. At this stage of the proceedings, we might add or emphasize these factors: (i) the only DIP lenders available to the Court were pre-existing filing creditors; (ii) no pre-existing filing creditor was prepared to step forward to provide financing secured on all of the assets of the debtor without a priority allocation being made and incurring the risk that such a decision would entail; (iii) all parties appeared to agree that financing was crucial to ensure the aims of the *CCAA*; and (iv) some $2.2 million of the $3 million facility were ultimately required and had already been expended by the time the appeal was heard. On this last point, we accept the argument of FCC that to change the priorities with respect to funds already expended this early in the process plants an unwelcome seed of uncertainty in the process contemplated by the *CCAA*.

23 In sum, the Court refused leave with respect to the initial DIP financing as the Court would be highly unlikely to intervene and intervention would upset a significant arrangement that was already in place.

2. Reasons for Granting Leave to Appeal the Order Pertaining to Future DIP Financing

24 When we turned to consider whether leave should be granted with respect to the April 23 Order as it pertains to future financing, however, other considerations came to the fore. As with the orders pertaining to the initial financing, the issues raised are of significance to the practice and to the action and the appeal would not unduly hinder the progress of the action, but with respect to future financing the Court was satisfied that the appeal was *prima facie* meritorious. Thus, leave was granted with respect to this part of the April 23 Order.

3. Reasons for Allowing the Appeal Pertaining to Future DIP Financing

25 The Court recognizes that there is a general reluctance on behalf of appellate courts to intervene in decisions taken by restructuring judges in *CCAA* matters. The mix of business and legal decisions made in real time can make it difficult to say, after the fact and with any degree of precision, that one particular decision would have been better than another. Further, the Court is hesitant to elevate a decision in one restructuring to a principle of law that will hamper the appropriate exercise of discretion in another. As Dr. Sarra has said:

> There have been a number of judicial pronouncements on the role of the appellate courts during a *CCAA* proceeding. The British Columbia Court of Appeal in *Doman Industries Ltd.* held that where an order is made by the judge who is supervising the *CCAA* proceedings of the insolvent company from the beginning, the court will be very reluctant to grant leave to appeal the order. The appellate court will exercise its power sparingly when asked to intervene with respect to decisions made during the course of a *CCAA* proceeding, as the *CCAA* judge is undertaking a careful and delicate balancing of numerous interests; and appellate proceedings may upset that balance and frustrate that process. The appellate courts have held that they will be cautious about intervening in *CCAA* proceedings at an early stage, particularly where the order contains a come-back clause that allows parties to bring their concerns regarding a decision to the judge supervising the *CCAA* proceeding. [19] [Emphasis added.]

In this Court, leave has been refused in recent times based on these principles. See: *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce* [20] and *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* [21]

26 Notwithstanding this high level of deference, as Dr. Sarra indicates, appellate courts will intervene in certain cases:

> Appellate courts will accord a high degree of deference when asked to interfere with the exercise of discretion of a *CCAA* court. At the same time, discretionary decisions are not immune from review if the appellate court reaches the clear conclusion that there has been a wrongful exercise of discretion or there is a fundamental question of the lower court's jurisdiction. Leave will be refused by the appellate court [if] the appeal is of no general significance to the practice and where granting leave would disrupt the proposed plan that has been approved by the creditors. [22] [Emphasis added]

27 As Newbury J.A. stated in *New Skeena Forest Products Inc., Re*, [23] discretionary decisions in this area are not immune from review. Quoting from Viscount Simon L.C. in *Charles Osenton & Co. v. Johnston*, [24] she wrote:

> [20] ... At the same time, discretionary decisions are not immune from review. As Viscount Simon L.C. stated in the same case:
>
> > But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. [at 138]
>
> (See also *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 at 588, where it was said that in refusing to take into consideration a "major element for the determination of the case", the trial judge had failed to exercise his discretion on relevant grounds and thus gave the Court of Appeal "no choice" but to intervene.) [25] [Emphasis added]

28 It is now well established that a superior court supervising the restructuring of an insolvent corporation under the *CCAA* may confer upon a lender, providing DIP financing to the insolvent corporation, the benefit of a court-ordered "super-priority" charge on the assets of the insolvent corporation and that, in certain circumstances, the DIP lender's charge may rank in priority to the existing security held by secured creditors of the insolvent corporation. It is sufficient to cite as an example in support of this proposition the most recent decision on point: *Temple City Housing Inc., Re* [26]

29 While the above aspect of the law appears settled, few reported decisions consider the question of the appropriate allocation of DIP financing as between major secured creditors of the corporate debtor. Some principles are, however, more clear than others. The leading decision is *Hunters Trailer & Marine Ltd., Re* [27]

30 The basic determination that a *CCAA* judge must make in deciding how to allocate the DIP financing charge amongst the assets of the debtor is what allocation would be most equitable, a task that is left initially to the discretion of the *CCAA* judge:

> 15 Equity informs the decisions made by courts in the exercise of their jurisdiction under the *CCAA*. While each case must be judged on its own facts, in my view it is equitable in the present case that all of the major secured creditors be liable for a portion of the *CCAA* costs. That is not to say that equity call for an equal allocation of costs. [28]

The equitable allocation of a DIP financing charge will need to balance, among other things, the creditors' various positions, the purpose of the DIP financing in particular and the *CCAA* regime in general:

> ... The court, in balancing prejudices, will weigh the possibility of a going-concern solution that potentially creates long-term upside value for numerous stakeholders, with the risk of further depletion of value that may be able to satisfy claims on a short-term basis. This balancing of interest and prejudice is at the heart of most financing judgments. Notwithstanding these potential benefits to all stakeholders, absent careful scrutiny of the terms of the DIP financing agreement, granting access to short-term capital can increase the risk of harm to stakeholders if the terms approved by the court lead to a *CCAA* plan that prejudices their interests more than a liquidation outcome. [29] [Emphasis added.]

31 In *Hunters Trailer & Marine Ltd.*, the Court altered the allocation of the charge in relation to DIP financing near the end of the process, noting that the restructuring process was for the benefit, or potential benefit, of all creditors, including the creditor whose only security was in the real property. The Court appeared to allocate the charge on the basis of the extent of the benefit, or potential benefit, to the creditor of the DIP financing in relation to the assets over which it held a security:

> [20] I agree that it would be unfair to ignore differences in the type of security held by various creditors and the degree of potential benefit that might be derived by them from *CCAA* proceedings. The *CCAA* recognizes that there may be different classes of creditors for purposes of voting on a plan of arrangement or compromise. Would UMC as first and second mortgagee of Hunters' real property have been placed in a different class than the other secured creditors? There is no significant difference in the nature of the debt giving rise to the claim. However, there is a difference in the nature and priority of UMC's security, the remedies that were available to it and the extent of its recovery.
>
> . . . . .
>
> [22] Under the Interim Receiver's proposal, UMC is not allocated any of the DIP financing costs. The Interim Receiver and UMC take the position that UMC received no benefit from the DIP financing and therefore should not be required to contribute to repayment of these funds.
>
> [23] Not only UMC but all of the secured creditors can point to costs that cannot be attributed to the assets over which they hold security. However, DIP financing was granted to meet the debtor company's urgent needs during the sorting-out period. That was for the benefit, at least the potential benefit, of all creditors.
>
> [24] Approximately 62 percent of the DIP financing to October 31, 2001 was used for wages. Outside of bankruptcy, wages would have no priority to UMC's interest in Hunters' real property but would have priority to the personal property interests of the other secured creditors. Nevertheless, certain of those wages may be attributable to building maintenance. In addition, some of the DIP financing was used in order to provide security on the premises.
>
> [25] An additional 20 percent of the DIP financing was applied to life insurance premiums. Strictly speaking, not all of the premiums can be considered *CCAA* costs as the premiums continue to be paid from the monies advanced for DIP financing. UMC holds an assignment on one of the life insurance policies. While it has made full recovery on the debt owing through the sale of Hunters' land holdings, at the outset of the *CCAA* proceedings there could have been no certainty as to the sale price of the land or UMC's share of the *CCAA* costs. Protecting their security in the life insurance policy by payment of the monthly premiums was at least of potential benefit to UMC, particularly given that UMC may wish to look to this security in the event that its allocation of *CCAA* costs exceeds the amount remaining from sale of Hunters' real property after payment of the initial debt.
>
> [26] I am of the view that UMC must bear a proportion of the DIP financing costs. I recognize that any means of calculating that percentage will be arbitrary. A strict accounting on a cost-benefit basis would be impractical. I am prepared to allocate five percent of the DIP financing costs to UMC, in addition to that share of the Monitor's fees and legal expenses identified above. [30]
>
> [Emphasis added]

Dr. Sarra makes the following observation about *Hunters Trailer*:

> The court's recognition of the need for an equitable allocation is aimed at a mid-ground between one creditor bearing all the costs and all creditors sharing equally. The notion that financing is a potential benefit to all creditors is critical to the equitable allocation of costs. [31]

32 Turning to the case at hand, only some statements may be made with certainty. There is in place a *pari passu* agreement between the principal lenders NBC and FCC. The nature of this arrangement is discussed fully in the decisions under appeal.

33 The estimated liquidation value of the Current Assets of Stomp, identified by the Monitor, ranges from a low of $12,949,616 and a high of $12,974,232. [32] The estimated liquidation value of the Fixed Assets of Stomp, identified by the Monitor, ranges between a low of $11,056,000 and a high of $13,004,000. [33]

34 The Monitor's Second Report concluded with the following recommendation as to the equitable method of allocating the DIP Lender's Charge: [34]

> There is no prescribed formula and any means of calculating the allocation of a DIP Lenders Charge will be arbitrary. Section 9 outlines that 93.6% of DIP financing is projected to apply towards Current Assets. However, it is important to appreciate that the Fixed Assets stand to gain a significant increase in value through a successful CCAA.
>
> All things considered, it is suggested that allocating the cost of the DIP Lenders Charge equally to Fixed Assets and Current Assets is a fair and equitable approach.
>
> Applying the 85/15 split under the *Pari Passu* agreement would result in NBC's share being 57.5% and FCC responsible for 42.5% of the DIP Lenders Charge.
>
> [Emphasis added]

FCC, as might be expected, resists the Monitor's conclusion that it will derive any benefit from the restructuring, on the basis that it is prepared to ride out the current economic cycle, with or without hogs, until such time as the Fixed Assets can be sold. There is, of course, no evidence of this and the Monitor's Report appears at this time to be the best evidence of a contrary position.

35 When Rothery J. made her initial decision, she was presented with no case law and little evidence beyond that which was necessary to demonstrate that if an order were to be made under s. 11 of the *CCAA*, it had to be accompanied by a DIP financing order. Then, by April 23, indeed by April 7, the DIP funds had been expended in accordance with a priority regime that accorded FCC priority. The same points cannot be made in relation to the future DIP financing.

36 With respect to future financing, there is no immediate urgency and, with the benefit of case law, evidence and the Monitor's Reports, it can be said that it is premature to make an allocation of the priority between the secured creditors, and indeed such an allocation appears speculative at this time.

37 None of the parties before this Court, including Stomp and FCC, argued in support of a split of 75% and 25%. With the benefit of full argument, it became apparent to all that the question of how to allocate the priority of the future DIP financing would best be left to further negotiation, and decision if necessary, as the restructuring process unfolds.

38 NBC and FCC will each bear their own costs. If there is any issue with respect to the costs of the other parties, an application may be transmitted to the panel through the office of the Registrar.

Appeal allowed in part.

Footnotes

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

2 Appeal Book, Vol. 2, pp. 180a and 182a, Affidavit of Ivan Stomp sworn March 26, 2008, paras. 4, 5 and 19.

3 Appeal Book, pp. 13a-35a, Amended Ex Parte Initial Order issued March 28, 2008.

4 *Ibid.*, p. 27a.

5 2008 SKQB 152 (Sask. Q.B.), para. 15.

6 *Ibid.* para. 16.

7 *Ibid.*

8 2008 SKQB 179 (Sask. Q.B.), paras. 2 and 10.

9 April 23 Order, Appeal Book, p. 169a.

10 Letter dated May 14, 2008 to the Registrar, Court of Appeal.

11 *CCAA*, *supra* note 1.

12 *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]).

13 *Cavendish Shopping Centre Co. v. Bertrand*, [1993] Q.J. No. 860 (Que. C.A.) [hereinafter Steinberg].

14 *Multitech Warehouse Direct Inc. (Re)* (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.); *Blue Range Resource Corp., Re* (1999), 1999 ABCA 255, 244 A.R. 103 (Alta. C.A.); *Canadian Airlines Corp., Re* (2000), 2000 ABCA 149, 80 Alta. L.R. (3d) 213 (Alta. C.A. [In Chambers]).

15 *Algoma Steel Inc.* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.).

16 See, for example, *Multitech*, *supra* note 14 at para. 3, summarizing *Steinberg*, *supra* note 13.

17 *Blue Range*, *supra* note 14 at para. 4; *Stelco Inc. (Re)* (2005), 78 O.R. (3d) 254 (Ont. C.A.) at para. 13; *Minister of National Revenue v. Temple City Housing Inc.*, 2008 ABCA 1, 422 A.R. 4 (Alta. C.A.) at para. 12.

18 2008 SKQB 179 (Sask. Q.B.), *supra* note 8.

19 Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007) at 89 [footnotes omitted].

20 2005 SKCA 78 (Sask. C.A. [In Chambers]).

21 2007 SKCA 72 (Sask. C.A.)at para. 49, [2007] 9 W.W.R. 79 (Sask. C.A.).

22 Sarra, *supra* note 19 at 89 [footnotes omitted].

23 2005 BCCA 192, [2005] 8 W.W.R. 224 (B.C. C.A.).

24 [1941] 2 All E.R. 245 (U.K. H.L.).

25 *New Skeena*, *supra* note 23.

26 2007 ABQB 786 (Alta. Q.B.), affirmed *Temple*, *supra* note 17. The Court also notes that Bill C-12, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, 39th Parliament, 2d Session, 2007, received Royal Assent on December 14, 2007, but it is not in force as the *Act* it amends, being *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 is not yet in force. When these amendments come into effect, they will confirm an authority that the courts have been exercising for some time.

27 , (2001), 2001 ABQB 1094, 305 A.R. 175 (Alta. Q.B.).

28 *Ibid.*

29 Sarra, *supra* note 19 at 96-97 [footnotes omitted].

30 *Hunters Trailer*, *supra* note 27.

31 Sarra, *supra*, note 19 at 112.

32 Appeal Book, Vol. 1, p. 94a, Monitor's Second Report, s. 8.1.2.3.

33 *Ibid.*, p. 95a, s. 8.2.

34 *Ibid.*, pp. 99a and 100a, s. 13.0.

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TAB 8

2003 ABCA 158
Alberta Court of Appeal

Liberty Oil & Gas Ltd., Re

2003 CarswellAlta 684, 2003 ABCA 158, 122 A.C.W.S. (3d) 976, 44 C.B.R. (4th) 96

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF LIBERTY OIL & GAS LTD.

LEXXOR ENERGY INC. and LIBERTY OIL & GAS LTD. (Appellants) and RICHTER, ALLAN & TAYLOR INC., MONITOR OF LIBERTY OIL & GAS LTD. (Respondents)

Witmann J.A.

Heard: April 23, 2003
Judgment: May 14, 2003
Docket: Calgary Appeal 0301-0038-AC

Counsel: G. Brian Davison for Various Unsecured Creditors
Larry B. Robinson for Appellants, Lexxor Energy Inc.. Liberty Oil & Gas Ltd.
Geoffrey D. Baker for Rick Martin
Frank R. Dearlove for Respondents, Richter, Allan & Taylor Inc., Monitor of Liberty Oil & Gas Ltd
Peter S. Jull, Q.C. for Various Unsecured Creditors

Subject: Corporate and Commercial; Insolvency

Table of Authorities

Cases considered by *Witmann J.A.*:

Blue Range Resource Corp., Re, 1999 CarswellAlta 809, 244 A.R. 103, 209 W.A.C. 103, 12 C.B.R. (4th) 186, 1999 ABCA 255 (Alta. C.A.) — referred to

Canadian Airlines Corp., Re (2000), 2000 ABCA 149, 2000 CarswellAlta 503, 80 Alta. L.R. (3d) 213, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — referred to

Canadian Airlines Corp., Re, 2000 ABCA 238, 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — referred to

CIBC World Markets Inc. v. Blue Range Resources Corp., 2001 ABCA 86, 2001 CarswellAlta 461, 281 A.R. 172, 248 W.A.C. 172 (Alta. C.A.) — referred to

Multitech Warehouse Direct Inc., Re, 32 Alta. L.R. (3d) 62, 1995 CarswellAlta 331 (Alta. C.A.) — referred to

Royal Bank v. Fracmaster Ltd., 1999 CarswellAlta 539, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230 (Alta. C.A.) — referred to

Smoky River Coal Ltd., Re, 1999 CarswellAlta 128, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 237 A.R. 83, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 197 W.A.C. 83, 1999 ABCA 62 (Alta. C.A.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — considered

s. 13 — considered

s. 14(1) — considered

APPLICATION by purchaser of business for leave to appeal judgment approving monitor's interpretation of accounting concept for purposes of revenue recognition.

***Witmann J.A.*:**

Introduction

1 Lexxor Energy Inc. ("Lexxor") acquired Liberty Oil & Gas Ltd. ("Liberty") after Liberty's plan of arrangement ("the Plan") pursuant to the *Companies Creditors' Arrangement Act* ("*CCAA*") R.S.C. 1985 c. C-36 was accepted by its creditors. The transaction closed July 23, 2002.

2 Hart, J. at all material times was the supervising judge pursuant to the *CCAA* and Richter, Allan & Taylor Inc. acted as the court-appointed Monitor. The business of Liberty included the production of oil and gas. As is customary in the industry, payment for the previous month's production was not received until the following month. In the case of Liberty, on or about the 25th of each month. A dispute arose between the unsecured creditors and Lexxor as to the amounts available attributable to the post-petition interval between February 25, 2002, the petition date, and July 23, 2002 ("the *CCAA* Period").

3 At the core of the dispute was whether revenue accruing during the *CCAA* Period was available to pay excluded claims, a defined term under the Plan. Lexxor took the position before Hart, J. that the matching principle of accounting was inapplicable, that the Plan indicated that only cash received during the *CCAA* Period would be used to pay excluded claims and that therefore the cash proceeds ("the basket") were available to pay any unsecured creditor deficiency arising. The impact on the unsecured creditors if Lexxor's position were adopted is significant. It markedly decreases their recovery.

Facts

4 The relevant provisions of the Plan voted upon by the unsecured creditors and affirmed by court order dated June 29, 2002 are as follows:

2.1 — Purpose

. . . Liberty's Unsecured Creditors are to be paid their first $1,500.00 of Proven Claims in cash and receive their *pro rata* share of a pool of cash and Lexxor Shares estimated to enable them to recover $0.75 per dollar of Proven Claim. . . .

2.2 — Claims Not affected - Excluded Claims

This Plan does not compromise the following Claims and rights that arise in the following capacities (the "Excluded Claims"):

. . .

(b) All Claims arising or accruing for either or both of the provision of goods and performance of services to Liberty from and after the date of the Initial Order;

. . .

4.1 — Overview

. . . it is expected that this Plan will enable Liberty to go forward as a viable business entity. It is expected that this Plan will result in:

(a) repayment of 100% of all Excluded Claims from the Cash Proceeds with the exception of the National Bank Debt which will be dealt with . . .

(b) a distribution to Unsecured Creditors of approximately $0.75 per dollar, consisting of the balance of Cash Proceeds and Lexxor Shares;

. . .

4.2 — Details of the Plan

. . .

(d) Payment of Excluded Claims and Distributions to Secured Creditors, and Unsecured Creditors:

(i) *Excluded Claims*: If Excluded Claims which are to be repaid in accordance with the provisions of the Plan have not been paid by the Plan Implementation Date, then Liberty shall pay such Excluded Claims from the Cash Proceeds as soon as practicable following the Plan Implementation Date . . .

(ii) *Cash Distributions to Unsecured Creditors*: The Monitor shall distribute the portion of Cash Proceeds due to Unsecured Creditors with Proven Claim after payment of or allowance for all Excluded Claims . . .

"*Cash Proceeds*"means a cash payment of $6,811,425.00 which will be available to Liberty and the Monitor which will permit Liberty or the Monitor, as applicable, to make the payments to Creditors contemplated by this Plan.

The Monitor's Fifth Report to the Court

5 In that part of the Fifth Report of the Monitor to the Court dealing with "Lexxor's Interpretation of the Plan", the Monitor stated at p.2:

> At the closing date of July 23, 2002, the Liberty had $1,362,484 in liabilities relating to post-petition trade creditors that had not yet been paid by Liberty. These creditors are to be satisfied in full as the amounts owed to them arose subsequent to the Initial Order [FEB. 25, 2002]. Lexxor is of the view that the $1,362,484 is to be paid from the Cash Proceeds as Lexxor acquired no debt. Interpreting the Plan in this fashion has the effect of reducing the cash recovery to Liberty's unsecured creditors from 45 cents on the dollar to 27.5 cents on the dollar.

6 He continued at pp.2-3:

> . . . The Plan, however, does not address revenues earned by Liberty during the post-petition period. Those revenues which Lexxor believes they are entitled to, are required to pay Liberty's post-petition creditors.
>
> When Liberty's Plan was advanced to creditors to vote upon, unsecured creditors expected a recovery of 75 cents on the dollar, 45 cents in cash, and 35 cents in Lexxor shares. Paying post-petition trade creditors from the Cash Proceeds advanced by Lexxor was not contemplated. It is the Monitor's view that if the Plan is interpreted in this way the resulting removal of $1,362,484 from funds available to unsecured creditors may have significantly affected their vote on the Plan. Moreover, there were alternatives available other than Lexxor's proposal which both Liberty and the unsecured creditors may have considered differently if those parties were aware that the cash component of their recovery would only be 27.5 cents not 45 cents as a result of post-petition trade creditors sharing in the cash proceeds.
>
> As well, given Lexxor's interpretation of the Plan, it appears that the quantum of post-petition trade creditors left in Liberty is arbitrary based on the closing date. If Lexxor had acquired Liberty on July 26, 2002, not July 23, 2002, the revenues for June 2002 production would have been received by Liberty and would have been used to pay a portion of Liberty's post-petition trade creditors. Consequently, the date of closing has a substantial impact on the recovery to Liberty's unsecured creditors. The gross revenues received by Liberty for June and July 2002 total approximately $1.55 million net of royalties. It seems consistent to the Monitor that these funds should be available to satisfy Liberty's post-petition trade creditor debt, not the Cash Proceeds.

7 There were other issues put forward by Lexxor that are not subject to this leave application but which were dealt with by Hart, J. on January 24, 2003.

Monitor's Sixth Report to the Court

8 This report was part of the material before Hart, J. on January 24, 2003. It is dated January 21, 2003. It is short. It repeats the issue as set out in the Monitor's Fifth Report in terms of the position of Lexxor and the payment of post-petition trade creditors. It also indicates that the Monitor had requested a summary of receipts and disbursements for the period February 25 to February 28, 2003 from Lexxor but that that information had not been provided. It goes on to reference Exhibit 1 which the Monitor at p.3 stated:

> . . . reflects Liberty's receipts for July and August, 2002 as well as the disbursements made by Liberty in July 2002, the majority of which were made after the July 23, 2002 closing date. Based on the information available to the Monitor, it

appears that during the *CCAA* Period Liberty had positive cash flow. Consequently, if the revenues and expenses (receipts and disbursements) were matched, it appears that the post-petition trade creditors would have been paid in full and the unsecured creditors of Liberty would receive a greater percentage of the Cash Proceeds.

Lexxor's interpretation of the Plan may be contrary to a fundamental accounting concept. The concept is known as matching whereby expenses that are linked to a revenue generating activity are matched with the revenues in the period the revenue is recognized. Liberty would have prepared its statements on an accrual basis and therefore would have recognized or recorded the revenue in the period it occurred as well as when the expenses were incurred. Lexxor's interpretation would only reflect Liberty's expenses and not its revenues. The treatment of revenues in Liberty's Plan is not addressed and it is the Monitor's view that in the absence of clear language fundamental accounting principles should be applied.

The Decision of the Supervising Chambers Judge — January 24, 2003

9 The transcript of the reasons includes the following:

. . . looking at the plan as a whole and considering the process as a whole and included in that, of course, are the monitor's ongoing reports reporting on positive cashflow, that data coming from the operating company, looking at the various clauses in the plan itself, I am satisfied that the matching principle, as set out by the monitor in its reports, most notable the sixth report, and as contained in the briefs of - at least as contended for - in the briefs of Mr. Davison and Mr. Jull, is the proper principle and that the plan should be and was intended to be interpreted accordingly.

There is no clear language to rebut a proper application of generally accepted accounting principles and it is clear that the unsecured creditors, at least, were given very strong representations that they could expect, on the basis of ongoing operations between the petition date and the closing date, that they could expect something in the order of $.75 on the dollar. There were other expenses that were not contemplated at the time that drives that figure down. But implicit in that representation I am satisfied was the notion that the matching principle would be applied between those dates and that earnings would be taken into account.

Now that is the advice and direction that I give to the monitor.

10 The application for leave to appeal to this Court was filed February 10, 2003. During the period from January 24, 2003 to March 3, 2003, the parties could not agree on the form of order to be taken out pursuant to Hart, J. reasons. On March 3, 2003, another hearing before Hart, J. was held to settle the minutes of his January 24, 2003 order.

The Decision of the Supervising Judge on March 3, 2003

11 At this hearing, counsel for Lexxor and Liberty shifted gears, perhaps in an attempt to grasp too much of a good thing. Two alternate forms of order were put forward to Hart, J. on March 3, 2003. So far as this leave application is concerned, the relevant clauses are, as put forward by Lexxor:

2. The Court approves and adopts the matching principle as set out by the Monitor in its Reports, most notably the Sixth Report, and, in particular:

(a) the application of the matching principle is to be applied in accordance with generally accepted accounting principles for the period between February 25, 2002 and July 23, 2002.

12 The second form of order put forward by the remainder of the parties, including the Monitor and the unsecured creditors, stated:

> 2. The Court approves and adopts the concept of "matching" as applied in the Monitor's Sixth Report, and, in particular, Exhibit "1" to that Report.

13 At the hearing before Hart, J., Lexxor's counsel repeatedly advocated that the words "generally accepted accounting principles" be used in the form of the order because Hart, J. had mentioned that terminology in his decision on January 24, 2003 and wanted to make sure it applied to the entire *CCAA* period. Extensive argument occurred before Hart, J. as to the difference in impact on the unsecured creditors if Lexxor's version of the order were adopted or if the remainder, i.e. the majority of the parties' version were adopted. Hart, J. stated at p.42-43 of his March 3, 2003 decision as follows:

> The purpose of this hearing today on - this aspect of the hearing at least is to fix the terms of the order that I granted on January 24th on the monitor's application.
>
> I have heard all counsel who have spoken on this settlement of terms hearing and I am satisfied that the version that - as between the two versions of the order, the one that accords with the actual order that I granted on the 24th is the order acceptable to the majority of the parties.
>
> I was at pains in January to make it clear that the matching principle that I wanted to see applied and which formed a basis for the rationale of the order I gave at that time was the matching principle as discussed by the monitor in his sixth report. And that was clear then, it remains clear and, in my belief, the order sponsored by the monitor and the majority of the parties reflects that position. I am not satisfied that the order proposed by Mr. Robinson on behalf of his client [Lexxor] does that.
>
> Indeed, in my view, his order distorts the matching principle and could well result in a clawback or a diversion of funds from the unsecured creditor or the estate back to Lexxor contrary to the spirit and intent of my order of January the 24th and, indeed, as I see it, contrary to the proper meaning of the plan of arrangement itself.
>
> So I order and direct that the form of order to be used in the circumstances is the form of order agreed to by the majority of the parties.

The Test for Leave to Appeal

14 Leave to appeal is available under the *CCAA* by virtue of s. 13. Sections 13 and 14(1) state as follows:

> 13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.
>
> 14. (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

15 The test for granting leave, as articulated in this Court, involves a single criterion subsuming four factors. The single

criterion is that there must be serious and arguable grounds that are of real and significant interest to the parties: *Canadian Airlines Corp., Re* (2000), 261 A.R. 120, 2000 ABCA 149 (Alta. C.A. [In Chambers]), ("*Resurgence #1*") at para 6; *Smoky River Coal Ltd., Re*, 1999 ABCA 62 (Alta. C.A.) at para. 22; *Canadian Airlines Corp., Re* (2000), 266 A.R. 131, 2000 ABCA 238 (Alta. C.A. [In Chambers]) ("*Resurgence #2*") at para. 19; *Multitech Warehouse Direct Inc., Re*, [1995] A.J. No. 663 (Alta. C.A.) at para. 3; (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.), at 63.

16 The four factors subsumed in an assessment whether the criterion is present are:

(1) Whether the point on appeal is of significance to the practice;

(2) Whether the point raised is of significance to the action itself;

(3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) Whether the appeal will unduly hinder the progress of the action: *Resurgence #1* at para. 7; *Resurgence #2* at para. 19.

17 The first factor may be influenced by whether there is appellate authority on the question proposed to be considered on appeal: *Resurgence #1* at para. 33. It is also interpreted broadly to include not only in the insolvency practice but the industry involving the claimant: *CIBC World Markets Inc. v. Blue Range Resources Corp.* (2001), 281 A.R. 172 (Alta. C.A.) at para. 1. It was argued by the unsecured creditors that the point on appeal had no significance to the insolvency practice because it involved an interpretation of the terms of a specific plan of arrangement. Therefore, it was not a point of significance in the sense used. Perhaps. But the timing of payment for oil and gas production in relation to the *CCAA* period may be of significance to the practice.

18 The second factor - whether the point raised is of significance to the action itself - is conceded. In argument before me, Lexxor asserted that the proper application of the matching principle would result in a clawback of over a million dollars but Lexxor proposed to cap the clawback at a million dollars in any event of the result. The unsecured creditors indicated that the broader import of the matching principle as put forward by Lexxor would indeed have that result. So it is of significance to the parties.

19 The third factor involves a consideration as to whether there appears to be an error in principle of law or a palpable and overriding error of fact or that the exercise of discretion by a supervising *CCAA* judge has been exercised improperly, such as by taking into consideration irrelevant factors or failing to consider relevant factors: *Resurgence #1* at para. 41-42. Lexxor's counsel argued strenuously that the alleged misstatement of the matching principle was an error of law, subject to the standard of review of correctness. The other parties submitted that there was no error of law or principle, that the interpretation of the Plan and the adoption of the Monitor's proposal was at most an error of mixed law and fact or the exercise of discretion by the supervising judge. I agree.

20 The standard of review that would govern the appeal is to be considered: *Resurgence #2* at para. 42; *Resurgence #1* at para. 28-29. Ancillary to these considerations are indications that a supervising chambers judge under the *CCAA* should be accorded considerable deference. Their decisions will be interfered with only in the event of unreasonable acts, errors in principle or manifest errors: *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) at para. 3. It has also been stated that an appellate court scrutinizing leave applications under the *CCAA* should exercise its powers sparingly, that a supervising *CCAA* judge has an ongoing management process similar to that of a judge making orders during a trial: *Blue Range*

Resource Corp., Re, 1999 ABCA 255 (Alta. C.A.) at para. 3; *Smoky River Coal Ltd., Re* at para. 62. Finally, the four factors are to be assessed in the context of determining whether the criterion has been met by ascribing appropriate weight to each of the elements of the general criterion: *Resurgence #1* at para. 46.

Application in this Case

21 Central to the issue proposed for appeal is the impact of the application of the matching principle either as propounded by Lexxor or as propounded by the Monitor. The issue is not whether the matching principle is to be applied in accordance with generally accepted accounting principles. It is whether Hart, J. erred in law in approving the Monitor's proposed application of the matching principle in his Sixth Report. In my view, he did not. No details were articulated as to what the error complained of was. Only that the words "generally accepted accounting principles" were absent from the formal order actually settled on when they were, in fact, included in the reasons. It is clear from the quotation from the Monitor's Sixth Report what Hart, J. had in mind. He said what he had in mind when he settled the minutes of the order. He, in effect, approved the Monitor's version of the matching principle, i.e. the recognition of revenue during the *CCAA* period and its availability to satisfy excluded claims. Neither the Monitor nor Hart, J. intended to extend "the matching principle" beyond revenue recognition. In other words, there was no intent to derive a new accounting from February 25 to July 23 on a full accrual basis according to the version put forward by Lexxor.

22 Whether the appeal would unduly hinder the progress of the action was not strenuously argued. Apparently, an interim distribution can be made and there must be some delay because there is another contingent claim brought by one Martin which remains outstanding and which will delay a final distribution in any event. I am prepared to proceed on the basis that this factor would not and does not influence the decision to grant leave.

Conclusion

23 What is fatal to the applicant's position here is the absence of any demonstrable or, with respect, arguable error in the decision of the supervising chambers judge. He did not pronounce on the matching principle as if he were writing a chapter of the *Canadian Institute of Chartered Accountants* ("*CICA Handbook*") in setting out generally accepted accounting principles. What he did do was adopt the Monitor's interpretation of fundamental accounting concepts for the purposes of revenue recognition during the *CCAA* period. Recognition in terms of revenue is a specialized term pursuant to the *CICA Handbook* at 1000.41 where it is indicated that "recognition is the process of including an item in the financial statements of an entity". It has a particular application to revenue in terms of the timing of it: See s. 3400 revenue .06, .07 of the *CICA Handbook*.

24 Generally accepted accounting principles are defined at paragraph 1000 .59, .60, .61 of the *CICA Handbook* including departure and applicability. That terminology would not be helpful in a general sense to the resolution of the dispute between the parties here. The particular application of a fundamental accounting concept in terms of revenue recognition and measurement, as recommended in detail by the Monitor, is what is relevant, and that is what Hart, J. ordered.

25 The application for leave to appeal is denied.

Application dismissed.

reserved.

TAB 9

2001 ABCA 86
Alberta Court of Appeal

CIBC World Markets Inc. v. Blue Range Resources Corp.

2001 CarswellAlta 461, 2001 ABCA 86, [2001] A.J. No. 400, 248 W.A.C. 172, 281 A.R. 172

In the Matter of the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended; And In the Matter of Blue Range Resource Corporation; And In the Matter of the Application of CIBC World Markets Inc.; CIBC World Markets Inc. (Applicant / Appellant) and Blue Range Resources Corporation by its Creditors' Committee (Respondent / Respondent)

Fruman J.A.

Heard: March 14, 2001
Judgment: March 14, 2001
Written reasons: March 30, 2001
Oral reasons: March 14, 2001
Docket: Calgary Appeal 01-00015

Proceedings: refusing leave to appeal (December 22, 2000), Doc. Calgary 9901-04070 (Alta. Q.B.)

Counsel: *P. Pastewka, C.J. Popowich*, for Applicant / Appellant
G.H. Poelman, W.K. Johnston, for Respondent

Subject: Corporate and Commercial

Table of Authorities

Cases considered by *Fruman J.A.*:

Blue Range Resource Corp., Re (1999), 244 A.R. 103, 209 W.A.C. 103, 12 C.B.R. (4th) 186 (Alta. C.A.) — considered

Industrial Construction Ltd. v. Lakeview Development Co. (1976), 16 N.B.R. (2d) 287 (N.B. Q.B.) — applied

Multitech Warehouse Direct Inc., Re (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) — considered

APPLICATION by financial advisor for leave to appeal judgment dated (December 22, 2000), Doc. Calgary 9901-04070 (Alta. Q.B.), dismissing action for payment under agreement.

Fruman J.A.:

1 To grant leave from a decision made under the *Companies'Creditors Arrangement Act*, R.S.C. 1985, c. C-36, the court must find "serious and arguable grounds that are of real and significant interest to the parties": *Multitech Warehouse Direct Inc., Re* (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.). One of the factors to be considered is whether the appeal is of significance to the practice: *Blue Range Resource Corp., Re* (1999), 244 A.R. 103 (Alta. C.A.). I interpret practice broadly, to include not only the insolvency practice but the industry in which the claimant is involved, in this case, the financial services industry.

2 The trial judge construed two agreements negotiated between sophisticated parties, represented by legal advisers. The agreements involve the same financial adviser, contemplate similar services, overlap in time and contain "trailer clauses". The trial judge decided that the agreements could not co-exist and that the second agreement replaced the first. His construction was based on the unique circumstances and specific construction of the two agreements. This issue is not of general significance to the insolvency or financial services industry. Although the interpretation of "contact" for purposes of determining whether a completion fee is payable under a trailer clause could have industry-wide implications, the determination in this case is fact specific and unlikely to have strong precedential value. In any event, the trial judge's decision on this point appears to be *obiter*.

3 To determine implied rescission and replacement, the trial judge, at para. 17 of his judgment, applied the test in *Industrial Construction Ltd. v. Lakeview Development Co.* (1976), 16 N.B.R. (2d) 287 (N.B. Q.B.): "[...]the parties will be presumed to have intended to rescind the old contract and to have substituted a new one whenever the agreement is inconsistent with the original contract to an extent which goes to the very root of it". The applicant does not take issue with this test, but disagrees with the trial judge's analysis and his conclusion that the inconsistencies go to the very root of the contract.

4 The issue does not raise serious and arguable grounds. Accordingly the application for leave to appeal is dismissed.

Leave refused.

TAB 10

2005 CarswellOnt 4869
Ontario Superior Court of Justice

Kelley v. Pollock Leasing Inc.

2005 CarswellOnt 4869

Bruce Kelley, Plaintiff and Pollock Leasing Inc., Defendant

McGill D.J.

Heard: April 12 - August 17, 2005
Judgment: August 30, 2005
Docket: Kitchener SC 792/04

Counsel: T. Hobson, for Plaintiff
J. McCarthy, for Pollock Leasing

Subject: Contracts

Table of Authorities

Cases considered by *McGill D.J.*:

Industrial Construction Ltd. v. Lakeview Development Co. (1976), 16 N.B.R. (2d) 287, 1976 CarswellNB 293 (N.B. Q.B.) — considered

***McGill D.J.*:**

1 The plaintiff, hereinafter referred to as Kelley, claims damages for breach of contract from the defendant, hereinafter referred to as Pollock, for failure to properly diagnose and repair engine problems in the 1997 Ford truck.

Facts:

2 On August 25th 1997, Kelley leased a 1997 Ford single axle straight truck LN-7000 from Tiger Lease Inc pursuant to a written lease filed as Exhibit #1 (Tiger lease). The truck had a special hydraulic bed, which made it ideal for use in Kelley's trucking business that specializes in moving construction equipment. The term of the lease was 64 months and the lease gave Kelley an option to purchase the vehicle at the expiration of the term for the residual value of $16,000.00.

3 Almost immediately, in the fall of 1997, Kelley experienced problems with engine coolant leaks and the temperature gauge. The steel tube holding the temperature gauge broke. Tiger advised Kelley that this was a design flaw and the tube held too much weight so it was likely it would break again. Kelley was advised by Tiger that there was a secondary warning system on the dash so it did not matter if the temperature gauge broke again.

4 Kelley believed this was correct since the secondary warning light came on when the fan belts broke repeatedly over the next few years. Each time Tiger repaired the belts and added coolant. No further mention was made of the steel tube or the temperature gauge and Kelley continued to operate the truck relying on the secondary system.

5 Some time around September of 2001, Pollock merged with Tiger Leasing Inc. Pursuant to paragraph 22 of the Tiger lease, Pollock assumed the benefit and the burden of the lease. Pollock does not dispute responsibility for the lease

6 In the spring 2002, Kelley noticed contamination of the oil system. Pollock was notified, they installed a new filter and changed the oil. This happened again with the same result. Eventually in the summer, Pollock did a cool compression test and Brad Partridge told Kelley there was no leak. When the problem reappeared, Pollock replaced the air compressor and told Kelley the problem was fixed. A few days later, the problem reappeared only this time the secondary warning did not perform.

7 Finally, while delivering a load to London, the engine light came on; Kelley added coolant, finished the delivery and returned to Pollock. Now a crack on the head was visible. The coolant was topped up and Kelley drove to St. Catherines. Kelley never made it. Kelley called Pollock and was told to add coolant and bring it back. Kelley took it to Highway Sterling where Pollock had previously contracted out the repair. It needed an engine cylinder head replacement at a cost of $9,186.65. Kelley believed Pollock would pay for this. The Highway Sterling mechanic gave evidence that a hot compression test rather than a cool one would have detected the problem.

8 Unfortunately, this crisis with the engine was occurring at the same time that the lease was expiring and Kelley's option to purchase was being exercised. Pollock was deliberating about the cost of repairs when Kelley executed the purchase documents which contained a statement that he was purchasing the truck in an "as is" condition. Kelley went ahead with the purchase because he needed the truck and had already sunk 150,000.00 into it. Kelley gave written notice to Pollock that he was not abandoning his claim for the cost of repairs. He initialed the "as is" clause but did not sign the acknowledgment of terms clause. Written in the comment section is the phrase: "No warranties expressed or implied". Soon after completion of the purchase, Pollock advised Kelley that it would not pay for the cost of repairs.

9 The parties agree repairs were necessary because of a crack in the cylinder head. Overheating of the engine caused the crack in the engine head. The engine became overheated because it was leaking coolant and there was no functioning temperature gauge. There is no issue as to cost of repairs.

Issues:

10

1. Did Pollock breach the repair obligations of the Tiger lease?

2. Was this repair an unauthorized repair and therefore not Pollock's responsibility?

3. Did Kelley's continued use of the truck with knowledge of a malfunctioning temperature gauge break the chain of causation of damage?

4. Did Kelley's purchase of the vehicle relieve Pollock of any further liability under the lease? Has the lease been discharged?

5. Did Pollock have a duty to advise Kelley that it would not pay for the cost of repairs before completing the purchase? Did silence amount to misrepresentation?

6. Did the "as is" clause in the purchase contract relieve Pollock of any responsibility for the condition of the truck at the time of purchase?

Issue #1 — Did Pollock breach the repair obligations of the Tiger lease?

11 The Tiger lease sets out the repair obligations para-phrased as follows:

6.01 The lessor shall promptly repair or cause to be repaired each vehicle, which has become disabled, after notice of its disability. Drivers... shall not make any repairs of adjustments to any vehicle but shall promptly notify the lessor.

6.02 The lessor will not be liable for unauthorized repairs or service

6.03 (a) All regular service and maintenance will be provided by the lessor at its cost;

(b) The lessee shall report any and all faulty operations or trouble on the day of occurrence on forms provided by lessor.

(c) The vehicle must be in shop 8 hours a week for service.

12 The repair obligation is triggered by notice. Pollock's evidence is that they had no record of notice of the malfunctioning temperature gauge. Their service history (Exhibit # 6) begins in October 2001 when Pollock merged with Tiger. It shows the following "Driver Reports" and repairs related to overheating:

Nov 13 /02	PM "B" Service	Pressure tested system with oil drain plug out. After one hour pressure had not dropped. No sign of leak
Nov 23/02	Inspect substance coming out blow by tube	Anti freeze in oil coming out blow by in gel substance. Repaired back up alarm. Adjusted brakes
Dec 1/02	PM "B" Service	"Subletted" to Highway Sterling for oil in coolant. Sterling replaced leaking crank seal in front cover, air compressor, hoses, lines and gaskets. Flushed cooling system and reassembled. Inspected air dryer purge valve. Note on memo from Sterling that no internal leaks from cylinder head discovered. Confirmed by Shop Foreman.

13 It is clear from the repair notes on November 13 that Pollock was aware of the complaint about leaking. Reference to "No sign of leaks" means they were looking for one. The repair note of November 23 shows Pollock was aware of a malfunctioning alarm since they fixed it. To get to the back up alarm the primary warning system must not work. Therefore,

Pollock had to know the back up was being used. This implies knowledge that the primary was not working. Pollock stands in the shoes of Tiger. I accept the Kelley evidence that Tiger was told about the temperature gauge. The repair note of December 1 addresses the very issue that all parties now agree was the problem: overheating and leaks from the cylinder head. Pollock assumed responsibility for this repair on December 1st. Pollock failed to repair the coolant leak as they were contractually required to do. Pollock breached the repair obligations under the Tiger lease paragraph 6.01

14 The defendants spent a lot of time on the issue of when the crack in the cylinder head occurred. In my mind nothing turns on the timing of the crack. The cause of the crack was the overheating and Pollock was contractually obligated to repair the cause of the overheating whether it was the crack or something else. Failure to properly diagnose and repair the overheating problem is breach of the repair obligation.

Issue #2: Was this repair an unauthorized repair and therefore, not Pollock's responsibility?

15 The purpose of this clause is to prevent a lessee from having unnecessary, expensive or poor quality work done on the vehicle. This is not one of those situations. The complaint had already been submitted to Pollock and they had authorized repair work that turned out to be ineffective. Rather than have the vehicle returned to Pollock, Kelley had it towed directly to Highway Sterling. This is the subcontractor that Pollock hired to work on the vehicle on December 1st. Therefore, despite the fact that this specific work was not approved before it was done. I do not find that it is an unauthorized repair. It is work that was attempted before by the very same contractor. To hold otherwise would make the repair obligations in 6.01 meaningless. The lessor could withhold authorization to avoid the repair obligation.

Issue # 3: Did Kelley's continued use of the truck with knowledge of a malfunctioning temperature gauge break the chain of causation of damage?

16 Kelley admits he knew the temperature gauge was not working and continued to operate the vehicle. He did this because Tiger told him it was okay. Pollock's records do not show this but they do not incorporate the Tiger service period. Therefore, I accept Kelley's evidence that his continued use of the vehicle was as a result of Tiger's representation.

17 Kelley relied on the back up warning system. Pollock repaired the back up alarm on November 23rd. It should have been working. Pollock should have been aware that the primary engine temperature gauge was not working when it tested the back up.

18 Therefore, I do not find any break in the chain of causation of damage. I find the damages flow from the breach of the obligation to repair both the temperature gauge and the coolant leak. This action is framed in contract not tort, and therefore, contributory negligence is not relevant.

Issue # 4: Did Kelley's purchase of the vehicle relieve Pollock of any further liability under the lease? Has the lease been discharged?

19 When a contract is discharged, each party is released from further performance of its obligations. There are two possible ways the purchase agreement could discharge the lease: novation or accord and satisfaction.

20 Novation occurs when parties end the rights and obligations of the first contract and replace them with the rights and obligations of the second. "If it is clear from the intentions of the parties that their subsequent agreement should replace the earlier one... then the later contract will be a good defence to an action brought upon the first one, even if the first contract was under seal and the latter was not." (Fridman, The Law of Contract in Canada, 3d edition, 1994 at page 551)

21 *Industrial Construction Ltd. v. Lakeview Development Co.* (1976), 16 N.B.R. (2d) 287 (N.B. Q.B.) held that in determining the intentions of the parties there is a basic presumption in favor of novation when the new agreement is inconsistent with the original contract to an extent which goes to the very root of it. Here, the new agreement is consistent with the option to purchase contained in the lease. The second contract is the fulfillment of the first contract.

22 Some of the circumstances surrounding the purchase agreement are consistent with an intention to end the lease. The only outstanding provisions in the lease relate to repair and the purchase is on an "as is" basis without warranties. This is not consistent with the continued enforcement of the lease obligations. Kelley initialed beside the "as is" clause. He completed the purchase pursuant to the agreement. If there were no other factors I would hold that the lease is discharged. However, Kelley gave notice to Pollock that he was not waiving his right to claim damages for breach of repair under the lease. Exhibit #4 is a letter prepared by Kelley and provided to Pollock for signature of James Allen of Pollock. It indicates that Kelley was signing "under duress" as the repair issue had not been resolved. This is a clear expression of his intention not to end the repair obligations under the lease. In light of Exhibit # 4, I find that Pollock was aware that Kelley was not releasing his rights to repair under the lease when he signed the purchase agreement. There was no common intention to enter into novation.

23 To release the breach that had already been brought to the attention of Pollock, the purchase would have to take the form of an accord and satisfaction. Pollock would be discharged from its obligation to repair only if the purchase was completed as part of an arrangement to discharge the existing obligation. Specific reference to this repair issue would have to be part of the agreement and the release of the repair obligation would have to form part of the consideration. (Fridman, supra page 553) No such reference exits here. The purchase was a separate transaction from the lease and the release repair issue did not form part of the consideration.

Issue # 5: Did Pollock have a duty to advise Kelley that it would not pay for the cost of repairs before completing the purchase? Did silence amount to misrepresentation?

24 Pollock did not misrepresent its position on the repairs. Exhibit # 4 shows that Kelley was not under the impression that Pollock had agreed to cover the repairs at the time of signing the purchase. It is because he knew that negotiations were on going that he gave notice that he was not releasing his right to insist on performance of the repair obligation under the lease.

Issue # 6: Did the "as is" clause in the purchase contract relieve Pollock of any responsibility for the condition of the truck at the time of purchase?

25 Since I have already found that Kelley may enforce his rights under the lease agreement, nothing turns on the whether he could use the purchase agreement to complain about the condition of the vehicle. However, I find that Kelley initialed the

"as is" clause and therefore is bound by it, save and except for this pre-existing repair issue that he specifically preserved through the notice given in Exhibit # 4.

Conclusion:

26 Therefore, I find that Pollock was in breach of its repair obligations under the lease. The repair obligation under the lease was not discharged by the purchase agreement. Pollock is responsible for Kelley's damages in the amount of $9186.00.

27 There is judgment for the plaintiff in the amount of $9186.00 plus pre-judgment interest from December 23, 2003 to August 17th 2005 at the court rate, plus costs including a counsel fee of $300.00.

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TAB 11

2012 ONCA 597
Ontario Court of Appeal

Technicore Underground Inc. v. Toronto (City)

2012 CarswellOnt 11173, 2012 ONCA 597, 14 C.L.R. (4th) 169, 220 A.C.W.S. (3d) 333, 296 O.A.C. 218, 2 M.P.L.R. (5th) 1, 354 D.L.R. (4th) 516

Technicore Underground Inc., Plaintiff and City of Toronto, Defendant (Respondent) and Clearway Construction Inc., Third Party (Appellant)

E.E. Gillese, R.G. Juriansz, G.J. Epstein JJ.A.

Heard: June 20, 2012
Judgment: September 12, 2012
Docket: CA C54801

Proceedings: affirming *Technicore Underground Inc. v. Toronto (City)* (2011), 2011 ONSC 7205, 2011 CarswellOnt 14960, 11 C.L.R. (4th) 268, 94 M.P.L.R. (4th) 115 (Ont. S.C.J.)

Counsel: Christos Papadopoulos, for Appellant
Darrel A. Smith, for Respondent

Subject: Contracts; Corporate and Commercial; Civil Practice and Procedure; Public; Property

Table of Authorities

Cases considered by *E.E. Gillese J.A.*:

Bemar Construction (Ontario) Inc. v. Mississauga (City) (2004), 2004 CarswellOnt 222, 30 C.L.R. (3d) 169, [2004] O.T.C. 51 (Ont. S.C.J.) — considered

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Colautti Construction Ltd. v. Ottawa (City) (1984), 9 D.L.R. (4th) 265, 46 O.R. (2d) 236, 1984 CarswellOnt 731, 7 C.L.R. 264, 5 O.A.C. 74 (Ont. C.A.) — distinguished

Corpex (1977) Inc. v. Canada (1982), [1982] 2 S.C.R. 643, 6 C.L.R. 221, 1982 CarswellNat 143, 50 N.R. 197, 1982 CarswellNat 493 (S.C.C.) — followed

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First City Development Corp. v. Stevenson Construction Co. (1985), 1985 CarswellBC 762, 14 C.L.R. 250 (B.C. C.A.) — considered

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Jones v. Laurie (2004), 2004 NSSC 87, 2004 CarswellNS 164, 223 N.S.R. (2d) 129, 705 A.P.R. 129 (N.S. S.C.) — referred to

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Med-Chem Health Care Inc., Re (2000), 2000 CarswellOnt 3820 (Ont. S.C.J. [Commercial List]) — referred to

Petridis v. Shabinsky (1982), 1982 CarswellOnt 631, 35 O.R. (2d) 215, 22 R.P.R. 297, 132 D.L.R. (3d) 430 (Ont. H.C.) — referred to

Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co. (1994), [1994] 2 S.C.R. 490, 1994 CarswellAlta 744, [1994] 7 W.W.R. 37, 20 Alta. L.R. (3d) 296, 168 N.R. 381, (sub nom. *Maritime Life Assurance Co. v. Saskatchewan River Bungalows Ltd.)* [1994] I.L.R. 1-3077, 155 A.R. 321, 73 W.A.C. 321, 115 D.L.R. (4th) 478, 23 C.C.L.I. (2d) 161, 1994 CarswellAlta 769 (S.C.C.) — followed

Tudale Explorations Ltd. v. Bruce (1978), 20 O.R. (2d) 593, 88 D.L.R. (3d) 584, 1978 CarswellOnt 778 (Ont. Div. Ct.) — referred to

APPEAL by third party from judgment reported at *Technicore Underground Inc. v. Toronto (City)* (2011), 2011 ONSC 7205, 2011 CarswellOnt 14960, 11 C.L.R. (4th) 268, 94 M.P.L.R. (4th) 115 (Ont. S.C.J.), granting partial summary judgment dismissing its counterclaim against city.

***E.E. Gillese J.A.*:**

1 The City of Toronto (the "City") successfully disposed of the bulk of a multimillion dollar construction claim against it, by means of a partial summary judgment motion. The claimant says that the matter requires a trial and should not have been decided by way of summary judgment.

2 Is the claimant correct? In my view, it is not. As I will explain, this appeal should be dismissed.

Overview

3 Clearway Construction Inc. ("Clearway") entered into a construction contract with the City in which it agreed to construct a water main 5.88 kilometres in length (the "Contract"). The water main ran under a number of roads in Toronto, including Leslie Street (the "Leslie Street Project").

4 Clearway subcontracted with Technicore Underground Inc. ("Technicore") to do the underground tunnelling, which it did through a tunnel boring machine.

5 Technicore excavated the tunnel under Leslie Street. During the evening of August 2 - 3, 2006, there was a flood in that tunnel. It is the flood that led to these legal proceedings.

6 As a result of the flood, Technicore's tunnel boring machine was trapped under Leslie Street. After rescuing and refurbishing the boring machine, Technicore completed the tunnelling by December 22, 2006.

7 The Contract work affected by the flood was completed at the end of December 2006.

8 By letter dated February 9, 2007, Technicore made a claim against Clearway for approximately $800,000 plus G.S.T. for damages arising from the flood (the "Technicore claim").

9 On March 6, 2007, Clearway submitted a claim to the City for additional payment under the Contract to cover costs incurred as a result of the flood (the "March 2007 Claim"). In the March 2007 Claim, Clearway sought approximately $1,270,000, comprised of indemnity for the Technicore claim plus a claim for approximately $400,000 of its own costs incurred as a result of the flood. In the March 2007 Claim, Clearway noted the possibility that "some costs have not yet been identified" and "reserve[d] the right to claim payment for work(s) not specifically mentioned herein".

10 By letter dated April 4, 2007, the City denied the March 2007 Claim.

11 Technicore started the main action in these proceedings on July 30, 2008. It claimed solely against the City for damages suffered as a result of the flood.

12 The City defended and started a third party claim against Clearway for contribution and indemnity, and additional damages.

13 Clearway defended the City's third party claim and counterclaimed against the City. In its initial defence and counterclaim, served on the City in March 2010, Clearway sought indemnity for the Technicore claim, plus damages of $1,000,000.

14 In August of 2010, Clearway sent the City a claim in which it repeated the amounts sought in the March 2007 Claim and added new claims in excess of $3,000,000 (the "August 2010 Claim").

15 In an amended defence and counterclaim dated June 23, 2011 (the "Counterclaim"), Clearway continued to seek indemnity for the Technicore claim but increased its damages claim to just over $3,400,000.

16 In a companion construction lien action, Technicore sues Clearway for damages arising out of the Leslie Street flood and for certain other claims. The lien action has been ordered to be tried together with this proceeding.

17 The City brought a motion for partial summary judgment, seeking a dismissal of those parts of the Counterclaim that were in excess of the March 2007 Claim. The focus of the motion was paragraph GC 3.14.03.03 of the General Conditions that were included as part of the Contract (the "Notice Provision"). The Notice Provision sets out specific requirements for the filing of claims under the Contract. It reads as follows:

> The Contractor shall submit detailed claims as soon as reasonably possible and in any event no later than 30 Days after completion of the work affected by the situation. The detailed claim shall:
>
> a) identify the item or items in respect of which the claim arises;
>
> b) state the grounds, contractual or otherwise, upon which the claim is made; and
>
> c) include the Records maintained by the Contractor supporting such claim.

18 The full text of GC 3.14 can be found as appendix A to these reasons.

19 The motion judge concluded that Clearway was limited to the March 2007 Claim. By judgment dated December 5, 2011, she granted partial summary judgment (the "Judgment").

20 Clearway appeals. It contends that the portions of its Counterclaim that the Judgment has the effect of dismissing raise genuine issues requiring a trial. It asks that the Judgment be set aside.

21 In my view, the motion judge correctly decided this matter. I would dismiss the appeal.

A Preliminary Matter

22 The focus of the motion below was on the timing of the August 2010 Claim, as it had been made years after the time required by the Notice Provision. However, the motion judge struck two other parts of the August 2010 Claim for reasons other than the timing of its delivery.

23 First, she struck those parts of the August 2010 Claim that pre-dated, and were unrelated to, the Leslie Street Project, noting that they failed to raise a genuine issue requiring a trial in respect of the City's liability.

24 Second, she struck the parts in which Clearway sought reimbursement for the claims that Technicore made against it (Clearway) in the related lien action that had not been made against the City. These other Technicore claims against Clearway were unrelated to the flood or the work under Leslie Street ("the non-Leslie Street Claims").

25 Before the motion judge, the parties agreed that the non-Leslie Street Claims were not properly asserted against the City and should be dismissed, but they disagreed on the procedure that should be followed for their dismissal. The motion judge was satisfied that partial summary judgment was an appropriate method by which to dispose of the non-Leslie Street claims.

26 I do not understand Clearway's appeal to extend to these two other parts of the August 2010 Claim, even though Clearway purports to seek to have the entire Judgment set aside. However, even if Clearway did intend to appeal the dismissal of these parts of the Counterclaim, it is readily apparent that the appeal fails in respect of these items. For the reasons given by the motion judge, they raise no genuine issue requiring a trial in respect of the City.

The Issues

27 Clearway submits that the motion judge erred in:

1. her interpretation of the Notice Provision;

2. granting the motion despite the absence of evidence of prejudice to the City;

3. allowing the City to rely on the Notice Provision when it had failed to comply with GC 3.14.04;

4. failing to recognize and find that items 7 and 8 in Part 1 of the August 2010 Claim are the same as items 3 and 6 of the March 2007 Claim; and

5. allowing the City to rely on the Notice Provision when it has raised no complaint in respect of the date of delivery of the March 2007 Claim.

Analysis

Issue 1: Interpreting the Notice Provision

28 Based on the jurisprudence, the motion judge concluded that the Notice Provision operated as a condition precedent that served to bar the August 2010 Claim because Clearway failed to deliver it (the August 2010 Claim) before the expiry of the time limit. Clearway submits that the motion judge erred in her interpretation of the Notice Provision. It argues that had the motion judge reviewed GC 3.14 in its entirety, she would have seen that the Notice Provision in GC 3.14.03 simply sets out a procedure to identify, and provide details of, any claims that are to be subsequently negotiated and possibly mediated pursuant to GC 3.14.04 and 3.14.05. As none of these provisions contains a "failing which" clause, Clearway submits that the Contract does not contain the clear language necessary to deprive it of the right to proceed with its full counterclaim against the City.

29 I do not accept this submission. The Notice Provision sets out a mandatory procedure for the filing of claims under the Contract, including the requirement that detailed claims are to be submitted no later than 30 days after completion of the work affected by the situation. [1] The Notice Provision need not include a "failing which" clause in order for it to bar the August 2010

Claim. This conclusion flows inexorably from the decision of the Supreme Court of Canada in *Corpex (1977) Inc. v. Canada*, [1982] 2 S.C.R. 643 (S.C.C.).

30 In *Corpex*, the plaintiff contractor had a contract with the federal government to build a dam across a river. The first stage of the contract required the river to be dewatered. The contractor based his estimate of the pumping costs on incorrect information about the nature of the soil contained in the plans and specifications. After a fortnight of pumping, it became obvious that the pumping equipment was not equal to the task. Additional pumps had to be installed. The contractor did not give written notice to the government that it would claim for the additional costs occasioned by the mistake as to the soil conditions.

31 Notice of the claim was required by clause 12 of the General Conditions to the contract. Clause 12 provided:

> 12. (1) **No payment shall be made** by Her Majesty to the Contractor **in addition to the payment expressly promised by the contract on account of any extra expense, loss or damage incurred or sustained by the contractor for any reason**, including a misunderstanding on the part of the Contractor as to any fact, whether or not such misunderstanding is attributable directly or indirectly to Her Majesty or any of Her Majesty's agents or servants (whether or not any negligence or fraud on the part of Her Majesty's agents or servants is involved) unless, in the opinion of the Engineer, the extra expense, loss or damage is directly attributable to
>
> > (a) a substantial difference between information relating to soil conditions at the work site, or a reasonable assumption of fact based thereon, in the plans and specifications or other documents or material communicated by Her Majesty to the Contractor for his use in preparing his bid and the actual soil conditions encountered at the work site by the Contractor when performing the work, ...
> >
> > . . . . .
>
> in which case, **if the Contractor has given the Engineer written notice of his claim before the expiry of thirty days after encountering the soil conditions giving rise to the claim [...] Her Majesty shall pay** to the Contractor in respect of the additional expense, loss or damage incurred or sustained by reason of that difference [...] an amount equal to the cost, calculated in accordance with clauses 44 to 47 of the General Conditions, of the additional plant, labour and materials necessarily involved.
>
> [Emphasis added.]

32 Corpex sued the government for, among other things, the additional costs arising from the mistake as to the soil conditions. The trial judge allowed this part of Corpex's claim based on considerations of equity rather than on a "technical application of certain clauses in the General Conditions". [2]

33 The Federal Court of Appeal overturned the trial decision on this point because Corpex had failed to give notice as required by clause 12 of the General Conditions.

34 The Supreme Court upheld the decision of the Federal Court of Appeal. In paras. 59 and 60 of *Corpex*, Beetz J., writing for the court, explains that a clause such as clause 12 of the General Conditions is of benefit to both the contractor and the owner.

> The contractor is practically certain of being compensated for additional costs either during the work or later, if he complies with the provisions of clause 12, and in particular, if he gives the notice provided for in that clause. ...
>
> An owner who is thus informed of a mistake as to the nature of the soil knows that the contractor will probably not drop his claim, and he is enabled to reconsider his position. He can in practice be assured that the work will go forward if he wishes .... He may conclude another agreement with the same contractor or some other. If he prefers for the work to continue under the new circumstances, he may make arrangements to monitor quantities and costs of additional work so that the payments due the contractor ... can be made.

35 In para. 62, Beetz J. explains why compliance with a notice provision is a condition precedent to legal proceedings:

> However, once the work is complete, a contractor cannot claim in a court of law benefits similar to those which clause 12 would have guaranteed if he has not himself observed that clause and given the notice for which the clause provides. Otherwise, he would be depriving the owner of the benefits which he is guaranteed by clause 12.

36 There was no "failing which" provision in *Corpex*. Nonetheless, the contractor was barred from asserting this part of its claim because it had failed to give notice as required by clause 12.

37 Nor was there a "failing which" provision in *Doyle Construction Co. v. Carling O'Keefe Breweries of Canada Ltd.* (1988), 27 B.C.L.R. (2d) 89 (B.C. C.A.). In *Doyle*, the plaintiff contractor was engaged to construct an expansion of the defendant's brewery. The tender documents did not contain a clear statement that certain items of equipment would be installed by the defendant during the construction. The contractor contracted on the assumption that the equipment would not be installed until after the construction was complete. When the mistake was discovered a new construction schedule had to be drawn up. After the work was completed, the contractor submitted a claim for the extra costs incurred because of delay.

38 The trial judge held that the defendant had not breached the contract but, in any event, the contractor's claim could not proceed because the contractor had failed to give notice as required by the contract. He noted that had the contractor given proper notice, the defendant could have addressed cost reduction measures, insisted on the institution of a cost control system and taken steps to see that all records were preserved. The contractor's failure to comply with the notice provisions deprived the defendant of these rights.

39 The British Columbia Court of Appeal dismissed the contractor's appeal, holding that compliance with the notice provision in the contract was a condition precedent to the contractor's claim.

40 In *Bemar Construction (Ontario) Inc. v. Mississauga (City)* (2004), 30 C.L.R. (3d) 169 (Ont. S.C.J.), Fragomeni J. considered *Doyle* at length and applied the principles set out in it. At para. 194, Fragomeni J. concluded that the contractor could not advance its claims as it had failed to properly comply with the notice provisions in the contract. On appeal, this court approved the trial decision: see *Bemar Construction (Ontario) Inc. v. Mississauga (City)*, 2007 ONCA 685, 63 C.L.R. (3d) 161 (Ont. C.A.).

41 Again, there was no "failing which" provision in *Bemar*.

42 I acknowledge that at para. 6 of *First City Development Corp. v. Stevenson Construction Co.* (1985), 14 C.L.R. 250 (B.C. C.A.), the British Columbia Court of Appeal stated:

> I approach the construction of art. 36 with the proposition established by the decided cases in mind: if a party to a building contract is to be deprived of a cause of action, this is only to be done by clear words.

43 However, as the motion judge explained, there are significant factual distinctions between *First City* and this case. In *First City*, there was no express time requirement. Article 36 of the construction contract provided that a claim was to be made in writing "within a reasonable time after the first observance of such damage and not later than the time of final certificate". The plaintiff commenced an action one year after completion. As no final certificate of completion had ever been issued, the claim was permitted to proceed.

44 Two additional points must be made in respect of the decision in *First City*. First, the court makes no mention of *Corpex* in its judgment. Second, *Doyle* was decided after *First City*. The British Columbia Court of Appeal was fully aware of its decision in *First City* when it rendered its decision in *Doyle*.[3] Nonetheless, and in the absence of a "failing which" clause, the court clearly and emphatically concluded that compliance with a notice provision is a condition precedent to maintaining a claim in the courts.

45 Accordingly, I see no error in the motion judge's interpretation of the Notice Provision. This ground of appeal fails.

Issue 2: The Absence of Evidence of Prejudice to the City

46 Clearway submits that when dealing with notice provisions, the court's central concern is to protect parties from any prejudice resulting from non-compliance with them. It contends that *Doyle* and *Bemar Construction (Ontario) Inc. v. Mississauga (City)* are authority for the proposition that notice provisions serve to bar claims only where there is evidence of prejudice resulting from non-compliance. Clearway says that the City provided no evidence that it suffered prejudice as a result of the timing and delivery of the August 2010 Claim and, therefore, the motion judge erred in granting partial summary judgment.

47 I begin by considering *Corpex*. Does it stipulate that prejudice must be proven in order for an owner to rely on a notice provision? No, it does not. As para. 60 of *Corpex* makes clear, one purpose of a notice provision is to enable the owner to consider its position and the financial consequences of the contractor providing additional work. Notice gives the owner the opportunity to decide whether to conclude another agreement with the contractor or have the work done by some other. It also enables the owner to make arrangements to monitor the costs of the additional work. The contractor must give notice in accordance with the notice provision, otherwise it deprives the owner of the benefits guaranteed by the notice provision.

48 What then of *Doyle* and *Bemar*? Do either of these cases stand for the proposition that the owner must show prejudice in order to rely on a notice provision? In my view, they do not.

49 At para. 21 of *Doyle*, the trial judge is quoted as stating that had the contractor given proper notice, the defendant "could have addressed cost reduction measures, could have insisted upon the institution of a cost control system, and could have taken steps to see that all records, including site diaries, were preserved". Similarly, had Clearway given proper notice in this case, the City could have chosen whether to permit Clearway to continue with the work occasioned by the flood and, if so, it could have instituted cost control mechanisms. The fact that the trial judge in *Doyle* made those findings does not make it a requirement in law.

50 *Bemar* does not elevate this aspect of *Doyle* to a requirement of law. It is true that *Doyle* is quoted at length and relied on by the trial judge in *Bemar*, and that the findings of prejudice in *Doyle* set out in the preceding paragraph are quoted. But, Fragomeni J. does not suggest that prejudice must be established before non-compliance with notice provisions will bar a claim. At para. 194 of the *Bemar* trial decision, Fragomeni J. concludes that the contractor did not properly comply with the notice provisions in the contract and, therefore, it could not advance its claims. He made no finding of prejudice on the part of the city in reaching that conclusion.

51 Accordingly, there was no onus on the City to lead evidence of prejudice. As owner, the City is assumed to have been prejudiced by a multimillion dollar claim being made years after the Contract permitted and long after the City could consider its position and take steps to protect its financial interests.

Issue 3: Reliance on the Notice Provision despite Failing to Comply with GC 3.14.04

52 GC 3.14.04 of the Contract requires the parties to "make all reasonable efforts to resolve their dispute by amicable negotiations" and to provide "open and timely disclosure of relevant facts, information, and documents to facilitate these negotiations".

53 Clearway says that instead of attempting to negotiate after receiving the March 2007 Claim, the City simply issued the denial letter of April 4, 2007. Clearway also complains about the City's delay in disclosing the report prepared by its geotechnical engineer on the causes of the flood. Clearway submits that because the City failed to comply with the negotiation and disclosure requirements in GC 3.14.04, it should be barred from relying on the Notice Provision.

54 In my view, this submission completely misses the mark. GC 3.14.04 *follows* the Notice Provision in GC 3.14.03. Therefore, the negotiation and disclosure requirements in GC 3.14.04 arise *after* a claim has been made pursuant to GC 3.14.03. Accordingly, the complaints that Clearway levies against the City about negotiation and disclosure can only relate to the March 2007 Claim, with which the City took no issue in the motion below. An alleged failure on the part of the City to negotiate in the spring of 2007 is not, and cannot be, relevant to the August 2010 Claim, as the negotiation requirement did not arise until

the August 2010 Claim had been delivered to the City. Similarly, the disclosure requirement could not have arisen in 2007 in respect of the August 2010 Claim.

55 Finally, while I need not decide the point, it may be that GC 3.14.04 is not engaged at all where, as in this case, the August 2010 Claim was not properly advanced in accordance with the Notice Provision.

Issue 4: Items 7 and 8 of the August 2010 Claim

56 Items 3 and 6 of the March 2007 Claim were for the extended maintenance of excavations or pits, and the associated shoring required for the pits. The cost of these two items in the March 2007 Claim was slightly in excess of $455,000. Clearway says that items 7 and 8 of the August 2010 Claim are for the same items, but for the increased amount of approximately $1,700,000.

57 Clearway submits that the motion judge erred in failing to recognize that items 7 and 8 of the August 2010 Claim are of the same type as those in items 3 and 6 of the March 2007 Claim and, instead, treated them as new claims. It asks that even if the appeal is otherwise dismissed, it be allowed to continue to pursue the amounts set out as items 7 and 8 of the August 2010 Claim.

58 The City disputes the factual assertion that underpins this ground of appeal. It says that items 3 and 6 of the March 2007 Claim are for extended maintenance of excavations under Leslie Street and under a CN Rail tunnel but that items 7 and 8 are for pit delay costs at numerous locations, including Leslie Street and the CN Rail tunnel.

59 *Corpex* dictates that this ground of appeal must fail. It will be recalled that in para. 62 of *Corpex*, the Supreme Court stated:

> [O]nce work is complete, a contractor cannot claim in a Court of law benefits similar to those which [the notice provision] would have guaranteed if he has not himself observed that clause and given the notice for which the clause provides.

60 Thus, even if Clearway's factual assertion is correct, Clearway cannot rely on items 3 and 6 of the March 2007 Claim to save items 7 and 8 of the August 2010 Claim. The Notice Provision requires detailed claims in which the items being claimed are identified and supported by records. Items 3 and 6 do not contain the information necessary to meet those requirements in respect of items 7 and 8 of the August 2010 Claim. Accordingly, items 3 and 6 of the March 2007 Claim did not give the notice required by the Notice Provision such that Clearway can rely on them to proceed with its claims in items 7 and 8 of the August 2010 Claim.

Issue 5: No Complaint by the City in respect of the Date of Delivery of the March 2007 Claim

61 This ground of appeal rests on the timing of the March 2007 Claim, which Clearway delivered to the City more than 30 days after completion of the work affected by the flood.

62 Clearway contends that as the City did not raise any issue with respect to the timing of the March 2007 Claim, it waived compliance with the Notice Provision or, alternatively, it varied the terms of the Contract by this conduct. On the basis of either waiver or variation of contract, Clearway submits, the City cannot rely on the timing component of the Notice Provision to bar the August 2010 Claim.

63 The Supreme Court of Canada provides guidance on the doctrine of waiver in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 (S.C.C.). In paragraphs 19, 20 and 24, it lays down the following. Waiver occurs when one party to a contract (or proceeding) takes steps that amount to foregoing reliance on some known right or defect in the performance of the other party. It will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of the deficiency that might be relied on and (2) an unequivocal and conscious intention to abandon the right to rely on it. The intention to relinquish the right must be communicated. Communication can be formal or informal and it may be inferred from conduct. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.

64 There is nothing in Clearway's affidavit material that meets the requirement that the City communicated an "unequivocal and conscious intention to abandon" its right to rely on the Notice Provision or to otherwise waive strict compliance with

its terms. Indeed, Clearway did not assert that it had any such belief. Accordingly, there is no factual basis to support this submission. On that basis alone, this ground of appeal must fail.

65 Two other arguments advanced on this ground of appeal warrant comment. The first is Clearway's argument, based on the decision of this court in *Colautti Construction Ltd. v. Ottawa (City)* (1984), 46 O.R. (2d) 236 (Ont. C.A.), that the City varied the terms of the Contract by its conduct such that it cannot rely on the timing component of the Notice Provision.

66 *Colautti Construction* is a very different case from the present one. In *Colautti Construction*, the plaintiff contractor entered into a contract with the defendant city for the construction of a sanitary sewer. The contract stipulated that written authorization was required for additional charges. Nonetheless, at various different times over the course of the project, the contractor billed the city for significant extra charges and the city paid them, despite the absence of written authorization. This court held that the parties had varied the terms of the contract by their conduct and the city could not rely on the strict provisions of the contract to escape liability for further additional costs.

67 In the present case, there is no pattern of conduct by the parties over the course of the Contract demonstrating that they did not intend to be bound by the Notice Provision. Far from ignoring the relevant provisions in the Contract, the parties acted in compliance with its terms. GC 3.14.03.01 required Clearway to give notice of any situation that might lead to a claim for additional payment. The affidavit evidence shows that Clearway did this. Further, as we have seen, the Notice Provision required Clearway to give a detailed claim after completion of the work affected by the situation. Clearway did that, by delivering its March 2007 Claim. As for the City, GC 3.14.03.05 required that it advise Clearway, in writing, within 90 days of receiving the detailed claim, of its opinion of the validity of the claim. This the City did by means of its letter dated April 4, 2007, which denied the March 2007 Claim. There is no pattern of conduct by the parties that had the effect of varying the terms of the Contract.

68 The second matter warranting comment is the City's contention that waiver and promissory estoppel are one and the same. Based on this view, the City submitted that Clearway had to meet the test for promissory estoppel enunciated by the Supreme Court of Canada in *Maracle v. Travelers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 (S.C.C.), at para. 13:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

69 The Supreme Court decided *Saskatchewan River Bungalows* a mere three years after *Maracle*. It did not conflate or equate the requirements for waiver and promissory estoppel in those two cases. Rather, as has been seen, it articulated different requirements for each doctrine. Indeed, at para. 18 of *Saskatchewan River Bungalows*, after acknowledging that waiver and promissory estoppel are "closely related", the Supreme Court expressly declined to determine how and whether the two doctrines should be distinguished. Instead, it decided the appeal based on waiver, because that is how "the parties [had] chosen to frame their submissions".

70 There has been much speculation, both judicial and academic, on whether waiver and promissory estoppel are essentially the same thing, with the sole or primary difference being that waiver developed as a common law doctrine whereas promissory estoppel arose in equity.[4] That determination awaits the proper case, one in which it is squarely raised and fully argued. Following the lead of the Supreme Court, I would decide this ground of appeal based on waiver and variation, as that is how Clearway framed the issue. I would add, however, that if the doctrine of promissory estoppel is in play, my conclusion that Clearway has failed to establish the necessary evidentiary basis is reinforced because there is no evidence of detrimental reliance.

Disposition

71 Accordingly, I would dismiss the appeal, with costs to the City in the agreed-on amount of $5,000, inclusive of disbursements and applicable taxes.

R.G. Juriansz J.A.:

I agree

G.J. Epstein J.A.:

I agree

Appeal dismissed.

Appendix A

GC 3.14 Claims, Negotiations, Mediation

GC 3.14.01 Continuance of the Work

.01 Unless the Contract has been terminated or completed, the Contractor shall in every case, after serving or receiving any notification of a claim or dispute, verbal or written, continue to proceed with the Work with due diligence and expedition. It is understood by the parties that such action will not jeopardize any claim it may have.

GC 3.14.02 Record Keeping

.01 Immediately upon commencing work which may result in a claim, the Contractor shall keep Daily Work Records during the course of the Work, sufficient to substantiate the Contractor's claim, and the Contract Administrator will keep Daily Work Records to be used in assessing the Contractor's claim, all in accordance with clause *GC 8.02.07*, Records.

.02 The Contractor and the Contract Administrator shall reconcile their respective Daily Work Records on a daily basis, to simplify review of the claim, when submitted.

.03 The keeping of Daily Work Records by the Contract Administrator or the reconciling of such Daily Work Records with those of the Contractor shall not be construed to be acceptance of the claim.

GC 3.14.03 Claims Procedure

.01 The Contractor shall give oral notice to the Contract Administrator of any situation which may lead to a claim for additional payment immediately upon becoming aware of the situation and shall provide written notice to the Contract Administrator of such situation or of any express intent to claim such payment, within seven days of the commencement of any part of the work which may be affected by the situation or will form part of the claim.

.02 Not used.

.03 The Contractor shall submit detailed claims as soon as reasonably possible and in any event no later than 30 Days after completion of the work affected by the situation. The detailed claim shall:

a) identify the item or items in respect of which the claim arises;

b) state the grounds, contractual or otherwise, upon which the claim is made; and

c) include the Records maintained by the Contractor supporting such claim.

In exceptional cases the 30 Days may be increased to a maximum of 90 Days with approval in writing from the Contract Administrator.

.04 Within 30 Days of the receipt of the Contractor's detailed claim, the Contract Administrator may request the Contractor to submit any further and other particulars as the Contract Administrator considers necessary to assess the claim. The Contractor shall submit the requested information within 30 Days of receipt of such request.

.05 Within 90 Days of receipt of the detailed claim, the Contract Administrator shall advise the Contractor, in writing, of the Contract Administrator's opinion with regard to the validity of the claim.

GC 3.14.04 Negotiations

.01 The parties shall make all reasonable efforts to resolve their dispute by amicable negotiations and agree to provide, without prejudice, open and timely disclosure of relevant facts, information, and documents to facilitate these negotiations.

.02 Should the Contractor disagree with the opinion given in paragraph *GC 3.14.03.05*, with respect to any part of the claim, the Contract Administrator shall enter into negotiations with the Contractor to resolve the matters in dispute. Where a negotiated settlement cannot be reached and it is agreed that payment cannot be made on a Time and Material basis in accordance with clause *GC 8.02.04*, Payment on a Time and Material Basis, the parties shall proceed in accordance with clause *GC 3.14.05*, Mediation.

GC 3.14.05 Mediation

.01 If a claim is not resolved satisfactorily through the negotiation stage noted in clause *GC 3.14.04*, Negotiations, within a period of 30 Days following the opinion given in paragraph GC *3.14.03.05*, and the Contractor wishes to pursue the issue further, the parties may, upon mutual agreement, utilize the services of an independent third party mediator.

.02 The mediator shall be mutually agreed upon by the Owner and Contractor.

.03 The mediator shall be knowledgeable regarding the area of the disputed issue. The mediator shall meet with the parties together and separately, as necessary, to review all aspects of the issue. In a final attempt to assist the parties in resolving the issue themselves prior to proceeding to arbitration the mediator shall provide, without prejudice, a non-binding recommendation for settlement.

.04 The review by the mediator shall be completed within 90 Days following the opinion given in paragraph *GC 3.14.03.05*.

.05 Each party is responsible for its own costs related to the use of the third party mediator process. The costs of the third party mediator shall be equally shared by the Owner and Contractor.

GC 3.14.06 Payment

.01 Payment of the claim will be made no later than 30 Days after the date of resolution of the claim or dispute. Such payment will be made according to the terms of *Section GC 8.0*, Measurement and Payment.

GC 3.14.07 Rights of Both Parties

.01 It is agreed that no action taken under this subsection *GC 3.14*, Claims, Negotiations, Mediation, by either party shall be construed as a renunciation or waiver of any of the rights or recourse available to the parties, provided that the requirements set out in this subsection are fulfilled.

Footnotes

1 The Notice Provision allows for time extensions of up to 90 days in "exceptional cases", with approval in writing from the Contract Administrator. As the August 2010 Claim greatly exceeds either time limit, for ease of reference I refer only to the 30-day limit.

2 *Corpex*, at para. 31.

3 See pp. 101-103.

4 See, for example, *Med-Chem Health Care Inc., Re*, [2000] O.J. No. 4009 (Ont. S.C.J. [Commercial List]); *HREIT Holdings 36 Corp. v. R.A.S. Food Services (Kenora) Inc.* (2009), 80 R.P.R. (4th) 64 (Ont. S.C.J.), at paras. 57-61; *Tudale Explorations Ltd. v. Bruce* (1978), 20 O.R. (2d) 593 (Ont. Div. Ct.), at pp. 595 -99; *Petridis v. Shabinsky* (1982), 35 O.R. (2d) 215 (Ont. H.C.); *Jones v. Laurie*, 2004 NSSC 87 (N.S. S.C.), at para. 14, (2004), 223 N.S.R. (2d) 129 (N.S. S.C.). For academic consideration of this matter see,

for example, S.M. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010), at paras. 195-206; Angela Swan, *Canadian Contract Law*, 2d ed. (Markham, Ont.: LexisNexis, 2009), at paras. 2.198-255; John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005), at pp. 275ff.

End of Document

TAB 12

2012 ONSC 7182
Ontario Superior Court of Justice (Divisional Court)

Geographic Resources Integrated Data Solutions Ltd. v. Peterson

2012 CarswellOnt 15907, 2012 ONSC 7182, 225 A.C.W.S. (3d) 86, 300 O.A.C. 58

Geographic Resources Integrated Data Solutions Ltd., and The State of Oregon, Acting by and Through its State Board of Higher Education, on Behalf of Southern Oregon University, Appellants/Plaintiffs and Perry Peterson, Nelligan O'Brien Payne, Nelligan O'Brien Payne LLP, and Wing T. Yan, Respondents/Defendants

Aitken J.

Heard: December 12, 2012
Judgment: December 17, 2012
Docket: 12-DV-1823

Counsel: Patrick Snelling, for Appellants / Plaintiffs
Heather Williams, for Respondents / Defendants, Nelligan O'Brien Payne, Nelligan O'Brien Payne LLP, and Wing T. Yan

Subject: Intellectual Property; Civil Practice and Procedure

Table of Authorities

Cases considered by *Aitken J.*:

Equity Waste Management of Canada Corp. v. Halton Hills (Town) (1997), 40 M.P.L.R. (2d) 107, 1997 CarswellOnt 3270, 103 O.A.C. 324, 35 O.R. (3d) 321 (Ont. C.A.) — considered

Gold v. Rosenberg (1997), (sub nom. *Gold v. Primary Developments Ltd.)* 19 E.T.R. (2d) 1, 35 O.R. (3d) 736, 1997 CarswellOnt 3273, 1997 CarswellOnt 3274, 152 D.L.R. (4th) 385, 219 N.R. 93, [1997] 3 S.C.R. 767, 104 O.A.C. 1, 35 B.L.R. (2d) 212 (S.C.C.) — followed

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — followed

Musselman v. 875667 Ontario Inc. (2012), 2012 CarswellOnt 1507, 2012 ONCA 41, 8 C.L.R. (4th) 163, 93 M.P.L.R. (4th) 167 (Ont. C.A.) — considered

Waxman v. Waxman (2004), 2004 CarswellOnt 1715, 44 B.L.R. (3d) 165, 186 O.A.C. 201 (Ont. C.A.) — followed

Zeitoun v. Economical Insurance Group (2009), 73 C.C.L.I. (4th) 255, 257 O.A.C. 29, 2009 ONCA 415, 73 C.P.C.

(6th) 8, 307 D.L.R. (4th) 218, 2009 CarswellOnt 2665, 96 O.R. (3d) 639 (Ont. C.A.) — followed

Statutes considered:

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B
s. 4 — referred to

APPEAL by plaintiff's from judgment dismissing plaintiff's motion to amend pleadings in action arising out of appropriation of intellectual property.

***Aitken J.*:**

Nature of Proceedings

1 The appellants, Geographic Resources Integrated Data Solutions Ltd. ("GRIDS") and The State of Oregon ("SOU"), appeal from the decision of Master MacLeod dated February 24, 2012 dismissing their motion to file an Amended Amended Statement of Claim. The defendants, Nelligan O'Brien Payne and Nelligan O'Brien Payne LLP (collectively referred to as "NOP"), and Wing T. Yan ("Yan") were successful respondents on the motion before the Master and have responded to this appeal. The defendant, Perry Peterson ("Peterson"), did not participate in the motion before the Master and is not a respondent on this appeal.

Brief Chronology of Litigation

2 On August 15, 2006, the appellants commenced an action against Peterson, NOP, and Yan seeking, amongst other forms of relief: (1) a declaration that they are the sole and exclusive owners of certain intellectual property ("IP"), and that Peterson holds in trust for them the invention in question and any patents relating to it (including a Canadian patent obtained with the assistance of NOP and Yan); (2) various injunctions; and (3) damages for breach of contract, breach of fiduciary duty, and conversion. The Statement of Claim was subsequently amended to add claims for aggravated, punitive and exemplary damages against each of the defendants in favour of GRIDS. Included in the Amended Statement of Claim, issued April 14, 2008, are the following factual allegations which, it will be noted, are at times inconsistent:

- GRIDS and SOU are the joint owners of IP, including the invention in question.

- Peterson was an officer, director, employee, and fiduciary of GRIDS and, through his company, Archibald Peterson Limited ("APL"), was a shareholder of GRIDS.

- In September, 2002, GRIDS and SOU instructed Peterson to retain NOP and Yan to provide legal advice and services for the protection of the IP, and to file patent applications on behalf of GRIDS and SOU (paras. 5, 9). At the time, Peterson was a director, officer, and subcontractor of GRIDS, and occupied the position of project manager.

- NOP was retained by GRIDS to provide legal advice and services for the protection of the IP and to file patent applications in regard to the invention on behalf of GRIDS (para. 5). NOP was retained by both GRIDS and SOU to provide these services (para. 22).

• Yan was a member of NOP and was the lawyer who performed the work for GRIDS (para. 6). Yan performed work for both GRIDS and SOU (para. 22).

• On March 28, 2003, Peterson resigned from his role as project manager of GRIDS.

• In June, 2003, Peterson resigned as a director of GRIDS.

• On or about August 1, 2003, unbeknownst to GRIDS and SOU, NOP and Yan filed patent applications in Canada, Europe, Australia, the United States, and internationally in regard to the invention in question.

• On or about January 21, 2004, GRIDS and SOU filed a separate patent application for the same invention in the United States.

• NOP and Yan knew, *or ought to have known*, that GRIDS and SOU were the sole owners of the IP (para. 22).

• Peterson owed a fiduciary duty to GRIDS and SOU and breached that duty (para. 21). Peterson owed a fiduciary duty to GRIDS and breached that duty (paras. 4, 28).

• NOP owed a fiduciary duty to GRIDS and SOU and breached that duty (paras. 21, 23). NOP owed a fiduciary duty to GRIDS and breached that duty (paras. 35-37.1).

• Yan owed a fiduciary duty to GRIDS and SOU and breached that duty (paras. 21, 23). Yan owed a fiduciary duty to GRIDS and breached that duty (paras. 35-37.1).

• Peterson committed the tort of conversion as against GRIDS and SOU.

• NOP and Yan "deliberately and intentionally" filed the Canadian patent application for Peterson "in circumstances where NOP ... and Yan knew that they were acting in a manner that would cause damage to GRIDS" (para. 37.1).

3 Peterson filed a Statement of Defence dated January 25, 2007[1] , which was subsequently amended. In the Amended Statement of Defence, Peterson alleged that he was the sole inventor and owner of the invention subject to the Canadian patent, and other international patents, in question. Peterson denied that, when he had the Canadian patent filed, he was a subcontractor, employee, or fiduciary of GRIDS. Peterson acknowledged that in March, 2003, he held the position of director and officer of GRIDS and was the project manager of GRIDS in respect to a particular project. Peterson acknowledged that he had NOP and Yan file on his behalf the application for the Canadian patent of the invention in question. He denied that he retained NOP and Yan to provide any services to GRIDS.

4 NOP and Yan filed their Statement of Defence on June 15, 2007. An Amended Statement of Defence was filed on September 9, 2008. In that document, NOP and Yan crossclaimed against Peterson for indemnification. As well, NOP and Yan denied that they were ever retained by either GRIDS or SOU with respect to the protection of any IP or the filing of any patent applications. NOP and Yan alleged that they had been retained by Peterson in September, 2002, to provide general information about the patent application process, and not to provide services in relation to any specific patent application. NOP and Yan also alleged that, in June, 2003, Yan was retained by Peterson to provide legal services in regard to a specific Canadian patent application. At all times, Yan understood that Peterson was the sole inventor and owner of the invention. Yan and NOP denied that they had anything to do with the filing of any patent application, other than the Canadian application. Yan and NOP denied that they ever had any contractual or other relationship with SOU. Yan and NOP denied that, when they were retained by Peterson in June, 2003, they owed any fiduciary duty to GRIDS.

5 Subsequently, Peterson filed a Statement of Defence to the Cross-claim dated August 17, 2009 in which Peterson made the following allegations:

6. Perry Peterson relies on the knowledge that legal staff of NOP were at all times aware of the material facts necessary to establish Mr. Peterson's ownership over intellectual property claimed in the Canadian patent.

7. Perry Peterson relies on the knowledge that, at all times, he relied on the skill, judgment, their detailed knowledge of the material facts and advice of NOP legal staff in his actions to protect his intellectual property rights and his obligations to GRIDS.

6 During the discovery process, Peterson, by mistake, produced to GRIDS and SOU an email dated June 4, 2003 ("Document 134") from Tracey Ross ("Ross"), a lawyer at NOP, to Peterson in which Ross provided certain legal advice to Peterson regarding the filing of a patent application for the invention in question. The following are some statements included in that email:

• "I have spoken with Wing Yan about your ongoing situation. I know you and he have spoken briefly before about filing a patent for this technology."

• "At this point, prior to sending out a cease and desist letter, it is ABSOLUTELY ESSENTIAL that you file for a patent for the IP in question. Once the patent is filed, the presumption, at law, is that you are the owner. This doesn't mean that they can't dispute this with litigation but you would certainly have the standing to bring an application for injunction and to have any third parties pay attention to your claims."

• "Time is however of the essence because at this stage, any of the other parties could do the same thing — rush down and register their patent and they would be presumed to be the owner of the invention. IT is imperative that you do this immediately."

• "If you wish, Wing can assist you with your application."

• "I am expecting that Shai will be calling me to find out what i[s] going on — They will likely figure out that you are planning on filing the patent application and may race to do the same themselves."

7 A motion was brought before Master MacLeod to determine whether Document 134 was privileged and, therefore, immune from production. In their factum filed in support of the motion, the appellants stated:

3. The Plaintiffs take the position that document 134 cannot be the subject of a proper claim of privilege insofar as it is evidence of the Defendants, Wing T. Yan ("Yan") and Nelligan O'Brien Payne and Nelligan O'Brien Payne LLP ("NOP") advising Peterson with respect to what course of action to take to undermine Grids' proprietary interest in certain intellectual property. The course of action advised and subsequently taken by Peterson amounts to the tort of conversion. Communications made in advance of or in furtherance of tortious conduct of this nature are not protected by solicitor-client privilege.

. . .

25. The Plaintiff says the contents of that email are of significant probative value for the within litigation as it [is] evidence which:

a) It underscores the seriousness of the Defendant's [sic] conduct insofar as it reveals that his conduct is based on the advice of counsel, was planned and deliberate in design with the purpose of defeating Grids' proprietary interest and thus constitutes the tort of conversion;

b) Establishes that contrary to the position alleged in their Statement of Defence Yan and NOP were aware that Grids was asserting a proprietary interest in the I.P., and hence recommended a course of action calculated to

undermine Grids' rights to the I.P.;

c) Demonstrates a calculated effort by Peterson to move expeditiously to patent the I.P. in order to undermine Grids' rights to the I.P.;

d) Is thus at odds with the testimony of Peterson with respect to the nature and scope of legal services which Yan and NOP actually provided with respect to the I.P. in question.

26. Solicitor client privilege is not absolute. Privilege cannot be claimed in cases where the communication counsels or is in furtherance of the commission of a fraud. This is regardless of whether or not the lawyer in question was aware that the conduct in question was fraudulent.

8 In his decision released April 3, 2009, the Master determined that privilege did not attach to the document and that Peterson had to answer questions in relation to the legal advice and services provided by NOP and Yan. The Master concluded that there was a waiver of solicitor/client privilege in regard to the patent application and also that the document might fall within the future crime and fraud exception regarding production of privileged communications between a solicitor and client. The Master observed that Document 134 demonstrated the following:

- Peterson and NOP knew that GRIDS was challenging Peterson's ownership of the IP.
- Peterson was advised not to send a cease and desist letter until he commenced a patent application.
- Peterson was advised to commence a patent application immediately to give him standing to obtain an injunction.
- Peterson was advised to commence a patent application immediately because it was likely there would be a competing application commenced by GRIDS.

9 The Master concluded at para. 12 of his Reasons: "It is readily apparent that this document could be evidence of sinister intent if it is shown that Peterson is not the rightful owner of the invention that was patented and if it is shown that he knew or ought to have known he was appropriating intellectual property belonging to GRIDS."

10 On August 21, 2009, the appellants conducted further examinations for discovery of Peterson, at which time Peterson was questioned about the legal advice he had received from NOP and, more particularly, about Document 134. He stated:

Tracy Ross in that email says to me that, "I've already spoken to Wing about this because I understood you had talked to him previously about patent. That's my interpretation of it and you need to get that patent filed right away".

So this was an initiative that Tracey has taken upon the conclusions of understanding the process that had been going on with Archibald Peterson, the discussions that she had with Frank Huntley, including the one of June 3rd or 2nd, I believe, it's the draft letter to the Professor at Queen's University, James Stewart.

She had reviewed the Agreements that we just talked about between APL and myself and GRIDS and myself, she had seen the email correspondence from Kevin Sahr that said, you know, "I'm jealous that I didn't invent this", and so this is with the knowledge that I would have had up to that date, as well.

I don't think there's any external knowledge that I had that she didn't have, not knowingly any knowledge, anyway. She had all the knowledge to make that decision to say to me, "You need to file a patent as soon as possible".

11 On August 16, 2011, the appellants brought a motion before the Master seeking leave to issue an Amended Amended Statement of Claim to include a claim against NOP and Yan for damages pursuant to the doctrine of knowing assistance in regard to Peterson's breaches of fiduciary duty. The particulars of the claim sought to be advanced were provided in paragraphs 29 and 30 of a draft Amended Amended Statement of Claim filed with the Notice of Motion:

> 29. In addition to the breach of fiduciary duty aforementioned, NOP/NOP LLP and Yan are further liable to each of the Plaintiffs for the consequences of Peterson's fiduciary breaches pursuant to the legal doctrine of knowing assistance owing to the fact that:
>
> a) NOP/NOP LLP and Yan knew or should have known that Peterson was not entitled to claim ownership of the I.P. given that Peterson had sought specific advice and provided instructions on this matter and had specifically sought their advice as to his entitlements to the I.P. and the best way to secure the I.P. for himself to the exclusion of the Plaintiffs;
>
> b) NOP/NOP LLP and Yan knew or should have known that, owing to the services Peterson performed for GRIDS, and the remuneration he was paid, and the absence of an agreement otherwise between himself and GRIDS, GRIDS retained ownership of all intellectual property which Peterson created or participated in creating in the course of providing innovative services to GRIDS;
>
> c) NOP/NOP LLP and Yan knew or should have known that Peterson stood in a fiduciary role to GRIDS owing to the fact that he was a director of GRIDS and was hence bound by the statutory obligations provided for in s. 134 of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16; and
>
> d) NOP/NOP LLP and Yan knew or should have known that Peterson, by virtue of his position in GRIDS, received confidential proprietary information from GRIDS and SOU, and therefore Peterson held the proprietary information which make up the I.P. in trust for GRIDS and SOU, owed those partners fiduciary obligations with respect to the I.P. for the reasons enumerated in paragraph 21.4 *supra.*
>
> 30. By advising Peterson to file a patent so as to trump the Plaintiffs' claims and subsequently causing the Peterson patent to be filed, NOP/NOP LLP and Yan rendered assistance to Peterson in circumstances where they knew or were wilfully blind to the fact that Peterson was instructing them to act in a manner contrary to his fiduciary obligations of trust, fidelity, loyalty, good faith and confidence which he owed to SOU and GRIDS, and with the intent of deliberately converting the I.P. to his own use to the exclusion of the Plaintiffs.

12 In the Notice of Motion seeking leave to file the Amended Amended Statement of Claim, the appellants stated under "Grounds":

> 1. The proposed amendments to the Statement of Claim amount to a fleshing out of the original claims advanced by the Plaintiffs, Geographic Resources Integrated Data Solutions Ltd. ("GRIDS"), and the State of Oregon, acting by and through its State Board of Higher Education, on behalf of Southern Oregon University ("SOU") against Nelligan O'Brien Payne, Nelligan O'Brien Payne LLP and Wing T. Yan ("NOP/NOP LLP and Yan") arising from a breach of duties with respect to the Plaintiffs, and *all the material facts that give rise to the new claims are plead in the current Statement of Claim.*
>
> [Emphasis added.]

13 It was only as an alternative argument that the appellants stated that the facts giving rise to the new claims in the proposed amendments to the Statement of Claim were not discoverable by them until August 17, 2009, at the earliest, when Peterson served his Statement of Defence to the Cross-claim in which he made reference to the legal advice he received from

NOP and Yan. In paragraph 12 of their Notice of Motion, the appellants stated:

> 12. Prior to Peterson putting the legal advice he received from NOP/NOP LLP and Yan in issue, the Plaintiffs were aware of no factual basis to allege the actual knowledge requirement to make out a claim of knowing assistance against NOP/NOP LLP and Yan. Furthermore, prior to Peterson putting the legal advice in issue, the facts underlying a claim for knowing assistance were not discoverable due to the legal protections provided by solicitor and client privilege.

14 In their factum in support of the motion to amend before the Master, the appellants reiterated that the claim based on knowing assistance was merely a further particularization of existing claims and was based on the same facts that had already been substantially pleaded in the Amended Statement of Claim. In the alternative, if the proposed amendments were considered a new cause of action, the appellants took the position that the claim was not statute barred because it was only discoverable on August 22, 2009. In their factum, the appellants stated that they were relying on the concept of "wilful blindness" or "failure to investigate" as the basis for satisfying the "actual knowledge" element of the knowing assistance claim which they sought to add in their Amended Amended Statement of Claim.

Order Under Appeal

15 The Master found that the proposed claim for knowing assistance was a new cause of action not encompassed in the existing pleading. No appeal is taken in regard to this aspect of his decision.

16 The Master concluded that the claim of knowing assistance was statute barred because October 30, 2008, at the latest, was the date when a reasonable person in the exercise of reasonable diligence would have realized that: (1) the plaintiffs had suffered a loss, (2) the loss was due to the act or omission of the defendants, and (3) there was a legal remedy against those defendants which could appropriately be pursued. In arriving at this conclusion, the Master pointed to those portions of the appellants' factum dated October 30, 2008 used in support of their motion for production of Document 134, as set out in paragraph 7 above.

17 The Master went on to observe that the only thing that had changed since October 30, 2008, was that Peterson pleaded in his Statement of Defence to the Cross-claim dated August 17, 2009 that he had provided information to NOP and Yan concerning his ownership of the IP in question and had received legal advice from NOP and Yan, and Peterson stated during his examination for discovery on August 22, 2009 that he had shared certain specific documents with NOP and Yan in regard to his proprietary rights to the IP. His evidence on that discovery was that he told Ross that the IP was his invention and he provided her with documents that he believed supported that assertion. The Master pointed out that, when the motion was argued, the appellants' theory was that the documents provided to Ross by Peterson were so inadequate for that purpose that Ross was wilfully blind as to the true ownership of the IP. The Master concluded that the appellants had not adequately explained why all of the necessary elements to trigger discoverability of the appellants' knowing assistance claim were not known to the appellants once they had Document 134. He noted that, on the motion for production of that document, the appellants had argued that Document 134 was not privileged because it fell under the fraud exception to solicitor/client privilege.

18 The appellants concede that the Master properly interpreted the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 4 and the principles regarding discoverability. The parties are in agreement that, since the Notice of Motion seeking to further amend the Amended Statement of Claim was served on July 29, 2011, the limitation period would have expired if all of the essential elements required to establish a knowing assistance claim were discoverable prior to July 29, 2009. In fact, the

Master found, based on the evidence provided on the motion, that all such elements were discoverable no later than October 30, 2008.

Grounds of Appeal

19 The appellants advanced three grounds of appeal:

- The Master made an error in law in identifying the elements of a claim for knowing assistance, particularly in regard to SOU's claim.
- The Master made a palpable and overriding error in failing to appreciate that Document 134 did not demonstrate that NOP and Yan knew of GRIDS and SOU's proprietary interest in the IP.
- The Master made a palpable and overriding error in failing to appreciate all of the relevant evidence before the Master on the motion and focusing instead on Document 134.

Standard of Review

20 In *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), the Supreme Court of Canada addressed the standard of review on an appeal from a judge's decision. In summary:

> On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate Court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness (at para. 8).
>
> The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error": *Stein v. The Ship "Kathy Krantzberg"* (at para. 10).
>
> Questions of mixed fact and law are subject to the "palpable and overriding error" standard unless it is clear that the trial judge made some error of law or principle that can be identified independent of the judge's application of the law to the facts of the case. In these circumstances, the error of law is extricable from the questions of mixed fact and law in issue and must be separated out and reviewed on a standard of correctness (at paras. 36-37).

21 The Ontario Court of Appeal elaborated on the definition of a palpable and overriding error in *Waxman v. Waxman* (2004), 186 O.A.C. 201 (Ont. C.A.), at paras. 296-297, 300:

> The "palpable and overriding" standard addresses both the nature of the factual error and its impact on the result. A "palpable" error is one that is obvious, plain to see or clear: *Housen* at 246. Examples of "palpable" factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.
>
> An "overriding" error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a "palpable" error does not automatically mean that the error is also "overriding". The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the

face of that error: *Schwartz v. Canada*, [1996] 1 S.C.R. 254 at 281.

22 In *Zeitoun v. Economical Insurance Group*, 2009 ONCA 415, 96 O.R. (3d) 639 (Ont. C.A.), at para. 1, the Ontario Court of Appeal confirmed that the standard of review set out in *Housen v. Nikolaisen* applies to appeals from decisions of a master.

23 If a master's findings of fact are reasonably available based on the entirety of the evidence, the fact that some aspects of the evidence are capable of alternate interpretations is insufficient to support a finding of misapprehension of the evidence warranting appellate interference (*Musselman v. 875667 Ontario Inc.*, 2012 ONCA 41 (Ont. C.A.), at para. 6).

24 Even though a motion is decided on the basis of a written record, the decision of a master must be accorded deference (*Equity Waste Management of Canada Corp. v. Halton Hills (Town)* , 1997 CanLII 2742 [1997 CarswellOnt 3270 (Ont. C.A.)], at para. 45).

Analysis

Elements for Claim of Knowing Assistance

25 There is no dispute that, as set out in *Gold v. Rosenberg*, [1997] 3 S.C.R. 767 (S.C.C.), at para. 34, the required elements to establish a claim for knowing assistance are the following:

- There was a trust;
- The named trustee perpetrated a dishonest and fraudulent breach of trust; and
- The third party against whom the claim is made had actual knowledge of the trustee's dishonest and fraudulent breach of trust and participated in it.

26 It is not in dispute that recklessness or wilful blindness will suffice to establish the actual knowledge required under the third element.

27 The appellants acknowledge that the existence of a fiduciary duty on the part of Peterson to GRIDS and SOU was discoverable prior to July 29, 2009. As well, that Peterson perpetrated a dishonest and fraudulent breach of that fiduciary duty was discoverable prior to July 29, 2009. What the appellants take issue with in regard to the Master's decision is his conclusion that the third element (i.e. that NOP and Yan had actual knowledge of Peterson's dishonest and fraudulent breach of that fiduciary duty and assisted him in that regard) was discoverable prior to July 29, 2009.

28 The appellants argued that, in order for the third element to have been discoverable prior to July 29, 2009, the appellant in question had to have been aware that: (1) NOP and Yan knew, ought to have known, or were wilfully blind to the fact that Peterson owed a fiduciary duty to the appellant; (2) NOP and Yan knew, ought to have known, or were wilfully

blind to the fact that Peterson was breaching his fiduciary duty in a fraudulent way by applying for the Canadian patent; and (3) NOP and Yan assisted Peterson in applying for the patent. It is not in dispute that NOP and Yan assisted Peterson in applying for the patent.

29 The appellants took the position that, although it was discoverable prior to July 29, 2009 that NOP and Yan knew that Peterson owed a fiduciary duty to GRIDS, it was not discoverable by that date that they knew that Peterson owed a fiduciary duty to SOU. There are numerous problems with this argument.

30 First, at no time prior to the hearing of this appeal did the appellants raise the argument that the claims of the two plaintiffs (appellants) were discoverable at different times. This was not pleaded in any of the earlier pleadings or in the draft Amended Amended Statement of Claim. The draft Amended Amended Statement of Claim does go into greater detail as to why Peterson owed fiduciary duties to each of the appellants and as to why NOP and Yan knew or should have been aware of those fiduciary duties; however, the facts upon which it relies in making these allegations were known to the appellants long before July 29, 2009. The appellants did not raise in their factum on the motion before the Master that the claims of the two appellants were discoverable at different times. This argument was not raised in the appellants' factum for this appeal. Motions and appeals are not supposed to be argued on the basis of new submissions not included in the facta exchanged in advance of the hearings.

31 Second, the argument the appellants are now raising in regard to the discoverability of SOU's claim, as distinct from GRIDS' claim, ignores those portions of the Amended Statement of Claim that expressly state that Peterson owed a fiduciary duty to SOU as well as GRIDS, that GRIDS and SOU (through Peterson) retained NOP and YAN to represent them, that NOP and YAN ought to have known that GRIDS and SOU were the sole owners of the IP, that NOP and YAN owed a fiduciary duty to GRIDS and SOU as their clients, and that NOP and YAN assisted Peterson to assert ownership of the IP — thereby defeating the proprietary interests of both GRIDS and SOU in the IP. In view of all of these statements of fact contained in earlier pleadings, I cannot conclude that it was a palpable and overriding error for the Master to find that the appellants were in the position to discover that NOP and Yan *ought to have known* that Peterson owed a fiduciary duty to SOU (if such existed) prior to August 2009.

32 The draft Amended Amended Statement of Claim provides more particulars as to why Peterson owed a fiduciary duty to SOU (para. 21.4), but the only further particular it provides as to why NOP and YAN should have been aware of such fiduciary duty is the following paragraph:

> 29.d) NOP/NOP LLP and Yan knew or should have known that Peterson, by virtue of his position in GRIDS, received confidential proprietary information from GRIDS and SOU, and therefore Peterson held the proprietary information which make up the I.P. in trust for GRIDS and SOU, owed those partners fiduciary obligations with respect to the I.P. for the reasons enumerated in paragraph 21.4 *supra*.

33 Nothing is pled in the draft Amended Amended Statement of Claim as to why the appellants could not have been aware of this fact — at least in regard to wilful blindness — prior to July 29, 2009. Paragraphs 49 to 53 of the Amended Amended Statement of Claim are unhelpful in this regard. As well, the thrust of all earlier pleadings was that NOP and Yan should have made further inquiries regarding Peterson's relationship with the appellants and about the appellants' proprietary interests in the IP.

34 In regard to the second factor identified in para. 28 above, namely, that NOP and Yan knew, ought to have known, or were wilfully blind to the fact that Peterson was breaching his fiduciary duty in a fraudulent way by applying for the Canadian patent, the appellants particularize this factor in para. 30 of the draft Amended Amended Statement of Claim as follows:

> 30. By advising Peterson to file a patent so as to trump the Plaintiffs' claims and subsequently causing the Peterson patent to be filed, NOP/NOP LLP and Yan rendered assistance to Peterson in circumstances where they knew or were wilfully blind to the fact that Peterson was instructing them to act in a manner contrary to his fiduciary obligations of trust, fidelity, loyalty, good faith and confidence which he owed to SOU and GRIDS, and with the intent of deliberately converting the I.P. to his own use to the exclusion of the Plaintiffs.

35 Nothing is pled in the draft Amended Amended Statement of Claim as to why the appellants could not have discovered this fact prior to July 29, 2009. In fact, as of April 3, 2009, the contents of Document 134 were available for the appellants to rely on. As the Master noted, that document would be evidence of sinister intent if Peterson was not the rightful owner of the IP, as already alleged by the appellants. In earlier pleadings, the appellants had already stated that GRIDS and SOU were the rightful owners of the IP, that Peterson had converted that IP to his own use, and that NOP and Yan should have been aware of that through their interactions with Peterson and through exercising their professional duties in an appropriate fashion.

36 In paras. 49 to 53 of the draft Amended Amended Statement of Claim, the appellants point to the information gleaned from Peterson's Statement of Defence to the Cross-claim in which Peterson stated that NOP and Yan knew of the material facts relevant to his ownership of the IP and he relied on the advice of NOP and Yan to protect his IP rights. The appellants argue that this pleading allowed them to discover that NOP and Yan had the actual knowledge that could support a claim for knowing assistance. First, a claim for knowing assistance can be based on recklessness or wilful blindness; actual knowledge is not required. Second, Peterson's statements in his Statement of Defence to the Cross-claim are consistent with Peterson being the rightful owner of the IP and his having provided NOP and Yan with all relevant information to establish his proprietary interests therein. The statements do not add anything of significance to the appellants' claim regarding knowing assistance based on wilful blindness. It must be remembered that para. 22 of the Amended Statement of Claim stated that NOP and Yan knew or ought to have known that the appellants were the sole owners of the IP; therefore, presumably the appellants had already discovered by April 2008 that NOP and Yan ought to have known that Peterson did not own the IP in question.

37 The appellants have failed to persuade me that the Master made any error in law in his appreciation of the knowing assistance test when he considered whether the limitation period for this claim had expired.

Master's Findings of Fact

38 As is apparent from the previous section, the appellants have also failed to persuade me that the Master made any palpable and overriding errors in his appreciation of the facts or in his application of the law to the facts. The appellants themselves stated in the materials filed on their motion for production of Document 134 that that document was evidence that NOP and Yan advised Peterson with respect to what course of action to take to undermine GRIDS' proprietary interest in the IP in question and that the deliberate and fraudulent course of action Peterson then took, with NOP and Yan's support and on the basis of their advice, amounted to conversion. The appellants also stated that NOP and Yan were aware of GRIDS' proprietary right in the IP and recommended a course of conduct calculated to undermine those rights. It was open to the Master to conclude that, based on Document 134, the factum the appellants had submitted on the motion for its production, the affidavits filed on this motion, and the pleadings to date, the appellants had not satisfied him that the limitations clock regarding the knowing assistance claim started ticking only in August, 2009.

39 As the Master rightfully noted in his endorsement, throughout the course of this litigation, the appellants' theory has been that NOP and Yan were wilfully blind as to whether Peterson was the sole owner of the IP in question and as to whether GRIDS and SOU had a proprietary interest in that IP. The Master's finding, that the appellants did not provide any evidence as to why their ability to make claims based on the failure to make reasonable inquiries was materially better in August, 2009 from what it had been on October 30, 2008, was a finding available to him on all of the evidence. It was not a finding which, by any stretch, amounted to a palpable and overriding error.

Disposition

40 The appeal is dismissed. The parties may make brief written submissions regarding costs within 30 days of the release of these reasons.

Appeal dismissed.

Footnotes

[1] I am assuming the correct date is January 25, *2007* and not *2006* as stated in some of the documents, in that the initial Statement of Claim was only issued in August, 2006.

End of Document

TAB 13

2003 CarswellOnt 897
Ontario Court of Appeal [In Chambers]

Fantom Technologies Inc., Re

2003 CarswellOnt 897, 41 C.B.R. (4th) 55

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

IN THE MATTER OF SECTION 47 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED

IN THE MATTER OF A PLAN OR PLANS OF COMPROMISE OR ARRANGEMENT OF FANTOM TECHNOLOGIES INC., FANTOM TECHNOLOGIES INTELLECTUAL PROPERTY, INC., FANTOM TECHNOLOGIES DIRECT, INC., FANTOM TECHNOLOGIES U.S.A., INC. AND FANTOM TECHNOLOGIES U.S.A. HOLDINGS INC. (Applicants)

SIGMA MOULDERS and NORDICA PLASTICS LTD. (Appellants) and PRICEWATERHOUSECOOPERS INC., IN ITS CAPACITY AS INTERIM RECEIVER FOR FANTOM TECHNOLOGIES INC., FANTOM TECHNOLOGIES INTELLECTUAL PROPERTY, INC., FANTOM TECHNOLOGIES DIRECT, INC., FANTOM TECHNOLOGIES U.S.A., INC. AND FANTOM TECHNOLOGIES U.S.A. HOLDINGS INC., AND THE BANK OF NOVA SCOTIA (Respondents)

Gillese J.A.

Heard: March 18, 2003
Judgment: March 21, 2003
Docket: CA M29617

Proceedings: allowing leave to appeal (2003), 2003 CarswellOnt 348 (Ont. S.C.J.)

Counsel: Earl Altman for Appellants, Sigma Moulders and Nordica Plastics Ltd.
Daniel V. MacDonald for Respondent, Interim Receiver
Monica Creery for Respondent, Bank of Nova Scotia

Subject: Corporate and Commercial; Insolvency

Table of Authorities

Cases considered by *Gillese J.A.*:

Algoma Steel Inc., Re, 2001 CarswellOnt 1742, 25 C.B.R. (4th) 194, 147 O.A.C. 291 (Ont. C.A.) — considered

Pacific National Lease Holding Corp., Re, 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — considered

Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp., 19 C.P.C. (3d) 396, 1988 CarswellBC 615 (B.C. C.A.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

APPLICATION by plastic moulders for leave to appeal from judgment reported at 2003 CarswellOnt 348 (Ont. S.C.J.), dismissing motion to set aside ex parte order dismissing motion to assert security interest.

Gillese J.A.:

1 Sigma Moulders and Nordica Plastics Ltd. seek leave to appeal the order of Ground J. dated January 28, 2003 in which Ground J. refused to set aside the *ex parte* dismissal of their motion claiming entitlement to certain funds held by the Interim Receiver.

BACKGROUND

2 Fantom Technologies Inc. (and its affiliates) is an insolvent manufacturer of floor care products that was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended, on October 25, 2001.

3 Sigma and Nordica ("the moulders") are plastics moulders who made moulds and, from the moulds, produced parts for Fantom.

4 The initial order granted under the *CCAA* was obtained without notice to the moulders. The order required suppliers in possession of moulds or tooling to deliver the items to Fantom or the Interim Receiver.

5 At the time that the order was made, the moulders were holding certain of Fantom's parts and moulds to which they laid claim pursuant to the terms of their agreements with Fantom.

6 The Interim Receiver entered into an agreement to sell certain of Fantom's assets including various items in the moulders' possession. Of the $3 million (U.S.) purchase price for Fantom's assets, $1 million (U.S.) was allocated to the moulds and tooling.

7 The moulders turned over the items that they held to the Interim Receiver for sale. The Interim Receiver was to hold the proceeds of sale of the goods pending determination of priorities.

8 The market value of the moulds and parts delivered by Sigma and Nordica to the Interim Receiver was estimated to be $3.3 million and $1.7 million respectively.

9 The moulders brought a motion in Fantom's insolvency proceeding claiming approximately $4 million and asserting a security interest in the moulds that they had manufactured for Fantom ("the moulders motion").

10 On September 3, 2002, Ground J. made an order with a schedule for filing material by the moulders in support of their motion. The moulders failed to comply with the schedule.

11 The Bank of Nova Scotia is Fantom's principal secured creditor. It brought a motion returnable on December 11, 2002 to set a new schedule to be followed by the parties. The supporting documentation sets out the previous timetables agreed to by the parties and the fact that the moulders had failed to meet the scheduled requirements. The motion was settled on December 11, 2002 by way of a consent order. The December 11, 2002 order contained a new schedule and a provision that the Interim Receiver would be at liberty to move *ex parte* for dismissal of the moulders motion should Sigma and Nordica fail to meet any deadline in the schedule.

12 The first deadline in the December 11, 2002 order was delivery by the moulders of its expert report by January 3, 2003. The moulders failed to meet the deadline.

13 On January 7, 2003, the Interim Receiver obtained an *ex parte* order from Farley J. dismissing the moulders' motion.

14 The moulders moved to have Farley J.'s order set aside. At the return of the motion on January 23, 2003, the moulders had the expert's report and were ready to deliver it.

15 Ground J. refused to set aside the *ex parte* order. He held that he had jurisdiction to hear the motion because the law on setting aside *ex parte* orders made pursuant to an earlier order obtained on notice was not settled. He found that there was a dispute as to whether the moulders had complied with their obligations in respect of the undertakings portion of the order of December 11th.

16 At paragraph 3 of the endorsement, Ground J. dismisses the motion to set aside, on the basis of the moulders' failure to comply with court orders, in these words:

> [T]he moving parties are not, in my view, in the circumstances of this case, entitled to the relief sought. There has been a pattern of failure by these parties to comply with previous orders of this court with no valid explanation for such failure. They consented to the September 2002 timetabling order, sought and obtained an extension of certain dates in such order and then failed to comply with the order. They then consented to the December 11, 2002 timetabling order and to the provision of such order that the interim Receiver could move *ex parte* to dismiss their motion if any dates in such

order were not complied with, the most crucial date being the delivery of the Valuator's Report by January 3, 2003. They do not appear to have discussed this date with the Valuator before agreeing to it or even to have informed him of this date until December 16 or 20, 2002. Even when advised by him on December 23, 2002 that the date could not be met, they failed to inform the Interim Receiver of this until January 7, 2003. This behaviour to me demonstrates a cavalier attitude toward compliance with the orders of this court which should not be condoned by this court. This is clearly, in my view, in the words of Laforme, J. in *Pesah v. Grosz*, an "enough is enough" situation.

The Test for Leave to Appeal

17 In determining whether to grant leave to appeal in *CCAA* matters, appellate courts are to be cautious about interfering with a discretionary order of a judge exercising his or her supervisory function. See *Algoma Steel Inc., Re*, [2001] O.J. No. 1943 (Ont. C.A.). At para. 8 of that decision, this court quoted with approval the following passage from MacFarlane J.A. of the British Columbia Court of Appeal in *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]), at 272:

> [T]here may be an arguable case for the petitioners to present to a panel of this court on discrete questions of law. But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.C.A. The process of management which the Act has assigned to the trial court is an ongoing one. . . .
>
> A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.
>
> . . . In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellant proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. *I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.* [emphasis added]

18 Before me, all counsel agreed that the four factors listed by McLachlin J.A. (as she then was) in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*, [1988] B.C.J. No. 1403 (B.C. C.A.) are to be considered when determining whether to grant leave to appeal. The factors are:

(a) whether the point on appeal is of significance to the practice;

(b) whether the point raised is of significance to the action itself;

(c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(d) whether the appeal will unduly hinder the progress of the action.

ANALYSIS

19 The parties differ in their characterisation of the issue on appeal. In my view, it is unclear whether Ground J. had jurisdiction to set aside an *ex parte* order made pursuant to an earlier order made on notice. This is a matter of significance to

the practice.

20 The issue is of obvious significance to the parties. The order below has the effect of finally determining the moulders' motion without an adjudication on the merits and the amounts in question are substantial.

21 It cannot be said that the appeal is frivolous. If the judge below had jurisdiction, it is unclear at this stage whether all relevant considerations were brought to bear in the exercise of his discretion.

22 The granting of leave to appeal may slow the process. On the evidence before me, it is unclear how much of a hindrance will be caused. In view of the significance of the issues involved, however, in my view any hindrance will not be undue especially if the hearing of the appeal is expedited.

CONCLUSION

23 Accordingly, leave to appeal is granted. The appeal is to be expedited to a date to be set by the Registrar. If the parties are unable to agree on costs, they may make brief written submissions within ten days of the date of release of this decision.

Application granted.

TAB 14

2001 CarswellOnt 1258
Ontario Court of Appeal

Cineplex Odeon Corp., Re

2001 CarswellOnt 1258, 24 C.B.R. (4th) 201

In the Matter of the Companies' Creditors Arrangement Act

In the Matter of a Plan of Compromise or Arrangement of Cineplex Odeon Corporation and the other Applicants in Schedule "A"

MacPherson J.A.

Judgment: March 27, 2001
Docket: CA M27138

Counsel: *David M. McNevin*, for Applicant, Mady Development Corporation

Subject: Corporate and Commercial; Insolvency

Table of Authorities

Cases considered by *MacPherson J.A.*:

Blue Range Resource Corp., Re (1999), 244 A.R. 103, 209 W.A.C. 103, 12 C.B.R. (4th) 186 (Alta. C.A.) — considered

Smoky River Coal Ltd., Re, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94 (Alta. C.A.) — applied

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
s. 13 — pursuant to

s. 14 — pursuant to

APPLICATION by creditor for leave to appeal from decision of trial judge under *Companies' Creditors Arrangement Act.*

***MacPherson J.A.*:**

1 The applicant, Mady Development Corporation ("MDC") seeks leave to appeal from the decision of Farley J. dated March 6, 2001 in which he determined that certain fixtures (seats and screens) located on MDC's premises (a movie Theatre in Windsor) were trade fixtures rather than permanent fixtures. As a result, Farley J. ordered that Cineplex Odeon Corporation ("Cineplex") could remove the trade fixtures from the premises.

2 The application for leave to appeal is made pursuant to ss.13 and 14 of the *Companies' Creditors Arrangement Act* ("CCAA"). The parties are agreed that four factors should be considered on such an application:

(1) whether the point on appeal is of significance to the practice;

(2) whether the point raised is of significance to the proceeding itself;

(3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) whether the appeal will unduly hinder the progress of the action.

See: *Re Blue Range Resource Corp.* (1999), 12 C.B.R. (4th) 186 (Alta. C.A.) at 190.

3 I do not think that the issue proposed for the appeal is of significance to the practice generally. Generally speaking, the issue of tenants' trade fixtures does not arise in, or is a very small component of, *CCAA* proceedings.

4 I do not think that the issue proposed for the appeal is of significance to this particular *CCAA* proceeding. The issue relates to theatre seats and movie screens in one theatre in the context of a nationwide re-organization designed to keep a major corporation afloat *and* to deal fairly with all creditors, which will include MDC.

5 I do not think that the proposed appeal is *prima facie* meritorious. Farley J. specifically considered the leading authorities and the relevant provisions of the lease. In my view, his conclusion that the theatre seats and movie screens were trade fixtures is correct.

6 The respondent concedes the fourth factor. This was a proper concession because this court could hear the appeal on an expedited basis in very short order.

7 In *Re Smoky River Coal Ltd.* (1999), 237 A.R. 326 (Alta. C.A.), Hunt J.A. conducted an extensive review of the history and purposes of the *CCAA*. She said, at p 341:

> The fact that an appeal lies only with leave of an appellate court (s.13 CCAA) suggests that Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.

8 I agree with Hunt J.A.'s observation. In my view, the present matter is not one of those clear cases on which leave to

appeal should be granted. In the end, I think that Farley J.'s analysis and conclusion are correct.

Application dismissed.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD DOING BUSINESS AS "THE TITLE STORE"

Court of Appeal File No.: M44126
Court File No. CV-14-10518-00CL

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF TRIMOR ANNUITY FOCUS LIMITED PARTNERSHIP #5

(Motion for Leave to Appeal in writing returnable week of September 8, 2014)

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