Court File No. M44124

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

BRIEF OF AUTHORITIES OF THE DIP LENDERS AND THE AD HOC COMMITTEE
(returnable August 15, 2014)

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[1] Bodnar et al. v. The Cash Store Financial Services Inc. et al., Supreme Court of British Columbia, Vancouver Reg. No. S041348;
Stewart v. The Cash Store Financial Services Inc. et al, Supreme Court of British Columbia, Vancouver Reg. No. S126361;
Tschritter et al. v. The Cash Store Financial Services Inc. et al, Alberta Court of Queen's Bench, Calgary Reg. No. 0301-16243;
Efthimiou v. The Cash Store Financial Services Inc. et al, Alberta Court of Queen's Bench, Calgary Reg. No. 1201-11816;
Meeking v. The Cash Store Inc. et al, Manitoba Court of Queen's Bench, Winnipeg Reg. No. CI 10-01-66061;
Rehill v. The Cash Store Financial Services Inc. et al, Manitoba Court of Queen's Bench, Winnipeg Reg. No. CI 12-01-80578;
Ironbow v. The Cash Store Financial Services Inc. et al, Saskatchewan Court of Queen's Bench, Saskatoon Reg. No. 1452 of 2012;
Ironbow v. The Cash Store Financial Services Inc. et al, Saskatchewan Court of Queen's Bench, Saskatoon Reg. No. 1453 of 2012

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The Heart and Stroke Foundation of Canada, Interveners on the
the Canadian Cancer Society, application for the Canadian
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Physicians for a Smoke-Free Canada
And between
Imperial Tobacco Ltd., Applicant;
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File Nos.: 23460, 23490.

Supreme Court of Canada

1993: October 4 / 1994: March 3.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé,
Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.
APPLICATIONS FOR INTERLOCUTORY RELIEF

Practice -- Interlocutory motions to stay implementation of regulations pending final decision on appeals and to delay implementation if appeals dismissed -- Leave to appeal granted shortly after applications to stay heard -- Whether the applications for relief from compliance with regulations

should be granted -- Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18. -- Tobacco Products Control Regulations, amendment, SOR/93-389 -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1) - - Rules of the Supreme Court of Canada, SOR/83-74, s. 27 -- Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.

The Tobacco Products Control Act regulates the advertisement of tobacco products and the health warnings which must be placed upon those products. Both applicants successfully challenged the Act's constitutional validity in the Quebec Superior Court on the grounds that it was ultra vires Parliament and that it violates the right to freedom of expression in s. 2(b) of the Canadian Charter of Rights and Freedoms. The Court of Appeal ordered the suspension of enforcement until judgment was rendered on the Act's validity but declined to order a stay of the coming into effect of the Act until 60 days following a judgment validating the Act. The majority ultimately found the legislation constitutional.

The Tobacco Products Control Regulations, amendment, would cause the applicants to incur major expense in altering their packaging and these expenses would be irrecoverable should the legislation be found unconstitutional. Before a decision on applicants' leave applications to this Court in the main actions had been made, the applicants brought these motions for stay pursuant to s. 65.1 of the Supreme Court Act, or, in the event that leave was granted, pursuant to r. 27 of the Rules of the Supreme Court of Canada. In effect, the applicants sought to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. They also requested that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

This Court heard applicants' motions on October 4 and granted leave to appeal the main action on October 14. At issue here was whether the applications for relief from compliance with the Tobacco Products Control Regulations, amendment should be granted. A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants.

Held: The applications should be dismissed.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the Supreme Court of Canada Act and r. 27 of the Rules of the Supreme Court of Canada.

The words "other relief" in r. 27 of the Supreme Court Rules are broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered. It can apply even though leave to appeal may not yet be granted. In interpreting the language of the rule, regard should be had to its purpose: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can

neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal.

Section 65.1 of the Supreme Court Act was adopted not to limit the Court's powers under r. 27 but to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. It should be interpreted as conferring the same broad powers as are included in r. 27. The Court, pursuant to both s. 65.1 and r. 27, can not only grant a stay of execution and of proceedings in the traditional sense but also make any order that preserves matters between the parties in a state that will, as far as possible, prevent prejudice pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. The Court therefore must have jurisdiction to enjoin conduct on the part of a party acting in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court.

Jurisdiction to grant the relief requested by the applicants exists even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd. which established that the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established. If jurisdiction under s. 65.1 of the Act and r. 27 were wanting, jurisdiction would be found in s. 24(1) of the Canadian Charter of Rights and Freedoms. A Charter remedy should not be defeated because of a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

The three-part American Cyanamid test (adopted in Canada in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.) should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the Metropolitan Stores test.

At the second stage the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving Charter rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

As a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

Here, the application of these principles to the facts required that the applications for stay be dismissed.

The observation of the Quebec Court of Appeal that the case raised serious constitutional issues and this Court's decision to grant leave to appeal clearly indicated that these cases raise serious questions of law.

Although compliance with the regulations would require a significant expenditure and, in the event of their being found unconstitutional, reversion to the original packaging would require another significant outlay, monetary loss of this nature will not usually amount to irreparable harm in private law cases. However, where the government is the unsuccessful party in a constitutional claim, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies. Although the required expenditure would impose economic hardship on the companies, the economic loss or inconvenience can be avoided

by passing it on to purchasers of tobacco products. Further, the applications, since they were brought by two of the three companies controlling the Canadian tobacco industry, were in actual fact for a suspension of the legislation, rather than for an exemption from its operation. The public interest normally carries greater weight in favour of compliance with existing legislation. The weight given is in part a function of the nature of the legislation and in part a function of the purposes of the legislation under attack. The government passed these regulations with the intention of protecting public health and furthering the public good. When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. The applicants, rather, must offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation. The only possible public interest in the continued application of the current packaging requirements, however, was that the price of cigarettes for smokers would not increase. Any such increase would not be excessive and cannot carry much weight when balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

Cases Cited

Applied: Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110; considered: Labatt Breweries of Canada Ltd. v. Attorney General of Canada, [1980] 1 S.C.R. 594; American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396; referred to: R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401; Keable v. Attorney General (Can.), [1978] 2 S.C.R. 135; Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1924), 55 O.L.R. 127; Laboratoire Pentagone Ltée v. Parke, Davis & Co., [1968] S.C.R. 269; Adrian Messenger Services v. The Jockey Club Ltd. (No. 2) (1972), 2 O.R. 619; Bear Island Foundation v. Ontario (1989), 70 O.R. (2d) 574; N.W.L. Ltd. v. Woods, [1979] 1 W.L.R. 1294; Trieger v. Canadian Broadcasting Corp. (1988), 54 D.L.R. (4th) 143; Tremblay v. Daigle, [1989] 2 S.C.R. 530; Dialadex Communications Inc. v. Crammond (1987), 34 D.L.R. (4th) 392; R.L. Crain Inc. v. Hendry (1988), 48 D.L.R. (4th) 228; MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577; Hubbard v. Pitt, [1976] Q.B. 142; Mills v. The Queen, [1986] 1 S.C.R. 863; Nelles v. Ontario, [1989] 2 S.C.R. 170; Ainsley Financial Corp. v. Ontario Securities Commission (1993), 14 O.R. (3d) 280; Morgentaler v. Ackroyd (1983), 150 D.L.R. (3d) 59; Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791; Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans) (1988), 21 F.T.R. 304; Island Telephone Co., Re (1987), 67 Nfld. & P.E.I.R. 158; Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439; Vancouver General Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; Rio Hotel Ltd. v. Commission des licences et permis d'alcool, [1986] 2 S.C.R. ix; Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373; R. v. Oakes, [1986] 1 S.C.R. 103.

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Code of Civil Procedure of Québec, art. 523.
Constitution Act, 1867, s. 91.
Fisheries Act, R.S.C. 1970 c. F-14.
Rules of the Supreme Court of Canada, 1888, General Order No. 85(17).
Rules of the Supreme Court of Canada, SOR/83-74, s. 27.
Supreme Court Act, R.S.C., 1985, c. S-26, ss. 65.1 [ad. S.C. 1990, c. 8, s. 40], 97(1)(a).
Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18.
Tobacco Products Control Regulations, amendment, SOR/93-389.

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Cassels, Jamie. "An Inconvenient Balance: The Injunction as a Charter Remedy". In Jeffrey Berryman, ed. Remedies: Issues and Perspectives. Scarborough, Ont.: Carswell, 1991, 271.
Sharpe, Robert J. Injunctions and Specific Performance, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (loose-leaf).

APPLICATIONS for interlocutory relief ancillary to constitutional challenge of enabling legislation following judgment of the Quebec Court of Appeal, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, allowing an appeal from a judgment of Chabot J., [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, granting the application. Applications dismissed.

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The judgment of the Court on the applications for interlocutory relief was delivered by

SOPINKA AND CORY JJ.:--

I. Factual Background

1 These applications for relief from compliance with certain Tobacco Products Control Regulations, amendment, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

2 The Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

3 The first part of the Tobacco Products Control Act, particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(f) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(b) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

5 Each of the applicants challenged the constitutional validity of the Tobacco Products Control Act on the grounds that it is ultra vires the Parliament of Canada and invalid as it violates s. 2(b) of the Canadian Charter of Rights and Freedoms. The two cases were heard together and decided on common evidence.

6 On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, finding that the Act was ultra vires the Parliament of Canada and that it contravened the Charter. The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

7 Up to that point, the applicants had complied with all provisions in the Tobacco Products Control Act. However, under the Act, the complete prohibition on all point of sale advertising was

not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

8 On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not ultra vires the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(b) of the Charter but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the Charter. Brossard J.A. agreed with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the Charter. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

9 On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: Tobacco Products Control Regulations, amendment, SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

10 According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotogravе cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about $30,000,000.

11 Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the Supreme Court Act, R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the Rules of the Supreme Court of Canada, SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

12 The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

13 The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

> 3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
> (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
> (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

> 65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

14 In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

15 Chabot J. concluded that the dominant characteristic of the Tobacco Products Control Act was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the Tobacco Products Control Act as a law regulating advertising of a particular product, a matter within provincial legislative competence.

16 Chabot J. found that, with respect to s. 2(b) of the Charter, the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that Charter guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

17 However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that advertising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

18 In deciding whether or not to exercise its broad power under art. 523 of the Code of Civil Procedure of Québec to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

> But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a valid act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of valid legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

> Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under Sec. 5 after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it seems reasonable to order the suspension of enforcement under Sec. 5 of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.
>
> We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.
>
> ...
>
> Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd. [1987] 1 S.C.R. 110, 127, 135). [Emphasis in original.]

Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. LeBel J.A. (for the majority)

19 LeBel J.A. characterized the Tobacco Products Control Act as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

20 LeBel J.A. applied the criteria set out in R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401, and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

21 LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(b) of the Charter but found that it was justified under s. 1 of the Charter. LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the Oakes test have been attenuated by later decisions of the Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [Translation] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit

consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

2. Brossard J.A. (dissenting in part)

22 Brossard J.A. agreed with LeBel J.A. that the Tobacco Products Control Act should be characterized as public health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

23 However, he did not think that the violation of s. 2(b) of the Charter could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

24 A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

25 First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was intra vires s. 91 of the Constitution Act, 1867 and justified under s. 1 of the Charter. Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

26 The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations

that were not even in existence at the time the appeal judgment was rendered.

27 The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the Supreme Court Act and r. 27 of the Rules of the Supreme Court of Canada.

Supreme Court Act

> 65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

28 Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see Rules of the Supreme Court of Canada, 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rule-making power. Subsection (1)(a) of that section provides that the rules may be enacted:

> 97. ... (a) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the

former, traditionally described as stays of execution, are contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See Keable v. Attorney General (Can.), [1978] 2 S.C.R. 135. The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1924), 55 O.L.R. 127 (C.A.). Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

29 Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

30 In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new regulations constitute conduct under a law that has been declared constitutional by the lower courts.

31 This, in our opinion, is the view taken by this Court in Labatt Breweries of Canada Ltd. v. Attorney General of Canada, [1980] 1 S.C.R. 594. The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

> It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court. I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

32 While the above passage appears to answer the submission of the respondents on this motion that Labatt was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

> Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in Labatt reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

33 In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110. In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in Metropolitan Stores strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

34 Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the Charter. A Charter remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

35 The applicants rely upon the following grounds:

1. The challenged Tobacco Products Control Regulations, amendment were promulgated pursuant to ss. 9 and 17 of the Tobacco Products Control Act, S.C. 1988, c. 20.
2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the Canadian Charter of Rights and Freedoms.
3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.
4. The tests for granting of a stay are met in this case:

    (i) There is a serious constitutional issue to be determined.
    (ii) Compliance with the new regulations will cause irreparable harm.
    (iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

36 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra. If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

37 The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

38 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

39 On the other hand, the Charter charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of Charter rights. Such a practice would undermine the spirit and purpose of the Charter and might encourage a government to prolong unduly final resolution of the dispute.

40 Are there, then, special considerations or tests which must be applied by the courts when Charter violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

41 Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In Metropolitan Stores, at p. 127, Beetz J. expressed the position in these words:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

42 We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

43 Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

B. The Strength of the Plaintiff's Case

44 Prior to the decision of the House of Lords in American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong prima facie case" on the merits in order to satisfy the first test. In American Cyanamid, however, Lord Diplock stated that an applicant need no longer demonstrate a strong prima facie case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other

words, that there is a serious question to be tried". The American Cyanamid standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, Injunctions and Specific Performance (2nd ed. 1992), at pp. 2-13 to 2-20.

45 In Metropolitan Stores, Beetz J. advanced several reasons why the American Cyanamid test rather than any more stringent review of the merits is appropriate in Charter cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

46 The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following dicta of this Court in Laboratoire Pentagone Ltée v. Parke, Davis & Co., [1968] S.C.R. 269, at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits. It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in Adrian Messenger Services v. The Jockey Club Ltd. (No. 2) (1972), 2 O.R. 619 (C.A.), at p. 620:

> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in Bear Island Foundation v. Ontario (1989), 70 O.R. (2d) 574 (H.C.), at p. 576:

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the

> appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

47 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in Charter cases.

48 The Charter protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged Charter violation to review the matter carefully. This is so even when other courts have concluded that no Charter breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in Metropolitan Stores, at p. 128, that "the American Cyanamid 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

49 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the Charter claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see Metropolitan Stores, supra, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

50 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

51 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the

application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the American Cyanamid principle in such a situation in N.W.L. Ltd. v. Woods, [1979] 1 W.L.R. 1294, at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

52 In Trieger v. Canadian Broadcasting Corp. (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

> This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

53 In Tremblay v. Daigle, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

54 The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

55 The second exception to the American Cyanamid prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in Metropolitan Stores, at p. 133:

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the Canadian Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the Charter and might perhaps be struck down right away; see Attorney General of Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

56 The suggestion has been made in the private law context that a third exception to the American Cyanamid "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in Dialadex Communications Inc. v. Crammond (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong prima facie case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in Charter cases. Even if the facts upon which the Charter breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. Irreparable Harm

57 Beetz J. determined in Metropolitan Stores, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

58 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

59 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (R.L. Crain Inc. v. Hendry (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (American Cyanamid, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (Hubbard v. Pitt, [1976] Q.B. 142 (C.A.)).

60 The assessment of irreparable harm in interlocutory applications involving Charter rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in Charter cases.

61 This Court has on several occasions accepted the principle that damages may be awarded for a breach of Charter rights: (see, for example, Mills v. The Queen, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; Nelles v. Ontario, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the Charter. In light of the uncertain state of the law regarding the award of damages for a Charter breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. The Balance of Inconvenience and Public Interest Considerations

62 The third test to be applied in an application for interlocutory relief was described by Beetz J. in Metropolitan Stores at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in Charter cases, many interlocutory proceedings will be determined at this stage.

63 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In American Cyanamid, Lord Diplock cautioned, at

p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

64 The decision in Metropolitan Stores, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in Ainsley Financial Corp. v. Ontario Securities Commission (1993), 14 O.R. (3d) 280, at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

65 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in Metropolitan Stores. A few additional points may be made. It is the "polycentric" nature of the Charter which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., Remedies: Issues and Perspectives, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in Charter litigation is not unequivocal or asymmetrical in the way suggested in Metropolitan Stores. The Attorney General is not the exclusive representative of a monolithic "public" in Charter disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

66 It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

67 We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in Morgentaler v. Ackroyd (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

> The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that these women would suffer irreparable harm, such evidence would not indicate any irreparable harm to these applicants, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

68 When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

69 Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the Fisheries Act, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

> (b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in Metropolitan Stores at p. 139. It was applied by the Trial Division of the Federal Court in Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans) (1988), 21 F.T.R. 304.

70 A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in Island

Telephone Co. Re, (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

> I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The public interest is equally well served, in the same sense, by any appeal. . . .

71 In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

72 A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

73 Consideration of the public interest may also be influenced by other factors. In Metropolitan Stores, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law than when the application of the law is suspended entirely. See Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439; Vancouver General Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; Rio Hotel Ltd. v. Commission des licences et permis d'alcool, [1986] 2 S.C.R. ix.

74 Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373 (H.C.), the court restrained the enforcement of an impugned taxation statute against

the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

75 In the course of discussing the balance of convenience in American Cyanamid, Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to ... preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the Charter is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. Summary

76 It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a Charter case.

77 As indicated in Metropolitan Stores, the three-part American Cyanamid test should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

78 At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the Metropolitan Stores test.

79 At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

80 The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving Charter rights. In addition to the damage each

party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

81 We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

82 The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the Charter. The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in R. v. Oakes, [1986] 1 S.C.R. 103, to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. Irreparable Harm

83 The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

84 Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will

face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. Balance of Inconvenience

85 Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

86 The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of $50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondarily, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

87 Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the Tobacco Products Control Act. On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in Metropolitan Stores. However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation".

88 The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in Metropolitan Stores:

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically-elected legislatures and are generally passed for the common good, for instance: ... the protection of public health ... . It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will

> be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

89 The regulations under attack were adopted pursuant to s. 3 of the Tobacco Products Control Act which states:

> 3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
> (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
> (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

90 The Regulatory Impact Analysis Statement, in the Canada Gazette, Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

> The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

91 These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

92 When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an

interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

93 The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

94 The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

TAB 2

Case Name:

Stuart Budd & Sons Ltd. v. IFS Vehicle Distributors ULC

Between
Stuart Budd & Sons Limited, 290756 Alberta Ltd., Saab on the Queensway Ltd., 798983 Ontario Inc., 9216-0415 Quebec Inc., 6847781 Canada Ltd., Forbes Saab and Used Car Shop Inc., and Springman & Springman Limited, Responding Parties, and IFS Vehicle Distributors ULC, International Fleet Sales Inc., Michael Libasci and Peggy King, Moving Parties

[2014] O.J. No. 3349

2014 ONCA 546

Docket: M43903 (C58835)

Ontario Court of Appeal
Toronto, Ontario

G.J. Epstein J.A.
(In Chambers)

Heard: June 23, 2014
Judgment: July 14, 2014.

(48 paras.)

Civil litigation -- Civil procedure -- Appeals -- Time to appeal -- Extension of time -- Stay of proceedings pending appeal -- Balance of convenience -- Irreparable harm -- Serious issue to be tried -- Motion by appellants for stay pending appeal and extension of time to perfect appeal allowed -- Appellants were British Columbia and California companies and principals who challenged jurisdiction to hear claims brought under Arthur Wishart (Franchise Disclosure) Act -- Claims were brought by eight plaintiffs, five of which were non-resident to Ontario -- Motion was dismissed with timetable set for litigation -- Order stayed pending appeal -- Balance of convenience was determinative factor, as it was appropriate to resolve jurisdictional issue prior to mounting substantive defence -- Prejudice to respondents was minimal.

Conflict of laws -- Proceedings -- Appeals and judicial review -- Practice and procedure -- Courts

-- Jurisdiction of courts -- Stays -- Motion by appellants for stay pending appeal and extension of time to perfect appeal allowed -- Appellants were British Columbia and California companies and principals who challenged jurisdiction to hear claims brought under Arthur Wishart (Franchise Disclosure) Act -- Claims were brought by eight plaintiffs, five of which were non-resident to Ontario -- Motion was dismissed with timetable set for litigation -- Order stayed pending appeal -- Balance of convenience was determinative factor, as it was appropriate to resolve jurisdictional issue prior to mounting substantive defence -- Prejudice to respondents was minimal.

Motion by the appellants for a stay of proceedings pending appeal and for an extension of time to perfect the appeal. The corporate appellants were two companies based in British Columbia and California. The individual appellants were the principals of the companies and resided in California. The responding parties were eight new and used car dealerships, five of which were located in provinces other than Ontario. The order under appeal dismissed the appellants' motion challenging the jurisdiction of the Ontario courts to hear an action by the non-Ontario plaintiffs seeking damages and related relief under the Arthur Wishart (Franchise Disclosure) Act. The motion judge referred to the jurisdictional challenge as an abuse of process, finding that dealership agreements listed Ontario as the governing law, that the appellants conducted considerable amounts of business in Ontario, and that the appellants had an Ontario mailing address and bank account. The judge found that the plaintiffs were able to assert a common cause under the terms of the Arthur Wishart Act. The judge imposed a timetable for the litigation and ordered the appellants to deliver a statement of defence by a specified date. The appellants moved for a stay pending appeal and further time to perfect their appeal.

HELD: Motion allowed. The proposed appeal raised several serious issues regarding the proper test to determine jurisdiction in claims involving franchise legislation with respect to the intersection of jurisdictional issues and joinder, and whether comments by the judge regarding case management and abuse of process indicated that he pre-determined the issues. The possibility of attornment to the jurisdiction raised some prospects of irreparable harm to the appellants. The balance of convenience favoured the appellants, as it was appropriate to resolve the jurisdictional issues prior to the appellants being forced to mount a substantive defence to the Ontario action. The resolution of the substantive and procedural issues expeditiously raised by the appellants would cause little prejudice to the respondents. The appellants were granted an extension of 60 days to perfect their appeal.

Statutes, Regulations and Rules Cited:

Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3

Ontario Rules of Civil Procedure, Rule 63.02

Appeal From:

On motion to stay the order of Justice David L.Corbett of the Superior Court of Justice, dated April 23, 2014 and for an extension of time to perfect the appeal.

Counsel:

Matthew J. Latella and Sarah Petersen, for the moving parties.

Andy Seretis, for the responding parties.

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1 **G.J. EPSTEIN J.A.**:-- The moving parties, the appellants in the appeal, move under rule 63.02 of the *Rules of Civil Procedure* for an order staying the order of Corbett J. dated April 23, 2014, pending the final disposition of their appeal from that order. The moving parties also seek an extension of time to perfect their appeal.

2 The order under appeal dismissed the moving parties' motion in which they, particularly the claims advanced by the non-Ontario plaintiffs, challenged the jurisdiction of the Ontario Superior Court to hear their action seeking various forms of relief, including substantial damages, under the *Arthur Wishart Act (Franchise Disclosure),* 2000, S.O. 2000, c. 3.

3 Through preliminary reasons released April 23, 2014 the motion judge dismissed the motion, referring to it as an "abuse of process". The motion judge also imposed a timetable for the advance of the action. Specifically, he ordered the moving parties to deliver a statement of defence by June 30, 2014.

4 I refer to the April 23, 2014 reasons as "preliminary" as in his decision the motion judge stated that, "[f]urther supporting reasons will be delivered in due course for the purposes of any appeal of this decision." No further reasons have yet been released.

5 For the reasons that follow I grant both the stay and the extension of time to perfect the appeal.

THE PROCEDURAL BACKGROUND

6 The responding parties to this motion and the respondents on appeal are eight new and used car dealers operating in five different provinces. Five of the responding parties are not based in Ontario, three are Ontario-based.

7 The moving party, IFS Vehicle Distributors ULC ("ULC"), is an unlimited liability company incorporated pursuant to the laws of British Columbia. Its head office is in British Columbia. The moving party, International Fleet Sales Inc. ("Fleet"), is a corporation incorporated pursuant to the laws of California. Its head office is in California. Michael Libasci is the president of IFC and the

President and Chief Executive Officer of Fleet Sales. Peggy King is the Secretary and Treasurer of IFS and Chief Financial Officer of Fleet Sales. At the material time, the moving parties, Mr. Libasci and Ms. King resided in California.

8 On March 15, 2013, the responding parties issued the statement of claim in this action. On April 29, 2013, the moving parties challenged the jurisdiction of the Superior Court of Ontario.

9 Counsel for the moving parties made every effort to obtain the first available date for the motion to be heard. That date was March 27, 2014. The moving parties cross-examined the affiants who provided evidence on behalf of the responding parties. The responding parties cross-examined Mr. Libasci's affidavit on behalf of the moving parties, in writing. They asked only one question.

10 The moving parties delivered a reply factum in which they raised various problems about the sufficiency of the responding parties' evidence.

11 The motion proceeded before Corbett J. on March 27, 2014. He agreed with the moving parties that the responding parties' evidence was improper. On his own initiative the motion judge adjourned the motion on the basis that the responding parties' improper framing of the evidence "would be fatal" to the motion. The motion judge ordered the parties to serve further affidavit material.

12 Specifically, the endorsement of March 27, 2014 contained the following:

> i) Mr. Latella is correct that the information from [the responding parties] who have not provided direct evidence has not been framed properly. This would be fatal on a motion such as this. However, the goal here, as must be the case on a jurisdiction issue, should be to establish the underlying facts so that definitive determinations may be made and the case then proceed in the proper form.
>
> ii) The [responding party] shall provide a supplementary affidavit identifying the sources of the information, and information about the precise relationship of the sources to the [responding parties]. This shall be done by April 1, 2014. The [moving parties] shall identify which of these individuals they wish to cross-examine, and these cross-examinations shall be completed by April 11, 2014. The motion shall return before D.L. Corbett J. for a full day on Wednesday, April 23, 2014.
>
> iii) [I]t seems plain that there is jurisdiction *simpliciter* in Ontario over the claims brought by the Ontario [responding parties]. But for having their claims joined with those of the Ontario [responding parties], there seems no reason for the non-Ontario [responding parties] to pursue claims in Ontario.
>
> iv) Thus it appears that the principal arguments on the motion [will concern][1] the effect of joinder on jurisdiction, and issues of *forum non conveniens.*

v) I also indicted to counsel that I do not anticipate that cross-examination of representatives of each of the [responding parties] will add materially to the factual background in which these issues arise. However, it may be that something will be added, and I will not second guess counsel's choice to cross-examine, given the significance of the issues.

vi) Also as I indicated to the parties, since the [moving parties] object to the way in which this matter is being pursued against them, they should be prepared to identify the alternative(s) they say would be preferable to the single action brought against them in Ontario.

vii) This case cries out for case management. [The responding parties'] counsel shall write to Himel J. bringing this endorsement to Her Honour's attention. Both sides are at liberty to advise Her Honour of their respective positions on whether there should be case management.

13 The responding parties served further affidavit material upon which they were cross-examined.

14 The parties filed additional factums in which they addressed the new evidence and made submissions on the issues of joinder and *forum non conveniens*, as requested by the motion judge.

15 Further argument took place in the morning of April 23, 2014. Prior to the lunch break and before hearing argument on joinder and *forum non conveniens*, the motion judge rendered his decision.

THE MOTION JUDGE'S DECISION - PRELIMINARY REASONS

16 The motion judge referred to the motion as an abuse of process.

17 The motion judge noted that ULC is in the business of distributing Saab automobiles in Canada. It has a mailing address and bank accounts in Ontario. Each dealership agreement provides that Ontario law will apply. The agreements contain no choice of forum clause.

18 The motion judge found ULC's activities in Ontario to be of considerable scope. He found that in adopting Ontario law, the provisions of the *Arthur Wishart Act* apply, permitting the dealers to make common cause.

19 In dismissing the motion, the motion judge expressed concern that the motion had been pursued on an unreasonable basis and had caused excessive delay. He therefore established a tight timeline for the progress of the action and ordered that a request be made for a "fresh" supervising judge.

20 Finally, the motion judge ordered that "complying with the terms of this order will not constitute attornment to Ontario for the purposes of any appeal."

ANALYSIS

REQUEST FOR A STAY

21 In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 334, the Supreme Court of Canada set out a three-part test for obtaining a stay of a judgment pending appeal: (1) is there a serious question to be tried (i.e., to be determined on the appeal); (2) will the moving party suffer irreparable harm if the stay is not granted; and (3) does the balance of convenience favour granting the stay?

(1) Serious question

22 The first component, whether there is a serious question to be determined on the appeal, requires a preliminary assessment of the merits of the appeal: *RJR-MacDonald Inc.*, at p. 334.

23 This assessment begins with a presumption of correctness of the decision under appeal: *Ogden Entertainment Services v. United Steelworkers of America, Local 440* (1998), 38 O.R. (3d) 448 (C.A.), at p. 450. The onus is on the moving parties to establish a case for a stay: *International Corona Resources Ltd. v. Lac Minerals Ltd.* (1986), 21 C.P.C. (2d) 252 (Ont. C.A.- Ch'rs), at p. 255. The threshold to be met in connection with this first component of the test is a modest one: *Horsefield v. Ontario (Registrar of Motor Vehicles)* (1997), 35 O.R. (3d) 304 (C.A. - Ch'rs), at p. 311; *RJR-MacDonald Inc.*, at p. 337. The moving parties must demonstrate that the appeal is not frivolous or vexatious: *Longley v. Canada (Attorney General),* 2007 ONCA 149, 223 O.A.C. 102, at para. 16; *International Corona*, at p. 255.

24 The proposed appeal raises several serious issues:

1. the proper test to determine jurisdiction in claims involving franchise legislation, here, the *Arthur Wishart Act,* with regard to the intersection of jurisdictional issues and joinder; and
2. the consequences of the fact that in his determination of the jurisdictional issue, the motion judge only referred to the defendant ULC; and
3. the consequences of the motion judge's comments that may suggest predetermination of the issues such as the statement made in his first endorsement that "this case cries out for case management" and his conclusion expressed at the outset of his second endorsement, given prior to hearing full argument, that the motion was an abuse of process - a position not taken by the responding parties.

25 There is also the possibility of an appeal based not on the merits of the decision but on the delay in the release of reasons after an appeal has been brought.

(2) Irreparable harm

26 The irreparable harm component has to do with the nature, not the magnitude of the harm: *RJR-MacDonald Inc.*, at p. 341. It refers to harm that cannot be quantified in monetary terms or that cannot be cured. *RJR-MacDonald Inc.*, at p. 341.

27 The moving parties assert that they will suffer irreparable harm in several respects if a stay is not granted.

28 The moving parties submit that, without a stay, they will be forced to choose between risking attornment to the jurisdiction of the Ontario court by filing a defence, or being noted in default and subjected to default proceedings, either of which would irreparably harm their proposed appeal by rendering it moot.

29 I have some difficulty assessing this argument. I say this based on differing views expressed in recent decisions of this court concerning whether a party risks attornment by taking court-ordered steps in a proceeding in the face of an on-going jurisdictional challenge. I refer to the decision in *M.J. Jones Inc. v. Kingsway General Insurance Co.* (2004), 72 O.R. (3d) 68 (C.A. - Ch'rs) where at paras. 27-31, Lang J.A. dealt with whether a court order requiring a defendant to deliver a statement of defence would amount to attornment. She held that the defendant's compliance with such an order might amount to attornment. She therefore held that despite the plaintiff's undertaking not to treat the defendant's participation as attornment, refusing a stay could cause irreparable harm.

30 In *BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust*, 2011 ONCA 620, 283 O.A.C. 321, at paras. 28-31, Laskin J.A. distinguished *M.J. Jones* on the basis that the defendant's responding to the plaintiff's request for documents outside of the "formal bounds" of the court proceedings would constitute attornment.

31 More recently, in *Van Damme v. Gelber*, 2013 ONCA 388, 115 O.R. (3d) 470, at paras. 21-23, Doherty J.A. noted that attornment by participation in court proceedings had been addressed in *Wolfe v. Pickar*, 2011 ONCA 347, 332 D.L.R. (4th) 157, where, at para. 44, Goudge J.A. said:

> [W]hen a party to an action appears in court and goes beyond challenging the jurisdiction of the court based on jurisdiction *simpliciter* and *forum non conveniens*, the party will be regarded as appearing voluntarily, thus giving the court consent-based jurisdiction. That is what happened here.

32 Justice Doherty also recognized *M.J. Jones* and *Gourmet Resources International Inc. (Trustee of) v. Paramount Capital Corp.* (1991), 5 C.P.C. (3d) 140 (Ont. C.A.) as authorities for the proposition that, if a party appears in a court to challenge jurisdiction or seek a stay on the basis of *forum non conveniens*, any additional steps taken by the party pursuant to an order of the court will not amount to attornment.

33 While Doherty J.A. expressed the view that taking steps in the proceedings further to a court order would not necessarily constitute attornment, advancing a motion for summary judgment, a

motion that went beyond a jurisdictional challenge and was not further to any court order was attornment.

34 Finally, in *Yaiguaje v. Chevron Corp.*, 2014 ONCA 40, 315 O.A.C. 109, at para. 11, MacPherson J.A. (in Chambers), citing *Van Damme* and *BTR,* rejected the argument that the party seeking a stay was exposed to irreparable harm based on the risk of attornment.

35 Here, the responding parties have undertaking not to argue that the moving parties have attorned to the Ontario jurisdiction "by taking any further steps in the action".

36 I conclude that in the light of this court's unresolved position on this issue, and the wording of the undertaking in question, the possibility of being found to have attorned creates some risk of irreparable harm to the moving parties.

37 The moving parties also submit that there is a risk of the court's making a finding of statutory applicability of the *Arthur Wishart Act*, on an incomplete record. I do not see that as a reasonable possibility.

38 The moving parties further argue that, without a stay, if the costs ordered by this court are paid to the *ex juris* plaintiffs, there is no assurance they will be returned if the appeal succeeds. I reject this argument. There is no evidence upon which to make a finding that the parties will not respect final costs orders of the relevant Canadian court.

39 The moving parties' argument that they will suffer irreparable harm has some merit.

(3) Balance of convenience

40 The balance of convenience part of the test involves a determination of which of the parties will suffer the greater harm from the granting or refusal of the stay pending the disposition of the appeal on the merits. The factors relevant for consideration in determining where the balance of convenience settles varies from one case to the next: *RJR-MacDonald Inc.*, at pp. 342-343.

41 In my view, the balance of convenience favours the moving parties. The jurisdictional and other issues they raise deserve to be resolved before the moving parties are forced to mount a substantive defence in the Ontario action.

Conclusion

42 The "serious issue" and "balance of convenience" factors clearly favour the moving parties. The "irreparable harm" factor slightly favours the responding parties. However, given the current uncertainty in this court's position on attornment, it is preferable to deal with this case through the prism of balance of convenience.

43 I note the words of Laskin J.A. in *Circuit World Corp. v. Lesperance* (1997), 33 O.R. (3d) 674

(C.A.), at p. 677, that "[t]hese three criteria are not watertight compartments. The strength of one may compensate for the weakness of another. Generally, the court must decide whether the interests of justice call for a stay." See also *BTR Global*, at para. 16.

44 The substantive and procedural issues the moving parties have raised are significant. The moving parties have moved expeditiously to challenge the order of Corbett J. There is no basis to be concerned about the time it will take for the appeal to be heard. Waiting for the disposition of the appeal to this court would cause very little prejudice to the responding parties. A stay is justified.

EXTENSION OF TIME TO PERFECT THE APPEAL

45 The responding parties consent to the granting of an extension of time in which to perfect the appeal. The only divide is the length of the extension. Given the uncertainty over the length and timing of the delivery of the motion judge's further reasons, I grant an extension of 60 days from the date of receipt of the further reasons.

DISPOSITION

46 The motion is granted. The order of Corbett J. dated April 23, 2014, is stayed pending the determination of the moving parties' appeal from that order.

47 The moving parties have 60 days from the receipt of the further reasons of Corbett J. to perfect their appeal.

48 As agreed, the costs of this motion are to be paid by the responding parties in the amount of $2,000 including disbursements and HST.

G.J. EPSTEIN J.A.

1 The original hand-written endorsement is cut off. It appears to state "will concern".

TAB 3

Case Name:

BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust

Between
BTR Global Opportunity Trading Limited, BTR Global Growth Trading Limited, BTR Global Arbitrage Trading Limited, and BTR Global Prospector Trading Limited, Plaintiffs (Respondents/Responding Parties), and RBC Dexia Investor Services Trust and Lehman Brothers International (Europe), Defendants (Appellant/Moving Party)

[2011] O.J. No. 4279

283 O.A.C. 321

2011 ONCA 620

Dockets: M40432 (C53335)

Ontario Court of Appeal
Toronto, Ontario

J.I. Laskin J.A.
(In Chambers)

Heard: September 12, 2011.
Judgment: September 29, 2011.

(37 paras.)

Civil litigation -- Civil procedure -- Judgments and orders -- Enforcement -- Stay of -- Motion by defendant Lehman Brothers for stay of order pending appeal to Supreme Court of Canada dismissed -- Plaintiff commenced Ontario action against defendant and New York action for recovery of traded securities after defendant became insolvent -- Defendant sought to appeal order refusing to stay Ontario action -- Motion for leave had slim chance of success as appeal raised no issues of national importance -- While leave motion was pending, balance of convenience was very much against granting stay.

Motion by the defendant Lehman Brothers for a stay of an order pending appeal to the Supreme Court of Canada. The plaintiff had entered into brokerage contracts with the defendant to settle trades in privately traded and publicly listed securities. The plaintiff commenced an action in Ontario against the defendant for recovery of the publicly traded securities after the defendant became insolvent. A subsequent action was commenced in New York for the recovery of American privately traded securities physically located in the State of New York. The defendant had sought an order to stay the Ontario action on the ground that the parties had agreed that a New York court would have exclusive jurisdiction over any proceeding relating to their contracts. The stay was refused and the defendant's appeal from the order was dismissed. The defendant now sought leave to appeal the decision to the Supreme Court of Canada. In the Ontario action, the plaintiff undertook not to argue attornment if the defendant filed a defence or participated in examinations for discovery.

HELD: Motion dismissed. The defendant did not establish that it was in the interests of justice to stay the Ontario action pending the determination of its leave motion. The leave motion had little merit as the appeal raised no real issues of national importance. In light of the plaintiff's undertaking not to argue attornment, the risk of the appeal becoming moot was eliminated and no irreparable harm was thus made out. While the leave motion was pending, the balance of convenience was very much against granting a stay.

Appeal From:

On a motion to stay the order of Campbell J. of the Superior Court of Justice dated January 25, 2011 pending leave to appeal to the Supreme Court of Canada.

Counsel:

Christopher D. Bredt, for the moving party.

Jeffrey Leon, for the responding parties.

J.I. LASKIN J.A.:--

A. INTRODUCTION

1 The moving party, Lehman Brothers International (Europe) ("LBIE"), asks to stay the order of Campbell J. pending a decision on its motion for leave to appeal to the Supreme Court of Canada. The responding parties, the BTR Funds, oppose the stay.

2 BTR placed publicly and privately traded securities with LBIE under various brokerage contracts. In September 2008, LBIE became insolvent. BTR then brought two separate proceedings in Ontario to recover their securities - one in respect of the Canadian privately traded securities, and the other in respect of the Canadian publicly traded securities. The motion before me concerns the action for recovery of the publicly traded securities.

3 LBIE sought a permanent stay of this action on the ground that the parties had agreed that a New York court would have exclusive jurisdiction over any proceeding relating to their contracts.

Campbell J. refused to grant the stay. In his view, even if the exclusive jurisdiction clause governed the parties' dispute, BTR had shown "strong cause" why it should not be enforced.

4 On July 8, 2011 this court dismissed LBIE's appeal from Campbell J.'s order. For somewhat different reasons, this court also concluded that BTR had shown strong cause not to give effect to the exclusive jurisdiction clause. It is from this court's decision that LBIE seeks leave to appeal to the Supreme Court of Canada. Earlier this month, LBIE perfected its leave motion.

B. BACKGROUND

(1) The parties and their contracts

5 LBIE was a trading and brokerage company registered in England. Three years ago it went into administration, in other words, it became insolvent.

6 BTR had invested in a variety of privately traded and publicly listed securities. Between 2002 and 2008, BTR entered into brokerage contracts with LBIE to settle trades in these securities.

(2) The litigation

7 BTR started three proceedings, two in Ontario and one in New York. In each proceeding it claimed beneficial ownership of the securities held by or for LBIE.

8 The first proceeding, for the recovery of Canadian private securities located in Toronto, was started in Ontario in October 2008. Although not a party to that proceeding, LBIE was aware of it and chose not to participate. In that proceeding, BTR obtained an order that it beneficially owns the Canadian private securities. LBIE was given a copy of the order. It took no steps to have it varied or set aside.

9 The second proceeding is an action in Ontario started in April 2010 for recovery of the Canadian publicly listed securities. Because LBIE has claimed an ownership interest in these securities, it is a named defendant in the action. This action is the subject of the stay motion before me.

10 The third proceeding, also started in April 2010, is an action in the Supreme Court of New York for the recovery of United States privately traded securities physically located in the State of New York. In this action, LBIE has counter-claimed for a declaration that it owns *all* the securities - publicly and privately traded, Canadian and American - that BTR has placed with it.

11 Because of LBIE's counter-claim, both the New York action and the Ontario action raise the identical question: who is the beneficial owner of the Canadian publicly listed securities? LBIE's counter-claim also seeks to re-litigate the question of the ownership of the Canadian privately traded securities, which was determined in Ontario nearly three years ago.

12 In the New York action, pleadings have been completed and documentary production has begun. LBIE's attorneys are pressing to move forward with examinations for discovery. They will not agree to delay examinations in New York unless BTR agrees to a stay of its action in Ontario for recovery of the Canadian public securities.

13 Meanwhile, in Ontario, BTR's action has been stalled by the various stay motions brought by LBIE. BTR has delivered a statement of claim; LBIE has not delivered a statement of defence, and does not wish to do so. It relies on the exclusive jurisdiction clause, and does not want to attorn to the jurisdiction of the Ontario court.

(3) BTR's undertakings

14 BTR wants to proceed with the Ontario action. It is content to have LBIE deliver a statement of defence without filing it with the court. It undertakes not to argue that delivery of the statement of defence or participation in examinations for discovery constitute acts of attornment. BTR also undertakes not to invoke the jurisdiction of the Ontario court, by, for example, a motion for summary judgment, while LBIE's leave motion is outstanding.

15 Against this background, I turn to the issues on the stay motion.

C. ANALYSIS

16 The test for a stay pending appeal, including a motion for leave to appeal to the Supreme Court of Canada, is well established. The moving party, here LBIE, must show that it has raised a serious issue to be adjudicated, that it will suffer irreparable harm if a stay is not granted, and that the balance of convenience favours a stay. These three components of the test are interrelated in the sense that the overriding question is whether the moving party has shown that it is in the interests of justice to grant a stay.

17 In my view, LBIE has not shown that it is in the interests of justice to stay the Ontario action pending the determination of its leave motion. Three considerations underlie my conclusion: the dubious merit of the leave motion; BTR's undertaking; and the ongoing New York litigation.

(i) Serious issue - the merit of the leave motion

18 Ordinarily, the threshold for showing a serious issue to be adjudicated is low. However, the criteria for granting leave to appeal to the Supreme Court of Canada add another layer to this component of the test. Under s. 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, the Supreme Court of Canada typically grants leave to appeal only in cases of public or national importance. Thus, a provincial appellate court judge hearing a motion for stay pending leave to appeal to the Supreme Court of Canada must take account of the stringent leave requirements in the *Supreme Court Act*: see *Merck & Co. v. Nu-Pharm Inc.* (2000), 5 C.P.R. (4th) 417 (F.C.A.) and *Ontario Public Service Employees Union v. Ontario (A.G.)* (2002), 158 O.A.C. 113.

19 The Supreme Court of Canada itself decides when leave should be granted and does not give reasons for doing so. As Rothstein J.A. noted in *Merck*, this puts provincial appellate court judges in a "somewhat awkward position." Nonetheless, the stay test requires that I make some preliminary assessment of the merit of the leave motion. And having made that assessment, I think that LBIE's leave motion has very little merit for the following three reasons.

20 First, LBIE's leave motion does not raise any real issues of national importance. The general issue on which LBIE seeks leave, the contours of the strong cause test, has already been addressed by the Supreme Court of Canada quite recently in *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450. Since *Pompey* was decided, several appellate court decisions have elaborated on the strong cause test. One example is this court's decision in *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351.

21 If the appellate decisions post-*Pompey* conflicted with each other or with *Pompey* itself, that would improve LBIE's prospects for obtaining leave. In those circumstances the Supreme Court of

Canada might wish to revisit *Pompey* and clarify the law. But there is no conflict among the later decisions, and moreover, they are consistent with *Pompey.*

22 In *Pompey*, Bastarache J. emphasized that the assessment of strong cause is a fact driven inquiry, in which the court should take account of all the circumstances of a given case. When this court dismissed LBIE's appeal, it did precisely that. After noting that BTR disputed whether the exclusive jurisdiction clause applied to the contracts it relied on, the panel concluded that even if the clause did apply, BTR had shown strong cause not to enforce it. In so concluding, this court, like Campbell J., was particularly critical of LBIE's conduct, especially its failure to raise the question of Ontario's jurisdiction in the 2008 proceedings that dealt with the Canadian privately traded securities. This court did not even call on BTR to respond LBIE's appeal.

23 Second, this is not a criminal, constitutional or administrative law case. Those types of cases form the bulk of the Supreme Court of Canada's case load, and constitute most of the approximately 11 per cent of cases in which leave is granted. Therefore, it follows that those types of cases most often raise issues that the Supreme Court considers to be of public importance. This consideration further diminishes LBIE's prospect for obtaining leave.

24 Of course, the Supreme Court does grant leave in private law cases. One recent example is this court's decision in *Momentous.ca Corporation v. Canadian American Association of Professional Baseball Ltd.*, 2010 ONCA 722. That case, however, raises entirely different questions, including one of major national importance, which is not present here: the effect of attornment on the application of an exclusive jurisdiction clause. LBIE's motion raises no similar important issue.

25 Third, the order sought to be appealed is discretionary, thus warranting appellate deference. Campbell J.'s order is consistent with both the jurisprudence of this court and the Supreme Court of Canada. The discretionary nature of the order further militates against additional appellate review.

26 For these three reasons, in my opinion, LBIE's leave motion has little merit.

(ii) Irreparable harm - the effect of BTR's undertaking

27 LBIE argues that it will be irreparably harmed if a stay is not granted because it will be forced to attorn to the jurisdiction of the Ontario court, thus rendering its leave motion moot. BTR's undertaking, however, addresses LBIE's claim of irreparable harm.

28 If LBIE decides to deliver a statement of defence, BTR will not require it to be filed with the court, will not argue that it amounts to an act of attornment, and will not invoke the jurisdiction of the Ontario court until LBIE's leave motion is decided.

29 LBIE contends that the undertaking is unsatisfactory and in support of this contention points to the decision of Lang J.A. in *M.J. Jones Inc. v. Kingsway General Insurance Co.* (2004), 242 D.L.R. (4th) 139. Without commenting on the correctness of that decision, I simply observe that the present case is distinguishable. In *M.J. Jones*, Lang J.A. dealt with whether a court order requiring a defendant to deliver a statement of defence would amount to attornment. She held that a court order requiring a defendant to participate in an action, even though involuntarily, might amount to attornment. Therefore, she held that despite the plaintiff's undertaking not to treat the defendant's participation as attornment, refusing a stay could cause irreparable harm.

30 Here, no court order or involuntary participation is required because BTR asks LBIE only for a statement of defence to permit it to move ahead with discoveries. Furthermore, Lang J.A. appears to have contemplated and approved of this very scenario. She wrote at para. 52:

> This disposition does not necessarily preclude all parties to this action cooperating by exchanging documents and answering questions about the merits of the disputes between them. Such exchange, if done outside the formal bounds of these court proceedings, would, in my view, not be considered an attornment to Ontario's jurisdiction. It would simply be an efficient exchange of information that, with the agreement of the parties, could later be used either in the Ontario proceeding, or in any subsequent Michigan proceeding.

31 As BTR asks LBIE for documents outside of the "formal bounds" of the court proceedings, I do not consider that the delivery of a statement of defence or participation in discoveries, would amount to attornment. If there is no attornment, the risk of LBIE's appeal becoming moot is eliminated. LBIE, therefore, has not made out irreparable harm.

(iii) Balance of convenience - the effect of the ongoing New York litigation

32 LBIE submits that the balance of convenience favours a stay because without one it will be prejudiced. It argues that proceeding with the Ontario action while the issue of the Ontario court's jurisdiction has not been finally decided will result in duplication, waste the courts' and the parties' time and resources, and create a risk of inconsistent judgments.

33 Respectfully, this argument overstates any prejudice to LBIE from refusing a stay. I accept that there may be some modest increase in costs if the litigation proceeds concurrently in New York and Ontario. However, costs can be reduced by consolidating discoveries, a process that counsel for BTR advised would indeed be used. The risk of inconsistent judgments from the refusal of a stay is practically non-existent because the Supreme Court of Canada will likely decide LBIE's leave motion within the next three to four months, or at least long before the Ontario action comes to trial.

34 If the Supreme Court of Canada refuses leave then the parties will eventually have to deal with the risk of different results in the two jurisdictions. However, that risk arises from the existence of the two proceedings themselves, not from any decision on the stay motion. If, on the other hand, the Supreme Court of Canada grants LBIE's motion for leave to appeal, then LBIE would be at liberty to renew its stay motion and would have a compelling argument that it be granted.

35 However, while the leave motion is pending, the balance of convenience is very much against granting a stay. Tactics play a role here. LBIE wants the issue of beneficial ownership decided in New York and thus, wants to move the New York action along while delaying the Ontario action. BTR wants the issue of beneficial ownership of the publicly traded securities decided in Ontario, especially as it already has a decision in its favour on the issue of ownership in respect of the Canadian privately traded securities.

36 Whether this turns out to be a race to the swift is not for me to decide; however, BTR is at least entitled to be on an even footing. If LBIE is proceeding on its counter-claim in New York, BTR should be allowed to proceed on its claim in Ontario.

37 The motion for a stay is dismissed. If the parties cannot agree on costs, they may make brief submissions in writing.

J.I. LASKIN J.A.

TAB 4

Case Name:

ROI Fund Inc. v. Gandi Innovations Ltd.

Between
Return on Innovation Capital Ltd. as agent for ROI Fund Inc., ROI Sceptre Canadian Retirement Fund, ROI Global Retirement Fund and ROI high Yield Private Placement Fund and Any Other Fund Managed by ROI from time to time, Applicants/Respondents, and
Gandi Innovations Limited, Gandi Innovations Holdings LLC and Gandi Innovations LLC, Respondents/Appellants

[2012] O.J. No. 31

2012 ONCA 10

90 C.B.R. (5th) 141

2012 CarswellOnt 103

211 A.C.W.S. (3d) 264

Docket: M40553

Ontario Court of Appeal
Toronto, Ontario

R.J. Sharpe, R.A. Blair and P.S. Rouleau JJ.A.

Heard: January 3, 2012 by written submissions.
Judgment: January 9, 2012.

(13 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Claims against directors -- Motion by officers, directors and shareholders in Gandi Group for leave to appeal from order determining their entitlement to indemnity from Gandi Group companies arising out of arbitration proceedings brought against them by TA Associates dismissed -- TA Associates was major unsecured creditor in CCAA proceed-

ings -- Issues raised by appeal were of no significance to practice -- Further, appeal with respect to these issues had little merit.

Motion by the officers, directors and shareholders in the Gandi Group for leave to appeal from an order determining their entitlement to indemnity from the Gandi Group companies arising out of arbitration proceedings brought against them by TA Associates, the major unsecured creditor in the CCAA proceedings. The Gandi Group companies were under CCAA protection. The order provided that the claimants were only entitled to indemnity from the direct and indirect parent company, that any claim of James Gandy was subordinated to the claim of TA Associates because of an earlier existing Subordination Agreement, and that the claims for indemnification in respect of the TA Associates claim in the arbitration were equity claims for purposes of the CCAA and therefore subsequent in priority to the claims of unsecured creditors.

HELD: Motion dismissed. The indemnification issue and subordination issues raised by the appeal were of no significance to the practice and the appeal with respect to these issues had little merit. The application judge's determination of the claimants' indemnity claims as equity claims was also not of significance to the practice since all insolvency proceedings commenced after the new provisions of the CCAA came into effect in September 2009 would be governed by those provisions, not by the prior jurisprudence.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2(1), s. 6(8)

Counsel:

Christopher J. Cosgriffe and Natasha S. Danson, for James Gandy, Hary Gandy and Trent Garmoe.

Matthew J. Halpin and Evan Cobb, for TA Associates Inc.

Harvey Chaiton and Maya Poliak, for the Monitor.

ENDORSEMENT

The following judgment was delivered by

THE COURT:--

Overview

1 The moving parties (James Gandy, Hary Gandy and Trent Garmoe) are officers, directors and shareholders in the Gandi Group, a series of related companies currently under CCAA protection. In those proceedings they assert indemnity claims in the range of $75 - 80 million against each of the companies in the Gandi Group. The indemnity claims arise out of arbitration proceedings brought against them individually, as officers and directors, by TA Associates, a disgruntled investor in the Gandi Group. TA Associates is the major unsecured creditor in the CCAA proceedings.

2 The assets of the Gandi Group have been sold and what remains to be done in the CCAA process is the finalization of a plan of compromise and arrangement for the distribution of the proceeds among the various creditors. Before settling on the most effective type of plan for such a distribution - a consolidated plan, a partial consolidation plan, or individual corporate plans - the Monitor and the creditors sought to have two preliminary issues determined by the Court:

a) whether the moving parties (the Claimants) are entitled to indemnity from all of the entities which comprise the Gandi Group, and, if so,
b) whether those indemnification claims are "equity" or "non-equity" claims for purposes of the CCAA (non-equity claims have priority).

3 On August 25, 2011, Justice Newbould, sitting on the Commercial List, ruled:

a) that the Claimants were only entitled to indemnity from the direct and indirect parent company, Gandi Holdings (except that the Claimant, James Gandy only was also entitled to indemnification from a second entity in the Group, Gandi Canada);
b) that any claim of James Gandy was subordinated to the claim of TA Associates because of an earlier existing Subordination Agreement; and
c) that the claims for indemnification in respect of the TA Associates claim in the arbitration were equity claims for purposes of the CCAA and therefore subsequent in priority to the claims of unsecured creditors.

4 The Claimants seek leave to appeal from that order.

5 We deny the request.

Analysis

The Test

6 Leave to appeal is granted sparingly in CCAA proceedings and only when there are serious and arguable grounds that are of real and significant interest to the parties. The Court considers four factors:

(1) Whether the point on the proposed appeal is of significance to the practice;
(2) Whether the point is of significance to the action;
(3) Whether the appeal is prima facie meritorious or frivolous; and
(4) Whether the appeal will unduly hinder the progress of the action.

See *Re Stelco (Re)*, (2005), 75 O.R. (3d) 5, at para. 24 (C.A.).

7 The Claimants do not meet this stringent test here.

The Indemnification Issue

8 Whether the Claimants are entitled to indemnification from all or just one or some of the entities in the Gandi Group was essentially a factual determination by the motion judge, is of no significance to the practice as a whole, and the proposed appeal on that issue is of doubtful merit in our view. We would not grant leave to appeal on that issue.

The Subordination Issue

9 The same may be said for the Subordination Agreement issue. The Claimants argue that by declaring that the indemnity claim of James Gandy is subordinate to the CCAA claim of TA Associates, the motion judge usurped the role of the pending arbitration. We do not agree. The subordination issue needed to be clarified for purposes of the CCAA proceedings. None of the criteria respecting the granting of leave is met in relation to this proposed ground.

The "Equity Claim" Issue

10 Nor do we see any basis for granting leave to appeal on the equity/non-equity claim issue.

11 "Equity" claims are subsequent in priority to non-equity claims by virtue of s. 6(8) of the CCAA. What constitutes an "equity claim" is defined in s. 2(1) and would appear to encompass the indemnity claims asserted by the Claimants here. Those provisions of the Act did not come into force until shortly after the Gandi Group CCAA proceedings commenced, however, and therefore do not apply in this situation. Newbould J. relied upon previous case law suggesting that the new provisions simply incorporated the historical treatment of equity claims in such proceedings: see, for example, *Re Nelson Financial Group Ltd.*, 2010 ONSC 6229 (CanLII), (2010), 75 B.L.R. (4th) 302, at para. 27 (Pepall J.). He therefore concluded that TA Associates was in substance attempting to reclaim its equity investment in the Gandi Group through the arbitration proceedings and that the Claimants' indemnity claims arising from that claim must be equity claims for CCAA purposes as well.

12 This issue in the proposed appeal is not of significance to the practice since all insolvency proceedings commenced after the new provisions of the CCAA came into effect in September 2009 will be governed by those provisions, not by the prior jurisprudence. The interpretation of sections 6(8) and 2(1) does not come into play on this appeal. To the extent that existing case law continues to govern whatever pre-September 2009 insolvency proceedings are still in the system, those cases will fall to be decided on their own facts. We see no error in the motion judge's analysis of the jurisprudence or in his application of it to the facts of this case, and therefore see no basis for granting leave to appeal from his disposition of the equity issue in these circumstances.

Disposition

13 The motion for leave to appeal is therefore dismissed. Costs to the Monitor and to TA Associates fixed in the amount of $5,000 each, inclusive of disbursements and all applicable taxes.

R.J. SHARPE J.A.
R.A. BLAIR J.A.
P.S. ROULEAU J.A.

cp/e/qllxr/qljxr/qlmll/qlana/qlcas

TAB 5

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 other Applicants listed in Schedule "A" Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended

[Indexed as: Stelco Inc. (Re)]

75 O.R. (3d) 5

[2005] O.J. No. 1171

Docket: M32289

Court of Appeal for Ontario,

Goudge, Feldman and Blair JJ.A.

March 31, 2005

Corporations -- Directors -- Removal of directors -- Jurisdiction of court to remove directors -- Restructuring supervised by court under Companies' Creditors Arrangement Act -- Supervising judge erring in removing directors based on apprehension that directors would not act in best interests of corporation -- In context of restructuring, court not having inherent jurisdiction to remove directors -- Removal of directors governed by normal principles of corporate law and not by court's authority under s. 11 of Companies' Creditors Arrangement Act to supervise restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Debtor and creditor -- Arrangements -- Removal of directors -- Jurisdiction of court to remove directors -- Restructuring supervised by court under the Companies' Creditors Arrangement Act -- Supervising judge erring in removing directors based on apprehension that directors would not act in best interests of corporation - In context of restructuring, court not having inherent jurisdiction to remove directors -- Removal of directors governed by normal principles of corporate law and not by court's authority under s. 11 of Companies' Creditors Arrangement Act to supervise restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

On January 29, 2004, Stelco Inc. ("Stelco") obtained protection from creditors under the Companies' Creditors Arrangement Act ("CCAA"). Subsequently, while a restructuring under the CCAA was under way, Clearwater Capital Management Inc. ("Clearwater") and Equilibrium Capital Management Inc. ("Equilibrium") acquired a 20 per cent holding in the outstanding publicly traded common shares of Stelco. Michael Woollcombe and Roland Keiper, who were associated with Clearwater and Equilibrium, asked to be appointed to the Stelco board of directors, which had been depleted as a result of resignations. Their request was supported by other shareholders who, together with Clearwater and Equilibrium, represented about 40 per cent of the common shareholders. On February 18, 2005, the Board acceded to the request and Woollcombe and Keiper were appointed to the Board. On the same day as their appointments, the board of directors began consideration of competing bids that had been received as a result of a court-approved capital raising process that had become the focus of the CCAA restructuring.

The appointment of Woollcombe and Keiper to the Board incensed the employees of Stelco. They applied to the court to have the appointments set aside. The employees argued that there was a reasonable apprehension that Woollcombe [page6] and Keiper would not be able to act in the best interests of Stelco as opposed to their own best interests as shareholders. Purporting to rely on the court's inherent jurisdiction and the discretion provided by the CCAA, on February 25, 2005, Farley J. ordered Woollcombe and Keiper removed from the Board.

Woollcombe and Keiper applied for leave to appeal the order of Farley J. and if leave be granted, that the order be set aside on the grounds that (a) Farley J. 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 had no application to the removal of directors, (c) he had erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) in any event, the facts did not meet any test that would justify the removal of directors by a court.

Held, leave to appeal should be granted, and the appeal should be allowed.

The appeal involved the scope of a 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 of the CCAA. In particular, it involved the court's power, if any, to make an order removing directors under s. 11 of the CCAA. The order to remove directors could not be founded on inherent jurisdiction. Inherent jurisdiction is a power derived from the very nature of the court as a superior court of law, and it permits the court to maintain its authority and to prevent its process from being obstructed and abused. However, inherent jurisdiction does not operate where Parliament or the legislature has acted and, in the CCAA context, 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 supplanted the need to resort to inherent jurisdiction. A judge is general ly 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 was

designed to supervise the company's process, not the court's process.

The issue then was the nature of the court's power under s. 11 of the CCAA. The s. 11 discretion is not open-ended and unfettered. Its exercise was guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. What the court does under s. 11 is 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. In the course of acting as referee, the court has authority 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. The court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructurin g efforts. 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. 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.

The matters relating to the removal of directors did not fall within the court's discretion under s. 11. The fact that s. 11 did not itself provide the authority for a CCAA judge to order the removal of directors, however, did not mean that the supervising judge was powerless to make such an order. Section 20 of the CCAA offered a gateway to the oppression remedy and other provisions of the Canada [page7] Business Corporations Act, R.S.C. 1985, c. C-44 ("CBCA") and similar provincial statutes. 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.

Court removal of directors is an exceptional remedy and one that is rarely exercised in corporate law. In determining whether directors have fallen foul of their obligations, 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. The evidence in this case was far from reaching the standard for removal, and the record would not support a finding of oppression, even if one had been sought. The record did not support a finding that there was a sufficient risk of misconduct to warrant a conclusion of oppression. Further, Farley J.'s borrowing the administrative law notion of apprehension of bias was foreign to the principles that govern the election, appointment and removal of directors and to corporate governance considerations in general. There was nothing in the CBCA or other corporate legislation that envisaged the screening of directors in advance for their ability to a ct neutrally, in the best interests of the corporation, as a prerequisite for appointment. The issue to be determined was not whether there was a connection between a director and other shareholders or stakeholders, but rather whether there was some conduct on the part of the director that would justify the imposition of a corrective sanction. An apprehension of bias approach did not fit this sort of analysis.

For these reasons, Farley J. erred in declaring the appointment of Woollcombe and Keiper as

directors of Stelco of no force and effect, and the appeal should be allowed.

Cases referred to

Alberta Pacific Terminals Ltd. (Re), [1991] B.C.J. No. 1065, 8 C.B.R. (3d) 99 (S.C.); Algoma Steel Inc. (Re), [2001] O.J. No. 1943, 147 O.A.C. 291, 25 C.B.R. (4th) 194 (C.A.); Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71, 39 C.B.R. (4th) 5 (C.A.), revg in part [2001] O.J. No. 5046, 30 C.B.R. (4th) 163 (S.C.J.); Babcock & Wilcox Canada Ltd. (Re) [2000] O.J. No. 786, 18 C.B.R. (4th) 157, 5 B.L.R. (3d) 75 (S.C.J.); Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, 5 N.R. 515, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240; Blair v. Consolidated Enfield Corp., [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29, 25 O.R. (3d) 480n, 128 D.L.R. (4th) 73, 187 N.R. 241, 24 B.L.R. (2d) 161; Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683, 45 O.A.C. 320, 80 D.L.R. (4th) 161, 1 B.L.R. (2d) 225 (C.A.); Catalyst Fund General Partne r I Inc. v. Hollinger Inc., [2004] O.J. No. 4722, 1 B.L.R. (4th) 186 (S.C.J.); Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136, 4 C.B.R. (3d) 311 (C.A.); Clear Creek Contracting Ltd. v. Skeena Cellulose Inc. [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (C.A.); Country Style Foods Services Inc. (Re), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.); Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.); Ivaco Inc. (Re), [2004] O.J. No. 2483, 3 C.B.R. (5th) 33 (S.C.J.); Lehndorff General Partner Ltd. (Re), [1993] O.J. No. 14, 9 B.L.R. (2d) 275, 17 C.B.R. (3d) 24 (Gen. Div.); London Finance Corp. Ltd. v. Banking Service Corp. Ltd., [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545, 17 C.B.R. (3d) 1 (Gen. Div.) (sub nom. Olympia & York Dev. v. Royal Trust Co.); Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, [2004] S.C.J. No. 64, 244 D.L.R. (4th) 564, 2004 SCC 68, 49 B.L.R. (3d) 165, 4 C.B.R. (5th) 215; R. v. Sharpe, [2001] 1 S.C.R. 45, [2001] [page8] S.C.J. No. 3, 88 B.C.L.R. (3d) 1, 194 D.L.R. (4th) 1, [2001] 6 W.W.R. 1, 86 C.R.R. (2d) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, [2001] SCC 2; Richtree Inc. (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251, 7 C.B.R. (5th) 294 (S.C.J.); Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 36 O.R. (3d) 418n, 154 D.L.R. (4th) 193, 221 N.R. 241, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC 210-006 (sub nom. Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd., Adrien v. Ontario Ministry of Labour); Royal Oak Mines Inc. (Re), [1999] O.J. No. 864, 7 C.B.R. (4th) 293, 96 O.T.C. 279 (Gen. Div.); Sammi Atlas Inc. (Re), [1998] O.J. No. 1089, 3 C.B.R. (4th) 171 (Gen. Div.); Stephenson v. Vokes (1896), 27 O.R. 691, [1896] O.J. No. 191 (H.C.J.); Westar Mining Ltd. (Re), [1992] B.C.J. No. 1360, 14 C.B.R. (3d) 88, 70 B.C.L.R. (2d) 6, [1992] 6 W.W.R. 331 (S.C.)

Statutes referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 2 [as am.], 102 [as am.], 106(3) [as am], 109(1) [as am.], 111 [as am.], 122(1) [as am.], 145 [as am.], 241 [as am.]

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11 [as am.], 20 [as am.]

Authorities referred to

Driedger, E.A., The Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983)

Halsbury's Laws of England, 4th ed. (London: LexisNexis UK, 1973 --),

Jacob, I.H., "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28

Peterson, D.H., Shareholder Remedies in Canada, looseleaf (Markham: LexisNexis--Butterworths, 1989)

Sullivan, R., Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002)

APPLICATION for leave to appeal and, if leave is granted, an appeal from the order of Farley J., reported at [2005] O.J. No. 729, 7 C.B.R. (5th) 307 (S.C.J.), removing two directors from the board of directors of Stelco Inc.

Jeffrey S. Leon and Richard B. Swan, for appellants Michael Woollcombe and Roland Keiper.

Kenneth T. Rosenberg and Robert A. Centa, for respondent United Steelworkers of America.

Murray Gold and Andrew J. Hatnay, for respondent Retired Salaried Beneficiaries of Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd. And Welland Pipe Ltd.

Michael C.P. McCreary and Carrie L. Clynick, for USWA Locals 5328 and 8782.

John R. Varley, for Active Salaried Employee Representative.

Michael Barrack, for Stelco Inc.

Peter Griffin, for Board of Directors of Stelco Inc.

K. Mahar, for Monitor.

David R. Byers, for CIT Business Credit, Agent for DIP Lender. [page9]

The judgment of the court was delivered by

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 (the "CCAA")[1] at the end of the document] 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 per cent 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 per cent 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 [page10] 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. [page11]

[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 11 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 20 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 [page12]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 five per cent as at November 19, to 14.9 per cent as at January 25, 2005, and finally to approximately 20 per cent 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 other 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 per cent of the company's common shares. [page13]

[19] At paras. 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 per cent 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 [page14] 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] O.J. No. 1377, 158 O.A.C. 30 (C.A.), 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 [page15] 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 e vident 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, second, that it threatens to undermine the even-handedness and integrity of the capital raising process, thus jeopardizing the [page16] 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: Re Algoma Steel Inc., [2001] O.J. No. 1943, 25 C.B.R. (4th) 194 (C.A.), at para. 8.

[29] The crux of the respondents' concern is well-articulated in the following excerpt from para. 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 Re Olympia & York Development Ltd. (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.); Re Ivaco Inc., [2004] O.J. No. 2483, 3 C.B.R. (5th) 33 (S.C.J.), at paras. 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, 5 B.L.R. (3d) 75 (S.C.J.), at para. 11. See also, Chef Ready Foods Ltd. v. Hong Kong Bank of Canada, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 320 C.B.R.; Re Lehndorff General Partners Ltd., [1993] O.J. No. 14, 17 C.B.R. (3d) 24 (Gen. Div.). [page17]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 Re Dylex Ltd., [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div. (Commercial List)), Royal Oak Mines Inc. (Re), [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div. (Commercial List); and Westar Mining Ltd. (Re), [1992] B.C.J. No. 1360, 70 B.C.L.R. (2d) 6 (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: LexisNexis 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, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should [page18] not be brought into play" (para. 4). See also, Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, at p. 480 S.C.R.; Richtree Inc. (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251 (S.C.J.).

[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 Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (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] at the end of the docuemnt], 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 [page19]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] at the end fo the document]. 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 Canada Business Corporation Act, R.S.C. 1985, c. C-44 ("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 gr ounds.

[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); [page20]
(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, [2001] S.C.J. No. 3, at para. 33, and Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 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 p. 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 [page21]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 subparas. 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, 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. Ltd. v. Banking Service Corp. Ltd., [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); Stephenson v. Vokes, [1896] O.J. No. 191, 27 O.R. 691 (H.C.J.). 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: [page22] CBCA, ss. 106(3) and 111[4] at the end of the document]. 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, 1 B.L.R. (4th) 186 (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 Cooperative Ltd., supra, at p. 480 S.C.R.; Royal Oak Mines Inc. (Re), supra; and Richtree Inc. (Re), supra.

[49] At para. 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 [page23] 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:

> 20. 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. [page24]

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] at the end of the document]
>
> > 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. [page25]

[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: Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, [2004] S.C.J. No. 64, 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 [page26]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 14 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, [2003] O.J. No. 71 (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 ... [page27]

[66] In Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683 (C.A.), at p. 320 O.R., 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] at the end of the document]

[67] McKinlay J.A. then went on to say [at p. 320 O.R.]:

> There can be no doubt that on an application under s. 234[7] at the end of the document] 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 Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., supra; Sammi Atlas Inc. (Re), [1998] O.J. No. 1089, 3 C.B.R. (4th) 171 (Gen. Div.); Olympia & York Developments Ltd. (Re), supra; Re Alberta Pacific Terminals Ltd., [1991] B.C.J. No. 1065, 8 C.B.R. (4th) 99 (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 [page28]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. 2 of the CBCA as meaning "the relationships among a corporation, its 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 [page29] 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 di rectors.

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 aebias' 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 per cent 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 [page30]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, [1995] S.C.J. No. 29, 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.

Order accordingly.

[page31]

Notes

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

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

Note 3: See para. 43, infra, where I elaborate on this decision.

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

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

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

Note 7: Now s. 241.

* * * * *

[* Editor's note: Schedule "A" was not attached to the copy received from the Court and therefore is not included in the judgment.]

TAB 6

Case Name:

Calpine Canada Energy Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited and 3094479 Nova Scotia Company (the "CCAA Applicants")
Between
Calpine Power L.P., Appellant/Applicant (Creditor),
and
The CCAA Applicants and Calpine Energy Services Canada Partnership, Calpine Canada Natural Gas Partnership and Calpine Canadian Saltend Limited Partnership, Respondents (Applicants)
And between
Calpine Canada Natural Gas Partnership, Respondent (Applicant/CCAA Party), and
Calpine Energy Services Canada Partnership and Lisa Winslow, Trustee of Calpine Greenfield Commercial Trust, Respondents (CCAA Applicant and Interested Parties), and
Calpine Power L.P., Appellant/Applicant (Creditor in CCAA Proceedings)

[2007] A.J. No. 917

2007 ABCA 266

80 Alta. L.R. (4th) 60

417 A.R. 25

33 B.L.R. (4th) 94

35 C.B.R. (5th) 27

161 A.C.W.S. (3d) 370

2007 CarswellAlta 1097

Docket: 0701-0222-AC and 0701-0223-AC

Registry: Calgary

Alberta Court of Appeal
Calgary, Alberta

C.D. O'Brien J.A. (In Chambers)

Heard: August 15, 2007.
Judgment: August 17, 2007.

(42 paras.)

Insolvency law -- Proposals -- Court approval -- Voting by creditors -- Application by creditor for leave to appeal from three orders approving agreement between Canadian and U.S. debtor companies dismissed -- Judge had jurisdiction to approve agreement, regardless of its complexity -- Monitor was of opinion agreement would result in payment in full to all creditors including applicant -- Judge committed no palpable or overriding error in finding agreement was not plan of arrangement such that voting by creditors was necessary -- If agreement did what it was expected to do, there would be no reason to make plan of arrangement, and if it did not, creditors would still be able to vote on plan of arrangement -- Companies' Creditors Arrangement Act, ss. 4, 5, 6.

Insolvency law -- Practice -- Proceedings in bankruptcy -- Appeal -- Jurisdiction of courts -- Orders -- Application by creditor for leave to appeal from three orders approving agreement between Canadian and U.S. debtor companies dismissed -- Judge had jurisdiction to approve agreement, regardless of its complexity -- Monitor was of opinion agreement would result in payment in full to all creditors including applicant -- Judge committed no palpable or overriding error in finding agreement was not plan of arrangement such that voting by creditors was necessary -- If agreement did what it was expected to do, there would be no reason to make plan of arrangement, and if it did not, creditors would still be able to vote on plan of arrangement.

Application by Calpine Power for leave to appeal from three orders. Several related companies obtained protection under the Companies' Creditors Arrangement Act in December 2005. The United States debtors obtained similar protection in the United States. Ernst & Young was appointed monitor in the extremely complex insolvency of the Calpine companies. The Canadian and U.S. debtors reached a settlement agreement in June 2007, resolving all the cross-border issues between them. The Canadian companies were subsequently granted orders approving the terms of the agreement, permitting the companies to take steps necessary to sell certain holdings, and extending the initial stay of proceedings under the Act to December 20, 2007. The U.S. companies were granted similar orders in the U.S. Calpine Power, one of the companies' creditors, opposed the approval of the

agreement. It submitted the judge erred in finding the agreement was not a compromise or plan of arrangement, thereby dispensing with the need for a vote on the agreement by creditors. The judge based that conclusion on her finding the agreement did not unilaterally deprive creditors of contractual rights without their participation. She accepted Ernst & Young's analysis that the agreement would likely result in payment in full of all Canadian creditors, including Calpine Power.

HELD: Application dismissed. To have succeeded in its appeal Calpine Power was required to show the judge made a palpable and overriding error in her findings with respect to the nature and effects of the agreement. Calpine Power failed to do so. There was no serious issue with respect to the judge's authority to approve the agreement. The complexity of the agreement at issue did not affect this jurisdiction. The judge carefully reviewed the circumstances in concluding the agreement was not a plan of arrangement. Her decision was entitled to deference, especially in light of the fact she had been overseeing the proceedings with respect to the insolvency for more than 18 months prior to making the orders. If the monitor's analysis turned out to be right, no plan of arrangement would be necessary as all the Canadian creditors would be fully repaid. The agreement did not usurp the right of the creditors to vote on a plan of arrangement in the event one was presented.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 4, s. 5, s. 6

Appeal From:

Application for Leave to Appeal and Stay Pending Appeal of the Orders granted by The Honourable Madam Justice B.E. Romaine. Dated the 24th day of July, 2007. Filed on the 27th day of July, 2007. (Dockets: 0501-17864; 0601-14198).

Counsel:

P.T. Linder, Q.C. and R. Van Dorp, for the Applicant, CPL.

L.B. Robinson, Q.C., S.F. Collins and J.A. Carfagnini, for the CCAA Applicants and the CCAA Parties (Respondents).

H.A. Gorman, for the Ad Hoc ULC1 Noteholders Committee.

P.H. Griffin and U. Sheikh, for the Calpine Corporation and other U.S. Debtors.

F.R. Dearlove, for HSBC.

P. McCarthy, Q.C. and J. Kruger, for Ernst & Young Inc., the Monitor.

N.S. Rabinovitch, for the Lien Debtholders.

R. De Waal, for the Unsecured Creditors Committee.

Reasons for Decision

C.D. O'BRIEN J.A.:--

Introduction

1 Calpine Power L.P. (CLP) applies for a stay pending appeal and leave to appeal three orders granted on July 24, 2007 in a proceeding under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (C.C.A.A.). At the request of counsel, the applications have been dealt with on an expedited basis. Oral submissions were heard on August 15, at the close of which I undertook to deliver judgment by the end of the week. I do so now.

Background facts

2 In December 2005, Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (CCAA Applicants) sought and obtain protection under the C.C.A.A. At the same time, the parties referred to as the U.S. Debtors sought and obtained similar protection under Chapter 11 of the U.S. Bankruptcy Code.

3 A monitor, Ernst & Young Inc., was appointed under the C.C.A.A. proceedings and a stay of proceedings was ordered against the C.C.A.A. Applicants and against Calpine Energy Services Canada Partnership, Calpine Canada Natural Gas Partnership and Calpine Canadian Saltend Limited Partnership. The latter three parties collectively are referred to as the C.C.A.A. Parties and those parties together with the C.C.A.A. Applicants as the C.C.A.A. Debtors.

4 This insolvency is extremely complex, involving many related corporations and partnerships, and highly intertwined legal and financial obligations. The goal of restructuring and realizing maximum value for assets has been made more difficult by a number of cross-border issues.

5 As described in the Monitor's 23rd Report, dated June 28, 2007, the C.C.A.A. Debtors and the U.S. Debtors concluded that the most appropriate way to resolve the issues between them was to concentrate on reaching a consensual global agreement that resolved virtually all the material cross-border issues between them. The parties negotiated a global settlement agreement (GSA) subject to the approval of both Canadian and U.S. courts, execution of the GSA and the sale by Calpine Canada Resources Company of its holdings of Calpine Canada Energy Finance ULC (ULC1) Notes in the face amount of US$359,770,000 (the CCRC ULC1 Notes). Counsel at the oral hearing informed me that the Notes were sold on August 14, 2007, yielding a net amount of approximately U.S. $403 million, an amount exceeding the face amount.

6 On July 24, 2007, the C.C.A.A. Applicants sought and obtained three orders. First, an order approving the terms of the GSA and directing the various parties to execute such documents and implement the transactions necessary to give effect to the GSA. Second, an order permitting CCRC and ULC1 to take the necessary steps to sell the CCRC ULC1 Notes. Third, an extension of the stay contemplated by the initial C.C.A.A. order to December 20, 2007. No objection was taken to the latter two orders and both were granted. The supervising judge also, in brief oral reasons, approved the GSA with written reasons to follow. Written Reasons for Judgment were subsequently filed on July 31, 2007: Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act), 2007 ABQB 504. The reasons are careful and detailed. They fully set out the relevant facts and canvas the applicable law and as I see no need to repeat the facts and authorities, the reasons should be read in conjunction with these relatively short reasons dealing with the applications arising therefrom.

7 The applications to the supervising judge were made concurrently with applications by the U.S. Debtors to the U.S. Bankruptcy Court in New York state, the applications proceeding simultaneously by video conference. The applications to the U.S. Court, including an application for approval of the GSA, were also granted.

8 The applicant, CLP, the Calpine Canada Energy Finance II ULC (ULC2) Indenture Trustee and a group referring to itself as the "Ad Hoc Committee of Creditors of Calpine Canada Resources Company" opposed the approval of the GSA. CPL is the only party seeking leave to appeal.

9 CLP submits that the supervising judge erred in concluding that the GSA was not a compromise or plan of arrangement and therefore, sections 4 and 5 of the C.C.A.A. did not apply and no vote by creditors was necessary.

10 Sections 4 and 5 of the C.C.A.A. provide:

> 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 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 court directs.

11 CLP further submits that the jurisdiction of the supervising judge to approve the GSA is governed by section 6 of the C.C.A.A. Section 6 provides:

> 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 bankruptcy 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.

12 The supervising judge found that the GSA is not linked to or subject to a plan of arrangement and does not compromise the rights of creditors that are not parties to it or have not consented to it, and it does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA. She concluded that the GSA was not a compromise or arrangement for the purposes of section 4 of the C.C.A.A. In the course of her reasons she cites a number of cases for support that the court has jurisdiction to review and approve transactions and settlement agreements during the stay period of a C.C.A.A. proceedings if an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally.

Test for leave to appeal

13 This Court has repeatedly stated, for example in Re Liberty Oil & Gas Ltd., 2003 ABCA 158, 44 C.B.R. (4th) 96 at paras. 15-16, that the test for leave under the C.C.A.A. involves a single criterion 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; and
(4) Whether the appeal will unduly hinder the progress of the action.

14 In assessing these factors, consideration should also be given to the applicable standard of review: Re Canadian Airlines Corp., 2000 ABCA 149, 261 A.R. 120. Having regard to the commercial nature of the proceedings which often require quick decisions, and to the intimate knowledge acquired by a supervising judge in overseeing a C.C.A.A. proceedings, appellate courts have expressed a reluctance to interfere, except in clear cases: Re Smoky River Coal Ltd., 1999 ABCA 252, 244 A.R. 196 at para. 61.

Analysis

15 The standard of review plays a significant, if not decisive, role in the outcome of this application for leave to appeal. The supervising judge, on the record of evidence before her, found that the GSA was "not a plan of compromise or arrangement with creditors" (Reasons, para. 51). This was a finding of fact, or at most, a finding of mixed law and fact. The applicant has identified no extricable error of law so the applicable standard is palpable or overriding error.

16 The statute itself contains no definition of a compromise or arrangement. Moreover, it does not appear that a compromise or an arrangement has been proposed between a debtor company and either its unsecured or secured creditors, or any class of them within the scope of sections 4 or 5 of the C.C.A.A. Neither the company, a creditor, nor anyone made application to convene a meeting under those sections.

17 Rather, the GSA settles certain intercorporate claims between certain Canadian Calpine entities and certain U.S. Calpine entities subject to certain conditions, including the approvals both of the Court of Queen's Bench of Alberta and of the U.S. Bankruptcy Court.

18 This is not to minimize the magnitude, significance and complexity of the issues dealt with in the intercorporate settlement which, by definition, was not between arm's length companies. The

material cross-border issues are identified in the 23rd Report of the monitor and listed by the supervising judge (Reasons, para. 5).

19 It is implicit in her reasons, if not express, that the supervising judge accepted the analysis of the monitor, and found that the GSA would likely ultimately result in payment in full of all Canadian creditors, including CLP. CLP does not challenge this finding, but points out that payment is not assured, and rightly relies upon its status as a creditor to challenge the approval in the meantime until such time as it has been paid.

20 The supervising judge further found that the GSA "does not compromise the rights of creditors that are not parties to it or have not consented to it, and it certainly does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA" (Reasons, para. 51). CPL challenges this finding. In order to succeed in its proposed appeal, CPL must also demonstrate palpable and overriding error in these further findings of the supervising judge which once again, involve findings of fact or of mixed law and fact.

Application in this case

21 CPL submits that the "fundamental problem" with the approval granted by the supervising judge is that the GSA is in reality a plan of arrangement because it settles virtually all matters in dispute in the Canadian C.C.A.A. estate and therefore, entitles the applicant to a vote. CPL argues that the GSA must be an arrangement or compromise within the meaning of sections 4, 5 and 6 of the C.C.A.A. because, in its view, the GSA requires non party creditors to make concessions, re-orders the priorities of creditors and distributes assets of the estate.

22 The supervising judge acknowledged at the outset of her analysis that if the GSA were a plan of arrangement or compromise, a vote by creditors would be necessary (Reasons, para. 41). However, she was satisfied that the GSA did not constitute a plan of arrangement with creditors.

23 The applicant conceded that a C.C.A.A. supervising judge has jurisdiction to approve transactions, including settlements in the course of overseeing proceedings during a stay period and prior to any plan of arrangement being proposed to creditors. This concession was proper having regard to case authority recognizing such jurisdiction and cited in the reasons of the supervising judge, including Re Air Canada (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.), Re Playdium Entertainment Corp. (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J.), Re Canadian Red Cross Society (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.), Re T. Eaton Co. (1999), 14 C.B.R. (4th) 298 (Ont. S.C.) and Re Stelco Inc. (2005), 78 O.R. (3d) 254 (C.A.).

24 The power to approve such transactions during the stay is not spelled out in the C.C.A.A. As has often been observed, the statute is skeletal. The approval power in such instances is usually said to be found either in the broad powers under section 11(4) to make orders other than on an initial application to effectuate the stay, or in the court's inherent jurisdiction to fill in gaps in legislation so as to give effect to the objects of the C.C.A.A., including the survival program of the debtor until it can present a plan: Re Dylex Ltd. (1995), 31 C.B.R. (3d) 106 at para. 8 (Ont. Gen. Div.).

25 Hunt J.A. in delivering the judgment of this Court in Smoky River Coal considered the history of the legislation and its objectives in allowing the company to take steps to promote a successful eventual arrangement. She concluded at para. 53:

> These statements about the goals and operation of the C.C.A.A. support the view that the discretion under s. 11(4) should be interpreted widely.

and further at para. 60:

> To summarize, the language of s. 11(4) is very broad. The C.C.A.A. must be interpreted in a remedial fashion.

26 In my view, there is no serious issue as to the jurisdiction of a supervising judge to approve a settlement agreement between consenting parties prior to consideration of a plan of arrangement pursuant to section 6 of the C.C.A.A. The fact that the GSA is not a simple agreement between two parties, but rather resolves a number of complex issues between a number of parties, does not affect the jurisdiction of the court to approve the agreement if it is for the general benefit of all parties and otherwise meets the tests identified in the reasons of the supervising judge.

27 CPL urges that the legal issue for determination by this Court is where the line is to be drawn to say when a settlement becomes a compromise or arrangement, thus requiring a vote under section 6 before the court can grant approval. It suggests that it would be useful to this practice area for the court to set out the criteria to be considered in this regard.

28 An element of compromise is inherent in a settlement as there is invariably some give and take by the parties in reaching their agreement. The parties to the GSA made concessions for the purpose of gaining benefits. It is obvious that something more than compromise between consenting parties within a settlement agreement is required to constitute an arrangement or compromise for purposes of the C.C.A.A. as if that were not so, no settlement agreement could be approved without a vote of the creditors. As noted, that is contrary to case authority accepted by all parties to these applications.

29 The C.C.A.A. deals with compromises or arrangements sought to be imposed upon creditors generally, or classes of creditors, and a vote is a necessary mechanism to determine whether the appropriate majority of the creditors proposed to be affected support the proposed compromise or arrangement.

30 As pointed out by the supervising judge, a settlement will almost always have an impact on the financial circumstances of a debtor. A settlement will invariably have an effect on the size of the estate available for other claimants (Reasons, para. 62).

31 Whether or not a settlement constitutes a plan of arrangement requiring a vote will be dependent upon the factual circumstances of each case. Here, the supervising judge carefully reviewed the circumstances and concluded, on the basis of a number of the fact findings, that there was no plan of arrangement within the meaning of the C.C.A.A., and that the settlement merited approval. She recognized the peculiar circumstances which distinguishes this case, and observed at para. 76 of her Reasons:

> The precedential implications of this approval must be viewed in the context of the unique circumstances that have presented a situation in which all valid claims of Canadian creditors likely will be paid in full. This outcome, particularly with respect to a cross-border insolvency of exceptional complexity, is unlikely to be matched in other insolvencies, and therefore, a decision to approve this settlement agreement will not open any floodgates.

32 At the time of granting her approval, the supervising judge had been overseeing the conduct of these C.C.A.A. proceedings since their inception -- some 18 months earlier. She had the benefit of the many reports of the monitor and was familiar with the record of the proceedings. Her determination of this issue is entitled to deference in the absence of legal error or palpable and overriding error of fact.

33 CPL submits that the GSA compromises its rights and claims, and thus, challenges the express finding of the supervising judge that the settlement neither compromises the rights of creditors before it, nor deprives them of their existing contractual rights. The applicant relies upon the following effects of the GSA in making this submission:

(i) a priority payment of $75 million out of the proceeds of the sale of bonds owned by Calpine Canada Resources Company;
(ii) the release of a potential claim against Calpine Canada Energy Limited, the parent of Calpine Canada Resources Company, which is a partner of Calpine Energy Services Canada Ltd., against which CPL has a claim;
(iii) the dismissal of a claim by Calpine Canada Energy Limited against Quintana Canada Holdings LLC, thereby depleting Calpine Canada Energy Limited of a potential asset which that company could use to satisfy any potential claim by CPL for any shortfall, were it not for the release of claims against Calpine Canada Energy Limited (see (ii) above); and
(iv) the dismissal of the Greenfield Action brought by another C.C.A.A. Debtor against Calpine Energy Services Canada Ltd. for an alleged fraudulent conversion of its interest in Greenfield LP which was developing a 1005 Megawatt generation plant.

34 For purposes of the C.C.A.A. proceedings, the applicant is a creditor of Calpine Energy Services Canada Ltd., Calpine Canada Power Ltd. and perhaps, also, Calpine Canada Resources Company. The GSA does not change its status as a creditor of those companies, nor does it bar the applicant from any existing claims against those companies.

35 In my view, the submission of the applicant does not show any palpable and overriding error in the findings of the supervising judge that the right of creditors not parties to the GSA have not been compromised or taken away. Firstly, there is no compromise of debt if such indebtedness, as ultimately found due to the applicant, is paid in full, which is the likely result as found by the supervising judge, albeit she acknowledged that this result was not guaranteed (Reasons, para. 81). Secondly, and in any event, the fact that the GSA impacts upon the assets of the debtor companies, against which the applicant may ultimately have a claim for any shortfall experienced by it, is a common feature of any settlement agreement and as earlier explained, does not automatically result in a vote by the creditors. The further fact that one of the affected assets of the debtor companies is a cause of action, or perhaps, more correctly, a possible cause of action, does not abrogate the rights of a creditor albeit there may be less monies to be realized at the end of the day.

36 The GSA does not usurp the right of the creditors to vote on a plan of arrangement if it becomes necessary to propose such a plan to the creditors. As explained by the supervising judge, the settlement between the C.C.A.A. Debtors and the U.S. Debtors unlocked the Canadian proceedings to meaningful progress in asset realization and claims resolution, and provided the mechanisms for resolving the remaining issues and significant creditor claims, and the clarification of priorities.

37 It is correct, of course, that if the claims of CPL are paid in full in the course of the C.C.A.A. proceedings, it will never be necessary for it to vote on a plan of arrangement. The applicant should have no complaint with that result. On the other hand, if the claims are not satisfied, it seems likely a plan of arrangement will ultimately be proposed to the applicant, who will then have its right to vote on any such plan.

38 CPL argues that the supervising judge was not entitled to assess the merits of the GSA vis-a-vis the creditors as this was a matter for the exclusive business judgment of the creditors and to be exercised by their vote. As became apparent during the course of its submissions, if a vote were required, from the perspective of the CPL, this would give it veto power over the GSA. Unless clearly mandated by the statute, this is a result to be avoided. While it is understandable that an individual creditor seeks to obtain as much leverage as possible in order to enhance its negotiating position, the objectives and purposes of the C.C.A.A. could easily be frustrated in such circumstances by the self interest of a single creditor. Court approval requires, as a primary consideration, the determination that an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally. As the supervising judge noted, court approval of settlements and major transaction can and often is given over the objections of one or more parties because the court must act for the greater good consistent with the purpose and spirit and within the confines of the legislation.

39 I am not persuaded that the applicant has demonstrated any reasonably arguable error of law in the reasons of the supervising judge or any palpable and overriding errors in her findings of fact or findings of mixed fact and law. In the absence of any such error, it follows that she had discretion to approve the GSA, which she exercised based upon her assessment of the merits and reasonableness of the settlement, and other factors in accordance with the principles set out in the authorities, cited in her reasons, governing the approval of transactions, including settlements, during the stay period prior to a plan of arrangement being submitted to the creditors.

Conclusion

40 CPL has failed to establish serious and arguable grounds for granting leave. In particular, two of the factors used to assess whether this criterion is present have not been met. It has not been demonstrated that the point on appeal is of significance to the parties having regard to the fact dependent nature of whether a plan of arrangement has been proposed to creditors. More importantly, having regard to the standard of review and the findings of the supervising judge, the applicant has not demonstrated that the appeal for which leave is sought is prima facie meritorious.

41 The application for leave is dismissed. It follows that the application for a stay likewise fails and is dismissed.

42 Finally, I would be remiss if I did not acknowledge the excellent quality of the submissions, both written and oral, of counsel on these applications. The submissions were of great assistance in permitting the application to be dealt with in an abbreviated time frame.

C.D. O'BRIEN J.A.

cp/e/qlfxs/qljjn/qljxl/qlcas

TAB 7

Case Name:

Noble v. Noble

IN THE MATTER OF A Proceeding Under SS. 161 and 248 of the Business Corporations Act (Ontario), R.S.O. 1990, c. B.16
Between
Darlene Noble, and
Edward Noble, Yvonne Sin, Wellness Innovations Corp., Vibrotone Ltd., Adam Inc., Wellness America Inc., Wellness America LP and Ramedes Inc.

[2002] O.J. No. 4997

[2002] O.T.C. 1017

119 A.C.W.S. (3d) 183

Court File No. 02-CL-4593

Ontario Superior Court of Justice
Commercial List

Himel J.

Heard: December 19, 2002.
Judgment: December 31, 2002.

(22 paras.)

Practice -- Service -- Service of notice, writ or statement of claim out of jurisdiction -- Consideration by court of forum conveniens -- Appeals -- Stay of proceedings pending appeal -- What constitutes "irreparable harm" -- What constitutes "prejudice" to successful party -- Considerations.

Motion by the respondents, Edward Noble and others, for a stay pending their appeal of a decision dismissing an earlier motion. Darlene and Edward Noble separated in 1998. The divorce was obtained in Arizona, but the parties agreed to a court order to the effect that all outstanding issues relating to marital property and support would be heard in California. The Nobles owned and operated a number of companies, including one in Ontario. Fearing the dissipation of assets in Ontario, Darlene brought an oppression action under the Ontario Business Corporations Act. The respondents moved to have service ex juris set aside and the action stayed on the ground of the exclusive juris-

diction agreement between the parties as set out in the Arizona order. They also moved to have Ontario declared forum non conveniens. The motion was dismissed, and the respondents appealed. They applied for a stay of the order pending the appeal, arguing that they would incur litigation costs.

HELD: Motion dismissed. The respondents had failed to establish that there was a genuine issue to be tried on appeal. Furthermore, they had not shown that there would be any irreparable harm to them. Costs of litigation could be addressed by a costs award following the disposition of the action. The balance of convenience favoured Darlene Noble, given the risk that the company's assets would dissipate should the oppression action not heard soon.

Statutes, Regulations and Rules Cited:

Business Corporations Act, ss. 161, 248. Ontario Rules of Civil Procedure, Rule 17, 63.02, 63.02(1), 63.02(1)(a), 63.02(10(a)(i), 63.02(1)(a)(ii), 63.02(b), 63.02(2), 63.02(3).

Counsel:

Edward J. Babin and Kristine DiBacco, for the applicant (responding party on the motion).
George Glezos, for the respondents (moving parties).

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1 **HIMEL J.** (endorsement):-- Edward Noble and companies controlled by him are respondents in an application brought by Edward's former spouse Darlene. Edward and the companies appeal a decision I rendered on November 12, 2002, dismissing a motion under Rule 17 of the Rules of Civil Procedure for an order to set aside service of the application record and to stay the application because of the parties' exclusive jurisdiction agreement and that Ontario is the forum non conveniens. I also dismissed a motion to expunge certain exhibits and portions of the applicant's affidavits on the basis that they were subject to solicitor-client privilege. I held that no such privilege attached to the documents which were already known to third parties and had been circulated in other proceedings. The respondents in this application brought under s. 161 and s. 248 of the Ontario Business Corporations Act have filed a notice of appeal of my decision to the Ontario Court of Appeal with respect to the motion on the court's jurisdiction (submitting that it is a final order) and have filed a notice for leave to appeal to the Divisional Court with respect to the motion to expunge (which they say is an interlocutory order). They also appeal the order of Farley J. setting a timetable in this matter. They appear today seeking a stay of my orders and Farley J.'s order pending the hearing of the appeals.

FACTUAL BACKGROUND:

2 The history and nature of these proceedings are set out in detail in my endorsement of November 12, 2002. Edward Noble takes the position that this court should stay the orders made pending the hearing of the appeal. Darlene Noble opposes the motion for stay and argues that her application under the OBCA was brought on an urgent basis for an investigation and appointing an inspector into the business and affairs of the respondent Wellness Innovations Corp (WIC). Affidavit evidence filed in this case alleges that the respondent Edward Noble has been misappropriating WIC's assets and corporate opportunities. Darlene claims that she has made repeated efforts to gain

access to the books and records of WIC in order to determine its value but has been denied access to the underlying source materials. Darlene submits that there is reason to believe that Edward intends to dissolve or wind up WIC imminently and that her interest in WIC is in jeopardy. Accordingly, she takes the position that there is no evidence of the respondents in support of their stay motion, that the consequences of granting a stay would result in significant harm to the applicant and other stakeholders in WIC and that the respondents fail to meet any aspect of the three part test for a stay. She submits that the motion for leave to appeal and the appeal do not raise serious issues, that there is no evidence that they will suffer irreparable harm if a stay is not granted and the balance of convenience does not favour granting a stay.

THE COURT'S JURISDICTION TO HEAR THE MOTION FOR STAY:

3 Darlene takes the position that this court does not have jurisdiction to grant a stay and that the appellate court is the only court that has such jurisdiction. Counsel argues that since a notice of appeal to the Court of Appeal had been filed, this court lacks jurisdiction to grant a stay of my order. Counsel relies upon the case of Bijowski v. Caicco (1985), 3 C.P.C. (2d) 295 (Ont. C.A.) and the more recent cases of this court of O'Brien v. McNabb, [2000] O.T.C. 21 and Coccimiglio v. 1037687 Ontario Ltd. (1999), 45 C.P.C. (4th) 128.

4 Edward takes the position that the present wording of Rule 63.02 is different from the wording of the rule that was in place in 1985 when Bijowski was decided by Finlayson J.A. The current phrasing of the rule now confers more extensive jurisdiction upon the court whose decision is appealed to grant a stay. In fact, the present rule confers a concurrent jurisdiction upon the court whose decision is appealed as well as the court to which an appeal of a final order has been taken.

5 I heard argument on this issue initially and ruled that I did have jurisdiction to hear the motion. My reasons are as follows:

6 In 1985, Rule 63.02 read as follows:

> (1) An order, whether final or interlocutory, may be stayed on such terms as are just, by,
>
> (a) an order of the court whose decision is to be appealed, but the stay expires,
>
> (i) when the time for delivery of a notice of motion for leave to appeal or notice of appeal expires, or
> (ii) when a notice of motion for leave to appeal or notice of appeal is delivered, whichever is earlier; or
>
> (b) an order of a judge of the court to which a motion for leave to appeal has been made or an appeal has been taken.
>
> (2) A stay granted under subrule (1) may be set aside or varied, on such terms as are just, by a judge of the court to which a motion for leave to appeal may or has been made or to which an appeal may be or has been taken.

7 In Bijowski, supra, at 300, Finlayson J.A. interpreted the meaning of the superseded provision and said:

> In my respectful view, the purpose of r. 63.02 is to confer a restricted jurisdiction upon the trial Judge or another Judge of that Court in his absence to stay an order which is not automatically stayed because of the provisions of r. 63.01(2). The order that he makes is only effective until notice of appeal is delivered or the time for appeal expires whichever is earlier. The rule really contemplates the maintenance of the status quo during the time available to the unsuccessful party to appeal. Once an appeal is launched the jurisdiction is then in the Court of Appeal to determine whether it would be appropriate for the longer term before the appeal is disposed of to interfere with the judgment or order that is under appeal. (emphasis added)

8 The current Rule 63.02 reads as follows:

> (1) An interlocutory or final order may be stayed on such terms as are just,
>
> (a) by an order of the court whose decision is to be appealed;
> (b) by an order of a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken.
>
> (2) A stay granted under clause (1)(a) expires if no notice of motion for leave to appeal or no notice of appeal, as the case may be, is delivered and the time for the delivery of the relevant notice has expired.
> (3) A stay granted under subrule (1) may be set aside or varied on such terms as are just, by a judge of the court to which a motion for leave to appeal may be or has been made or to which an appeal may be or has been taken.

9 The wording of the old and new versions of Rule 63.02 is clearly different. The former Rule 63.02(1)(a) comprised two distinct situations where the court which had made an order would no longer have jurisdiction to grant a stay. The first, set out in Rule 63.02(1)(a)(i), involved the applicants having missed the deadline for filing their notice of appeal or notice of motion for leave to appeal. The second, in Rule 63.02(1)(a)(ii), arose once the applicants had filed their notice of appeal or notice of motion for leave to appeal. Any stay which was in effect at either time would expire, and the applicants would have to apply for a new stay before the appellate court.

10 Under the old Rule 63.02, in other words, there was no concurrent jurisdiction to grant stays of orders pending appeal. The court being appealed from had jurisdiction up until the appeal had been filed or its limitation period expired. The court being appealed to took over from there. This is what I understand Justice Finalyson's decision in Bijowski to mean.

11 In the cases of O'Brien v. McNabb, supra, and Coccimiglio v. 1037687 Ontario Ltd. supra, the comparison between the old Rule 63.02 and the new Rule 63.02 does not appear to have been fully argued. In the case before me, I have had the benefit of complete argument on this issue and, with all due respect to Justice Kozak, in my view, the new Rule 63.02 has changed and expanded the jurisdiction of the court being appealed from to hear a motion to stay its decision. I find the decision of Bijowski has limited application to the Rule which now governs.

12 The new Rule 63.02 deletes the former paragraphs (1)(a)(i) and (1)(a)(ii) described above. The new subrule (2), however, only refers to the scenario outlined in former paragraph (1)(a)(i). In other words, any stay obtained by the applicants from the court being appealed from only expires if they have missed their deadline to appeal or to apply for leave to appeal. The court whose decision is being appealed thus has no jurisdiction to grant a stay once the appellants (or applicants) miss their appeal deadline. This does not preclude appellants (or applicants) from obtaining a stay from the court being appealed from once they have given notice of appeal or notice of motion for leave to appeal. The rationale for this new provision is not described in the Rules nor is it considered in caselaw as far as I have been able to determine. However, there is a practical reason for such a provision of concurrent jurisdiction over stays of orders pending their appeal in that it serves the interests of justice and affords efficiency. Not only does it mean that counsel are not obliged to re-argue the motion for a stay once they have filed notice of appeal, but there is also an alternative forum in which to seek a stay should the matter be urgent.

13 Given the expanded provision in Rule 63.02, I find that the Rule confers jurisdiction upon me to hear this motion.

THE MOTION FOR STAY:

14 The test for a stay under Rule 63.02(1) of an order pending appeal is the same as the test for an interlocutory injunction: see Circuit World Corp. v. Lesperance (1997), 33 O.R. (3d) 674 (C.A.). It is a three-part test which is set out in the leading decision of RJR-Macdonald Inc. v. Canada (A.G.), [1994] 1 S.C.R. 311. The moving party must establish that the appeal or application for leave to appeal raises a serious issue, that it will suffer irreparable harm if the stay is not granted and that the balance of convenience or inconvenience favours the granting of a stay. The court is to proceed on the assumption that the judgment under appeal is correct and the judge's findings must prima facie be accepted: Ogden Entertainment Services v. United Steelworkers of America, Local 440 (1998), 38 O.R. (3d) 448 at 450 (C.A.); 820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 49 C.P.C. (2d) 239 at 243 (Div. Ct).

15 In deciding whether there is a serious issue to be tried, the court must make a preliminary assessment of the merits of the case and consider the relative strength of each party's case. In the case before me, I note that the respondents have not demonstrated any conflicting authorities to doubt the correctness of the decision. In fact, the only authority cited on point supports the decision. That is the case of TD Asset Management Inc. v. Repap Enterprises Inc. [2000] O.J. No. 2250 (Ont. Sup. Ct.) which was upheld on the leave to appeal application to the Divisional Court reported at [2000] O.J. No. 3395 (Ont. Sup. Ct.). In the leave to appeal application, O'Driscoll J. commented that there was no decision cited that conflicted with the order of Farley J. who refused to grant a stay, and that the applicant had not persuaded him that there is "good reason to doubt the correctness of the order in question". Justice O'Driscoll wrote at para. 28: "Moreover, there is nothing in this case of such general importance nor is there anything relating to the development of the law or the administration of justice that would require leave to be given. There is no issue that warrants resolution by a higher level of judicial authority. The issues under review are those that are of "vital importance" to the parties alone."

16 In my view, even if the appeal raises serious issues, the respondents have not presented any evidence to demonstrate that proceeding with the application will cause irreparable harm and a stay is necessary. Evidence of irreparable harm must be "clear and not speculative": see Syntex Inc. v. Novopharm Ltd. (1991), 126 N.R. 122; 36 C.P.R. (3d) 139 at 135 (Fed. C.A.) and Kanda Tsushin

Kogyo Co. v. Coveley (1997), 96 O.A.C. 324 at 329 (Div. Ct.). That a party is likely to suffer irreparable harm is not enough. It is necessary that the applicant demonstrate evidence to support a finding that the applicant would suffer irreparable harm: see Centre Ice Ltd. v. National Hockey League (1994), 166 N.R. 44 (F.C.A.) at 46. The respondents point out that the denial of a stay will force them to deliver an appearance and file responding materials which will arguably, be attorning to the jurisdiction and would be highly prejudicial. However, so long as the party opposing a stay pending appeal agrees that the appealing party will not be considered to have attorned to the jurisdiction by filing pleadings and proceeding with the litigation, the appealing party will not suffer irreparable harm if a stay is refused and the action is allowed to proceed pending appeal: see Canaccord Capital Corp. v. Hongkong Bank of Canada, [1998] B.C.J. No. 1654 (C.A.); Shaw v. Servier Canada, Inc. [2002] Y.J. No. 76 (C.A.); Marren v. Echo Bay Mines Ltd., [2002] B.C.J. No. 2441 (C.A.). Here, Darlene is prepared to agree that the participation of the respondents pending the appeal will be without prejudice to their position on the appeal concerning Rule 17 and the jurisdictional issue.

17 Furthermore, the respondents argue that having to pursue the litigation while the appeal is pending would result in additional expenses. In Northwest Territories v. Public Service Alliance of Canada (2001) 33 Admin. L.R. (3d) 310 at 314, the Federal Court of Appeal held as follows: "The Government also argues that if the stay is not granted but its appeal eventually succeeds, it will have wasted all of the time and money required to prepare for and attend the hearing (including travel to Ottawa, where most of the hearings are held), and will have no means of recovering the wasted funds. I am unable to agree that resources that may be wasted on litigation is irreparable harm: Bell Canada v. C.E.P. (1997), 127 F.T.R. 44 (Fed. T.D.) at 56." In my view, if the respondents ultimately succeed on appeal, they may be compensated with costs of proceedings should they later be considered unnecessary. I adopt the rationale in 820099 Ontario Inc. v. Harold E. Ballard, supra, where Montgomery J. dismissed a motion for stay of execution pending appeal. In that decision, he considered the submission that the only harm to the applicant if a stay is denied is that legal and accounting expense will be incurred in unwinding the transaction and money would be wasted. At 243, he cited the case of Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1923), 55 O.L.R. 127 9 C.A. where Middleton J.A. wrote at 132:

> There is a wide distinction between cases in which the refusal of a stay will render an appeal nugatory, and cases in which one of the parties must suffer inconvenience and possibly some substantial pecuniary loss. I am inclined to think that it will be found that the refusal of a stay under certain circumstances does not arise from absence of jurisdiction so much as from the view taken that the case is one in which it would be improper to exercise the latent power. In all cases in which the stay will impose little suffering upon the respondent, and this can be compensated by payment of actual damages which admit of easy and substantially accurate computation and in which on the other hand grievous loss and irremediable harm will be done the appellant if the stay is refused, the operation of the judgment ought to be stayed. The principle then is the same as that applied in the case of the application for an interim injunction - the balance of convenience, with an added factor of the greatest weight, the actual adjudication that has taken place, and which must be regarded as prima facie right.

18 In my view, the expenses of the litigation may be compensated with costs and that does not constitute irreparable harm. Irreparable harm is irremediable harm and not mere inconvenience.

19 As to the balance of convenience, I have weighed the harm that Edward says a refusal of a stay would cause and the harm if a stay is granted. On balance, I find that granting a stay would be prejudicial to the applicant who alleges that the respondents have been dissipating assets and the financial positions of the companies are in jeopardy. A stay would result in further delay of the application for relief under the OBCA. The application was commenced in July, 2002 on an urgent basis. The motion under Rule 17 delayed the hearing of the appointment of an inspector which is now scheduled for March 10, 2003. Given the concerns about dissipation of assets, it is important that the action proceed while the appeal is pending. I note that Justice Blair granted an order on August 6, 2002 restraining the respondents from misappropriating or appropriating to their own use funds or assets which belong to WIC and selling or disposing of assets of WIC other than in the ordinary course of business and at fair market value. I acknowledge that the respondents' counsel submits that such an order continues through the determination of the motion under Rule 17 and includes the period during the appeal. Nonetheless, in my view, there will still be prejudice caused by delay if a stay is granted.

20 In considering the test for staying an order pending an appeal as set out in RJR-Macdonald, supra, I am mindful that in each case the criteria may not be weighted equally. In Circuit World Corp. v. Lesperance, supra, Laskin J.A. wrote at 677:

> These three criteria are not watertight compartments. The strength of one may compensate for the weakness of another. Generally, the court must decide whether the interests of justice call for a stay: International Corona Resources Ltd. v. LAC Minerals Ltd. (1986), 21 C.P.C. (2d) 252 (Ont. C.A.) Nonetheless, in many cases whether to grant a stay will depend on the third criterion, called the balance of convenience or the balance of inconvenience.

21 Applying the test applicable to a motion for stay, I find that the respondents have failed to establish (1) that there is a serious issue to be tried, (2) that there will be irreparable harm caused to the respondents if a stay is not granted, and (3) that the balance of convenience favours the respondents. On the contrary, prejudice will be caused to the applicants if there is further delay of the litigation. In my view, the principles which apply in determining whether a court should impose a stay pending an appeal are clear. The purpose of a stay is to prevent injustice and ensure fairness to both sides until the appeal can be argued. That exercise involves a balance of competing interests. It is for that reason that the courts require that the three criteria be met to justify a stay. In my view, the respondents have not met any of those criteria. Accordingly, the motions for stay of my orders of November 12, 2002 and the order of Farley J. of December 5, 2002 are dismissed. This decision is conditional upon the applicant, who has already agreed, undertaking not to raise the issue of attornment to the jurisdiction by the respondents pending disposition of the appeals.

22 If the parties are unable to agree on the issue of costs, they may file written submissions as follows: the applicant Darlene Noble shall file submissions by January 13, 2003 and the respondents Edward Noble and companies shall file submissions by January 17, 2003.

HIMEL J.

TAB 8

Indexed as:

Sherman v. Drabinsky

Between
Perry Sherman, plaintiff, and
Garth H. Drabinsky et al, defendants

[1997] O.J. No. 2735

11 C.P.C. (4th) 297

Court File Number: 11486/82

Ontario Court of Justice (General Division)
Divisional Court - Toronto, Ontario

MacPherson J.

June 5, 1997.

(6 pp.)

Practice -- Trials -- Stay of proceedings -- When available -- Circumstances when refused.

This was an application for a stay pending appeal. The grounds of appeal were that the Master erred in not granting the plaintiff an adjournment and in ordering that the plaintiff advise the defendants of the names and addresses of his clients. The plaintiff claimed "accountant-client" privilege for the names and addresses of his clients.

HELD: Application dismissed. The plaintiff failed to meet the preconditions for granting a stay pending appeal. First, the plaintiff failed to demonstrate a prima facie case. There was nothing like "accountant-client" privilege under Canadian law. Second, the plaintiff did not demonstrate he would suffer irreparable harm. The plaintiff's clients were already the subject of a Revenue Canada garnishment proceeding and there was no assertion that his business was hurt by that. Moreover the nature of his business made it unlikely that his clients would leave him if they knew he was having financial difficulty.

Barry S. Wortzman, Q.C. and Joel D. Watson for the plaintiff.
No counsel mentioned for the defendants.

1 **MacPHERSON J.** (endorsement):-- This is a motion by the plaintiff/debtor, Perry Sherman, to stay the Order of Master Peterson made 23 May 1997 pending his appeal to this court. The grounds of the appeal are that the learned Master erred in not granting the plaintiff an adjournment and in ordering the plaintiff to advise the defendants of the names and addresses of all his clients (the plaintiff is a chartered accountant) to whom he has sent bills or will send bills for services rendered before 1 May 1997. Master Peterson held that the plaintiffs's refusals of questions about these matters at an examination in aid of execution were improper refusals.

2 There is a three-stage test for courts to apply when considering an application for a stay. The components of the test are:

(1) an assessment of the merits of the case to ensure that there is a serious issue to be tried;
(2) an assessment of whether the applicant would suffer irreparable harm if the stay is refused; and
(3) an assessment as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

See: RJR-Macdonald Inc. v. Canada (Attorney General) (1994), 111 D.L.R. (4th) 385 (S.C.C.)

I will consider these three components in turn.

(1) Merits of Appeal

3 The applicant need not generally demonstrate a strong prima facie case in the merits. He must simply demonstrate that "there is a serious question to be tried." See RJR-Macdonald, supra, at p. 401.

4 In my view, the applicant has not met even the low threshold of this component of the test. The questions about the names and addresses of the clients of Mr. Sherman were refused on the basis of an asserted accountant-client privilege. There is no such privilege in Canadian Law. See Chartrey Martin (A Firm) v. Martin [1953] 2 Q.B. 286 (C.A.); Cineplex Odeon Corp. v. Canada (Minister of National Revenue, Taxation), [1994] O.J. No. 628 (Gen. Div.); Re Sun Squeeze Juice Inc., [1994] O.J. No. 1451 (Gen. Div.)

5 In argument, counsel for the applicant asserted a second ground of appeal on the substance of Master Peterson's decision, namely, that the fact that Revenue Canada was already garnishing some of the applicant's income would mean that the respondents here would not be able to do the same. No authority was cited for this proposition. At its highest, it seems to me that the applicant's argument means that there

may be a question of priorities that will arise if the respondents seek to enforce the costs awards they have obtained. That fact does not diminish or obliterate the respondent's legal right to enforce their orders, and to obtain relevant information on an examination in aid of execution.

6 Finally, I observe that the applicant's other ground of appeal - that the learned Master erred in not granting an adjournment - is, in my view, frivolous.

(2) Irreparable Harm

7 The applicant submits that his accounting business will suffer irreparable harm if he has to divulge to these creditors a list of his clients, their addresses, and the quantum they currently owe to him.

8 I do not accept this argument, for two reasons. First, Revenue Canada is already garnishing some of his clients. There is no assertion that this has hurt his business; I do not see why the potential garnishment of other clients would change the situation.

9 Second, the nature of the applicant's practice makes it very unlikely that his clients would desert him if they knew he was in financial difficulty. As Mr. Sherman put it in his examination in aid of execution (R 410):

> "A. Anthony, I don't want to seem rude and I don't want to be abusive. I run a practice on a very friendly basis. My clients have been my friends for over 40 to 50 years. I do what I can to help them, and if they can't pay, I don't force them to pay."

(3) Balance of Convenience

10 The inconvenience to the applicant if a stay is not granted is that the refusal has the practical effect of rendering the appeal nugatory, which is a serious consequence. See Gaudet v. Ontario Securities Commission (1990), 38 O.A.C. 216 (Div. Ct.) and Stroh v. Millers Cove Resources Inc. (1995), 83 O.A.C. 202 (Div. Ct.).

11 Moreover, I do not think that the respondents will be seriously inconvenienced if they do not receive the information about the applicant's clients until after the appeal is heard (likely September). The respondents argued that the money the applicant will receive from his clients for the 1996 tax may disappear in the May-June time frame. However, Mr. Sherman appears to be a very prosperous man with substantial assets. And there is no suggestion that he intends to stop working.

12 My conclusion is that this factor favours the applicant.

Conclusion.

13 There is no doubt that refusal of a stay which would render, in practical terms, an appeal nugatory is a serious matter. See Gaudet and Stroh, supra. However, in those cases the court was of the view that the appeals had merit. In this case, I believe that the appeal is essentially frivolous. It is the latest in a year-long litany of stalling tactics. Moreover, the information sought by the respondents will cause no harm to the applicant and is information to which it is clearly entitled.

14 The application is dismissed. Costs to the respondent Drabinsky defendants fixed at $1000 and to the respondent Merit Investment Corp. fixed at $350, both payable forthwith.

MacPHERSON J.

qp/mmr/DRS/DRS

TAB 9

Indexed as:

Ogden Entertainment Services v. Retail, Wholesale/Canada Canadian Service Sector Division of the United Steelworkers of America, Local 440

Between
Ogden Entertainment Services, plaintiff/respondent, moving party, and
Al Kay, in his representative capacity as Area Representative of Retail, Wholesale/Canada Canadian Service Sector Division of the United Steelworkers of America, Local 440, Jack Davis, in his capacity as Picket Captain and on behalf of all members of the aforementioned Union, defendants/appellants, responding parties

[1998] O.J. No. 1824

38 O.R. (3d) 448

43 C.L.R.B.R. (2d) 48

110 O.A.C. 297

98 CLLC para. 220-046

79 A.C.W.S. (3d) 301

Docket No. M22334 (C29462)

Ontario Court of Appeal

Robins, McKinlay and Weiler JJ.A.

Heard: April 24, 1998.
Oral judgment: April 28, 1998.

(8 pp.)

Injunctions -- Enforcement of injunctions -- Setting aside stay of injunction.

Motion by the plaintiff to set aside the staying of an injunction. The defendant union represented employees of the plaintiff. The union commenced a lawful strike. The plaintiff obtained an injunction restraining the picketers from impeding or obstructing persons or vehicles seeking entry to the plaintiff's business premises. The motions judge directed that the Ontario Provincial Police enforce the order. The defendants argued that there was no proof of unsuccessful reasonable efforts to obtain police assistance, and that the defendants were allowed to impede traffic temporarily in furtherance of their acknowledged right to picket.

HELD: Motion granted in part. The issue of police assistance was for argument on the hearing of the appeal. The right to picket had not been impeded. As such, there was no valid reason to stay the order for an injunction. However, there was no basis for directing the Ontario Provincial Police to enforce an order arising out of a civil proceeding. With the exception of that one point, the stay was vacated.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, ss. 7(5), 102(3), 141.

Counsel:

F. Paul Morrison and Steven G. Mason, for the moving party.
Dougald Brown, for the responding parties.
Anita Lyon, for Her Majesty the Queen in Right of Ontario as represented by the Ontario Provincial Police.

The judgment of the Court was delivered by

1 **ROBINS J.A.** (orally):-- This is a motion by the plaintiff Ogden Entertainment Services (the respondent in the appeal) under s. 7(5) of the Courts of Justice Act to set aside the order of Abella J.A. staying the order of McKinnon J. dated April 2, 1998 granting an injunction restraining the defendants and others from:

> ... intimidating, molesting or interfering with or blocking or physically obstructing or delaying whatsoever any person or vehicle from entering or exiting the property administered by Ogden Entertainment Services located at 1,000 Palladium Drive in the City of Kanata, including but not limited to all parking areas and parking lots where Ogden Entertainment Services carry on its operations.

2 The defendants (the appellants in the appeal), who shall be referred to as "Local 440", hold bargaining rights for approximately 90 cleaners employed by the plaintiff at the Corel Centre in Ottawa. On February 5, 1998 the union commenced a lawful strike. On March 20, 1998 the plaintiff brought this application contending that picketers were improperly impeding and obstructing traffic to and from the Corel Centre, which is a multiple-purpose arena located to the west of Ottawa. It appears that on the days when the events were scheduled anywhere from 40 to 120 picketers were present at 11 different locations in the area.

3 It is uncontroverted that union members and their supporters impeded the access of passenger vehicles, transport buses carrying event spectators, passenger vehicles carrying employees, commercial vehicles, team buses and vehicles carrying performers to the centre. During these events, and particularly events involving the Ottawa Senators Hockey Club, between 17,500 and 18,500 members of the public have attended the Corel Centre. Approximately 7,500 passenger vehicles entered the Centre over a 90 minute period prior to each game.

4 In determining whether a stay should be granted pending appeal, the appropriate test to be applied is that set out in R.J.R. MacDonald Inc. v. Canada (1994), 111 D.L.R. (4th) 385. This test is the same as the test for an interlocutory injunction. Generally, the court must decide whether the interests of justice call for a stay.

5 In determining whether a stay should be granted, regard must be had to the judgment under appeal and a strong case in favour of a stay must be made out. The court must proceed on the assumption that the judgment is correct and that the relief ordered was properly granted. The court is not engaged in a determination of the merits of the appeal on a stay application.

6 In this case, there are factual disputes that will have to be dealt with on the appeal. However, there is no basis at this stage for rejecting the findings of the motions judge. He stated in granting the injunction in question, that:

> During the normal course of events, the OPP have nine officers monitoring the Corel Centre. Since the protocol was developed the OPP have had to send as many as 43 officers in an attempt to maintain order. Numerous troubling incidents have occurred, particularly during hockey events. Because the picketers have stood on public roadways leading to the Corel Centre and stopped vehicles for two minutes per vehicle, traffic on Highway 417 has been backed up for many miles. Some patrons have parked their cars on the side of the Highway 417 and walked to the Corel Centre. OC Transpo buses have not been permitted entry, requiring passengers to be let off at some distance from the Corel Centre and having people walk to the arena. Predictably and inevitably, this situation has led to numerous incidents of "road rage" on the part of patrons, who have on numerous occasions nudged picketers with their cars, become involved in emotionally charged verbal exchanges with picketers and on a number of occasions have caused minor injury to picketers. To date, five members of the public have been charged with dangerous driving, and one other person has been charged with assault. Luckily, no serious injuries have occurred.
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> ...
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> All the picketers have placards. Vehicle traffic is backed up; various vehicles have tried to circumvent the picketers; squealing tires can be heard; shouts can be heard; and, during the video, Inspector Beechey can be heard to say, "We have a real unsafe situation here."
>
> ...

> Inspector Beechey of the OPP is the officer in charge of maintaining order relating to the strike. If his examination for discovery, he stated that in his opinion there was an unsafe situation. He was concerned about the picketers; about his own officers, one of whom had had a flashlight ripped out of his hand; about the pedestrians entering the Corel Centre, trying to run through the line of cars, some of which were gunning their engines ...
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> ...
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> He was asked whether or not he could prevent similar incidents at future events. His answer was this,
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> > Gauging from the history of what has gone on, I would say that no way can we prevent incidents from happening. They are going to happen. You have, as you heard before, in the neighbourhood of 7,500 vehicles for any events. And any place where there are picketers, we have always had nudging. We have had people hit. We have had cars running through and those type of things. They are really unforeseeable and uncontrollable. Our presence out there should deter most of this, but it seems that the people getting held up for long periods of time don't even consider that.

7 The defendants' argument in favour of a stay appears to be based primarily on two grounds. First, it is contended that the plaintiff has not satisfied the requirements of s. 102(3) of the Courts of Justice Act in that it has not established that reasonable efforts to obtain police assistance, protection and action to prevent or remove any obstruction of or interference with lawful entry or exit from the plaintiff's premises have been unsuccessful. While this will properly be a matter of argument on the hearing of the appeal, at this stage, the judge's finding must prima facie be accepted. The evidence of the police, as the motions judge interpreted that evidence, appears sufficient to satisfy the requirements of s. 102(3). It is not for this panel on a stay application to place a contrary interpretation on this evidence of the police action and the safety factors that came under consideration.

8 The second ground advance in support of the stay is to the effect that the defendants are entitled to impede or delay traffic by stopping cars for short periods in furtherance of their acknowledged right to picket in the course of their lawful strike. We have set out the terms of the order. It is clear that this order does not, as suggested, constitute a ban on picketing. Nor can the order be said to be analogous to a ban. The striking employees remain fully entitled to peacefully picket the plaintiff's premises in the locations where they have been doing so. They are restrained only from engaging in the type of conduct specified in the order, in particular, from interfering with or blocking or physically obstructing or delaying any person or vehicle from entering or exiting the property. The prohibition is against engaging in conduct of that nature.

9 A question arose during argument today as to the interpretation of the order as a result of comments which were apparently made during the hearing before the motions judge. The question is whether picketers are entitled to offer leaflets or pamphlets to motorists who may be stopped while waiting to enter the parking lots or who may of their own free will stop in order to accept information of this nature. The injunction does not appear to restrain this type of activity and Mr. Morrison, counsel for the plaintiff, agrees that such conduct would not, in and of itself, constitute a

violation of the order. We make this comment in the hope of avoiding any misunderstanding as to what is covered by the order.

10 Applying the test in R.J.R. v. MacDonald to the facts as found by the motions judge, we have concluded that there is no valid reason to stay his order, save in one respect. Counsel has appeared here today, with our leave, representing the Ontario Provincial Police. She takes the position that there was no jurisdiction on the part of the motions judge to direct, quoting the order, that "the Ontario Provincial Police enforce the Order of this Honourable Court." Counsel for the parties do not argue against the position advanced on behalf of the OPP. We are of the opinion that there is no basis for directing the OPP to enforce an order arising out of a civil proceeding. Unless a statute directs the contrary, such an order should be directed to a sheriff for enforcement. In the present circumstances, there is no statute directing the contrary. Where the enforcement of an order may give rise to a breach of the peace, the sheriff may require a police officer to assist in the execution. No order is required to gain this assistance. Reference may be had to s. 141 of the Courts of Justice Act.

11 Accordingly, in so far as paragraph 4 of the order of McKinnon J. is concerned, the stay previously granted will be continued. Otherwise, the stay is vacated. Costs of this application will be reserved to the panel hearing the appeal.

ROBINS J.A.
McKINLAY J.A. -- I agree.
WEILER J.A. -- I agree.

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

Court File No: M44124

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

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

BRIEF OF AUTHORITIES OF THE DIP LENDERS AND THE AD HOC COMMITTEE (RETURNABLE AUGUST 15, 2014)

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