Court File No.: CV-20-00637081-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

TRUIST BANK, AS AGENT

Applicant

- and -

KEW MEDIA GROUP INC., KEW MEDIA INTERNATIONAL (CANADA) INC.

Respondents

APPLICATION UNDER SUBSECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43 AS AMENDED

BOOK OF AUTHORITIES OF ALEX KAN AND STUART RATH
(Lift Stay and Carriage)
(Motion Returnable: July 14, 2020)

July 13, 2020

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LIST OF AUTHORITIES

1.	*Romspen Investment Corporation v. Courtice Auto Wreckers*, 2017 ONCA 301
2.	*Heyder v. Canada (Attorney General) (Federal Court File No. T-2111-16)*
3.	*Mancinelli v. Barrick Gold Corporation, 2016 ONCA 571*

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LIST OF AUTHORITIES

1.	*Romspen Investment Corporation v. Courtice Auto Wreckers*, 2017 ONCA 301
2.	*Heyder v. Canada (Attorney General) (Federal Court File No. T-2111-16)*
3.	*Mancinelli v. Barrick Gold Corporation, 2016 ONCA 571*

TAB 1

Romspen Investment Corporation v. Courtice AutoWreckers Limited et al.[Indexed as: Romspen Investment Corp. v. Courtice AutoWreckers Ltd.], 138 O.R. (3d) 373

Ontario Reports

Court of Appeal for Ontario,

Doherty, MacPherson and Lauwers JJ.A.

April 13, 2017

138 O.R. (3d) 373 | *2017 ONCA 301*

Case Summary

Bankruptcy and insolvency — Stay of proceedings — Union bringing post-receivership application for certification for bargaining unit comprised of six employees of company in receivership — Union alleging that receiver subsequently fired four of those employees and hired new workers to replace them — Motion judge erring in dismissing union's motion for leave to proceed with certification application and unfair labour practice complaint in face of stay imposed by receivership order — Motion judge's concerns about allowing certification application to proceed being speculative — Employees' legally protected rights not in conflict with Bankruptcy and Insolvency Act in circumstances of this case — Good reasons existing to lift stay and permit certification application and unfair labour practice complaint to go forward — Bankruptcy and Insolvency Act, *R.S.C. 1985, c. B-3*.

After a receivership order was made in respect of several corporations, the union brought a certification application, seeking to represent a bargaining unit comprised of six employees of one of those corporations. The union claimed that two days later, the receiver dismissed four of those employees and hired new workers to replace them. OLRB stayed the certification application, holding that the stay imposed by the receivership order applied. The union brought a motion for leave to proceed with the certification application and with an unfair labour practice ("ULP") complaint. The motion was dismissed. The motion judge found that the effect of the certification application was to increase the rights of the members of the proposed bargaining unit relative to other creditors of the corporation, which would be contrary to the policy and purpose of the stay of proceedings, that recognition of the proposed bargaining unit could impact the sale of the business, and that there was no certainty that the proposed bargaining unit would be meaningful after the completion of the sale of the corporation's assets. As for the ULP complaint, the motion judge found that as the certification application was not validly commenced, the union could not assert that the employees were terminated in response to that application. The union appealed.

Held, the appeal should be allowed.

Per MacPherson J.A. (Doherty J.A. concurring): The union could not appeal the motion judge's decision as of right under either s. 193(*a*) or s. 193(*c*) of the *Bankruptcy and Insolvency Act* ("*BIA*"). The union should be granted leave to appeal as the central issue in the appeal -- the relationship between, and intersection of, federal bankruptcy law and general provincial labour relations law -- was one of general importance to the practice in bankruptcy/insolvency matters and to the administration of justice generally. The appeal would not unduly hinder the progress of the insolvency proceedings.

The motion judge's concerns about the results of permitting the certification application to proceed were speculative and unsupported by the evidence. His reasoning that the certification application would increase the rights of the members of the proposed bargaining unit relative to other creditors rested on [page374] supposition. Certification does not have the effect of automatically increasing the rights employees have as creditors, thereby

prejudicing other creditors. It was simply conjecture at this point to assume that the union would be successful in negotiating a more financially favourable contract for bargaining unit employees. Moreover, there was no concrete evidence that recognition of the proposed bargaining unit would negatively impact a sale of the business. The motion judge erred in finding that the union would not be prejudiced by the continuation of the stay. Interfering with employees' ability to exercise their statutory labour rights, particularly in circumstances where employees were allegedly terminated for exercising those rights, causes clear prejudice. Courts should not unduly inoculate insolvency proceedings against the legitimate exercise of labour rights simply because the assertion of those rights represents an inconvenience to the receivership process. Further, maintaining the stay and delaying the representation vote risked undermining the legitimacy of the vote. The receiver could point to little material prejudice should the stay be lifted. The *BIA* is not intended to extinguish legally protected rights unless those rights are in conflict with the *BIA*. There was no conflict here. There were sound reasons to lift the stay and allow the union to proceed with the certification application.

The ULP complaint should be allowed to proceed as well. The fact that the certification application might be an irregularity (unless and until leave was granted *nunc pro tunc*) did not erase the fact that the application was filed. It would be unfair and a triumph of form over substance to prevent individuals who had lost their jobs from asserting basic protections otherwise available to them under law because of a technical defect in the original proceeding.

Per Lauwers J.A. (dissenting): The decision of the experienced motion judge was entitled to deference. Two distinct regulatory regimes came into contact in this case: the Ontario labour relations regime and the federal insolvency regime. This is precisely the kind of conflict that the paramountcy doctrine is intended to recognize and accommodate. While the first branch of the paramountcy analysis was not engaged as there was no operative incompatibility or conflicting language, the second branch was engaged, under which the motion judge was obliged to consider the exigencies of each regime and reconcile them if possible. That was a nuanced, difficult and delicate task informed by the motion judge's knowledge of both the law and the operation of the marketplace. The motion judge's statement that certification could negatively impact the sale of the business was self-evidently true and fell well within the margin of appreciation that was his due, given his knowledge of the commercial realities. If the court were to permit the post-receivership certification process to continue, it would effectively hand one interested group of creditors, the newly unionized employees, a tool with which to increase their leverage over the other creditors. Finally, the motion judge's conclusion that there was no basis for the unfair labour practice complaint was entitled to deference.

GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc., [2006] 2 S.C.R. 123, [2006] S.C.J. No. 36, 2006 SCC 35, 271 D.L.R. (4th) 193, 351 N.R. 326, J.E. 2006-1500, 215 O.A.C. 313, 22 C.B.R. (5th) 163, 51 C.C.E.L. (3d) 1, 53 C.C.P.B. 167, [2006] CLLC Â220-045, EYB 2006-108008, 149 A.C.W.S. (3d) 542, consd

Other cases referred to

407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy), [2015] 3 S.C.R. 397, [2015] S.C.J. No. 52, 2015 SCC 52, 85 M.V.R. (6th) 1, 30 C.B.R. (6th) 207, 391 D.L.R. (4th) 248, 340 O.A.C. 1, 477 N.R. 1, 2015EXP-3201, J.E. 2015-1776, EYB 2015-258558, 259 A.C.W.S. (3d) 18; *AbitibiBowater inc. (Arrangement relatif à)*, [2010] Q.J. No. 2176, 2010 QCCS 1064; [page375] *Alberta (Attorney General) v. Moloney*, [2015] 3 S.C.R. 327, [2015] S.C.J. No. 51, 2015 SCC 51, 476 N.R. 318, 85 M.V.R. (6th) 37, 2015EXP-3202, J.E. 2015-1777, EYB 2015-258559, [2015] 12 W.W.R. 1, 29 C.B.R. (6th) 173, 22 Alta. L.R. (6th) 287, 391 D.L.R. (4th) 189, 606 A.R. 123, 259 A.C.W.S. (3d) 20; *Business Development Bank of Canada v. Pine Tree Resorts Inc.* (2013), 115 O.R. (3d) 617, [2013] O.J. No. 1918, 2013 ONCA 282, 307 O.A.C. 1, 100 C.B.R. (5th) 91; *Canwest Global Communications Corp. (Re)*, [2011] O.J. No. 1590, 2011 ONSC 2215, 75 C.B.R. (5th) 156, 200 A.C.W.S. (3d) 1023; *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, 2010 SCC 60, 2011 D.T.C. 5006, 409 N.R. 201, 296 B.C.A.C. 1, 12 B.C.L.R. (5th) 1, 326 D.L.R. (4th) 577, EYB 2010-183759, 2011EXP-9, J.E. 2011-5, 2011 G.T.C. 2006, [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, [2010] G.S.T.C. 186, 196 A.C.W.S. (3d) 27;

Crystalline Investments Ltd. v. Domgroup Ltd., [2004] 1 S.C.R. 60, [2004] S.C.J. No. 3, 2004 SCC 3, 234 D.L.R. (4th) 513, 316 N.R. 1, J.E. 2004-335, 184 O.A.C. 33, 43 B.L.R. (3d) 1, 46 C.B.R. (4th) 35, 16 R.P.R. (4th) 1, 128 A.C.W.S. (3d) 380; *Enroute Imports Inc. (Re)*, [2016] O.J. No. 1744, 2016 ONCA 247, 35 C.B.R. (6th) 1, 265 A.C.W.S. (3d) 287; *Essar Steel Algoma Inc. (Re)*, [2016] O.J. No. 1394, 2016 ONSC 1802, 35 C.B.R. (6th) 89, 264 A.C.W.S. (3d) 569 (S.C.J.); *Essar Steel Algoma Inc. (Re)*, [2016] O.J. No. 1939, 2016 ONCA 274, 36 C.B.R. (6th) 56, 265 A.C.W.S. (3d) 838; *Gordon v. Canada (Attorney General)*, [2016] O.J. No. 4330, 2016 ONCA 625, 351 O.A.C. 44, 364 C.R.R. (2d) 17, 287 C.L.R.B.R. (2d) 1, [2016] CLLC Â220-058, 404 D.L.R. (4th) 590, 269 A.C.W.S. (3d) 466 [Leave to appeal to S.C.C. refused [2016] S.C.C.A. No. 444; [2016] S.C.C.A. No. 445]; *Grant Forest Products Inc. v. Toronto-Dominion Bank*, [2015] O.J. No. 4147, 2015 ONCA 570, 26 C.B.R. (6th) 218, 20 C.C.P.B. (2d) 161, 387 D.L.R. (4th) 426, 9 E.T.R. (4th) 205, 26 C.C.E.L. (4th) 176, 337 O.A.C. 237, 256 A.C.W.S. (3d) 269; *Hawkair Aviation Services Ltd. (Re)*, [2006] B.C.J. No. 938, 2006 BCSC 669, 18 B.L.R. (4th) 294, 22 C.B.R. (5th) 11, 150 A.C.W.S. (3d) 99; *Ma (Re)*, [2001] O.J. No. 1189, 143 O.A.C. 52, 24 C.B.R. (4th) 68, 104 A.C.W.S. (3d) 261 (C.A.); *Meredith v. Canada (Attorney General)*, [2015] 1 S.C.R. 125, [2015] S.C.J. No. 2, 2015 SCC 2, 380 D.L.R. (4th) 92, 249 L.A.C. (4th) 98, [2015] CLLC Â220-011, 466 N.R. 338, 2015EXP-186, 2015EXPT-120, J.E. 2015-94, D.T.E. 2015T-43, EYB 2015-246849, 325 C.R.R. (2d) 278, 248 A.C.W.S. (3d) 326; *Mounted Police Assn. of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3, [2015] S.C.J. No. 1, 2015 SCC 1, [2015] CLLC Â220-010, 380 D.L.R. (4th) 1, 249 L.A.C. (4th) 1, 325 C.R.R. (2d) 300, 328 O.A.C. 1, 2015EXP-185, 2015EXPT-119, J.E. 2015-93, D.T.E. 2015T-42, EYB 2015-246848, 248 A.C.W.S. (3d) 440; *Nortel Networks Corp. (Re)*, [2009] O.J. No. 2558, 55 C.B.R. (5th) 68, 75 C.C.P.B. 233, 178 A.C.W.S. (3d) 305 (S.C.J.); *Peoples Trust Co. v. Rose of Sharon (Ontario) Retirement Community*, [2012] O.J. No. 6219, 2012 ONSC 7319, 97 C.B.R. (5th) 303, 224 A.C.W.S. (3d) 323 (S.C.J.); *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005, [1990] S.C.J. No. 45, 107 N.R. 281, J.E. 90-803, 40 O.A.C. 81, 78 C.B.R. (N.S.) 193, 55 C.C.C. (3d) 449, 76 C.R. (3d) 378, 10 W.C.B. (2d) 111; *Royal Crest Lifecare Group Inc. (Re)*, [2004] O.J. No. 174, 98 C.L.R.B.R. (2d) 210, 181 O.A.C. 115, 46 C.B.R. (4th) 126, [2004] CLLC Â220-014, 128 A.C.W.S. (3d) 212 (C.A.) [Leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 104]; *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978, [2001] S.C.J. No. 90, 2001 SCC 92, 207 D.L.R. (4th) 385, 280 N.R. 155, J.E. 2002-93, 30 C.B.R. (4th) 105, REJB 2001-27203, 110 A.C.W.S. (3d) 596; *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 S.C.R. 245, [2015] S.C.J. No. 4, 2015 SCC 4, 2015EXP-365, 328 C.R.R. (2d) 1, 2015EXPT-224, [2015] 3 W.W.R. 1, 380 D.L.R. (4th) 577, J.E. 2015-186, D.T.E. 2015T-88, EYB 2015-247458, 248 L.A.C. (4th) 271, 451 Sask. R. 1, [2015] CLLC Â220-014, 281 C.L.R.B.R. (2d) 1, 249 A.C.W.S. (3d) 324; *Sproule v. Nortel Networks Corp.* (2009), 99 O.R. (3d) 708, [2009] O.J. No. 4967, 2009 ONCA 833, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, [2010] CLLC Â210-005, 256 O.A.C. 131, 184 A.C.W.S. (3d) 300 [Leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 531]; [page376] *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, [2013] S.C.J. No. 6, 2013 SCC 6, 301 O.A.C. 1, 96 C.B.R. (5th) 171, 8 B.L.R. (5th) 1, 354 D.L.R. (4th) 581, 2013EXP-356, 2013EXPT-246, J.E. 2013-185, D.T.E. 2013T-97, EYB 2013-217414, 439 N.R. 235, 20 P.P.S.A.C. (3d) 1, 2 C.C.P.B. (2d) 1, 223 A.C.W.S. (3d) 1049; *Vachon v. Canada (Employment and Immigration Commission)*, [1985] 2 S.C.R. 417, [1985] S.C.J. No. 68, 23 D.L.R. (4th) 641, 63 N.R. 81, J.E. 85-1089, 57 C.B.R. (N.S.) 113, 34 A.C.W.S. (2d) 379; *White Birch Paper Holding Company (Arrangement in respect of)*, [2010] Q.J. No. 5701, 2010 QCCS 2590, 2010EXP-2183, 2010EXPT-1594, J.E. 2010-1207, 65 C.B.R. (5th) 186, D.T.E. 2010T-443, 82 C.C.P.B. 192, EYB 2010-175508, [2010] R.J.Q. 1518, 191 A.C.W.S. (3d) 1037

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Canadian Charter of Rights and Freedoms, ss. 1, 2(*d*)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [as am.], ss. 11 [as am.], 11.7 [as am.], 33, (1)

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101 [as am.]

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APPEAL from the order of Wilton-Siegel J., *[2016] O.J. No. 1908*, *2016 ONSC 1808*, *36 C.B.R. (6th) 141* (S.C.J.) dismissing a motion for leave to proceed with a certification application and an unfair labour practice complaint.

Mark Zigler and *James Harnum*, for appellant International Union of Operating Engineers, Local 793.

Lisa S. Corne and *David P. Preger*, for respondent Rosen Goldberg Inc., in its capacity as court-appointed receiver.

MACPHERSON J.A. (DOHERTY J.A. concurring): —

A. *Introduction*

[1] The appellant International Union of Operating Engineers, Local 793 (the "union") appeals from the decision of Wilton-Siegel J. (the "motion judge") of the Superior Court of Justice (Commercial List). The motion judge dismissed the union's motion seeking leave to proceed with matters relating to certification and unfair labour practices before the Ontario Labour [page377] Relations Board (the "OLRB"). The issue on the appeal is whether the motion judge erred in so doing.

B. *Facts*

(1) *The parties and events*

[2] On the application of Romspen Investment Corporation as secured creditor, and pursuant to an order of Penny J. of the Superior Court of Justice on October 19, 2015, Rosen Goldberg Inc. (the "receiver") was appointed receiver of several corporations (together, the "Ambrose Group"). One of those corporations is Courtice Auto Wreckers Limited (the "employer"). Paragraphs 7 and 8 of the receivership order provide that no proceeding can be commenced or continued in any court or tribunal against the receiver or the debtors except with the consent of the receiver or with leave of the court.

[3] On December 9, 2015, the union applied to the OLRB for certification, seeking to represent a bargaining unit comprised of six employees at the employer's Harmony Road location in Oshawa (also known as Ontario Disposal).

[4] The union asserts that two days later, on December 11, the receiver dismissed four of the six employees in the proposed bargaining unit and, on December 14, hired new workers to perform duties substantially similar to

those performed by the dismissed employees. The receiver offers business reasons for the dismissals and denies hiring replacement workers.

[5] On December 14, the OLRB stayed the union's certification application, holding that the stay imposed by the receivership order applied.

[6] On December 18, the union filed an unfair labour practice ("ULP") complaint with the OLRB, alleging that the receiver dismissed the employees at least in part as a result of anti-union animus.

[7] In light of the OLRB's decision on December 14, the union sought leave of the court to proceed with its certification application and ULP complaint at the OLRB.

(2) *The motion judge's decision*

[8] The motion judge dismissed the union's motion in its entirety.

[9] The motion judge framed the inquiry in this fashion [at para. 23]:

> [The Union's motion raises two separate, but related, issues. The Union seeks an order lifting the stay of proceedings under paragraphs 8 and 9 of the Receivership Order to allow it to proceed with the Certification [page378] Application against the Debtor. In addition, as the ULP Complaint will also require an inquiry into the conduct of the Receiver, the Union seeks an order lifting the stay of proceedings under paragraph 7 of the Receivership Order, as well as an order granting leave to proceed against the Receiver under section 215 of the *BIA*, in respect of the ULP Complaint.

[10] With respect to the first issue -- the certification issue -- the motion judge considered whether he should make an order validating the commencement of the certification application on a *nunc pro tunc* basis. He framed the issue in this fashion [at para. 43]:

In considering the Union's request for an order lifting the stay of proceedings in respect of the Certification Application on a *nunc pro tunc* basis, the Court must first address whether such an order would have been granted if it had been sought prior to commencement of the Certification Application.

[11] The motion judge concluded that the court would not have granted leave at the relevant time. He offered four reasons in support of this conclusion:

- The effect of the certification application is to increase the rights of the members of the proposed bargaining unit relative to other creditors of the Ambrose Group. This would be contrary to the policy and purpose of the stay of proceedings, which effectively freezes the rights and remedies of all creditors of the debtor as of the date of the receivership order.

- Recognition of the proposed bargaining unit could impact the sale of Ontario Disposal and the proceeds that can be realized therefrom. It is inequitable to require creditors to accept a potential diminution in the value of the assets in circumstances where employees assert rights not previously in existence while the rights and remedies of the remaining stakeholders are frozen.

- The fact that there may be purchasers who are willing to take Ontario Disposal assets subject to the proposed bargaining unit does not support the case for lifting the stay. In such circumstances, the union will be able to pursue the certification application against the purchaser as soon as a sale is completed. Accordingly, the union is not prejudiced by the stay.

- There is no certainty that the proposed bargaining unit would be meaningful after the completion of any sale of Ontario Disposal assets. There is no guarantee what form the sale of Ontario Disposal assets will take. [page379]

[12] Turning to the question of whether leave should be granted to permit the union to proceed with its ULP complaint, the motion judge again provided a negative answer. The core of his reasoning on this issue was [at para. 57]:

> [U]nless the Certification Application was validly commenced, the Union cannot assert that the employees were terminated in response to such action. Therefore, unless the Certification Application was validly commenced, there can be no ULP Complaint. Given the determinations above that the Certification Application is null and void, and that there is no basis for an order lifting the stay in respect of the Certification Application on a *nunc pro tunc* basis, it follows that there is no basis for the ULP Complaint.

[13] The union appeals from the motion judge's order.

[14] The receiver moves to quash the appeal on the basis that the motion judge's order does not fall within the meaning of s. 193(*a*) through (*c*) of the *Bankruptcy and Insolvency Act*, *R.S.C. 1985, c. B-3* (the "*BIA*"). Accordingly, the appeal cannot proceed without leave of a judge of this court. The union did not seek the required leave when it filed its notice of appeal.

[15] The union resists the receiver's motion to quash. The union asserts that there is an automatic right of appeal under s. 193(*a*) and (*c*) for appeals involving "future rights" and property in excess of $10,000 and that its appeal implicates these categories.

[16] In the alternative, if this court determines that s. 193(*a*) and (*c*) of the *BIA* do not support its direct appeal, the union makes a cross-motion seeking leave to appeal pursuant to s. 193(*e*) of the *BIA*.

C. *Issues*

Preliminary issues

(1) Is the appeal as of right pursuant to s. 193(*a*) or 193(*c*) of the *BIA*?

(2) If the answer to (1) is no, should the union be granted leave to appeal pursuant to s. 193(*e*) of the *BIA*?

The appeal

(3) Did the motion judge err by not granting the union leave to continue its certification application at the OLRB?

(4) Did the motion judge err by not granting the union leave to continue its ULP complaint at the OLRB? [page380]

D. *Analysis*

Preliminary issues[1]

(1) *Motion to quash*

[17] The union says that its appeal is as of right under either s. 193(*a*) or (*c*) of the *BIA*:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
> (*a*) if the point at issue involves future rights;

> *(c)* if the property involved in the appeal exceeds in value ten thousand dollars[.]

(a) *BIA s. 193(a)*

[18] The union asserts that in this case there are legal rights at issue that qualify as inchoate future rights. These future rights include the union's right to bargain collectively for its members (which only exists if the certification application is successful) and the employees' right to be represented by a union of their choice in their dealings with their employer.

[19] I do not accept this submission. The leading case dealing with the interpretation of s. 193(*a*) of the *BIA* is *Business Development Bank of Canada v. Pine Tree Resorts Inc.* (2013), 115 O.R. (3d) 617, [2013] O.J. No. 1918, 2013 ONCA 282 ("*Pine Tree Resorts*"), where Blair J.A. defined "future rights", at para. 15:

> "Future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future.

(Citations omitted)

[20] In this proceeding, the right at issue before the motion judge was the union's existing right to apply for certification at a time when a stay is in place. Accordingly, it cannot reasonably be [page381] said that the union's right to apply for certification depended on a future event that had not yet occurred.

(b) *BIA s. 193(c)*

[21] The union contends that the rights at issue in its ULP complaint exceed $10,000. In addition to reinstatement of the four terminated employees, the union will seek back pay and damages that will exceed $10,000.

[22] I am not persuaded by this submission. The right of appeal without leave under s. 193(*c*) must be narrowly construed and limited to cases where the appeal directly involves property exceeding $10,000 in value: *Enroute Imports Inc. (Re)*, [2016] O.J. No. 1744, 2016 ONCA 247, 35 C.B.R. (6th) 1, at para. 5. In my view, the union's proposed appeal involves a procedural matter -- can the union proceed at this time with its certification application and ULP complaint at the OLRB? The appeal does not involve directly any quantum of money.

(c) *Conclusion*

[23] The union cannot appeal as of right from the motion judge's decision. The receiver's motion to quash the appeal is *prima facie* valid.

(2) *Cross-motion for leave to appeal*

[24] In order to avoid its appeal being quashed, the union brings a cross-motion seeking leave to appeal pursuant to s. 193(*e*) of the *BIA*:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> .??.??.??.??.
>
> *(e)* in any other case by leave of a judge of the Court of Appeal.

[25] The test for granting leave to appeal under this provision was set out by Blair J.A. in *Pine Tree Resorts*, at para. 29:

Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(*e*) is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing considerations in my view. The court will look to whether the proposed appeal,

a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;

b) is *prima facie* meritorious, and [page382]

c) would unduly hinder the progress of the bankruptcy/ insolvency proceedings.

[26] The central issue in this appeal is the relationship between, and intersection of, federal bankruptcy law and general provincial labour relations law. The factual context for the intersection of these laws in this case is the receiver's legitimate attempt to sell a large failing company and the important labour rights of some of the company's employees, including their right to seek to join a union and their right not to be fired unfairly. In my view, it is obvious that this issue is one of general importance to the practice in bankruptcy/insolvency matters and to the administration of justice generally.

[27] The resolution of this appeal requires careful consideration of whether the motion judge's decision is consistent with the leading case in this domain involving the intersection of the *BIA* and provincial labour law, namely, the Supreme Court of Canada's decision in *GMAC Commercial Credit Corp.* ù *Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123, [2006] S.C.J. No. 36, 2006 SCC 35 ("*GMAC*"). I cannot say that the proposed appeal appears to be unmeritorious.

[28] Finally, I am satisfied that this appeal will not unduly hinder the progress of these insolvency proceedings. The issues on appeal are narrow and the record is modest. Moreover, the receiver did not move to quash the appeal until almost six months after the union filed its notice of appeal and three months after the hearing date was set. As a result, the receiver's motion to quash and the union's cross-motion for leave were argued as part of the appeal proper. It cannot be said that granting leave in these circumstances would unduly hinder the progress of these proceedings.

[29] For these reasons, I would grant the union leave to appeal from the motion judge's order.

The appeal

(3) *The certification application*

[30] In determining whether to lift a stay of proceedings imposed by a receivership order, a court should consider the totality of the circumstances and the relative prejudice to both sides: *Peoples Trust Co. v. Rose of Sharon (Ontario) Retirement Community*, [2012] O.J. No. 6219, 2012 ONSC 7319, 97 C.B.R. (5th) 303 (S.C.J.), at para. 5. While not strictly applicable, a court may take guidance from the jurisprudence addressing the lifting of stays under s. 69.4 of the *BIA*: see *Peoples Trust Co*., at para. 5; and Lloyd W. Houlden, Geoffrey B. Morawetz [page383] and Janis P. Sarra, *The 2016-2017 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2016), at p. 1085. While the motion judge correctly identified these principles, in my view each of the four reasons he relied on to support his decision not to lift the stay presents problems. I will address those reasons in turn.

[31] First, the motion judge reasoned that leave ought to be refused because the certification application would in effect increase the rights of the members of the proposed bargaining unit relative to other creditors of the Ambrose Group.

[32] In my view, this reasoning rests on supposition. A successful certification application does not guarantee employees better wages; it simply allows employees to combine their bargaining power and rely on the union's assistance in negotiating their terms and conditions of employment. While it is true that upon certification certain rights and obligations crystallize that would not otherwise (*e.g.*, the employer's duty to recognize the union and bargain with it in good faith), certification does not have the effect of automatically increasing the rights employees have *as creditors*, thereby prejudicing other creditors. It is simply conjecture at this point to assume that the union

will be successful in negotiating a more financially favourable contract for bargaining unit employees. Moreover, at this juncture, allowing the union's certification application to proceed merely entitles the union to a representation vote, not to certification.

[33] The motion judge next reasoned that recognition of the proposed bargaining unit could negatively impact a sale of Ontario Disposal and that, in the circumstances, it would be inequitable to require creditors to accept such an outcome.

[34] In my view, this line of reasoning is speculative. While some purchasers may be dissuaded by recognition of the proposed bargaining unit, it may also be that a set collective agreement, with its clarity of terms, would be attractive to a prospective purchaser. The union, on behalf of its members, has an interest in the business being sold as a going concern and therefore has an incentive to act in a manner that would promote such an outcome.

[35] More fundamentally, however, there is simply no concrete evidence that recognition of the proposed bargaining unit would negatively impact a sale. The receiver's statement in its first report that it has "serious concerns" that certification could negatively impact a sale amounts to little more than self-serving speculation. Without having concrete evidence before him to ground the receiver's apparent concern, the motion judge erred in denying the union leave to proceed with its certification application on this basis. Further, even if there was some evidence to substantiate the receiver's concern, the union has indicated its [page384] willingness to delay bargaining a collective agreement for up to a year should the receiver produce such evidence.

[36] The motion judge also reasoned that the union will be able to pursue its certification application against the purchaser as soon as a sale is completed and that, therefore, the union faces no prejudice as a result of the continuation of the stay.

[37] I am not persuaded by this point. Interfering with employees' ability to exercise their statutory labour rights, particularly in circumstances where employees were allegedly terminated for exercising those rights, causes clear prejudice. The right to form and join a union of one's choosing is a fundamental right under the *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sch. A (the "*LRA*"). While flexibility is required to address the challenges in any particular insolvency proceeding, courts should not unduly inoculate insolvency proceedings against the legitimate exercise of labour rights simply because the assertion of those rights represents an inconvenience to the receivership process: *GMAC*, at paras. 50-51.

[38] Further, maintaining the stay and delaying the representation vote risks undermining the legitimacy of the vote. As the board itself noted in this case [at para. 17], "the scheme of the [*LRA*] is premised on quick votes". Quick votes at once minimize the possibility of undue influence and maximize the validity of the vote as a reflection of employee wishes. Delaying the vote prejudices these important objectives.

[39] Moreover, at present, there is nothing on the record that suggests that a suspension of these employees' labour rights will be a short-lived, stop-gap measure. On the motion, the receiver offered no specifics of a planned sale or prospective purchaser. As of the appeal hearing, the receiver had been running the business for over a year with no definite end in sight. In my view, it is unreasonable to characterize as entirely non-prejudicial what amounts to an indefinite suspension of the union's and employees' ability to exercise labour rights they otherwise enjoy at law, especially where, as here, employees have allegedly faced retribution for so doing.

[40] Finally, the motion judge reasoned that leave ought to be refused given that there is no certainty that the proposed bargaining unit would be meaningful after the completion of any sale of Ontario Disposal assets.

[41] Again, this is speculative. Whatever the results of the sale, the employees' have presently existing rights, established under the *LRA*, to organize themselves and select a collective bargaining agent. The fact that a court may speculate as to the ultimate efficacy of their decision to organize in this manner [page385] does not diminish the prejudice suffered now by preventing employees from exercising those rights.

[42] In light of the above, I am of the view that the motion judge erred in refusing to lift the stay. It therefore falls to this court to determine afresh whether the union ought to be granted leave to proceed with its certification application.

[43] I turn, then, to consider the relative prejudice to both sides.

[44] On the one hand, the receiver can point to little material prejudice should the stay be lifted. For the reasons discussed above, I do not accept that a sale will be prevented or that sale proceeds will be diminished should the union be granted leave to proceed with its certification application. And while I am willing to accept that certification proceedings inevitably involve some legal costs, I do not accept that these costs would be significant in this case. The union's certification application is an especially simple one. There are six employees in the proposed bargaining unit. The union applied for a unit at a specific street address (rather than a municipal-wide unit) and it appears from the record that there is only one classification of employees on-site. As the union's in-house counsel, a labour lawyer who has been involved in many certification applications, swore in her affidavit in support of the union's motion, "this [certification application] is as straightforward as any I have seen". It is also important to recognize that the employer is only one of a number of corporations within the Ambrose Group and that the the Ontario Disposal location, for which the union seeks certification, represents only one of the employer's two operations (the other operation has been unionized for some time). In these circumstances, I am simply not persuaded that allowing the union's certification application to proceed would cause any more than *de minimis* prejudice to Ambrose Group creditors.

[45] On the other hand, a lot is at stake for the union and the employees. Maintaining the stay prejudices the important objectives "quick votes" are designed to serve, unduly interferes with employees' ability to exercise their statutory labour rights, and, particularly where employees have allegedly been dismissed for exercising those rights, undermines employee confidence in the efficacy of core labour rights and protections.

[46] Labour rights do not end when insolvency proceedings begin. Indeed, s. 72(1) of the *BIA* provides:

> 72(1) *The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act*, and the trustee is entitled to avail himself of all rights and remedies provided by that law or [page386] statute as supplementary to and in addition to the rights and remedies provided by this Act.

(Emphasis added)

[47] As the Supreme Court of Canada explained in *GMAC*, at para. 47, "[t]he effect of s. 72(1) is that the *Bankruptcy and Insolvency Act* is not intended to extinguish legally protected rights unless those rights are in conflict with the *Bankruptcy and Insolvency Act*". There is no such conflict here.

[48] In light of the above, on weighing the relative prejudice to both sides, I am satisfied that there are sound reasons in this case to lift the stay and allow the union to proceed with its certification application.

(4) *The unfair labour practice complaint*

[49] The threshold for granting leave to proceed against a receiver is not a high one and is designed to protect a receiver against only frivolous or vexatious actions or actions that have no basis in fact: *GMAC*, at para. 55. Given the timing of the dismissals, the *prima facie* merit of the ULP complaint is, in my view, obvious.

[50] The motion judge, however, reasoned [at para. 39] that, given that the commencement of the certification application forms the core factual basis for the ULP complaint, "[i]n this particular case, there can be no ULP complaint independent of the prior commencement of the Certification Application".

[51] The union argues that the motion judge erred in holding that the union was not entitled to bring a ULP complaint without a valid prior commencement of a certification application.

[52] I do not accept this argument. On my reading of his reasons, the motion judge was not holding that, as a matter of law, ULP complaints cannot exist independently of certification applications. He was simply of the opinion that, in the particular circumstances of this case, given its factual basis, the ULP complaint could not stand independently of the certification application.

[53] Even on this more narrow interpretation, however, the motion judge's reasoning is flawed. The fact that the certification application may be an irregularity (unless and until leave is granted *nunc pro tunc*) does not erase the fact that the application was filed. I see no sound basis upon which to preclude the union from relying on this fact to

establish how and when the employer became aware of the union's organizing campaign. It would not only be unfair but also a triumph of form over substance to prevent individuals who have lost their jobs from asserting basic protections otherwise available to them under law because of a technical defect in a legally distinct proceeding. [page387] In any event, I would hold that the certification application ought to proceed and, as such, so too should the ULP complaint.

E. *Disposition*

[54] I would grant the appellant leave to appeal, allow the appeal, set aside the order of the motion judge, and grant the appellant leave to proceed with its certification application and unfair labour practice complaint before the Ontario Labour Relations Board.

[55] The appellant is entitled to its costs of the appeal which I would fix at $12,000, inclusive of disbursements and HST.

[56] LAUWERS J.A. (dissenting): ù Like my colleague, and for the reasons he gives, I would grant leave to appeal from the bankruptcy judge's order. The issues raised are undoubtedly important to the practice of insolvency law.

[57] However, I would dismiss the appeal of the bankruptcy judge's refusal to lift the stay with respect to both the union certification process, and the unfair labour practice complaint.

[58] The bankruptcy judge is owed deference regarding the exercise of his discretion, and I am not persuaded that he erred in law or in principle, as I will explain.

A. *The Organization of these Reasons*

[59] I begin with an overview of the insolvency system, make several preliminary observations and then turn to describe the governing principles for this appeal. After setting out the bankruptcy judge's reasoning, I apply the governing principles to the facts as he found them, taking into account my colleague's reasoning.

B. *An Overview of the Insolvency Regime*

[60] The insolvency regime in Canada is intricate and the way it addresses the interests of debtors, creditors and others is carefully calibrated. The regime includes the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), and the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"). See, generally, the decision of Deschamps J. in *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, 2010 SCC 60, at paras.12-24.

C. *Preliminary Observations*

[61] There is no doubt that "creditors include unionized employees", as Abella J. states in [page388] *GMAC Commercial Credit Corp. -- Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123, [2006] S.C.J. No. 36, 2006 SCC 35, at para. 2. Indeed, creditors include all of the debtor's employees, unionized or not.

[62] The intersection of insolvency law and labour relations law has occupied much judicial time in recent years. Judges have struggled to find the right balance between the interests of employees on the one hand, including the importance of maintaining an effective mechanism for rescuing distressed companies if possible, and, on the other hand, for efficiently and fairly liquidating them in the interests of all the creditors including the employees, if it is not possible.

[63] Some instructive contextual comments are made in the paper delivered in a 2017 National Judicial Institute program entitled "From Deterrence to Detente: Overview of the Intersection of Labour Law and the CCAA", authored by Massimo Starnino, Debra McKenna, Lauren Pearce and Glynnis Hawe, members of the Paliare Roland Rosenberg Rothstein LLP law firm. The authors begin the discussion with this observation, at p. 2:

> Experience tells us that in practice the singular focus of creditors is to use leverage in the CCAA process, and sometimes to manufacture leverage through the CCAA process, to extract the biggest piece of an economic pie that, no matter how expanded, is inevitably perceived to be inadequate.

[64] The authors note that increasingly, "the battle for value . . . has often been between lenders . . . on the one side, and organized labour on the other" (at p. 2). The complaint is made, at p. 3, that the court is inclined to accept "arguments that the rights and obligations created by provincial labour legislation are in conflict with the restructuring objective of the CCAA and therefore subordinate to the broad discretionary authority afforded to the court". As union counsel did in this case, they urge bankruptcy and *CCAA* judges to take into account how their jurisdiction might be affected by s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*.

[65] The effort in this case to certify the union after the receiver's appointment represents a new front in the "battle" the authors describe between employees and the other creditors of an insolvent business, and requires careful scrutiny. Even if the effect is limited in this particular case because some of the other units in the debtor's business are unionized already, my colleague's decision would be a critical precedent of broader application. It is necessary to step back and consider the larger context.

D. *The Governing Principles*

[66] There are several avenues into the insolvency regime. An insolvent person's creditor can apply for a bankruptcy order [page389] (*BIA*, s. 43), or the insolvent person can make an assignment (*BIA*, s. 49). An insolvent person can make a proposal (*BIA*, s. 50) and, if it fails, the result is bankruptcy (*BIA*, s. 57). As in this case, a secured creditor can apply to the court for the appointment of a receiver (*BIA*, s. 243). A qualified debtor corporation can make an application under the *CCAA*, which aims at restoring the health of the debtor company, if possible, as a going concern. However, if the company cannot be restored as a going concern, then the *CCAA* or the *BIA* can be used to liquidate the company and, once ordered into bankruptcy, the priorities of the creditors are determined under the *BIA*: see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, [2015] O.J. No. 4147, 2015 ONCA 570, 387 D.L.R. (4th) 426.

[67] While each of these avenues into the insolvency regime has unique features, they also have several interlocking common elements that reflect important underlying principles.

[68] First, the root principle is that creditors in the same class, including employees, are to be treated equally in relation to the distribution of the remaining assets of the estate. This is also known as the *pari passu* principle. It is reflected in s. 141 of the *BIA* and elsewhere: see *Vachon v. Canada Employment and Immigration Commission*, [1985] 2 S.C.R. 417, [1985] S.C.J. No. 68; *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005, [1990] S.C.J. No. 45, at para. 22.

[69] Second, the date on which the respective rights of creditors are to be determined is the effective date of the bankruptcy, or the date of the appointment of the receiver, or the making of a *CCAA* order. As an incident of the *pari passu* principle, after the effective date no creditor is to be permitted to advance its position over that of similarly situated creditors.

[70] Third, the administration of the debtor's assets is to be orderly. Central to the court's insolvency work is the ability to impose order on what would otherwise be a fractious and expensive free-for-all among the creditors intent on taking as much of the debtor's assets as soon as they could through self-help or litigation. To this end, the trustee or receiver is responsible for establishing a summary procedure for determining the validity and the value of the creditors' interests. This is to avoid exhausting a debtor's assets in defending a multiplicity of lawsuits, and to avoid distracting the trustee or receiver from the orderly administration of the estate. Hence, the "single proceeding model" for administrating claims expeditiously: see *Century Services*, at para. 22; *Alberta (Attorney General) v. Moloney*, [2015] 3 S.C.R. 327, [2015] S.C.J. No. 51, 2015 SCC 51, at paras. 33-34. In bankruptcy, there is a "public interest in the [page390] expeditious, efficient and economical clean-up of the aftermath of a financial collapse", as Binnie J. noted in *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978, [2001] S.C.J. No. 90, 2001 SCC 92, at para. 27.

[71] For example, in *Essar Steel Algoma Inc. (Re)*, [2016] O.J. No. 1394, 2016 ONSC 1802, 35 C.B.R. (6th) 89 (S.C.J.), the *CCAA* judge approved an expedited grievance arbitration process that was substantively the same as,

but procedurally different from, the grievance arbitration process in the collective agreement. He did this over the objection of the union, relying on several cases including *Nortel Networks Corp. (Re)*, [2009] O.J. No. 2558, 55 C.B.R. (5th) 68 (S.C.J.), *per* Morawetz J.; *White Birch Paper Holding Company (Arrangement in respect of)*, [2010] Q.J. No. 5701, 2010 QCCS 2590, 65 C.B.R. (5th) 186; *AbitibiBowater inc. (Arrangement relatif à)*, [2010] Q.J. No. 2176, 2010 QCCS 1064, *per* Gascon J., as he then was; and *Canwest Global Communications Corp. (Re)*, [2011] O.J. No. 1590, 2011 ONSC 2215, 75 C.B.R. (5th) 156 (S.C.J.), *per* Pepall J., as she then was, at para. 33. The union sought leave to appeal to this court in *Essar Steel*, which was rejected by Gillese J.A.: *Essar Steel Algoma Inc. (Re)*, [2016] O.J. No. 1939, 2016 ONCA 274, 36 C.B.R. (6th) 56. She considered the bankruptcy court's ability to expedite the grievance process to be well-settled law (at para. 33). I return to this case below in discussing the lurking constitutional issues.

[72] The imposition of a stay of proceedings against the debtor is the insolvency regime's primary tool for establishing order. The stay is intended to preserve the status quo; it is "crucial to the orderly administration of the estate and ensures that a creditor will not benefit or improve his or her position at the expense of other creditors": F. Bennett, *Bennett on Bankruptcy*, 19th ed. (Toronto: LexisNexis, 2016), at p. 377. See, also, R.J. Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law, 2009), at p. 152; J.P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013), at p. 57.

[73] A stay is imposed directly by ss. 69-69.3 of the *BIA* in defined circumstances, or by court order in conjunction with a receivership order under s. 243 of the *BIA* and s. 101 of the *CJA*, as in this case: see Wood, at p. 334. In *CCAA* proceedings, the stay is court-imposed under s. 11 *et seq.* of the *CCAA*: see, *e.g.*, *Sproule v. Nortel Networks Corp.* (2009), 99 O.R. (3d) 708, [2009] O.J. No. 4967, 2009 ONCA 833, at para. 16, leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 531; *Nortel Networks Corp. (Re)*, at para. 47; Wood, at pp. 333-34; Sarra, at pp. 51-52.

[74] Order is also ensured by the court's ongoing supervision of the insolvency. Receivers appointed by court order under s. 243 of the *BIA*, and monitors appointed under s. 11.7 of the *CCAA*, [page391] are also supervised by the court in accordance with the terms of the appointing order: *Ma (Re)*, [2001] O.J. No. 1189, 143 O.A.C. 52 (C.A.). Finally, order is ensured by the prospect of lawsuits for misconduct, with leave of the court, against the trustee specifically under s. 37, and against the trustee or interim receiver under s. 215 of the *BIA*.

[75] The fourth common element to each of the avenues into the insolvency regime is the existence of a process for managing exceptions. The court has discretion to lift the stay in circumstances where it is necessary. This is provided for in s. 69.4 and in s. 215 of the *BIA*. There is a difference in approach. Under s. 69.4 of the *BIA*, a person seeking leave need not prove a *prima facie* case, only that there are sound reasons, consistent with the scheme of the *BIA* to relieve against the automatic stay, whereas under s. 215 of the *BIA* the applicant must establish a *prima facie* case: Contrast *Ma*, at paras. 2-3, with *GMAC*, at para. 59.

[76] With respect to receivers appointed by court order under the *BIA*, and monitors appointed under the *CCAA*, since the stay flows from the court's order, the court must be persuaded to lift the stay, and applies the same principles.

[77] In discussing the appropriate analysis under s. 215 of the *BIA*, the Supreme Court noted in *GMAC* that the test involves a balancing of "the protection of trustees and receivers from the distraction and delay inherent in frivolous or merely tactical suits, and the preservation to the maximum extent possible of the rights of creditors and others as against a trustee or receiver" (at para. 61).

[78] Whatever the applicable test, "lifting the automatic stay is far from a routine matter", as this court noted in Ma, at para. 3. I point out that the insolvency regime does not contemplate that each creditor will proceed by separate litigation after getting leave of the court. Indeed, even if a creditor, suing with leave, succeeds in getting judgment, it is still caught by the stay in respect of recovery. It must be kept in mind that the lifting of a stay is exceptional, in view of the expectation that most creditors' claims will be resolved through the summary procedure, and not through ongoing court or administrative law proceedings: see, *e.g.*, *Moloney*, at paras. 33-34; Bennett, at p. 378; *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, [2013] S.C.J. No. 6, 2013 SCC 6, at para. 71.

[79] These governing principles have a role to play in the exercise of a bankruptcy judge's discretion and in the proper disposition of this appeal. [page392]

E. *The Application Judge's Reasons*

[80] Drawing on the principles set out above, the bankruptcy judge correctly sets the normative context in his decision, at para. 44:

> A receiver is a court-appointed officer whose role ideally is to take possession of the property of a debtor, to put the business of the debtor on a viable financial basis with a view to maintaining it in the short term, and to sell the business on a basis which maximizes the proceeds of sale available to satisfy the liabilities of the debtor to its creditors. To this end, a receiver is typically granted extensive powers, including the power to terminate the employment of employees who the receiver determines are not reasonably necessary for the conduct of the business to be sold. *The stay of proceedings typically granted is designed to prevent particular creditors from improving their position relative to other creditors.* It is also intended to permit the receiver to concentrate on its principal functions, all without the time and expense of litigation outside of any court-ordered claims process that is required within the receivership proceedings. *In a broader sense, the stay therefore freezes the rights and remedies of creditors as they existed as of the date of the receivership order.* Any motion to lift a stay of proceedings should be assessed in relation to the extent that it furthers the purposes of receivership proceedings.

(Emphasis added)

[81] In explaining why he refused leave to the union to commence the certification application before the Ontario Labour Relations Board, the bankruptcy judge states, at para. 46, that the debtor's creditors must not be able to improve their relative positions, and reiterates that the date for determining the relative positions of the creditors is the date the receiver is appointed:

> First, *the effect of the Certification Application is to increase the rights of the members of the proposed bargaining unit relative to other creditors of the Debtor.* I accept that, if the Certification Application were granted, the Union has agreed, subject to its discretion, to postpone negotiation of a collective agreement under certain conditions for a certain period of time. *Nevertheless, the effect of the Certification Application is to create rights in favour of employees that did not exist at the date of the Receivership Order.* As the proposed bargaining unit had not been certified by the OLRB, the employees of the Ontario Disposal division did not have the right to bargain for a collective agreement. *Commencement of the Certification Application would therefore be contrary to the policy and purpose of the stay of proceedings, which, as mentioned, effectively freezes the rights and remedies of all creditors of the Debtor as of the date of the Receivership Order.*

(Emphasis added)

[82] The bankruptcy judge also refers to a practical reason for refusing to lift the stay "based in the purpose and policy of receivership proceedings" (at para. 47). He points out that recognition of the proposed bargaining unit by the Labour Relations Board "could impact the sales proceeds" (at para. 48). In his view, "it is inequitable to require creditors to accept [page393] a potential diminution of the value of the assets in circumstances where employees assert rights not previously in existence while the rights and remedies of the remaining stakeholders are frozen" (at para. 48).

[83] Finally, with respect to the union's unfair labour practice claim, the bankruptcy judge finds, at para. 57: "unless the Certification Application was validly commenced, the Union cannot assert that the employees were terminated in response to such action". Since he would not have lifted the stay to permit the certification application to proceed *nunc pro tunc*, there was no factual basis for the unfair labour practice claim.

F. *The Principles Applied*

[84] As a commercial list judge with long experience in insolvency, the bankruptcy judge would be fully alive to the relevant law and to the business realities faced by the debtor, the creditors and the receiver. Moreover, he would be intimately familiar with the particular facts of the case. That is why it is important for this court, from the viewpoint of the standard of review, to defer to the bankruptcy judge in the exercise of his discretion under s. 215 of the *BIA* or the terms of the receivership order: see, *e.g.*, *Royal Crest Lifecare Group Inc. (Re)*, [2004] O.J. No. 174, 181 O.A.C. 115 (C.A.), at para. 23, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 104; *Grant Forest*, at paras. 97-99.

[85] Did the bankruptcy judge err in principle or exercise his discretion unreasonably? My colleague says that he did. I disagree.

[86] In this part of my reasons, I begin with the *Charter* issue, continue with the doctrine of paramountcy, and then attend to the reconciliation of the *BIA* and labour law, specifically the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A ("*LRA*"), the *pari passu* principle, the effect of certification on sale proceeds and the issue of prejudice.

(1) *The Charter issue*

[87] More atmospherically than substantively, in aid of its argument that s. 72 of the *BIA* obliges the bankruptcy court to give full effect to the *LRA* bargaining rights and process, the union enlists the 2015 labour trilogy of the Supreme Court of Canada: *Mounted Police Assn. of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3, [2015] S.C.J. No. 1, 2015 SCC 1 ("*MPAO*"); *Meredith v. Canada (Attorney General)*, [2015] 1 S.C.R. 125, [2015] S.C.J. No. 2, 2015 SCC 2; *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 S.C.R. 245, [2015] S.C.J. No. 4, 2015 SCC 4. The appellant quotes para. 58 [page394] of *MPAO* in which the court states that the purpose of the *Charter* s. 2(*d*) guarantee of associational rights is "to protect individuals against more powerful entities". The court stated: "By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires." The court added: "In this way, the guarantee of freedom of association empowers vulnerable groups", including employees, "and helps them work to right imbalances in society".

[88] The appellant's factum simply asserts that: "Given the constitutional protection afforded to this process, the court should be wary of allowing the existence of a receivership to frustrate the certification application." Fair enough, but the union had the entire life of the business before insolvency within which to pursue certification.

[89] In oral argument, counsel for the union expanded on this brief allusion. He asserted that the *MPAO* decision constitutionalized bargaining rights, and argued that the right of employees to unionize should "supersede" any concern in relation to the sale of the business. He added that there is no empirical evidence that unionization will reduce the sale value of the asset, but even if that were to be the outcome of the employees' exercise of their rights under the labour legislation: "So be it."

[90] However, counsel for the union did not take the position that the constitutionalization of labour rights takes away entirely the bankruptcy court's discretion under s. 215 of the *BIA* or the order appointing the receiver to refuse to lift the stay where labour rights are in issue. He acknowledged that "sometimes the discretion must be exercised" and cited *Hawkair Avation Services Ltd. (Re)*, [2006] B.C.J. No. 938, 2006 BCSC 669, 22 C.B.R. (5th) 11.

[91] In *Hawkair*, the union sought to certify just before the company was to bring forward its reorganization plan under the *CCAA*. The *CCAA* court concluded that in the context the prejudice to the union was minimal while the prejudice to the creditors was great. By contrast, the union points out that in this case there is no imminent reorganization and there is no empirical evidence of prejudice.

[92] In my view, this constitutional issue was not properly joined before the bankruptcy judge, nor before this court. It is not sufficient to simply allude to associational rights under s. 2(*d*) of the *Charter* and to the 2015 labour trilogy and assert they are dispositive. A similar argument was made in *Essar Steel* to the effect that the grievance provisions of the collective agreement were not subject to the *CCAA* stay. The constitutional [page395] argument was more fully developed in that case, and the *CCAA* court's rejection of it was approved by this court.

[93] In my view, giving unions carte blanche to begin certification efforts for insolvent enterprises after the date of the appointment of a trustee or receiver or the date of an order under the *CCAA* would effect a sea change in

insolvency law; it would profoundly alter the economic dynamics of insolvency, and whether the *CCAA* route is preferable to outright bankruptcy. The consensus is that the *CCAA* has been effective in salvaging businesses and jobs, including union jobs. It would be unwise for this court to sanction such a profound change in the absence of full evidence and argument addressing both whether the s. 2(*d*) *Charter* right of employees has been substantially limited in the insolvency context, and whether any such limit is demonstrably justified under s. 1 of the *Charter*: see *Gordon v. Canada (Attorney General)*, [2016] O.J. No. 4330, 2016 ONCA 625, 404 D.L.R. (4th) 590, leave to appeal to S.C.C. refused [2016] S.C.C.A. No. 444; [2016] S.C.C.A. No. 445. The issue is too important to the insolvency regime and too complex for the drive-by analysis the union proposes.

[94] In the article "From Deterrence to Détente", the authors specifically refer to "the acquisition of collective bargaining rights" as one of the new fronts in the "battle" they describe between employees and the other creditors of an insolvent business.

(2) *The role of paramountcy*

[95] In support of his view that the *Labour Relations Act* must be given full operational scope in this case, my colleague relies on the underlined words in s. 72 of the *BIA*, which provides:

> 72(1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

(Emphasis added)

[96] He draws support from the words of Abella J., who said in *GMAC* that s. 72 of the *BIA* "is not intended to extinguish legally protected rights unless those rights are in conflict" with the *BIA* (at para. 47). The appellant also points to para. 51 of *GMAC*, where Abella J. quoted *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60, [2004] S.C.J. No. 3, 2004 SCC 3, at para. 43:

> [E]xplicit statutory language is required to divest persons of rights they otherwise enjoy at law . . . so long as the doctrine of paramountcy is not [page396] triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights.

[97] My colleague concludes that there must be an operative conflict before the principle of paramountcy can give the *BIA* priority over the *LRA*, and asserts there is no such conflict here.

[98] I disagree with his construal of paramountcy and his assessment that no conflict exists on the facts of this case. Neither *Crystalline* nor *GMAC* is the latest word from the Supreme Court on paramountcy.

[99] The doctrine of paramountcy must be sensitive to the context in which it operates. There are two distinct branches to the test, as explained by Gascon J. in *Moloney*, which he echoed in the companion case *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*, [2015] 3 S.C.R. 397, [2015] S.C.J. No. 52, 2015 SCC 52. At para. 18 of *Moloney*, Gascon J stated:

> A conflict is said to arise in one of two situations, which form the two branches of the paramountcy test: (1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.

[100] He explained, at para. 25:

> In *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, the Court formulated what is now considered to be the second branch of the test. It framed the question as being "whether operation of the provincial Act is compatible with the federal legislative purpose" (p. 155). In other words, the effect of the provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions": *Western Bank*, [*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3] at para. 73.

[101] Justice Gascon noted, at para. 29, that "if it is technically possible to comply with both laws, but the operation of the provincial law still has the effect of frustrating Parliament's purpose, there is a conflict". He added: "Such a conflict results in the provincial law being inoperative, but only to the extent of the conflict with the federal law" (citations omitted). In remedial terms, he stated: "In practice, this means that the provincial law remains valid, but will be read down so as to not conflict with the federal law, though only for as long as the conflict exists." [citations omitted]

(3)*Reconciling the BIA and the Labour Relations Act*

[102] In this case, two distinct regulatory regimes come into contact: the Ontario labour relations regime and the federal insolvency regime. There is no operative incompatibility or [page397] conflicting language on the facts of this case to engage the first branch of the paramountcy analysis. However, in my view the second branch is engaged, under which the bankruptcy judge is obliged to consider the exigencies of each regime and reconcile them if possible.

[103] The court's task here is not to reconcile statutory language, but to reconcile different policies. This is a nuanced, difficult and delicate task informed by the bankruptcy judge's knowledge both of the law and the operation of the marketplace in the context of the specific matter before him, drawing also on his experience and wisdom, and his sense of what is commercially reasonable. The bankruptcy judge brought just that perspective to this case, as I will explain.

[104] Bankruptcy judges have proven to be adept at managing the interface between the two regulatory regimes. A good example is *Essar Steel*, where the *CCAA* judge found a way to reconcile grievance arbitration required by the collective agreement with the restructuring need for speed, expediency and reduced process costs.

[105] It is worth pointing out that s. 33 of the *CCAA*, which came into force in 2009, directly addresses collective agreements. Subsection 33(1) provides:

> 33(1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered *except as provided in this section or under the laws of the jurisdiction governing collective bargaining* between the company and the bargaining agent.

(Emphasis added)

[106] Can anything be drawn from this provision? It plainly assumes a collective agreement is in existence at the date proceedings are commenced and does not contemplate a new certification. This is a reasonable assumption for insolvency proceedings in general, built as they are to preserve the status quo.

(4) *The pari passu principle*

[107] In my view, the policy contest presented in this case is precisely the kind of conflict between provincial regulatory regime for labour relations and the federal insolvency regime that the paramountcy doctrine is intended to recognize and accommodate.

[108] My colleague relies on the Supreme Court's decision in *GMAC*. In that case, the issue was whether leave should be granted to the union under s. 215 of the *BIA* so that the Labour Relations Board could determine "successor employer" status. [page398]

[109] However, there is a crucial distinction between this case and *GMAC*. The union had long been certified in *GMAC*. By contrast, in this case, the certification effort followed the appointment of the receiver by several months. This distinction is important because it engages one of the fundamental policy principles in insolvency law, which is to preserve the status quo among the creditors as of the date the receiver was appointed. The bankruptcy judge accurately identified that this principle would be violated if the debtor could be forced to accept union certification post-bankruptcy. In my view, my colleague does not give due weight to this critical principle.

[110] In particular, my colleague says the bankruptcy judge was wrong to refuse leave on the basis that the certification application would effectively increase the rights of the members of the post-bargaining unit relative to the other creditors. He takes the view that "certification does not have the effect of automatically increasing the rights employees have as creditors, thereby prejudicing other creditors".

[111] I take a different view. It seems quite plain that neither the employees nor the union would be pursuing certification if it did not provide an advantage in the bankruptcy process. While a successful certification application does not guarantee employees better wages or working conditions, their enhanced bargaining power is surely what unionization is all about: see *MPAO*, at para. 70.

[112] The union's offer, as the bankruptcy judge notes [at para. 46], is this: "*subject to its discretion*, to postpone negotiation of a collective agreement *under certain conditions for a certain period of time*" (my emphasis), in effect to delay bargaining the first collective agreement for up to a year. This offer is plainly tactical, and the fact it was made at all simply underlines the force of the point that the union expects enhanced bargaining power to be effective in the insolvency.

[113] In addition to the operation of successor rights, and access to unfair labour practice remedies, the court must take cognizance of the significant protections given to a union seeking to negotiate a first collective agreement, which may include the imposition of such an agreement through arbitration ordered by the labour board under s. 43 of the *Labour Relations Act*. This is distinct from the more limited protections provided to the union in subsequent negotiations.

(5) *The effect of certification on the sale proceeds*

[114] In its first report to the court, the receiver advised: [page399]

> The Receiver has no long-term business goals or strategic plans for the Debtors' assets. Given the temporary nature of its appointment and its mandate to maximize realizations for the benefit of all stakeholders by, ideally, selling the Debtors' businesses as going concerns, the Receiver (unlike an ultimate purchaser) is fundamentally ill-equipped to evaluate the certification application properly nor to bargain collectively. Moreover, the Receiver is seriously concerned that any decision it makes or agreement it enters into with the Union will be unacceptable to prospective purchasers and will suppress realizations.
> The collective bargaining process, if permitted to proceed, will also add significant professional costs to the Receiver's administration. The cost of a labour negotiation will, in effect, be a super-priority expense that will ultimately be absorbed by and materially prejudice other creditors through reduced realizations and distributions.

[115] My colleague disputes the application judge's reasoning that certification of the bargaining unit could negatively impact a sale of the Harmony Road depot to the prejudice of all the creditors, on the basis that "this line of reasoning is speculative". He asserts that "while some purchasers may be dissuaded by recognition of the proposed bargaining unit, it may also be that a set collective agreement, with the clarity of terms, would be attractive to the perspective purchaser", and adds that "the receiver's statement in its first report that it has aeserious concerns' that certification could negatively impact a sale amounts a little more than self-serving speculation".

[116] In my view, the bankruptcy judge's statement that certification could negatively impact the sale of the Harmony Road depot is self-evidently true and falls well within the margin of appreciation that is his due, given his knowledge of the commercial realities. I would be most reluctant to disparage the advice of the court-appointed receiver as mere "self-serving speculation". Such an officer has no self-interest and owes duties to all the parties and to the court. In my view, it was open to the bankruptcy judge to accept the receiver's advice.

[117] If the union achieves certification and the Harmony Road depot is sold in such a way as to attract successor labour rights, then any prospective purchaser of the depot will be faced with the obligation to immediately embark on first collective agreement negotiations. This is not a small additional burden on what would otherwise be the terms and conditions of the depot's sale. It will plainly discourage some potential bidders and therefore

negatively affect the depot's market price by reducing the number of buyers who would be willing to engage. Any cooling of the interests of potential purchasers in the debtor's assets would reduce the proceeds of sale to the prejudice of all the creditors. With respect, this is more than a mere "inconvenience to the receivership process". [page400]

[118] If the court were to permit the post-receivership certification process to continue, it would effectively hand one interested group of creditors, the newly unionized employees, a tool with which to increase their leverage over the other creditors.

(6) *The role of prejudice*

[119] I agree with my colleague that the bankruptcy judge's decision does prejudice the employees and the union, at least measured by how certification would work if there were no insolvency. But that is not the right measure under the *BIA*.

[120] While it was possible in *GMAC* and *Essar Steel* to give considerable scope to the operation of the labour relations regime in relation to *existing collective agreements*, the bankruptcy judge concluded it was not desirable in this case because so many essential insolvency principles would be violated. This is a valid consideration, as the Supreme Court noted in *Moloney* and in *407 ETR*.

[121] There is limited scope for accommodating a certification effort after the receiver's appointment, because doing so would contradict bedrock insolvency principles. In his reasons, the bankruptcy judge identifies the central question as whether "unions have a right to commence certification applications during receiverships" (at para. 41). The bankruptcy judge's implicit response is that there is no universal answer; it is a case-specific issue for the judge to determine based on the facts. I agree. I would defer to the bankruptcy judge's judgment in the context of this case.

(7) *The unfair labour practice complaint*

[122] The bankruptcy judge showed that the unfair labour practice allegation was linked to the certification effort. In a factual sense there is no doubt that had the certification effort not started, there would have been no basis for an unfair labour practice allegation. If the certification effort was misguided, as he found, then there is no basis whatever for the complaint. Again, I would defer to the bankruptcy's judge's decision.

G. *Disposition*

[123] I would dismiss the appeal respecting the bankruptcy judge's refusal to lift the stay both with respect to the union certification process and the unfair labour practice complaint.

Appeal allowed.

Notes

1 At the appeal hearing, the court heard argument on the two preliminary issues. The court determined that the union could not bring its appeal as of right under s. 193(*a*) or (*c*) of the *BIA*. However, the court granted the union leave to appeal pursuant to s. 193(*e*) of the *BIA*. The court announced that reasons supporting these two conclusions would follow in the judgment on the main appeal.

TAB 2

Federal Court  Cour fédérale

Date: 20180420

Dockets: T-2111-16
T-460-17

Citation: 2018 FC 432

Toronto, Ontario, April 20, 2018

PRESENT: The Honourable Mr. Justice Fothergill

Docket: T-2111-16

BETWEEN:

SHERRY HEYDER

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-460-17

AND BETWEEN:

LARRY BEATTIE

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

I. Overview

[1] The Plaintiffs in these two proposed class actions have brought a motion in writing pursuant to Part 5.1 and Rule 369 of the *Federal Courts Rules*, SOR/98-106 for an order that:

a) *Heyder v The Attorney General of Canada* (Court File No. T-2111-16) and *Beattie v The Attorney General of Canada* (Court File No. T-460-17) proceed with Koskie Minsky LLP and Raven, Cameron, Ballantyne & Yazback LLP/S.R.L. as counsel for the Plaintiffs;

b) no other class action be permitted in the Federal Court in respect of the facts pleaded in *Heyder v The Attorney General of Canada* (Court File No. T-2111-16) and *Beattie v The Attorney General of Canada* (Court File No. T-460-17) without leave of this Court; and

c) the order be issued *nunc pro tunc*, effective March 23, 2018, the date on which the motion was filed.

[2] For the reasons that follow, the motion is granted.

II. Background

[3] These proposed class actions concern allegations of sexual harassment, sexual assault and gender-based discrimination made by current and former women and men serving in the Canadian Armed Forces.

[4] Six overlapping class proceedings were commenced in late 2016 and early 2017 in different jurisdictions within Canada. In September 2017, the Plaintiffs in these proceedings entered into a consortium agreement with the Plaintiffs in the related class actions [Consortium Agreement]. The other actions that are subject to the Consortium Agreement are: *Graham v Attorney General of Canada* (Court File No. 13-80853-CP) commenced in the Ontario Superior Court of Justice; *Rogers v The Attorney General of Canada* (Court File No. 457658) commenced in the Supreme Court of Nova Scotia; *Alexandre Tessier c Procureur General du Canada* (Court File No. 200-06-000209-174) commenced in the Superior Court of Quebec; and *Peffers v The Attorney General of Canada* (Court File No. 165018) commenced in the Supreme Court of British Columbia [collectively, the Provincial Actions].

[5] The parties to the Consortium Agreement have agreed that Court File Nos. T-2111-16 and T-460-17 will be pursued on behalf of national classes, and the Provincial Actions will be held in abeyance. The proceedings before the Federal Court are currently suspended to permit the parties to engage in exploratory settlement discussions.

[6] The Attorney General of Canada has declined to make submissions regarding the Court's discretion to grant or refuse the motion for carriage, despite having been asked to do so. Counsel representing the Attorney General note that they previously agreed to take no position on the motion, but it is unclear why this precludes them from assisting the Court in identifying relevant principles and considerations. It is regrettable that the Court's analysis has not benefited from the perspective of the Attorney General.

III. Analysis

[7] According to the Plaintiffs, the Court's discretion to grant or refuse a motion for carriage of a proposed class action should be exercised in accordance with the following non-exhaustive considerations:

a) whether the order is in the best interests of the Plaintiffs, the class members and the Defendant;

b) whether the order furthers the Federal Court's commitment to robust case management;

c) whether the order reflects the Federal Court's unique national jurisdiction; and

d) whether the order promotes the objectives of judicial economy and avoiding a multiplicity of proceedings.

[8] These considerations are derived in large part from Ontario jurisprudence (see, for example, *Mancinelli v Barrick Gold Corporation*, 2016 ONCA 571 at para 13). The policy objectives of Part 5.1 of the *Federal Courts Rules* are inspired by the policy objectives of the *Class Proceedings Act*, 1992, SO 1992, c 6, namely judicial economy, access to justice and behaviour modification (*Murphy v Compagnie Amway Canada*, 2015 FC 958 at para 34). I therefore agree that the considerations proposed by the Plaintiffs are appropriate.

[9] Applying these considerations in the present case, I am satisfied that awarding carriage of the proposed class proceedings in the manner requested is in the best interests of the Plaintiffs, the class members and the Defendant. The case management provisions of Rules 387(a) and 387(b) of the *Federal Courts Rules* are intended to facilitate the early settlement of disputes. The carriage order sought by the Plaintiffs will, among other things, prevent the commencement of overlapping and duplicative class actions which may have the effect of disrupting the settlement discussions that are currently underway.

[10] The order requested will not prejudice any class members. A prospective plaintiff may seek leave to commence an overlapping proceeding if there are compelling reasons to do so. If the present proceedings are certified, the *Federal Courts Rules* require that class members be permitted to opt out if they so choose. If class members opt out, they will not be bound by the outcome of the class actions, and may pursue litigation elsewhere.

[11] The order requested is consistent with Rules 3 and 385(1)(a) of the *Federal Courts Rules*, which promote robust case management to secure the just, most expeditious and least expensive determination of a proceeding on its merits.

[12] Importantly, the order requested furthers the effective exercise of the Federal Court's national class action jurisdiction. In the debates that preceded the enactment of the *Federal Court Act*, SC 1970-71-72, c 1, the then Minister of Justice observed that the Federal Court was designed to achieve two objectives: ensuring that members of the public "have resort to a national court exercising a national jurisdiction when enforcing a claim involving matters which frequently involve national elements"; and making it possible for "litigants who may often live in widely different parts of the country to [have] a common and convenient forum in which to enforce their legal rights" (*House of Commons Debates*, 28th Parl, 2nd Sess, Vol 5 (March 25, 1970) at 5473). The order requested recognizes the national dimensions of the claims, and facilitates their expeditious resolution by providing a common and convenient vehicle for class members who live in widely different parts of the country to enforce their legal rights.

[13] Finally, the order requested is consistent with the objectives of judicial economy and avoiding a multiplicity of proceedings. Imposing a leave requirement before duplicative and overlapping proceedings may be commenced in this Court will promote the efficient use of judicial resources.

IV. Conclusion

[14] The Plaintiffs' motion for carriage of the proposed class actions is granted.

ORDER

THIS COURT ORDERS that:

1. *Heyder v The Attorney General of Canada* (Court File No. T-2111-16) and *Beattie v The Attorney General of Canada* (Court File No. T-460-17) shall proceed with Koskie Minsky LLP and Raven, Cameron, Ballantyne & Yazback LLP/S.R.L. as counsel for the Plaintiffs.

2. No other class action may be commenced in the Federal Court in respect of the facts pleaded in *Heyder v The Attorney General of Canada* (Court File No. T-2111-16) and *Beattie v The Attorney General of Canada* (Court File No. T-460-17) without leave of this Court.

3. This order is issued *nunc pro tunc*, effective March 23, 2018, the date on which the motion was filed.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-2111-16, T-460-17
DOCKET:	T-2111-16
STYLE OF CAUSE:	SHERRY HEYDER v THE ATTORNEY GENERAL OF CANADA
DOCKET:	T-460-17
STYLE OF CAUSE:	LARRY BEATTIE v THE ATTORNEY GENERAL OF CANADA

MOTION MADE IN WRITING PURSUANT TO R. 369 OF THE *FEDERAL COURTS RULES*, CONSIDERED AT TORONTO, ONTARIO.

ORDER AND REASONS:	FOTHERGILL J.
DATED:	APRIL 20, 2018

WRITTEN SUBMISSIONS:

Kirk M. Baert Jonathan Ptak Garth Myers	FOR THE PLAINTIFFS
Andrew Raven Andrew Astritis	FOR THE PLAINTIFFS
Christine Mohr R. Jeff Anderson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

KOSKIE MINSKY LLP Barristers and Solicitors Toronto, Ontario	FOR THE PLAINTIFFS
RAVEN, CAMERON, BALLANTYNE & YAZBECK LLP/S.R.L. Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANT

TAB 3

Mancinelli v. Barrick Gold Corp., [2016] O.J. No. 3839

Ontario Judgments

Ontario Court of Appeal

G.R. Strathy C.J.O., S.E. Pepall and D.M. Brown JJ.A.

Heard: April 27, 2016.

Judgment: July 18, 2016.

Docket: C61288

[2016] O.J. No. 3839 | *2016 ONCA 571* | *2016 CarswellOnt 11222* | *131 O.R. (3d) 497* | *268 A.C.W.S. (3d) 729* | *400 D.L.R. (4th) 550* | *89 C.P.C. (7th) 225* | *30 C.C.L.T. (4th) 188* | *350 O.A.C. 389*

Between Joseph S. Mancinelli, Carmen Principato, Douglas Serroul, Luigi Carrozzi, Manuel Bastos, Jack Oliveira and Cosmo Mandella, in their capacity as The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, Mike Gallagher, Joe Redshaw, Rick Kerr, Alex Law, Brian Foote, Ron Martin, John Hartley, Nick Dekoning and Joe Keyes, in their capacity as the Trustees of International Union of Operating Engineers, Local 793, Members Pension Benefit Trust of Ontario and Michael Wiener, Plaintiffs (Appellants), and Barrick Gold Corporation, Aaron Regent, Jamie Sokalsky, Ammar Al-Joundi and Peter Kinver, Defendants And between The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund and Royce Lee, Plaintiffs (Respondents in Appeal), and Barrick Gold Corporation, Aaron Regent, Jamie Sokalsky, Ammar Al-Joundi and Peter Kinver, Defendants

(77 paras.)

Case Summary

Civil litigation — Civil procedure — Parties — Class or representative actions — Class counsel — Appeal by plaintiffs from decision of Divisional Court dismissing their appeal from a motion judge's decision awarding carriage of a class action to plaintiffs' group represented by Rochon Genova and staying appellant's action as represented by Koskie Minsky dismissed — Motions judge preferred Rochon's broader claims and more extensive preparation to Koskie's more streamlined approach — Motions judge made findings of fact in applying the factors to the competing consortia and his findings were entitled to deference — Appellants demonstrated no legal error in application of the multi-factor test by motion judge.

Appeal by the plaintiffs from a decision of the Divisional Court dismissing their appeal from a motion judge's decision awarding carriage of a class action to plaintiffs' group represented by Rochon Genova and staying the action brought by the appellants represented by Koskie Minsky. Two consortia of law firms were litigating the right to represent the class in a multi-billion dollar securities action. Both firms had commenced rival actions in Ontario. The actions were grounded in the common law and theáSecurities Actáand alleged negligent misrepresentations relating to the development and operation of a gold mine project in Chile. Koskie's action, however, focused only on alleged misrepresentations about environmental compliance. Rochon's action was broader as it alleged misrepresentations in environmental compliance, the capital expenditure budget and Barrick's financial statements. Rochon's action also included claims of conspiracy and fraudulent concealment. The motions judge preferred Rochon's broader claims and more extensive preparation to Koskie's more streamlined approach.

HELD: Appeal dismissed.

The motions judge made findings of fact in applying the factors to the competing consortia and determined the weight to be given to those factors. His findings were entitled to deference. The appellants demonstrated no legal error in the application of the multi-factor test. The court should not enter into an examination of the underlying merits of the respective claims on a carriage motion. The ultimate question was whether the proposed strategy was reasonable and defensible. The motion judge did not err in finding that funding was not a significant differentiating factor.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, *S.O. 1992, c. 6, s. 12*, s. 13

Courts of Justice Act, *R.S.O. 1990 c. C.43, s. 106*, s. 138

Securities Act, *R.S.O. 1990, c. S.5*

Appeal From:

On appeal from the order of the Divisional Court (Swinton, Harvison Young and Lederer JJ.), dated May 21, 2015, with reasons reported at *2015 ONSC 2717*, *126 O.R. (3d) 296*.

Counsel

Paul Pape, Shantona Chaudhury and Joanna Nairn, for the appellants.

W.A. Derry Millar and Peter Jervis, for the respondents.

Kent E. Thomson and Steven G. Frankel, for the Defendants.

The judgment of the Court was delivered by

G.R. STRATHY C.J.O.

1 This is an appeal in a "carriage dispute". Two consortia of law firms are litigating the right to represent the class in a multi-billion dollar securities action against Barrick Gold Corporation and four named executives, over alleged misrepresentations in Barrick's public filings.

2 The motion judge awarded carriage to a group led by Rochon Genova LLP (collectively, "Rochon") and stayed an action brought by plaintiffs represented by Koskie Minsky LLP and others (collectively, "Koskie"). He preferred Rochon's broader claims and more extensive preparation to Koskie's more streamlined approach. Koskie appeals.

3 The motion judge applied the multi-factor test set out in *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd*., [2000] O.J No. 4594 (S.C.J). He made findings of fact in applying the factors to the competing consortia and determined the weight to be given to those factors. His findings are entitled to deference. The appellants demonstrated no legal error in the application of the test. Accordingly, for the reasons that follow, I would dismiss the appeal.

I. BACKGROUND

4 Barrick, a Canadian gold company, had interests in a mining project in Chile, referred to as the Pascua-Lama Project. It obtained approvals from the Chilean government to develop an open-pit mine, subject to conditions regarding the project's environmental impact.

5 The proposed class actions allege that during the class period, Barrick's public disclosures represented that its activities in Pascua-Lama complied with Chilean regulatory requirements and that it had comprehensive environmental protection measures in place.

6 The actions arise from Barrick's disclosure on April 10, 2013 that a Chilean court had issued an interlocutory order suspending construction of the mine. The following month, Chilean regulators closed the project due to environmental violations. The resulting plunge in Barrick's share price spawned shareholder class actions in the U.S. and Canada, alleging that the company and some of its officers had violated the *Securities Act*, R.S.O. 1990, c. S.5, by misrepresenting the progress of the mine in Barrick's public disclosures.

7 Three actions remain active in Ontario. Two, referred to as the "Lee" and "DALI" actions, were commenced by members of the Rochon consortium. If granted carriage, Rochon proposes to consolidate these actions. The third action, referred to as the "Labourers'" action, was commenced by Koskie.

8 The actions seek damages in the billions of dollars. If certified, the proceeding will be one of the largest securities class actions in Canada.

9 The actions are grounded in the common law and Part XXIII.1 of the *Securities Act*, and allege negligent misrepresentations by Barrick relating to the development and operation of the Pascua-Lama Project. Koskie's action, however, focuses only on alleged misrepresentations about environmental compliance. Rochon's DALI action, on the other hand, is broader. It alleges misrepresentations in three related areas: environmental compliance, the capital expenditure budget and Barrick's financial statements. The DALI action also includes claims of conspiracy and fraudulent concealment.

10 Rochon filed a motion to certify the DALI action on September 22, 2014. This prompted a motion by Koskie on October 20, 2014 for a carriage order and a stay of Rochon's action. Rochon brought a similar motion on the same day. The carriage motion was heard on November 12 and 13, 2014.

II. THE TEST IN CARRIAGE MOTIONS

11 There cannot be two or more certified class actions in the same jurisdiction representing the same class in relation to the same claim. Where there are rival actions, a practice has developed for a proposed representative plaintiff to bring a motion for authorization to have his or her action proceed on behalf of all class members and to stay pending or future proceedings relating to the same issues. This is referred to as a "carriage" motion.

12 There are several sources of the court's jurisdiction to grant such relief. Section 12 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*") authorizes the court to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination". Section 13 gives the court jurisdiction to "stay any proceeding related to the class proceeding". Moreover, s. 138 of the *Courts of Justice Act*,

R.S.O. 1990 c. C.43, provides that "[a]s far as possible, multiplicity of legal proceedings shall be avoided." Section 106 provides that a court may stay any proceedings in the court "on such terms as are considered just."

13 The seminal carriage case is the decision of Cumming J. of the Superior Court of Justice in *Vitapharm*. He identified, at para. 48, the main criteria for determination of a carriage motion as: (a) the policy objectives of the *CPA*, namely, access to justice, judicial economy for the parties and the administration of justice, and behaviour modification; (b) the best interests of all putative class members; and, at the same time, (c) fairness to defendants.

14 He listed, at para. 49, the following factors for consideration on a carriage motion: (i) the nature and scope of the causes of action advanced; (ii) the theories advanced by counsel as being supportive of the claims advanced; (iii) the state of each class action, including preparation; (iv) the number, size and extent of involvement of the proposed representative plaintiffs; (v) the relative priority of commencing the class actions; and (vi) the resources and experience of counsel.

15 In *Sharma v. Timminco Inc*. *(2009), 99 O.R. (3d) 260*, an additional factor was identified: (vii) the presence of any conflicts of interest.

16 In *Smith v. Sino-Forest Corporation*, *2012 ONSC 24*, Perell J. described the foregoing factors as non-exhaustive. He added six others that he considered relevant to the circumstances of the competing actions before him: (viii) funding; (ix) definition of class membership; (x) definition of class period; (xi) joinder of defendants; (xii) the plaintiff and defendant correlation; and (xiii) prospects of certification.

17 This list remains non-exhaustive. Other factors may have significance in the unique circumstances of other cases. Determinative factors in one case may have little or no significance in another.

18 I suggest an additional factor that may have a bearing. The proposed fee arrangement between class counsel and the representative plaintiff is a factor that vitally affects the interests of the class. While the fee is ultimately subject to the approval of the court, significant differences between the fee arrangements may be considered on a carriage motion.

19 In the hearing in the Superior Court, the motion judge indicated that if the seven *Vitapharm* and *Sharma* factors had failed to yield a measurable and objective difference between the competing firms, he would have considered the fee arrangements of the respective consortia. Both counsel had proposed a 30 percent contingency fee, a common arrangement in class proceedings. He mused whether counsel might be prepared to "reduce their fee to say 25, or 20, or 10 percent if granted carriage". He referred to the possibility of a "reverse auction". I note in this regard that some United States courts have instituted competitive bidding procedures in carriage cases: see Federal Judicial Center, *Manual for Complex Litigation*, (3d U.S. West Publishing, 1995) at p. 221, citing *In re Wells Fargo Securities Litigation*, 156 F.R.D. 223, 157 F.R.D. 467 (N.D. Cal. 1994); and *In re Oracle Securities Litigation*, 131 F.R.D. 688, 132 F.R.D. 538 (N.D. Cal. 1990), 136 F.R.D. 639 (N.D. Cal. 1991).

20 There is room for debate about whether auctioning the right to represent the class will be in the best interests of the class. Is it in the best interests of the class to be represented by counsel who is prepared to take on the onerous professional and financial challenges of serving as class counsel at the lowest price? Will such counsel have a strong incentive to settle the case to recover their discounted fee at the earliest moment? Will such counsel be vulnerable to being ground down by the defence? On the other hand, is an auction a legitimate proxy for market realities? The issue does not call for a decision in this case and I would leave it, if necessary, for another day.

21 It seems to me that regardless of the balancing of the other factors, counsel's fee arrangements are a factor to be considered, among others.

22 I would resist a "tick the boxes" approach to carriage motions. The issue is not which law firm "wins" on the most factors. Rather, it is the best interests of the class and fairness to the defendants, having regard to access to justice, judicial economy and behaviour modification.

III. DECISIONS IN THE COURTS BELOW

A. The motion judge

23 Near the beginning of his reasons, the motion judge observed that the choice on a carriage motion is not between the relative resources and expertise of the competing firms. Rather, the question is "which of the competing actions is more likely to advance the interests of the class?": see *Sino Forest* at para. 19 and *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996 (S.C.J.). aff'd [2009] O.J. No. 821 (Div. Ct.). He also observed that the court should not embark on an analysis of which claim is most likely to succeed: see *Sino-Forest* at para. 20 and *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 at para. 19.

24 He concluded that in this case two of the *Vitapharm* factors were most significant and the remainder were neutral.

25 First, the causes of action being advanced in the Rochon claim were broader than those in the Koskie claim. He found that Rochon's misrepresentation claims, and the conspiracy claim, were genuinely viable and had evidentiary support. The fraudulent concealment claim was pleaded to address potential limitation periods. It was in the best interest of the class that the proceeding not be limited to one claim when three were genuinely available.

26 Second, the motion judge found that Rochon had achieved a level of preparation that was "measurably and objectively superior" to the Koskie group. This was reflected in the statement of claim. He would have granted carriage to the Rochon group on this basis alone.

B. Leave to Appeal

27 Nordheimer J. granted Koskie's motion for leave to appeal to the Divisional Court. He recognized that decisions on carriage motions generally involve the exercise of discretion, but held that this case raised serious issues about the principles to be applied in the exercise of that discretion. He found that the reasons of the motion judge suggested there was a conflict between the decision in *Locking v. Armtec Infrastructure Inc.*, 2013 ONSC 331, and the decision in *Setterington*, a conflict that the Divisional Court should resolve. He also considered that there was good reason to doubt the correctness of the decision below and that the issue of carriage was a matter of importance in class proceedings that warranted the Divisional Court's consideration.

C. Divisional Court

28 The Divisional Court noted that the *CPA* gives judges broad discretion. Reviewing courts, it said, should defer to their decisions, unless an error of law is established: see *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.); *Cassano v. Toronto Dominion Bank*, 2007 ONCA 781. This is especially so when the motion judge is a member of the small group of judges across the province with expertise in class proceedings. If the motion judge has identified and applied the correct test in determining which of the competing actions is most likely to advance the interests of the class, his or her carriage decision is entitled to considerable deference.

29 The Divisional Court found that the motion judge made no error in law or principle and no palpable and overriding error of fact in considering and applying the "cause of action/claims advanced" factor. The motion judge considered the viability of the claims and the reasons advanced by the parties. He also carefully considered the applicable jurisprudence, including both *Setterington* and *Locking* (discussed later in these reasons). While the motion judge criticized *Locking* and stated that the decision was in conflict with what he found to be the preferable approach in *Setterington*, he applied both cases and reached the same conclusion in doing so.

30 The Divisional Court also agreed with the motion judge's conclusion that the Rochon action was in a more advanced state of preparation and his finding that this reflected "a sustained and in-depth pattern of research and preparation" by Rochon, which would further the interests of the class.

31 The Divisional Court found that the motion judge articulated and applied the correct test. The application of the factors to the circumstances of the particular case is an exercise of discretion to which considerable deference is owed. Koskie's submissions asked the court to reweigh the factors applied by the motion judge and did not demonstrate any reversible error in the exercise of his discretion. There was no basis on which to set aside the motion judge's decision.

IV. SUBMISSIONS OF THE PARTIES

A. Appellants' submissions

32 Although this is an appeal from the order of the Divisional Court, Koskie focussed its submissions on the motion judge's alleged errors in principle. Koskie submits that the motion judge made four errors in principle.

33 First, and foremost, it says the motion judge erred in principle in preferring the complex and unworkable claim articulated by Rochon to the focused and streamlined theory pleaded by Koskie.

34 Second, the motion judge erred by examining the quality of Rochon's preparation, whereas he ought to have considered the stage of preparation. The motion judge was unduly impressed that Rochon had taken a trip to Chile to meet with authorities and witnesses. Further, in attempting to win carriage, Rochon had disclosed its expert reports, contrary to the interests of the class.

35 Third, the motion judge failed to give any weight to the fact that Koskie had made a favourable third party funding arrangement and erred in assuming, without any factual basis, that Rochon would be able to do the same in short order.

36 Fourth, the motion judge failed to recognize Koskie's greater expertise in securities class action and to take into account the history of disciplinary infractions and judicial criticism of the Merchant Law Group ("Merchant"), one of the members of the Rochon consortium.

B. Respondent's submissions

37 Rochon points out that there is no disagreement concerning the applicable test, nor with the proposition that a class action judge on a carriage motion has a broad discretion in the application of that test. The motion judge set out the correct test, identified and weighed the relevant factors and his decision is entitled to deference.

38 The motion judge made no error, Rochon says, in finding that a more comprehensive theory was in the best interests of the class and that, as found by the Divisional Court, the trip to Chile was only one of the factors that informed the motion judge's conclusion that Rochon was better prepared.

39 There was evidentiary support for the conclusion that both consortia had extensive experience in class actions and securities litigation. The appellants' position with respect to Merchant is hypocritical, Rochon says, given that members of the Koskie consortium had their own history of co-counsel agreements with Merchant.

V. ANALYSIS

40 I will discuss these grounds of appeal in order.

(1) The pleadings and scope of the action

41 In my view, this appeal turns on the appellants' argument with respect to the first *Vitapharm* factor: the nature and scope of the causes of action advanced. The appellants put a novel spin on this factor, in three ways. First,

they say that this factor refers to the "workability" of the action, a term that is not found in any of the authorities. Second, they say that it should be given priority over other factors. Third, they say that as a general proposition "less is more" when it comes to the scope of the action and a streamlined claim, like Koskie's, should be preferred to a more complex claim, like Rochon's.

42 The appellants acknowledge that the merits of the respective claims are not at issue on a carriage motion. In *Setterington*, at para. 19, Winkler J., as he then was, said that the claim may be scrutinized for "glaring deficiencies" or to see whether it is "fanciful or frivolous". See also: *Sino-Forest* at para. 20. Apart from this, however, he said it is inappropriate for the court to embark on an analysis of which claim is most likely to succeed.

43 The Divisional Court did not address the issue identified by Nordheimer J. on the leave motion, namely the potential conflict identified by the motion judge between *Setterington* and the Divisional Court decision in *Locking*. The latter case suggested that when the competing actions are similar in strength a more detailed and nuanced analysis of the cause of action criteria may be required.

44 The appellants say that the proper question to ask is not whether one claim or the other will succeed, but rather whether the claims are "workable". They submit that the Rochon claim is overly complex, that it would be costly and time-consuming to litigate and that it would eventually collapse under its own weight. They say that the motion judge should have analyzed the issue following the "less is more" principle.

45 In my view, it is and should be the rule that the court should not enter into an examination of the underlying merits of the respective claims on a carriage motion. . The motion judge gave three good reasons for the rule: (i) it is impossible to predict how the litigation will unfold and which claims will succeed and which will not; (ii) it is unfair and inappropriate to undertake such an analysis in full view of defence counsel; and (iii) a merits analysis should not be done on a carriage motion when it is not done on certification. I respectfully agree.

46 It is also my view, consistent with the jurisprudence, that there may be cases in which the actions are sufficiently indistinguishable that, to use the language of *Locking*, "a more detailed analysis may be necessary": see, *e.g.*, *Sharma*. This analysis will not consider the merits but will consider, as the Divisional Court said in *Locking*, at para. 23, "the nature and scope of the causes of action advanced and the theories advanced by counsel for their approach to the case". This may include an assessment of the efficiency and costs of the competing strategies. I regard this factor as important, but not necessarily of greater importance than every other factor.

47 While some cases have given preference to "lean" actions over more comprehensive ones, I would reject any firm rule that "less is more" or, indeed, that "more is better". The ultimate question is whether the proposed strategy is reasonable and defensible.

48 In this case, the motion judge appreciated the argument that the Koskie claim was simpler and more focused. But he noted that Rochon's capital expenditure, accounting and conspiracy claims were viable and supported by the evidence. The conspiracy claim added a further basis of liability and, significantly, opened up the defendants' exposure to damages in excess of the statutory limits. It could also help to lift the corporate veil. The conspiracy claim and the fraudulent concealment claim had a strong rationale and were genuinely viable.

49 In my view, this was precisely the kind of analysis that was appropriate. It resulted in the motion judge concluding that it was in the best interests of the class to plead the broader misrepresentation claims and the conspiracy and fraudulent concealment claims, resulting in a more comprehensive litigation framework.

50 The motion judge considered the appellants' argument that their claim was more streamlined and ultimately concluded that Rochon's "viable" and evidence-based claims provided the class with a more effective framework within which to litigate the claims. This was a call he was entitled to make.

(2) State of preparation

51 I agree that in general the focus under this heading is the extent of preparation as opposed to the quality of preparation. As Winkler J. observed in *Setterington*, at para. 22, this factor is relevant to the loss of efficiency and unfairness to the defendant if a less advanced action is given carriage. Nevertheless, quality of preparation can be a relevant factor. Perell J. did not consider it in *Sharma*, because he was unable to judge the relative quality of the work of the two firms, noting that it would be better assessed in the "crucible of battle".

52 But since only one firm will go into battle, it is not unreasonable to ask which has done the best job in preparing itself for battle and whether its preparation has yielded benefits for the class. And this is precisely what the motion judge did.

53 He found that the Rochon pleading demonstrated a more informed and sophisticated understanding of the underlying factual issues than the more formalistic Koskie pleading. This was achieved through on-the-ground legal work, including retaining one of the leading environmental lawyers in Chile to prepare a detailed report, retaining a number of mining and financial experts, and going to Chile to meet with legal and government officials, to interview a large number of witnesses and to visit the mine site.

54 The motion judge found that it was "this hands-on effort on the part of [Rochon] that best explains the detail and the deep understanding of the alleged environmental violations" that was evident in Rochon's statement of claim. The same superior level of understanding was found in Rochon's pleading of the capital expenditure claim and the accounting claims. The motion judge concluded, at para. 48, that Rochon had "conducted the more superior investigation and analysis of the facts and issues herein and is more prepared than [Koskie] to assume carriage of this proceeding forthwith."

55 These conclusions are appropriate and supported by the evidence.

56 Although not necessary to my conclusions, I will comment on two submissions made by counsel for Koskie.

57 First, he submits that it was improper for Rochon to produce its expert reports for the purpose of demonstrating its superior state of preparation, for this put the interests of counsel ahead of the interests of the class. It was detrimental to the class because it put their cards on the table in full view of the defendants. It appears this occurred in *Sharma* and *Sino-Forest* as well, where one party was more forthcoming in producing its work product: see *Sharma* at para. 86; *Sino-Forest* at paras. 24-26. Koskie submits that there should be a bright line rule that prevents the production of a party's expert evidence on a carriage motion.

58 I would not favour such a rule and would leave it to the good judgment of counsel and the supervisory jurisdiction of the court to prevent harm to the interests of the class.

59 Second, Koskie says it is an error in principle to give significant weight to events that take place after the carriage motion is scheduled. Rochon's trip took place after the carriage motion had been scheduled and the motion judge should not have considered it.

60 The Divisional Court rejected this argument and found that the trip to Chile was only part of an "ongoing and continuing narrative of preparation that began well before the motion was scheduled."

61 I would reject a rule that sees carriage motions decided based on a "freeze frame" on the date the motion is filed. For one thing, counsel cannot afford to down tools simply because a carriage motion is pending. For another, carriage motions can be contemplated in major class action litigation and the date of the carriage motion is an artificial one. That said, the court should be suspicious of conspicuous new activity after the filing of a carriage motion or of any attempts to "leapfrog" a lagging action ahead of a more advanced one.

(3) Funding

62 Funding is one of the factors identified in *Sino-Forest*. It refers to access to external funding to provide indemnity against adverse costs awards and, in some cases, funding for disbursements.

63 Funding is an important consideration because it goes to the issue of whether the class, or, as is usually the case, class counsel, will be able to withstand adverse costs awards as the action progresses, or in the event it does not succeed at certification, trial or other interlocutory steps such as leave or summary judgment. The terms of the funding agreement are also important, because the funder's fee is typically taken off the top of any settlement or judgment, thereby reducing the net available to the class.

64 In Ontario, the Class Proceedings Fund provides financing for disbursements and indemnity for costs awards in return for a 10 percent share of any settlement or judgment and reimbursement of funded disbursements. Funding arrangements with commercial third party funders have also been approved: *The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2012 ONSC 2937; *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Rooney v. ArcelorMittal S.A.*, 2013 ONSC 7768; *Musicians' Pension Fund of Canada (Trustees of) v. Kinross Gold Corp.*, 2013 ONSC 4974, 117 O.R. (3d) 150.

65 Koskie had entered into an agreement with a third party funder, Claims Funding International, which provided an indemnity against any adverse costs award in the action and $50,000 towards counsel's disbursements. This was in return for a contingency fee of 7 percent, capped at $7 million if the action was resolved before the filing of a pre-trial conference brief and $10 million if resolved by settlement or judgment thereafter.

66 Koskie argued that this arrangement was very favourable because it was less than the 10 percent uncapped levy charged by the Class Proceedings Fund. Rochon had no funding agreement.

67 I agree with the Divisional Court that the motion judge did not err in finding that funding was not a significant differentiating factor. Rochon's litigation plan stated that if granted carriage it would secure a funding arrangement. The motion judge expressed no doubt that it would be able to do so "in short order". In light of his experience and his familiarity with the claim and the issues, this was a finding he was entitled to make.

(4) Counsel

68 The appellants submit the motion judge should have engaged in a detailed weighing of the resources and expertise of the two counsel groups. They say that such an inquiry is mandated by the case law, including *Tiboni* at para. 26; *Setterington* at paras 22-24; and *Ricardo v. Air Transat A.T. Inc.*, *[2002] O.J. No. 1090* at para. 28. The appellants argue that if the motion judge had engaged in this weighing, he would have given far greater weight to his finding that Koskie had greater experience in securities class actions. He also would have been more concerned about the absence of evidence from the other members of the Rochon consortium, its failure to produce the agreement between counsel (including fee-sharing arrangements) and the presence of Merchant in the consortium.

69 The motion judge observed that any one of the "elite class action firms" who were members of the consortia would have more than enough expertise and experience on their own to do an excellent job as carriage counsel. As he pointed out, both consortia had added external securities specialists to their teams.

70 Like the Divisional Court, I see no error in law or principle nor palpable and overriding factual error in the motion judge's reasons on this factor. They were fully supported by the record. It is not our function to reweigh the evidence.

71 Neither party filed the agreements between members of the consortia as to their fee and work allocation arrangements. Since the fee is ultimately borne by class members, the court has an interest in how the work and fees are divided. Where appropriate, it is open to the court to require counsel to provide evidence as to the

allocation of responsibilities and fees between members of the consortia. In this case, the appellants have not demonstrated that the motion judge erred in the exercise of his discretion by not doing so.

72 The court has a duty to protect class members and a broader duty to the administration of justice when approving counsel in a carriage motion. The discharge of this duty may require the exclusion of counsel due to prior misconduct. It may also require the exclusion of counsel with a record of commencing class actions, not pursuing them, and then using them to demand ransom from other counsel in carriage disputes. The motion judge was clearly aware of these duties and of Merchant's history and I am not prepared to say that he erred in the exercise of his discretion in awarding carriage to Rochon in spite of Merchant's participation in that consortium.

(5) The undertaking

73 One of the components of the carriage test is whether the outcome is fair to the defendant: see *Setterington* at para. 13. Usually, this requires a consideration of whether giving carriage to one counsel over another would require the defendant to retrace steps already taken in the other proceeding. As a result, the defendant has standing on a carriage motion.

74 Barrick proposed an innovative and practical solution to the problem of overlapping or duplicative class actions. It requested an undertaking from counsel on both sides to prevent the continuation or commencement of multiple proceedings in Canadian jurisdictions. The parties agreed, and the motion judge made an order in the following terms: "[Rochon and Koskie] are directed to take all necessary steps to permanently stay or dismiss any parallel Canadian proceeding that they or their local agents have commenced and not to commence, instruct local agents to commence or otherwise permit, facilitate or encourage the commencement of any other parallel Canadian proceedings."

75 Counsel for Barrick appeared in the Divisional Court to request that the undertakings be maintained. Counsel for the competing counsel groups repeated their agreement to the undertaking and the Divisional Court ordered that it be continued.

76 Counsel for Barrick appeared before us to ensure that the undertakings and the orders giving effect to them would remain in place. The parties acknowledged this was the case.

VI. CONCLUSION AND ORDER

77 For these reasons, I would dismiss the appeal. The undertakings given by the parties remain in effect. By agreement between the parties, I would make no order as to costs.

G.R. STRATHY C.J.O.
S.E. PEPALL J.A.:— I agree.
D.M. BROWN J.A.:— I agree.

TRUIST BANK, AS AGENT
Applicant

and **KEW MEDIA GROUP INC. and KEW MEDIA INTERNATIONAL (CANADA) INC.**

Court File No.: CV-20-00637081-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF ALEX KAN AND STUART RATH (Lift Stay and Carriage) (Motion Returnable: July 14, 2020

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