Court File No. CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUEBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

(each, an "**Applicant**", and collectively, the "**Applicants**")

BRIEF OF AUTHORITIES OF THE LITIGATION INVESTIGATOR
(Re Appointment of Litigation Trustee, Lifting of Stay, and Other Relief)
(Returnable December 3, 2018)

November 20, 2018

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TO: **THE SERVICE LIST**

Index

INDEX

Tab 1

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

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***Deschamps J.*:**

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held

by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 Purpose and Scope of Insolvency Law

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid

liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA's* remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA's* objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if

> creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 GST Deemed Trust Under the CCAA

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp., Re*, 2009 QCCS 6332 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For

example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at § 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (*"ITA"*), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 (*"PPSA"*). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

> **222.** (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ....

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

> **18.3** (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions *(CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ....

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe

the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA's* override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA's* purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA's* supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good

faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA's* purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA's* objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective

proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 Express Trust

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA.*

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

***Fish J. (concurring)*:**

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to

amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

> **227 (4) Trust for moneys deducted** — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> **(4.1) Extension of trust** — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
> >
> > ...
>
> ... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

> **67** (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

> **222. (1) [Deemed] Trust for amounts collected** — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> ...
>
> **(3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...
>
> ...
>
> ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of

deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

***Abella J. (dissenting)*:**

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11[1] of the *CCAA* stated:

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

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

> **222 (3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart

from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA's* general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

18.3 (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* .... The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then

under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogani*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> [T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids

relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:

> The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant).* But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA.* Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...
>
> (f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or *any portion of an Act or regulation*".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

> **37.**(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
>
> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA.*

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act.* That includes the *ETA.* The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA.* Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed.
Pourvoi accueilli.

Appendix

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at December 13, 2007)**

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

...

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

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

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

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

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

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings

taken or that might be taken in respect of the company under an Act referred to in subsection (1);

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

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

...

(6) Burden of proof on application — The court shall not make an order under subsection (3) or (4) unless

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

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

11.4 (1) Her Majesty affected — An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and\

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) When order ceases to be in effect — An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) Deemed trusts — Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) Status of Crown claims — In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) Operation of similar legislation — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any

related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

...

20. [Act to be applied conjointly with other Acts] — The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at September 18, 2009)**

11. General power of court — Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

...

11.02 (1) Stays, etc. — initial application — A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

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

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

(2) Stays, etc. — other than initial application — A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

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

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

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

(3) Burden of proof on application — The court shall not make the order unless

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

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) Stay — Her Majesty — An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) When order ceases to be in effect — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax

similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

37. (1) Deemed trusts — Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

***Excise Tax Act*, R.S.C. 1985, c. E-15 (as at December 13, 2007)**

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act)*, to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the

amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (as at December 13, 2007)**

67. (1) Property of bankrupt — The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Exceptions — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is,

notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Footnotes

1 Section 11 was amended, effective September 18, 2009, and now states:
11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2 The amendments did not come into force until September 18, 2009.

Tab 2

2011 ONCA 579
Ontario Court of Appeal

Hollinger Inc., Re

2011 CarswellOnt 9272, 2011 ONCA 579, [2011] O.J. No. 3977, [2011] S.C.C.A. No. 473, 107 O.R. (3d) 1, 12 C.P.C. (7th) 29, 207 A.C.W.S. (3d) 234, 283 O.A.C. 264, 341 D.L.R. (4th) 182, 84 C.B.R. (5th) 79

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

And in the Matter of a Proposed Plan of Compromise or Arrangement with Respect to Hollinger Inc., 4322525 Canada Inc. and Sugra Limited (Applicants)

Goudge, Sharpe, Karakatsanis JJ.A.

Heard: August 24, 2011
Judgment: September 8, 2011
Docket: CA C53706

Proceedings: affirming *Hollinger Inc., Re* (2011), 2011 ONSC 1205, 2011 CarswellOnt 9087 (Ont. S.C.J. [Commercial List])

Counsel: Earl A. Cherniak Q.C., Kenneth D. Kraft, Jason Squire for Conrad Black, Conrad Black Capital Corporation
Paul D. Guy, Faren Bogach for Daniel Colson
Michael E. Barrack, Megan Keenberg for Hollinger Inc.
John Lorn McDougall, Q.C., Norman J. Emblem, Matthew Fleming for KPMG LLP
Ronald Foerster for Torys LLP
David C. Moore for Catalyst Fund General Partner I Inc.
George Benchetrit for Indenture Trustee
Lawrence Thacker for Ernst & Young Inc., Monitor

***Per curiam*:**

1 Conrad Black and Conrad Black Capital Corporation ("Black") appeal a sealing order redacting the amounts to be paid by the respondents, Torys LLP and KPMG LLP Canada, to the respondent, Hollinger Inc., pursuant to two proposed settlement agreements. The settlement agreements were made in the context of a *Companies' Creditor Arrangement Act* ("CCAA") proceeding and are subject to court approval. The sealing order provides for the immediate full disclosure of all terms of the settlements, other than the amounts to be paid, and details as to the manner of payment in the Torys agreement. The sealing order further provides that any non-settling party may have access to the redacted information upon signing a confidentiality agreement only to use the redacted information in the settlement approval proceeding. The sealing order terminates upon final approval of the settlements.

2 For the following reasons, we reject Black's argument that the sealing order constitutes a serious and unjustified infringement of the open court principle and dismiss the appeal.

Facts

3 Hollinger and two related corporations have been granted CCAA protection pursuant to a Commercial List order made in August 2007. The order appoints a Litigation Trustee to deal with the assets available to Hollinger's creditors which

consist almost entirely of Hollinger's claims against former officers, directors and advisors, including Black, Torys and KPMG.

4 Black asserts a claim against Hollinger in the CCAA proceedings, as well as claims for contribution and indemnity against Torys and KPMG in relation to several claims asserted against him by Hollinger.

5 Settlement discussions and mediations between Hollinger, the Litigation Trustee, Torys and KPMG led to two settlement agreements that require court approval. The draft settlement agreements were circulated to all parties with the amounts to be paid by way of settlement redacted. The respondents moved before the judge dealing with the CCAA proceedings for the sealing order that is the subject of this appeal. The crucial paragraph of the affidavit filed by Hollinger in support of that motion reads as follows:

> 21. In my view, disclosure of the commercially sensitive terms contained in the Settlements and the strategy of the Litigation Trustee and other confidential details relating to Litigation Assets set out in the Litigation Trustee's Report would undermine the Litigation Trustee's initiatives with respect to the remaining Litigation Assets including, without limitation, any possible settlements the Litigation Trustee may reach in respect of any of the remaining Litigation Assets and litigation with KPMG or Torys, in the event that the settlements are not approved.

6 The Litigation Trustee's Report has since been disclosed. There was no cross-examination on that affidavit.

7 Although the terms of the settlements are not directly at issue on this appeal, Black relies on the fact that both settlement agreements provide for a "bar order" that would prevent anyone sued by Hollinger; any shareholder, officer, director, or creditor of Hollinger; and any person who could claim rights or interest through Hollinger, from making any claim against Torys or KPMG in relation to the advice given by those parties to Hollinger. Black points out that the bar orders would extinguish his indemnity claims against Torys and KPMG. On the other hand, the respondents submit that the bar orders are economically neutral for Black and other non-settling defendants. This is because Hollinger waives its right to claim joint and several liability with respect to shared liability between settling and non-settling defendants if the non-settling defendant can establish a right to contribution and indemnity from a settling defendant.

Decision of the Motion Judge

8 The motion judge found that litigation settlement privilege applied to the terms of the two settlement agreements. He concluded that the onus to establish that a sealing order protecting the confidentiality of the amounts of the settlements was in the public interest had been satisfied and that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.) ("*Sierra Club*") had been met.

9 On the motion judge's suggestion, the sealing order included a "comeback" clause, permitting any party affected by the settlement motion to request relief from the sealing order if it operated in a manner that would prevent that party from making full submissions as to the approval of the settlement.

Issues

10 Black submits:

> 1. That the evidence was insufficient to justify a sealing order and departure from the open court principle;
>
> 2. That the requirement that a party seeking disclosure of the settlement amounts must sign a confidentiality agreement imposes an undue burden; and
>
> 3. That the respondents have waived privilege.

Analysis

1. Sufficiency of the evidence to justify a sealing order.

11 It is common ground that the motion judge applied the correct legal test, namely that laid down by the Supreme Court of Canada in *Sierra Club* at para. 53:

> A confidentiality order ... should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

12 Before us, there were two significant concessions.

13 First, the respondents indicated that they place no reliance upon the portions of the Litigation Trustee's affidavit referring to the "commercial sensitivity" of the redacted terms of the settlement. They rely solely upon the evidence that public disclosure of the settlement amounts before the agreements had been approved "would undermine the Litigation Trustee's initiatives with respect to ... litigation with KPMG or Torys, in the event that the settlements are not approved."

14 Second, Black conceded that his attack on the terms of the sealing order rests on the open court principle and that he does not assert that the terms of the sealing order give rise to any procedural disadvantage.

15 The respondents assert that their interest in maintaining the confidentiality of the amounts of the proposed settlements falls squarely within litigation settlement privilege. Simply put, the respondents say that should the settlement agreements not be approved, they would be unfairly prejudiced in the litigation that would follow if they had to disclose publicly the amounts they were prepared to pay or accept in settlement of the claims asserted by the Litigation Trustee.

16 It is well established that in order to foster the public policy favouring the settlement of litigation, the law will protect from disclosure communications made where;

> 1) there is a litigious dispute;
>
> 2) the communication has been made "with the express or implied intention it would not be disclosed in a legal proceeding in the event negotiations failed;" and
>
> 3) the purpose of the communication is to attempt to effect a settlement: see Bryant, Lederman & Fuerst, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis, 2009) at p. 1033, § 14.322); *Inter-Leasing Inc. v. Ontario (Minister of Finance)* (2009), 256 O.A.C. 83 (Ont. Div. Ct.).

17 We agree with the motion judge that those conditions are met here. We see no error in the motion judge's conclusion that "[l]itigation settlement privilege ... applies in this case at least until the Court either accepts or rejects the settlement". In the context of this case, Hollinger, Torys and KPMG have a legally protected interest in being afforded a zone of confidentiality to shelter the most sensitive aspect of their proposed settlement.

18 The sealing order protects litigation settlement privilege and thereby fosters the strong public interest in the settlement

of disputes and the avoidance of litigation. "*This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system*," (*Loewen, Ondaatje, McCutcheon & Co. c. Sparling*, [1992] 3 S.C.R. 235 (S.C.C.), at p. 259, citing *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.), at p. 28 (emphasis added by the Supreme Court)).

19 The rationale for litigation settlement privilege is that unless parties have an assurance that their efforts to negotiate a resolution will not be used against them in litigation should they fail to resolve their dispute, they will be reluctant to engage in the settlement process in the first place. A legal rule that created a disincentive of that nature would run contrary to the public policy favouring settlements.

20 We agree with the respondents that litigation settlement privilege constitutes a social value of super-ordinate importance capable of justifying a sealing order that limits the open court principle.

21 In our view, it was open to the motion judge to conclude under the *Sierra* test that the salutary effects of the sealing order outweighed its deleterious effects on the important right to free expression and the public interest in open and accessible court proceedings.

22 While the evidence led in support of the sealing order is limited to a bald statement that full disclosure of the terms of the settlement agreement "would undermine the Litigation Trustee's initiatives with respect to ... litigation with KPMG or Torys, in the event that the settlements are not approved," in light of the strong public policy favouring settlements and the recognized privilege that protects the confidentiality of settlement discussions, the motion judge did not err in concluding that the evidence was sufficient to satisfy the onus under the *Sierra* test.

23 We agree with the respondents that the motion judge's sealing order was a minimal intrusion on the open court principle and on the procedural rights of the non-settling parties. The sealing order protected only the amounts of the settlements and it gave the non-settling parties ready access to the amounts of the settlement upon signing a confidentiality agreement. The "come back" clause allowed any party to return to court for a reassessment of the need for the sealing order should the circumstances change.

24 We do not accept Black's submission that these are concluded agreements for which the litigation settlement privilege is spent. The settlement agreements at issue here have no legal effect until they are approved. In the context of this litigation and these settlement discussions, we are satisfied that just as the threat of disclosure of pre-resolution discussions would likely discourage parties from attempting to settle, so too would the threat of disclosure of their tentative settlement requiring court approval. We add, however, that our conclusion on the privileged nature of a settlement requiring court approval is based on the facts and circumstances of this case, and we leave to another day the issue of whether the privilege always attaches to other settlements requiring court approval, for example, class action settlements or infant settlements, where different values and considerations may apply.

25 Nor do we agree with Black's argument that because the litigation settlement privilege would still prevent any party from introducing the terms of the settlement into evidence in any trial that might follow should the court not approve the settlements, the information can now be made available to the public at large. We know of no authority that limits the reach of litigation settlement privilege in this manner. Moreover, the argument that no harm could flow from full public disclosure appears to us to ignore the practical reality that allowing for full public disclosure of all terms of the settlement agreements prior to court approval would have a very perverse effect on the desired incentives to engage in settlement discussions in the context of high stakes, high profile litigation.

2. Did the confidentiality agreement impose an undue burden?

26 We see no merit in the submission that Black's right to obtain disclosure of the settlement amounts was unduly burdened by the term of the sealing order requiring him to sign a confidentiality agreement as a pre-condition to disclosure. This term of the sealing order protects the non-settling parties' procedural right to have full access to the terms of the settlement agreements while maintaining the protection of the litigation settlement privilege. It is only if Black uses the privileged information for some improper purpose that he would face the prospect of some sanction for breach. Contrary to the submission that that sanction would inevitably be "draconian," it would be a matter for the discretion of the court to

decide an appropriate sanction in the circumstances and we see no reason to fear that the court would decide to impose a sanction that did not fit the circumstances of the case.

27 We add here that we do not consider the terms of the bar orders relevant to the issue of the sealing order. Neither the motion judge nor this court was asked to pass upon the appropriateness of the bar orders at this stage and as the sealing order allows Black to obtain full disclosure of the terms of the settlement, Black suffers no disadvantage if he chooses to challenge the settlement on the ground that the bar orders should not be approved.

3. Did the respondents waive privilege?

28 Black submits that by putting virtually all of the terms of the settlements on the public record and by disclosing the redacted portions of the settlement agreements to those non-settling parties who sign confidentiality agreements, the respondents have waived privilege.

29 We disagree. These terms were imposed by court order (albeit at the suggestion of the parties) and we fail to see how or why abiding by the terms of a court order should result in a finding that a party has waived privilege. Moreover, in our view, this argument is inconsistent with Black's purported reliance on the open court principle as requiring disclosure of the settlement amounts. The terms of the order said to amount to a waiver of privilege were plainly motivated to ensure that the sealing order was minimally intrusive on the open court principle. To accept Black's submission that those terms of the order constitute waiver would be to require sealing orders to be more restrictive than necessary to protect the public interest in fostering settlements. Such a rule would be self-defeating and contrary to the public interest in open access to court proceedings.

4. Conclusion

30 We conclude that the sealing order strikes an appropriate balance between the public interest in the promotion of settlements and the public interest in the open court principle:

> (i) the public interest in the promotion of settlements and the protection of settlement privileged information and communications is met by the sealing of the redacted portions of the settlement agreements from the public record; and
>
> (ii) the public interest in the open court principle is met by the public disclosure of all but the redacted terms of the settlement agreements, and the time-limited nature of the sealing order, lasting only so long as the settlements remain contingent on court approval.

31 In addition, the sealing order strikes the appropriate balance between the competing private interests of the parties:

> (i) the settling parties' interest in maintaining the confidentiality of their privileged information is met by the sealing of the redacted portions of the Settlement Agreements;
>
> (ii) the interests of all non-settling defendants (including Black) are met by the approval of the confidentiality agreement provision affording them access to the redacted portions of the settlement agreements and thereby enabling them to respond meaningfully to the settlement approval motion.

Disposition

32 The appeal is dismissed. In accordance with the agreement of counsel, the respondents Hollinger, Torys and KPMG are entitled to costs of $10,000 each, inclusive of disbursements and applicable taxes.

Appeal dismissed.

Tab 3

2012 ONSC 7050
Ontario Superior Court of Justice [Commercial List]

Sino-Forest Corp., Re

2012 CarswellOnt 15913, 2012 ONSC 7050, 224 A.C.W.S. (3d) 21

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

In the Matter of a Plan of Compromise or Arrangement of Sino-Forest Corporation, Applicant

Morawetz J.

Heard: December 7, 2012
Judgment: December 12, 2012
Docket: CV-12-9667-00CL

Counsel: Robert W. Staley, Kevin Zych, Derek J. Bell, Jonathan Bell, for Sino-Forest Corporation
Derrick Tay, Jennifer Stam, Cliff Prophet, for Monitor, FTI Consulting Canada Inc.
Robert Chadwick, Brendan O'Neill, for Ad Hoc Committee of Noteholders
Kenneth Rosenberg, Kirk Baert, Max Starnino, A. Dimitri Lascaris, for Class Action Plaintiffs
Won J. Kim, James C. Orr, Michael C. Spencer, Megan B. McPhee, for Invesco Canada Ltd., Northwest & Ethical Investments LP, Comité Syndicale Nationale de Retraite Bâtirente Inc.
Peter Griffin, Peter Osborne, Shara Roy, for Ernst & Young Inc.
Peter Green, Ken Dekkar, for BDO Limited
Edward A. Sellers, Larry Lowenstein, for Board of Directors of Sino-Forest Corporation
John Pirie, David Gadsden, for Poyry (Beijing)
James Doris, for Plaintiff in New York Class Action
David Bish, for Underwriters
Simon Bieber, Erin Pleet, for David Horsley
James Grout, for Ontario Securities Commission
Emily Cole, Joseph Marin, for Allen Chan
Susan E. Freedman, Brandon Barnes, for Kai Kit Poon
Paul Emerson, for ACE/Chubb
Sam Sasso, for Travelers

***Morawetz J.*:**

1 On December 10, 2012, I released an endorsement granting this motion with reasons to follow. These are those reasons.

Overview

2 The Applicant, Sino-Forest Corporation ("SFC"), seeks an order sanctioning (the "Sanction Order") a plan of compromise and reorganization dated December 3, 2012 as modified, amended, varied or supplemented in accordance with its terms (the "Plan") pursuant to section 6 of the *Companies' Creditors Arrangement Act* ("CCAA").

3 With the exception of one party, SFC's position is either supported or is not opposed.

4 Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndicale Nationale de Retraite Bâtirente Inc. (collectively, the "Funds") object to the proposed Sanction Order. The Funds requested an adjournment for a period of one

month. I denied the Funds' adjournment request in a separate endorsement released on December 10, 2012 (*Sino-Forest Corp., Re*, 2012 ONSC 7041 (Ont. S.C.J. [Commercial List])). Alternatively, the Funds requested that the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants".

5 The defined terms have been taken from the motion record.

6 SFC's counsel submits that the Plan represents a fair and reasonable compromise reached with SFC's creditors following months of negotiation. SFC's counsel submits that the Plan, including its treatment of holders of equity claims, complies with CCAA requirements and is consistent with this court's decision on the equity claims motions (the "Equity Claims Decision") (2012 ONSC 4377, 92 C.B.R. (5th) 99 (Ont. S.C.J. [Commercial List])), which was subsequently upheld by the Court of Appeal for Ontario (2012 ONCA 816 (Ont. C.A.)).

7 Counsel submits that the classification of creditors for the purpose of voting on the Plan was proper and consistent with the CCAA, existing law and prior orders of this court, including the Equity Claims Decision and the Plan Filing and Meeting Order.

8 The Plan has the support of the following parties:

(a) the Monitor;

(b) SFC's largest creditors, the Ad Hoc Committee of Noteholders (the "Ad Hoc Noteholders");

(c) Ernst & Young LLP ("E&Y");

(d) BDO Limited ("BDO"); and

(e) the Underwriters.

9 The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers Committee", also referred to as the "Class Action Plaintiffs") has agreed not to oppose the Plan. The Monitor has considered possible alternatives to the Plan, including liquidation and bankruptcy, and has concluded that the Plan is the preferable option.

10 The Plan was approved by an overwhelming majority of Affected Creditors voting in person or by proxy. In total, 99% in number, and greater than 99% in value, of those Affected Creditors voting favoured the Plan.

11 Options and alternatives to the Plan have been explored throughout these proceedings. SFC carried out a court-supervised sales process (the "Sales Process"), pursuant to the sales process order (the "Sales Process Order"), to seek out potential qualified strategic and financial purchasers of SFC's global assets. After a canvassing of the market, SFC determined that there were no qualified purchasers offering to acquire its assets for qualified consideration ("Qualified Consideration"), which was set at 85% of the value of the outstanding amount owing under the notes (the "Notes").

12 SFC's counsel submits that the Plan achieves the objective stated at the commencement of the CCAA proceedings (namely, to provide a "clean break" between the business operations of the global SFC enterprise as a whole ("Sino-Forest") and the problems facing SFC, with the aspiration of saving and preserving the value of SFC's underlying business for the benefit of SFC's creditors).

Facts

13 SFC is an integrated forest plantation operator and forest products company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China ("PRC"). SFC's registered office is located in Toronto and its principal business office is located in Hong Kong.

14 SFC is a holding company with six direct subsidiaries (the "Subsidiaries") and an indirect majority interest in Greenheart Group Limited (Bermuda), a publicly-traded company. Including SFC and the Subsidiaries, there are 137 entities

that make up Sino-Forest: 67 companies incorporated in PRC, 58 companies incorporated in British Virgin Islands, 7 companies incorporated in Hong Kong, 2 companies incorporated in Canada and 3 companies incorporated elsewhere.

15 On June 2, 2011, Muddy Waters LLC ("Muddy Waters"), a short-seller of SFC's securities, released a report alleging that SFC was a "near total fraud" and a "Ponzi scheme". SFC subsequently became embroiled in multiple class actions across Canada and the United States and was subjected to investigations and regulatory proceedings by the Ontario Securities Commission ("OSC"), Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police.

16 SFC was unable to file its 2011 third quarter financial statements, resulting in a default under its note indentures.

17 Following extensive arm's length negotiations between SFC and the Ad Hoc Noteholders, the parties agreed on a framework for a consensual resolution of SFC's defaults under its note indentures and the restructuring of its business. The parties ultimately entered into a restructuring support agreement (the "Support Agreement") on March 30, 2012, which was initially executed by holders of 40% of the aggregate principal amount of SFC's Notes. Additional consenting noteholders subsequently executed joinder agreements, resulting in noteholders representing a total of more than 72% of aggregate principal amount of the Notes agreeing to support the restructuring.

18 The restructuring contemplated by the Support Agreement was commercially designed to separate Sino-Forest's business operations from the problems facing the parent holding company outside of PRC, with the intention of saving and preserving the value of SFC's underlying business. Two possible transactions were contemplated:

> (a) First, a court-supervised Sales Process to determine if any person or group of persons would purchase SFC's business operations for an amount in excess of the 85% Qualified Consideration;
>
> (b) Second, if the Sales Process was not successful, a transfer of six immediate holding companies (that own SFC's operating business) to an acquisition vehicle to be owned by Affected Creditors in compromise of their claims against SFC. Further, the creation of a litigation trust (including funding) (the "Litigation Trust") to enable SFC's litigation claims against any person not otherwise released within the CCAA proceedings, preserved and pursued for the benefit of SFC's stakeholders in accordance with the Support Agreement (concurrently, the "Restructuring Transaction").

19 SFC applied and obtained an initial order under the CCAA on March 30, 2012 (the "Initial Order"), pursuant to which a limited stay of proceedings ("Stay of Proceedings") was also granted in respect of the Subsidiaries. The Stay of Proceedings was subsequently extended by orders dated May 31, September 28, October 10, and November 23, 2012 [2012 CarswellOnt 14701 (Ont. C.A.)], and unless further extended, will expire on February 1, 2013.

20 On March 30, 2012, the Sales Process Order was granted. While a number of Letters of Intent were received in respect of this process, none were qualified Letters of Intent, because none of them offered to acquire SFC's assets for the Qualified Consideration. As such, on July 10, 2012, SFC announced the termination of the Sales Process and its intention to proceed with the Restructuring Transaction.

21 On May 14, 2012, this court granted an order (the "Claims Procedure Order") which approved the Claims Process that was developed by SFC in consultation with the Monitor.

22 As of the date of filing, SFC had approximately $1.8 billion of principal amount of debt owing under the Notes, plus accrued and unpaid interest. As of May 15, 2012, Noteholders holding in aggregate approximately 72% of the principal amount of the Notes, and representing more than 66.67% of the principal amount of each of the four series of Notes, agreed to support the Plan.

23 After the Muddy Waters report was released, SFC and certain of its officers, directors and employees, along with SFC's former auditors, technical consultants and Underwriters involved in prior equity and debt offerings, were named as defendants in a number of proposed class action lawsuits. Presently, there are active proposed class actions in four jurisdictions: Ontario, Quebec, Saskatchewan and New York (the "Class Action Claims").

24 *Sino-Forest Corp., Re* (the "Ontario Class Action") was commenced in Ontario by Koskie Minsky LLP and Siskinds

LLP. It has the following two components: first, there is a shareholder claim (the "Shareholder Class Action Claims") brought on behalf of current and former shareholders of SFC seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; second, there is a $1.8 billion noteholder claim (the "Noteholder Class Action Claims") brought on behalf of former holders of SFC's Notes. The noteholder component seeks damages for loss of value in the Notes.

25 The Quebec Class Action is similar in nature to the Ontario Class Action, and both plaintiffs filed proof of claim in this proceeding. The plaintiffs in the Saskatchewan Class Action did not file a proof of claim in this proceeding, whereas the plaintiffs in the New York Class Action did file a proof of claim in this proceeding. A few shareholders filed proofs of claim separately, but no proof of claim was filed by the Funds.

26 In this proceeding, the Ad Hoc Securities Purchasers Committee - represented by Siskinds LLP, Koskie Minsky, and Paliare Roland Rosenberg Rothstein LLP - has appeared to represent the interests of the shareholders and noteholders who have asserted Class Action Claims against SFC and others.

27 Since 2000, SFC has had the following two auditors ("Auditors"): E&Y from 2000 to 2004 and 2007 to 2012 and BDO from 2005 to 2006.

28 The Auditors have asserted claims against SFC for contribution and indemnity for any amounts paid or payable in respect of the Shareholder Class Action Claims, with each of the Auditors having asserted claims in excess of $6.5 billion. The Auditors have also asserted indemnification claims in respect the Noteholder Class Action Claims.

29 The Underwriters have similarly filed claims against SFC seeking contribution and indemnity for the Shareholder Class Action Claims and Noteholder Class Action Claims.

30 The Ontario Securities Commission ("OSC") has also investigated matters relating to SFC. The OSC has advised that they are not seeking any monetary sanctions against SFC and are not seeking monetary sanctions in excess of $100 million against SFC's directors and officers (this amount was later reduced to $84 million).

31 SFC has very few trade creditors by virtue of its status as a holding company whose business is substantially carried out through its Subsidiaries in PRC and Hong Kong.

32 On June 26, 2012, SFC brought a motion for an order declaring that all claims made against SFC arising in connection with the ownership, purchase or sale of an equity interest in SFC and related indemnity claims to be "equity claims" (as defined in section 2 of the CCAA). These claims encapsulate the commenced Shareholder Class Action Claims asserted against SFC. The Equity Claims Decision did not purport to deal with the Noteholder Class Action Claims.

33 In reasons released on July 27, 2012 [2012 CarswellOnt 9430 (Ont. S.C.J. [Commercial List])], I granted the relief sought by SFC in the Equity Claims Decision, finding that the "the claims advanced in the shareholder claims are clearly equity claims." The Auditors and Underwriters appealed the decision and on November 23, 2012, the Court of Appeal for Ontario dismissed the appeal.

34 On August 31, 2012 [2012 CarswellOnt 11239 (Ont. S.C.J. [Commercial List])], an order was issued approving the filing of the Plan (the "Plan Filing and Meeting Order").

35 According to SFC's counsel, the Plan endeavours to achieve the following purposes:

> (a) to effect a full, final and irrevocable compromise, release, discharge, cancellation and bar of all affected claims;
>
> (b) to effect the distribution of the consideration provided in the Plan in respect of proven claims;
>
> (c) to transfer ownership of the Sino-Forest business to Newco and then to Newco II, in each case free and clear of all claims against SFC and certain related claims against the Subsidiaries so as to enable the Sino-Forest business to continue on a viable, going concern basis for the benefit of the Affected Creditors; and

> (d) to allow Affected Creditors and Noteholder Class Action Claimants to benefit from contingent value that may be derived from litigation claims to be advanced by the litigation trustee.

36 Pursuant to the Plan, the shares of Newco ("Newco Shares") will be distributed to the Affected Creditors. Newco will immediately transfer the acquired assets to Newco II.

37 SFC's counsel submits that the Plan represents the best available outcome in the circumstances and those with an economic interest in SFC, when considered as a whole, will derive greater benefit from the implementation of the Plan and the continuation of the business as a going concern than would result from bankruptcy or liquidation of SFC. Counsel further submits that the Plan fairly and equitably considers the interests of the Third Party Defendants, who seek indemnity and contribution from SFC and its Subsidiaries on a contingent basis, in the event that they are found to be liable to SFC's stakeholders. Counsel further notes that the three most significant Third Party Defendants (E&Y, BDO and the Underwriters) support the Plan.

38 SFC filed a version of the Plan in August 2012. Subsequent amendments were made over the following months, leading to further revised versions in October and November 2012, and a final version dated December 3, 2012 which was voted on and approved at the meeting. Further amendments were made to obtain the support of E&Y and the Underwriters. BDO availed itself of those terms on December 5, 2012.

39 The current form of the Plan does not settle the Class Action Claims. However, the Plan does contain terms that would be engaged if certain conditions are met, including if the class action settlement with E&Y receives court approval.

40 Affected Creditors with proven claims are entitled to receive distributions under the Plan of (i) Newco Shares, (ii) Newco notes in the aggregate principal amount of U.S. $300 million that are secured and guaranteed by the subsidiary guarantors (the "Newco Notes"), and (iii) Litigation Trust Interests.

41 Affected Creditors with proven claims will be entitled under the Plan to: (a) their *pro rata* share of 92.5% of the Newco Shares with early consenting noteholders also being entitled to their *pro rata* share of the remaining 7.5% of the Newco Shares; and (b) their *pro rata* share of the Newco Notes. Affected Creditors with proven claims will be concurrently entitled to their *pro rata* share of 75% of the Litigation Trust Interests; the Noteholder Class Action Claimants will be entitled to their *pro rata* share of the remaining 25% of the Litigation Trust Interests.

42 With respect to the indemnified Noteholder Class Action Claims, these relate to claims by former noteholders against third parties who, in turn, have alleged corresponding indemnification claims against SFC. The Class Action Plaintiffs have agreed that the aggregate amount of those former noteholder claims will not exceed the Indemnified Noteholder Class Action Limit of $150 million. In turn, indemnification claims of Third Party Defendants against SFC with respect to indemnified Noteholder Class Action Claims are also limited to the $150 million Indemnified Noteholder Class Action Limit.

43 The Plan includes releases for, among others, (a) the subsidiary; (b) the Underwriters' liability for Noteholder Class Action Claims in excess of the Indemnified Noteholder Class Action Limit; (c) E&Y in the event that all of the preconditions to the E&Y settlement with the Ontario Class Action plaintiffs are met; and (d) certain current and former directors and officers of SFC (collectively, the "Named Directors and Officers"). It was emphasized that non-released D&O Claims (being claims for fraud or criminal conduct), conspiracy claims and section 5.1 (2) D&O Claims are not being released pursuant to the Plan.

44 The Plan also contemplates that recovery in respect of claims of the Named Directors and Officers of SFC in respect of any section 5.1 (2) D&O Claims and any conspiracy claims shall be directed and limited to insurance proceeds available from SFC's maintained insurance policies.

45 The meeting was carried out in accordance with the provisions of the Plan Filing and Meeting Order and that the meeting materials were sent to stakeholders in the manner required by the Plan Filing and Meeting Order. The Plan supplement was authorized and distributed in accordance with the Plan Filing and Meeting Order.

46 The meeting was ultimately held on December 3, 2012 and the results of the meeting were as follows:

(a) the number of voting claims that voted on the Plan and their value for and against the Plan;

(b) The results of the Meeting were as follows:

a. the number of Voting Claims that voted on the Plan and their value for and against the Plan:

	Number of Votes	***%***		***Value of Votes***	***%***
Total Claims Voting For	250	98.81%	$	1,465,766,204	99.97%
Total Claims Voting Against	3	1.19%	$	414,087	0.03%
Total Claims Voting	253	100.00%	$	1,466,180,291	100.00%

b. the number of votes for and against the Plan in connection with Class Action Indemnity Claims in respect of Indemnified Noteholder Class Action Claims up to the Indemnified Noteholder Limit:

	Vote For	***Vote Against***	***Total Votes***
Class Action Indemnity Claims	4	1	5

c. the number of Defence Costs Claims votes for and against the Plan and their value:

	Number of Votes	***%***		***Value of Votes***	***%***
Total Claims Voting For	12	92.31%	$	8,375,016	96.10%
Total Claims Voting Against	1	7.69%	$	340,000	3.90%
Total Claims Voting	13	100.00%	$	8,715,016	100.00%

d. the overall impact on the approval of the Plan if the count were to include Total Unresolved Claims (including Defence Costs Claims) and, in order to demonstrate the "worst case scenario" if the entire $150 million of the Indemnified Noteholder Class Action Limit had been voted a "no" vote (even though 4 of 5 votes were "yes" votes and the remaining "no" vote was from BDO, who has now agreed to support the Plan):

	Number of Votes	***%***		***Value of Votes***	***%***
Total Claims Voting For	263	98.50%	$	1,474,149,082	90.72%
Total Claims Voting Against	4	1.50%	$	150,754,087	9.28%
Total Claims Voting	267	100.00%	$	1,624,903,169	100.00%

47 E&Y has now entered into a settlement ("E&Y Settlement") with the Ontario plaintiffs and the Quebec plaintiffs, subject to several conditions and approval of the E&Y Settlement itself.

48 As noted in the endorsement dated December 10, 2012, which denied the Funds' adjournment request, the E&Y Settlement does not form part of the Sanction Order and no relief is being sought on this motion with respect to the E&Y Settlement. Rather, section 11.1 of the Plan contains provisions that provide a framework pursuant to which a release of the E&Y claims under the Plan will be effective if several conditions are met. That release will only be granted if all conditions are met, including further court approval.

49 Further, SFC's counsel acknowledges that any issues relating to the E&Y Settlement, including fairness, continuing discovery rights in the Ontario Class Action or Quebec Class Action, or opt out rights, are to dealt with at a further court-approval hearing.

Law and Argument

50 Section 6(1) of the CCAA provides that courts may sanction a plan of compromise if the plan has achieved the support of a majority in number representing two-thirds in value of the creditors.

51 To establish the court's approval of a plan of compromise, the debtor company must establish the following:

(a) there has been strict compliance with all statutory requirements and adherence to previous orders of the court;

(b) nothing has been done or purported to be done that is not authorized by the CCAA; and

(c) the plan is fair and reasonable.

(See *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.), leave to appeal denied, 2000 ABCA 238 (Alta. C.A. [In Chambers]), aff'd 2001 ABCA 9 (Alta. C.A.), leave to appeal to SCC refused July 21, 2001, [2001] S.C.C.A. No. 60 (S.C.C.) and *Nelson Financial Group Ltd., Re*, 2011 ONSC 2750, 79 C.B.R. (5th) 307 (Ont. S.C.J.)).

52 SFC submits that there has been strict compliance with all statutory requirements.

53 On the initial application, I found that SFC was a "debtor company" to which the CCAA applies. SFC is a corporation continued under the *Canada Business Corporations Act* ("CBCA") and is a "company" as defined in the CCAA. SFC was "reasonably expected to run out of liquidity within a reasonable proximity of time" prior to the Initial Order and, as such, was and continues to be insolvent. SFC has total claims and liabilities against it substantially in excess of the $5 million statutory threshold.

54 The Notice of Creditors' Meeting was sent in accordance with the Meeting Order and the revised Noteholder Mailing Process Order and, further, the Plan supplement and the voting procedures were posted on the Monitor's website and emailed to each of the ordinary Affected Creditors. It was also delivered by email to the Trustees and DTC, as well as to Globic who disseminated the information to the Registered Noteholders. The final version of the Plan was emailed to the Affected Creditors, posted on the Monitor's website, and made available for review at the meeting.

55 SFC also submits that the creditors were properly classified at the meeting as Affected Creditors constituted a single class for the purposes of considering the voting on the Plan. Further, and consistent with the Equity Claims Decision, equity claimants constituted a single class but were not entitled to vote on the Plan. Unaffected Creditors were not entitled to vote on the Plan.

56 Counsel submits that the classification of creditors as a single class in the present case complies with the commonality of interests test. See *Canadian Airlines Corp., Re*.

57 Courts have consistently held that relevant interests to consider are the legal interests of the creditors hold *qua* creditor in relationship to the debtor prior to and under the plan. Further, the commonality of interests should be considered purposively, bearing in mind the object of the CCAA, namely, to facilitate reorganizations if possible. See *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.), *Canadian Airlines Corp., Re*, and *Nortel Networks Corp., Re*, [2009] O.J. No. 2166 (Ont. S.C.J. [Commercial List]). Further, courts should resist classification approaches that potentially jeopardize viable plans.

58 In this case, the Affected Creditors voted in one class, consistent with the commonality of interests among Affected Creditors, considering their legal interests as creditors. The classification was consistent with the Equity Claims Decision.

59 I am satisfied that the meeting was properly constituted and the voting was properly carried out. As described above, 99% in number, and more than 99% in value, voting at the meeting favoured the Plan.

60 SFC's counsel also submits that SFC has not taken any steps unauthorized by the CCAA or by court orders. SFC has regularly filed affidavits and the Monitor has provided regular reports and has consistently opined that SFC is acting in good faith and with due diligence. The court has so ruled on this issue on every stay extension order that has been granted.

61 In *Nelson Financial Group Ltd., Re*, I articulated relevant factors on the sanction hearing. The following list of factors is similar to those set out in *Canwest Global Communications Corp., Re*, 2010 ONSC 4209, 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]):

1. The claims must have been properly classified, there must be no secret arrangements to give an advantage to a creditor or creditor; the approval of the plan by the requisite majority of creditors is most important;

2. It is helpful if the Monitor or some other disinterested person has prepared an analysis of anticipated receipts and liquidation or bankruptcy;

3. If other options or alternatives have been explored and rejected as workable, this will be significant;

4. Consideration of the oppression rights of certain creditors; and

5. Unfairness to shareholders.

6. The court will consider the public interest.

62 The Monitor has considered the liquidation and bankruptcy alternatives and has determined that it does not believe that liquidation or bankruptcy would be a preferable alternative to the Plan. There have been no other viable alternatives presented that would be acceptable to SFC and to the Affected Creditors. The treatment of shareholder claims and related indemnity claims are, in my view, fair and consistent with CCAA and the Equity Claims Decision.

63 In addition, 99% of Affected Creditors voted in favour of the Plan and the Ad Hoc Securities Purchasers Committee have agreed not to oppose the Plan. I agree with SFC's submission to the effect that these are exercises of those parties' business judgment and ought not to be displaced.

64 I am satisfied that the Plan provides a fair and reasonable balance among SFC's stakeholders while simultaneously providing the ability for the Sino-Forest business to continue as a going concern for the benefit of all stakeholders.

65 The Plan adequately considers the public interest. I accept the submission of counsel that the Plan will remove uncertainty for Sino-Forest's employees, suppliers, customers and other stakeholders and provide a path for recovery of the debt owed to SFC's non-subordinated creditors. In addition, the Plan preserves the rights of aggrieved parties, including SFC through the Litigation Trust, to pursue (in litigation or settlement) those parties that are alleged to share some or all of the responsibility for the problems that led SFC to file for CCAA protection. In addition, releases are not being granted to individuals who have been charged by OSC staff, or to other individuals against whom the Ad Hoc Securities Purchasers Committee wishes to preserve litigation claims.

66 In addition to the consideration that is payable to Affected Creditors, Early Consent Noteholders will receive their *pro rata* share of an additional 7.5% of the Newco Shares ("Early Consent Consideration"). Plans do not need to provide the same recovery to all creditors to be considered fair and reasonable and there are several plans which have been sanctioned by the courts featuring differential treatment for one creditor or one class of creditors. See, for example, *Canwest Global Communications Corp., Re* and *Armbro Enterprises Inc., Re* (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.). A common theme permeating such cases has been that differential treatment does not necessarily result in a finding that the Plan is unfair, as long as there is a sufficient rational explanation.

67 In this case, SFC's counsel points out that the Early Consent Consideration has been a feature of the restructuring since its inception. It was made available to any and all noteholders and noteholders who wished to become Early Consent Noteholders were invited and permitted to do so until the early consent deadline of May 15, 2012. I previously determined that SFC made available to the noteholders all information needed to decide whether they should sign a joinder agreement and receive the Early Consent Consideration, and that there was no prejudice to the noteholders in being put to that election early in this proceeding.

68 As noted by SFC's counsel, there was a rational purpose for the Early Consent Consideration. The Early Consent Noteholders supported the restructuring through the CCAA proceedings which, in turn, provided increased confidence in the Plan and facilitated the negotiations and approval of the Plan. I am satisfied that this feature of the Plan is fair and reasonable.

69 With respect to the Indemnified Noteholder Class Action Limit, I have considered SFC's written submissions and accept that the $150 million agreed-upon amount reflects risks faced by both sides. The selection of a $150 million cap reflects the business judgment of the parties making assessments of the risk associated with the noteholder component of the Ontario Class Action and, in my view, is within the "general range of acceptability on a commercially reasonable basis". See *Ravelston Corp., Re* (2005), 14 C.B.R. (5th) 207 (Ont. S.C.J. [Commercial List]). Further, as noted by SFC's counsel, while the New York Class Action Plaintiffs filed a proof of claim, they have not appeared in this proceeding and have not stated any opposition to the Plan, which has included this concept since its inception.

70 Turning now to the issue of releases of the Subsidiaries, counsel to SFC submits that the unchallenged record demonstrates that there can be no effective restructuring of SFC's business and separation from its Canadian parent if the claims asserted against the Subsidiaries arising out of or connected to claims against SFC remain outstanding. The Monitor has examined all of the releases in the Plan and has stated that it believes that they are fair and reasonable in the circumstances.

71 The Court of Appeal in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 45 C.B.R. (5th) 163 (Ont. C.A.) stated that the "court has authority to sanction plans incorporating third party releases that are reasonably related to the proposed restructuring".

72 In this case, counsel submits that the release of Subsidiaries is necessary and essential to the restructuring of SFC. The primary purpose of the CCAA proceedings was to extricate the business of Sino-Forest, through the operation of SFC's Subsidiaries (which were protected by the Stay of Proceedings), from the cloud of uncertainty surrounding SFC. Accordingly, counsel submits that there is a clear and rational connection between the release of the Subsidiaries in the Plan. Further, it is difficult to see how any viable plan could be made that does not cleanse the Subsidiaries of the claims made against SFC.

73 Counsel points out that the Subsidiaries who are to have claims against them released are contributing in a tangible and realistic way to the Plan. The Subsidiaries are effectively contributing their assets to SFC to satisfy SFC's obligations under their guarantees of SFC's note indebtedness, for the benefit of the Affected Creditors. As such, counsel submits the releases benefit SFC and the creditors generally.

74 In my view, the basis for the release falls within the guidelines previously set out by this court in *ATB Financial*, *Nortel Networks Corp., Re*, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]), and *Kitchener Frame Ltd., Re*, 2012 ONSC 234, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List]). Further, it seems to me that the Plan cannot succeed without the releases of the Subsidiaries. I am satisfied that the releases are fair and reasonable and are rationally connected to the overall purpose of the Plan.

75 With respect to the Named Directors and Officers release, counsel submits that this release is necessary to effect a greater recovery for SFC's creditors, rather than having those directors and officers assert indemnity claims against SFC. Without these releases, the quantum of the unresolved claims reserve would have to be materially increased and, to the extent that any such indemnity claim was found to be a proven claim, there would have been a corresponding dilution of consideration paid to Affected Creditors.

76 It was also pointed out that the release of the Named Directors and Officers is not unlimited; among other things, claims for fraud or criminal conduct, conspiracy claims, and section 5.1 (2) D&O Claims are excluded.

77 I am satisfied that there is a reasonable connection between the claims being compromised and the Plan to warrant inclusion of this release.

78 Finally, in my view, it is necessary to provide brief comment on the alternative argument of the Funds, namely, the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants". The Plan was presented to the meeting with Article 11 in place. This was the Plan that was subject to the vote and this is the Plan that is the subject of this motion. The alternative proposed by the Funds was not considered at the meeting and, in my view, it is not appropriate to consider such an alternative on this motion.

Disposition

79 Having considered the foregoing, I am satisfied that SFC has established that:

(i) there has been strict compliance with all statutory requirements and adherence to the previous orders of the court;

(ii) nothing has been done or purported to be done that is not authorized by the CCAA; and

(iii) the Plan is fair and reasonable.

80 Accordingly, the motion is granted and the Plan is sanctioned. An order has been signed substantially in the form of the draft Sanction Order.

Motion granted.

Tab 4

2017 ONCA 553
Ontario Court of Appeal

New Solutions Financial Corporation (Re)

2017 CarswellOnt 10263, 2017 ONCA 553, 280 A.C.W.S. (3d) 464, 49 C.B.R. (6th) 185

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

In the Matter of a Plan of Compromise or Arrangement of New Solutions Financial Corporation, New Solutions Financial (II) Corporation, New Solutions, New Solutions (III) Corporation, New Solutions (IV) Corporation and 2055596 Ontario Limited (Applicants / Respondents in Appeal)

Robert J. Sharpe, P. Lauwers, B.W. Miller JJ.A.

Judgment: June 29, 2017
Docket: CA M47761

Counsel: Catherine Francis, for Appellants, Feldstein & Associates LLP and Warren Feldstein
Neil S. Rabinovitch, for Respondents

***Per curiam*:**

1 The responding parties sought and obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA). Their assets have been monetized and there is no intention to proceed with a restructuring plan. The main remaining asset is a claim for professional negligence against Feldstein & Associates LLP, and Warren Feldstein ("Feldstein"), the principal applicant's former auditor.

2 Feldstein seeks leave to appeal the order of the CCAA judge: (1) extending the stay period from March 30, 2017 to June 30, 2017; (2) approving the Monitor's 23rd report; (3) declaring the litigation trustee, appointed by the court to pursue the litigation against the moving parties, is not in a conflict of interest; and (4) staying the litigation against Feldstein until June 30, 2017.

3 Feldstein raises a number of proposed grounds of appeal:

1. that the pursuit of a lawsuit by an insolvent company on behalf of its secured creditors does not fall within the purpose and scheme of the CCAA;

2. that the CCAA judge ignored evidence of bad faith by the responding parties and others involved in the proceeding;

3. that it was inappropriate to make a declaratory order with respect to the role of the litigation trustee.

4 It is well-established that leave is granted sparingly in CCAA proceedings. The considerations on a leave application are whether:

1. the proposed appeal is *prima facie* meritorious or frivolous;

2. the points on the proposed appeal are of significance to the practice;

3. the points on the proposed appeal are of significance to the action; and

4. the proposed appeal will unduly hinder the progress of the action.

5 In our view, the proposed appeal fails to meet the test for leave to appeal and leave to appeal must be denied.

6 The CCAA judge carefully considered all of the submissions made by Feldstein and provided cogent reasons for the order he made.

7 There is authority for the proposition that a CCAA stay may be extended purposes other than effecting a restructuring and, in our view, the CCAA judge did not err in granting a three-month extension of the stay in the circumstances of this case. In any event, the stay expires on June 30, 2017 and so by the time an appeal could be heard on this issue it would be moot.

8 Feldstein raised objections to the conduct of the litigation trustee in response to the request for an extension of the stay and cannot complain that the CCAA judge ruled on that point.

9 The findings of the CCAA judge, including that the responding parties have acted in good faith and with due diligence and that the litigation trustee is acting in an appropriate manner, are essentially factual in nature and attract deference on appeal. Moreover, those findings do not have sufficient significance to the practice to warrant granting leave.

10 Leave to appeal dismissed is with costs to the responding parties fixed at $2,500 inclusive of disbursements and applicable taxes.

Application dismissed.

Tab 5

2017 ONSC 2472
Ontario Superior Court of Justice [Commercial List]

1511419 Ontario Inc. v. KPMG LLP

2017 CarswellOnt 5770, 2017 ONSC 2472, 278 A.C.W.S. (3d) 468, 47 C.B.R. (6th) 325

1511419 ONTARIO INC. (FORMERLY KNOWN AS THE CASH STORE FINANCIAL SERVICES INC.) (Plaintiff) and KPMG LLP (Defendant)

F.L. Myers J.

Heard: April 12, 2017
Judgment: April 21, 2017
Docket: CV-14-10771-00CL

Counsel: Gerald L.R. Ranking, Dylan Chocla, for Defendant
Megan Keenberg, for Plaintiff
John Fabello, for former independent Directors and Officers of Plaintiff
Matthew Lerner, for former inside Directors and Officers of Plaintiff, Gordon Reykdal and Ed McClelland

***F.L. Myers J.*:**

The Motion

1 The defendant KPMG LLP moves for an order relieving former members of the board of directors of the plaintiff (or its predecessor) Cash Store of their contractual obligation to refuse to "cooperate with, meet with or talk to" KPMG concerning this litigation except under compulsion of a court order or summons to witness.

2 The former directors' contractual obligation to refuse to speak to the defendant is contained in a side letter agreement that was part of a global settlement of litigation that was the centerpiece of the plan of compromise and arrangement of Cash Store under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36.

3 Cash Store (or those who were responsible for its actions at the time) did not disclose the side letter agreement to the defendant, the creditors, or to the Court in the *CCAA* plan approval process.

4 For the reasons that follow, I find that the prohibition against communicating with KPMG contained in the undisclosed side letter agreement is not binding on the former directors of Cash Store. Cash Store required approval of the Court to enter into the side letter agreement. As it did not disclose the side letter agreement to its creditors, KPMG, or to the Court, Cash Store thereby failed to obtain the required Court approval to agree to the side letter agreement. As such, Cash Store lacked authority to enter into the impugned term in the side letter agreement and cannot rely upon it.

The Facts

The Initial Order under the CCAA

5 On April 14, 2014, Regional Senior Justice Morawetz granted an initial order in favour of Cash Store under the *CCAA*. The initial order stayed enforcement actions by creditors against Cash Store and, in return, limited the insolvent Cash Store's

authority to carry on business and to utilize its property without Court approval. See, for example, paras. 4, 6(a), 7, and 10.

The Litigation

6 On November 24, 2014, Cash Store commenced litigation against KPMG who was its former auditor; Cassels Brock & Blackwell LLP its former legal counsel; Canaccord Genuity Corp. its former financial advisor; its former directors and officers; and a number of its lenders.

7 In this action, Cash Store alleges that KPMG committed auditor's negligence concerning the preparation of its financial statements for 2011 through 2013. Cash Store seeks damages of $300 million and disgorgement of KPMG's fees. In its statement of defence, KPMG claims, among other things, that the former directors and officers of Cash Store who retained and instructed the auditors never told them the facts that Cash Store now says ought to have been disclosed in its financial statements. KPMG and the other professional firm defendants assert rights to claim over for contribution and indemnity against former directors and officers of Cash Store.

The Global Settlement

8 In 2015, Cash Store negotiated a global settlement to resolve 22 pieces of litigation brought by and against it. The global settlement included a resolution of Cash Store's claim against its former directors and officers. Under that settlement, the directors and officers insurer agreed to pay substantial funds towards the resolution of Cash Store's litigation. As a CCAA debtor, Cash Store required approval of the Court to enter into the global settlement.

9 The global settlement was the centerpiece of Cash Store's plan of compromise and arrangement under the *CCAA*. Cash Store required the approval of its plan of compromise and arrangement by both its creditors and the Court under the statute.

10 Cash Store's claims against KPMG, Canaccord Genuity, and Cassels Brock were not settled in the global settlement. Under the terms of Cash Store's plan of compromise and arrangement, those claims would continue and would be carried by a Litigation Trustee and Litigation Counsel on behalf of creditors.

11 The settlement against the former directors and officers is said to require them to cooperate with Cash Store in the prosecution of its ongoing litigation. Cash Store's evidence is that the cooperation covenants were memorialized in a side letter agreement dated September 22, 2015 at the request of the former directors and officers.

12 On this motion, KPMG sought production of the side letter agreement. Cash Store has declined to produce it. Instead, it has disclosed a redacted version. The terms that are disclosed provide that the side letter agreement is conditional upon the approval of the global settlement and Cash Store's plan of compromise and arrangement. The only substantive term disclosed from the side letter agreement provides:

> The former directors and officers will] not directly or indirectly through their representatives or counsel, cooperate with, meet with or talk to any party to any of the Estate Claims other than Cash Store, for the purpose of, or with the effect of, addressing the Estate Claims or any matter at issue therein, unless compelled to do so by court order or summons to witness from a court of competent jurisdiction and in the event of such compulsion shall notify the Litigation Trustee and Litigation Counsel in writing

13 Although referred to throughout their materials and before me as "cooperation obligations," Cash Store has not disclosed any terms of the side letter or any agreement that impose obligations on its former directors and officers to cooperate with it or to positively help Cash Store in its ongoing litigation against KPMG or the other professional firm defendants.

Cash Store Agrees to a Pierringer Agreement and to Provide Third Party Releases

14 Cash Store included a *Pierringer* provision and third party releases in favour of the former directors and officers as terms of the global settlement and its plan of compromise and arrangement. These provisions are designed to protect the former directors and officers by preventing claims over being made against them by KPMG and the other remaining professional firm defendants. The *Pierringer* agreement also required approval of the Court.

15 *Pierringer* agreements have been recognized as very helpful methods to advance settlements in complex lawsuits. The Supreme Court of Canada has approved of the use of *Pierringer* agreements as long as the terms proposed are fair and avoid possible prejudice associated with these types of agreements. *Sable Offshore Energy Inc. v. Ameron International Corp*., [2013] 2 S.C.R. 623, 2013 SCC 37 (S.C.C.) (CanLII), at paras 24 to 27.

16 Promoting settlement while preserving the fairness of the ongoing litigation process to the remaining parties is at the heart of *Pierringer* agreement approval. In *Sable*, the Supreme Court of Canada was satisfied with the fairness of the process because, in that case, the terms of the *Pierringer* agreement were fully disclosed and protections were provided for disclosed concerns in order to ensure that the defendants in that case would be able to fairly "know and present their case."

17 In this case, the side letter agreement was not disclosed. Based on what was disclosed, KPMG and the other professional firm defendants objected and negotiated terms referred to as the Non-Party Protocol. The Non-Party Protocol requires the former directors and officers of Cash Store to produce relevant documents for discovery and binds them and Cash Store not to oppose a motion by any of the remaining defendants if any of them wish to examine a former director or officer for discovery. It also binds the former directors and officers to respond to a summons to witness for trial if one is served upon their counsel. Most of the former directors and officers reside outside of Ontario. The latter provision therefore saved significant time and expense that would have been necessary in attempting to summon witnesses for trial under the *Interprovincial Summonses Act*, RSO 1990, c I.12 or to arrange for commission evidence to be taken outside of Ontario.

18 As Cash Store did not disclose the term of the side letter agreement prohibiting the former directors and officers of Cash Store from communicating with KPMG and the remaining professional firm defendants, no one had an opportunity to object or to make submissions as to whether the inclusion of that term as part of the *Pierringer* agreement was lawful, fair, or caused avoidable prejudice.

Approval of the Plan

19 Cash Store submits in para. 20 of its factum that with the Non-Party Protocol in place, KPMG, Cassels Brock, and Canaccord withdrew their objections to its plan of compromise and arrangement so that the plan (including the global settlement and the *Pierringer* agreement) was approved by the Court on November 19, 2015.

20 In para. 29 of its factum in support of the approval of its plan of compromise and arrangement, Cash Store submitted that, "[t]he settlements are central to the resolution of these CCAA proceedings and are highly interconnected." It confirmed in para. 30 of its factum that it was a condition precedent of each settlement that the plan of compromise and arrangement be approved with the third party releases in favour of its former directors and officers among others as sought.

21 At para. 78 of its factum in support of the approval of its plan of compromise and arrangement, Cash Store described the consideration that it received from its former directors and officers as consisting of: a cash payment, cancellation of a related security, and:

> (c) the cooperation of the D&Os in the prosecution of the Applicants' Remaining Estate Actions for the potential benefit of the Applicants' creditors.

22 Cash Store led no evidence on the approval motions to support that submission in its factum.

KPMG Asks to Meet Directors with their Counsel

23 KPMG has moved for summary judgment to dismiss parts of Cash Store's remaining claims against it in this action.

KPMG's counsel contacted the lawyer for the former directors to request a meeting with a former director, Mr. Mondor, and possibly others, to discuss the facts concerning Cash Store's receipt in 2012 of certain correspondence referred to by KPMG as the "Whistleblower Letters." Counsel for the former Directors advised counsel for KPMG that the former directors could not meet with them due to obligations that they had undertaken to Cash Store. Counsel for KPMG wrote to Litigation Counsel for Cash Store and asked for production of the agreement that prevented the former directors from meeting him (now known to be the side letter agreement) and to ask for the release of the former directors from its terms. Litigation Counsel refused both requests.

Analysis

24 As pleaded, 10 of the 13 former directors of Cash Store reside in Alberta. One resides in British Columbia and one in Ontario. KPMG argues that requiring it to execute inter-provincial summonses for all of them just to talk to them to collect evidence and possibly seek affidavits from them adds cost and delay to the litigation that is contrary to the goals of the civil justice system recognized by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.). KPMG argues that Cash Store has no legitimate business rationale for gagging its former directors and officers. Rather, Cash Store just seeks to run up the cost and cause needless delays in the litigation for KPMG and the other professional firm defendants. KPMG is willing to meet with the former directors with their counsel and understands that to the extent that the former directors have confidentiality obligations concerning confidential information, that information is legitimately withheld at the pre-trial stage at least.

25 KPMG relies upon the decision of Lord Denning in *Harmony Shipping Co. S.A. v. Saudi Europe Line Ltd.*, [1979] 3 All E.R. 177 (Eng. C.A.) at 180

> So far as witnesses of fact are concerned, the law is as plain as it can be. There is no property in a witness. The reason is because the court has a right to every man's evidence. Its primary duty is to ascertain the truth. Neither one side or the other can debar the court from ascertaining the truth either by seeing a witness beforehand or by purchasing his evidence or by making communication to him. In no way can one side prohibit the other from seeing a witness of fact, from getting the facts from him or from calling him to give evidence or from issuing him with a subpoena.
>
> [Emphasis added.]

26 See also *Versloot Dredging BV v. HDI Gerling Industrie Versicherung AG*, [2013] EWHC 581 (Eng. Comm. Ct.) at paras 19, 22, and 27.

27 Cash Store argues that in 2015 it negotiated settlements to 22 different pieces of litigation including the claim against its former directors and officers. In doing so, it settled and exhausted is former directors' and officers' insurance policy. The settlements were the product of extensive negotiations and multiple mediation efforts. They included releases and *Pierringer* agreements. Ms. Keenberg acknowledged that the settlements required Court approval even if they had not been contained in Cash Store's plan of compromise and arrangement.

28 Ms. Keenberg submitted that obtaining cooperation obligations from the former directors and officers was part of consideration that made up the global settlement and was part of Cash Store's plan of compromise and arrangement. The cooperation obligations were referred to para. 78 (c) of the factum supporting the motion. When KPMG objected to the terms initially proposed for the *Pierringer* agreement, the Non-Party Protocol was negotiated to resolve KPMG's concerns. The law does not require that a *Pierringer* agreement always include terms like the Non-Party Protocol. It was a concession to KPMG and the other remaining professional firm defendants.

29 Ms. Keenberg notes that there is no suggestion in the side letter agreement that any former director or officer will not be available to testify. The agreement expressly confirms that the former directors and officers will testify if summoned or otherwise ordered to do so. She argues that there is no question of suppressing testimony or any basis to find the terms of the side letter agreement to be contrary to law or public policy, unfair, or prejudicial.

30 Ms. Keenberg submits that it would be unprecedented were the Court to deprive a CCAA debtor of part of the

consideration that it obtained under its approved plan of compromise and arrangement. In this case, the former directors' and officers' documents are being preserved as agreed. Summonses for trial can be served on Ontario counsel. KPMG does not have these rights against other third parties. They are part of a contractual arrangement which should not be ignored by the Court.

31 Cash Store relies upon case law in which courts have held that there is no obligation on a potential witness to agree to be interviewed out of court. See, for example, the Alberta Court of Appeal decision in *M. (N.) v. Drew Estate*, 2003 ABCA 231 (Alta. C.A.), at para. 12. As a general rule, I have no doubt that is correct. Cash Store argues that this answers KPMG's motion. KPMG has no right to compel any witness to speak to it, so it has no say in the issues between Cash Store and its former directors and officers as embodied in the side letter agreement.

32 The inside directors, represented by Mr. Lerner, argue that the former directors have the sole rights to determine if they will cooperate with any party in litigation. The question of whether witnesses wish to speak to parties is not covered by the *Rules of Civil Procedure* and it is wholly outside of this Court's jurisdiction. Mr. Lerner distinguishes issues of documentary and oral discovery and evidence at trial, on the one side, from interviews with witnesses on the other. All of the former matters are governed by the *Rules of Civil Procedure* and occur under the general auspices of the Court. But the right to cooperate and be interviewed out of court is a right of each witness and is his or her right to bargain away as he or she sees fit.

33 Mr. Lerner argues further that the terms as between his clients and Cash Store as to cooperation and non-cooperation were not part of the *Pierringer* agreement and were not before the Court for approval at all. This is directly contrary to the submission made by Ms. Keenberg, Cash Store's factum on the *Pierringer* agreement, global settlement, and plan approval motion and Mr. Aziz's affidavit before me.

34 Mr. Lerner argues that approval of the *Pierringer* agreement did not prejudice KPMG or the other remaining professional firm defendants in that they never had the right to interview the formers directors and officers informally out of court. Therefore the prohibition against speaking did not require Court approval as part of the *Pierringer* agreement. Similarly, the Non-Party Protocol did not require Court approval. By contrast, to obtain third party releases, the former directors and officers were required to tell the Court the consideration that they provided to the debtor. That explains why emphasis was placed on the "cooperation obligations" in para. 78 (c) of the factum supporting plan approval. But the agreement to refrain from speaking to KPMG did not form part of the consideration for the third party releases so it stands on a different footing that is outside of the proper scope of the Court's regulation or review.

35 There were three overlapping Court approval motions at play in November:

a. The *Pierringer* agreement;

b. The global settlement agreement; and

c. Cash Store's plan of compromise and arrangement.

36 *Pierringer* agreements require Court approval in the context of the ongoing litigation to which they apply. They entail a dismissal of proceedings against some defendants and a reconstitution of the claims to assert several liability rather than joint liability against the remaining defendants. In this case, KPMG had not yet commenced its third party claims against the former directors and officers. The *Pierringer* terms and third party releases were intended to prevent that from happening. The issue on the *Pierringer* agreement approval motion was whether the pro-settlement purpose of the agreement fairly offsets any potential prejudice caused by the agreement to the remaining defendants' ability to "know and present their case."

37 While ordinarily non-parties have no duty to cooperate with parties to litigation, they are also ordinarily not prohibited from doing so. What was being proposed was to add a layer of legal obligation, a gag order, that made the former directors and officers quite different than ordinary non-parties. The lawfulness of such a provision is not at all clear. But I do not need to rule on that broad point on this motion.

38 The issue that was before the Court for approval was the fairness of the remaining litigation process as it was affected

by the *Pierringer* agreement. In my view, it does not matter that the gag proposed is not addressed specifically by the *Rules of Civil Procedure*. Mr. Lerner tried to create a distinction between processes that fall under the *Rules* and those that are outside. He argued that the Court had no jurisdiction treading on his clients' rights to bargain about matters outside the *Rules of Civil Procedure*. In my view, that is a clever argument but it raises a straw man. The issue was not whether a matter was covered by the *Rules*. As stated above, the issue was the fairness of the remaining litigation process as it was affected by the proposed *Pierringer* terms. The ability to interview witnesses to obtain evidence and affidavits for motions or trial is certainly an aspect of the litigation process. It is not one specifically covered by the *Rules*, but that does not prohibit consideration of it under a general assessment of fairness or a balancing of proposed settlement terms against the equitable treatment of the defendants. The *Rules* are not a complete code for the management of lawsuits before this Court. The Court retains the inherent jurisdiction to control its process specifically in relation to matters where a gap exists in applicable legislation. *Stelco Inc., Re* [2005 CarswellOnt 1188 (Ont. C.A.)], 2005 CanLII 8671, at para. 35. In assessing the balance of the equities under the *Pierringer* agreement, it was relevant to the remaining defendants and to the Court to know that while the former directors and officers were agreeing to provide "procedural access" recited in the Non-Party Protocol, they had also gagged themselves from talking to the remaining defendants otherwise. That term directly affects the way the remaining defendants will both get to know and present their cases (to borrow the phrase used by the Supreme Court of Canada in *Sable*).

39 For the purposes of this motion, I agree with Cash Store, that the terms of the side letter agreement were part and parcel of the *Pierringer* agreement, the global settlement, and the plan. The creditors who by then were acting for Cash Store ought therefore to have put the side letter agreement before the Court for approval. They did not do so. Accordingly, the gag term of the side letter agreement relied upon by Cash Store was not approved as part of the *Pierringer* Agreement granted by the Court.

40 In paras. 82 to 88 of its factum filed for approval of its plan of arrangement and compromise, Cash Store discussed approval of settlements under the applicable case law dealing with settlements between a *CCAA* debtor and third parties. Among the cases upon which it relied was the decision of Farley J. in *Air Canada, Re* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]). In that case Farley J. adopted the "fair and reasonable" test for the approval of settlements as set out by MacEachern, CJBC in *Northland Properties Ltd., Re* [1989 CarswellBC 334 (B.C. C.A.)], 1989 CanLII 2672. In that case, the B.C. Court of Appeal was required to comment on a side deal entered into between a creditor and the debtor under which the creditor's claim was settled. The Court wrote:

> [30] There is no doubt that side deals are a dangerous game and any arrangement made with just one creditor endangers the appearance of the bona fides of a plan of this kind and any debtor who undertakes such a burden does so at considerable risk. In this case, however, it is apparent that this agreement was not made for the purpose of ensuring a favourable vote because at the time the deal was struck the companies had not reached an accommodation with the bank. I think the companies were negotiating, as businessmen do, on values for the purpose of putting a plan together.
>
> [31] Further, the arrangement with Relax was fully disclosed in the plan. This does not ensure its full absolution if it was improper, but at least it removes any coloration of an underhanded or secret deal...
>
> [Emphasis added.]

41 Prior to his appointment to the bench, the great jurist Justice Louis Brandeis wrote the following words that remain as vibrant and applicable today as when they were written over 100 years ago:

> If the broad light of day could be let in upon men's actions, it would purify them as the sun disinfects.[1]

42 Disclosure to interested parties and to the Court of the terms for which approval is sought or mandated is a minimum requirement. *CCAA* debtors are supervised by the Court under the watchful eyes of their creditors and other interested parties. Transparency is a part of the *quid pro quo* that comes with enjoying the protections of the *CCAA*. This is reflected in the Monitor's role as the Court's eyes and ears, its power to access all information and records of the debtor, its obligation to report to the Court periodically, and the Monitor's specific obligation to provide information concerning the debtor and its restructuring efforts upon request. See paras. 32, 33 (f) and 36 of Cash Store's initial order.

43 Moreover, transparency obligations flow from the public nature of Court proceedings.

44 At the hearing of the motion before me, counsel for Cash Store submitted that para. 78 (c) of its factum on the global settlement and plan approval motion amounted to disclosure of the side letter agreement to the Court. Nothing in the sentence disclosed in the factum alerted the Court, the creditors, or KPMG to the fact that, as part of the global settlement and *Pierringer* terms proposed, Cash Store had purported to obtain an agreement by its former directors and officers that they would not talk to the remaining defendants without a summons to witness or court order. Euphemistic references to "cooperation obligations" at the oral hearing of the plan approval motion as attested to by Mr. Aziz were equally no disclosure at all of the gag provision of the side letter agreement. Accordingly, I find that Cash Store did not disclose the impugned provision of the side letter to the parties or to the Court in respect of the motions to approve the global settlement or Cash Store's plan of compromise and arrangement.

45 I do not agree with Mr. Lerner's effort to parse some terms which he says were relevant to the third party releases and were required to be disclosed and others which he says were not. It was not up to the debtor and the former directors and officers to decide if the remaining professional firm defendants should or would object to the proposed terms. Nor were they entitled to withhold disclosure of terms that could be relevant to the balancing of prejudices and the assessment of the overall lawfulness, fairness, and reasonableness of the terms for which the Court's approval was required under the *CCAA*.

46 Secret side deals are not consistent with the transparency required of a CCAA debtor or with a public, Court-based process.

47 It follows that I reject Ms. Keenberg's submission that the Court's approval of the the global settlement, the *Pierringer* agreement, and Cash Store's plan of compromise and arrangement included approval of the undisclosed term of the side letter agreement prohibiting the former directors and officers from communicating with KPMG and the remaining professional firm defendants except under summons or Court order. Accordingly, Cash Store had no authority to enter into that term as part of an agreement. Therefore, Cash Store cannot rely upon or enforce the impugned term and it does not bind the former directors and officers.

48 I make no finding as to if or how this holding affects the approvals that Cash Store has obtained of the *Pierringer* agreement, the global settlement, and its plan of compromise and arrangement. While the Court is cognizant of counsel's submission that this outcome could have an effect on prior approvals purportedly obtained, if approval of the side letter agreement was required for any of those approvals to be effective, then it was incumbent on those in charge of Cash Store to seek the approval of the side letter agreement by proper means at that time.

Costs

49 The parties agreed that the successful party should be entitled to $5,000 in costs. Cash Store shall therefore pay KPMG LLP $5,000 in costs all-in forthwith. No other costs were sought or are awarded.

Order

50 Order to go in terms of para. 1 of KPMG's notice of motion dated March 24, 2017. KPMG does not need the Court's permission to seek to interview former directors as sought in the notice of motion. If case management directions are sought concerning processes to obtain evidence from former directors and officers or as to scheduling of the action, the parties are always at liberty to convene a 9:30 appointment under the *Practice Direction* and Rule 50.13.

Motion granted.

Footnotes

[1] *Brandeis and the History of Transparency*, online: Sunlight Foundation <https://sunlightfoundation.com/2009/05/26/brandeis-and-the-history-of-transparency/>

Tab 6

2010 ONSC 3306
Ontario Superior Court of Justice

1014864 Ontario Ltd. v. 1721789 Ontario Inc.

2010 CarswellOnt 4183, 2010 ONSC 3306, [2010] O.J. No. 2624, 190 A.C.W.S. (3d) 37

1014864 ONTARIO LIMITED (Plaintiff) AND 1721789 ONTARIO INC., DAVID MEHRASA, PHILLIPS-VAN HEUSEN CORPORATION and SUPERSIGN GAMMA INC. (Defendants)

Master Dash

Heard: June 3, 2010
Judgment: June 18, 2010
Docket: 07-CV-337088

Counsel: Edward Tonello for Plaintiff, 1014864 Ontario Ltd. in action 07-CV-337088
Alvin Meisels for 1721789 Ont. Inc., Defendants, Mehrasa in action 07-CV-337088, Plaintiffs in action CV-10-400470
Michael Tweedie for 1721789 Ont. Inc., Plaintiffs, Mehrasa in action CV-09-383666
R. Leigh Youd for Defendant, Bernstein in action CV-09-383666
Howard Reininger for Defendants, 985091 Ont. Ltd., Gidda in action CV- 10-400470

***Master Dash*:**

1 In this action a property owner was sued by his neighbour in nuisance for allowing a large display sign, erected without a permit, to block the view of the neighbour's sign. The property owner commenced a separate action in negligence against the lawyer who represented him on the purchase of the property for failing to ensure the sign was lawful and for failing to ascertain that a portion of the property would be subject to expropriation. The property owner commenced a further separate action against the vendor of the property for misrepresentations about the pending expropriation.[1] The property owner moves to have all three actions consolidated or tried together. The motion is supported by the neighbour, but opposed by both the vendor and the lawyer.

Background

2 In January 2007, 1721789 Ont. Inc. ("172") purchased from 985091 Ontario Ltd. ("985") a property known as 175 Welland Ave. (the "Property") in Toronto containing a coin car wash. 985 took back a vendor's mortgage for part of the purchase price. 172 and its principal Navid Mehrasa are referred to collectively in these reasons as the "Purchaser".[2] 985 and its principal Gurcharan Gidda are referred to collectively in these reasons as the "Vendor".[3] Part of the purchase price included assignment of a long term lease for a large display advertising sign, or billboard, in which Supersign Gamma Inc. ("Supersign") was lessee. The lease for the billboard had been executed between the Vendor and Supersign and the foundation for the sign created prior to the purchase, but the sign was erected shortly after the closing. Rent was paid for the sign commencing March 2007. The sign advertised businesses not located on the premises including Van Heusen Shirts ("Van Huesen"). It appears that the sign was erected without a permit from the Ministry of Transportation and contravened Ministry setback requirements. Lawyer Daniel Bernstein (the "Lawyer") represented the Purchaser on the purchase.

3 The neighbouring property, 1885 Wilson Avenue ("Neighbouring Property") was owned by 1014864 ("101"), referred to herein as the "Neighbour". A Remax real estate office is located on the Neighbouring Property and a sign was erected

thereon, with a proper permit, advertising the Remax location. It is alleged that the display sign on the Property impeded the view of the Remax sign on the Neighbouring Property.

4 Certain events took place in relation to the Property as the litigation progressed. Supersign defaulted on rent payments for the billboard in June 2007 and the display portion of the sign was taken down in May 2008. In April 2009 the Purchaser received a notice of expropriation respecting part of the Property for purposes of highway expansion. The Purchaser defaulted on the mortgage back and following summary judgment in favour of the Vendor on the mortgage in July 2009, the Purchaser surrendered possession of the Property back to the Vendor. The Vendor ultimately sold the Property in April 2010. These events will be discussed further in the context of the various court proceedings.

The Court Actions

(a) The Nuisance Action

5 On July 23, 2007 the Neighbour commenced action 07-CV-337088 (the "Nuisance Action") against the Purchaser based on both nuisance and negligence because the billboard on the Property blocked the Remax sign on the Neighbouring Property. It is alleged that the billboard was erected without a permit and was contrary to Ministry guidelines prohibiting signs that block the view of a commercial establishment or an approved sign. The Neighbour sought damages and an injunction against the Purchaser. The Neighbour also named Van Huesen as a defendant, but that claim was disposed of in May 2008 and in February 2009 Supersign was added as a defendant by Master Glustein.[4] Supersign has never defended and although not noted in default is said to be insolvent. The Purchaser filed a statement of defence and crossclaim (against Supersign) in January 2009, which it amended in July 2009. As part of its defence the Purchaser denied the sign impeded the view of the Neighbour's sign, pleaded that the sign was lawful and that the Vendor and Supersign represented that a permit application had been submitted. The Purchaser at no time issued a third party claim against either the Vendor or against the Lawyer.

(b) The First Vendor Action

6 On January 2, 2008 the Purchaser commenced action 08-CV-346437 against the Vendor ("First Vendor Action") claiming damages for breach of warranties and misrepresentations respecting the obtaining of a permit for the sign (and with respect to revenue from the car wash) as well as contribution and indemnity with respect to losses in the Nuisance Action. The Vendor denied the misrepresentations, stated that the sign was erected after closing and that the Purchaser had independent legal advice. The Vendor alleged that the vendor take-back mortgage was in default and counterclaimed for the amount due on the mortgage and possession. The Purchaser in reply pled that the Vendor was not entitled to payments on the mortgage as a result of its fraud and misrepresentations. The Vendor brought a motion for summary judgment and by reasons dated July 16, 2009 and supplementary reasons dated September 21, 2009 Strathy J. dismissed the Purchaser's action and granted judgment on the Vendor's counterclaim. In so doing he held there was no basis to assert any misrepresentations as to revenue from the car wash, which in any event merged on closing. He also determined that there was no evidence of a representation as to the validity of the sign or that the Vendor knew it was unlawful and that the Purchaser knew or should have known when the sign was erected after closing that Supersign had not obtained a permit.[5] He held that the Purchaser permitted the erection of the sign after closing without ensuring Supersign obtained the necessary approvals and that if either the Purchaser or its lawyer failed to do due diligence it has itself to blame.[6] Strathy J. acknowledged that "at best" the Purchaser "may have a claim against the [Vendor] for indemnity for any damages awarded in the [Nuisance] Action"[7] and that the Purchaser was free to assert a third party claim in the Nuisance Action,[8] "something that the [Purchaser] indicated that it intended to do."[9] It is noteworthy that despite such invitation the Purchaser has never issued a third party claim against the Vendor in the Nuisance Action.

7 During the course of the First Vendor Action, in or about April 2009 the Purchaser was served with a notice of expropriation of a part of the Property to facilitate highway widening. Strathy J. held there was no pleading of misrepresentation respecting the expropriation but even if it had been pled there was no evidence to establish either that expropriation had been planned at the time of closing or that the Vendor was aware of any planned expropriation.[10] He held it could not be a defence to the counterclaim on the mortgage. On the other hand, Strathy J. noted that the expropriation issue was "not an issue properly before [him] on the motion, as it had not been pleaded" and while he "found it could not be a

defence to the counterclaim in any event, [he] did not deal with it in any other respect".[11] For example Strathy J. did not determine whether it could form a basis for a claim for damages against the Vendor.

8 The Court of Appeal dismissed the Purchaser's appeal on January 12, 2010 and on the sign issue stated "there was no evidence to support the appellant's claim that the respondent had breached any representation or warranty contained in the closing documents...regarding the sign and the lease for the sign."[12] Possession of the Property was subsequently surrendered to the Vendor.

(c) The Solicitor's Negligence Action

9 The Purchaser also commenced action CV-09-383666 against the Lawyer on July 23, 2009 (the "Solicitor's Negligence Action"). The Purchaser pleads that the Lawyer was negligent by failing to confirm that all necessary permits for the sign had been obtained and failing to inquire as to planned or pending expropriations. The Purchaser claims by way of damages "loss of rental income from the advertising sign" and "loss of revenue from the car wash business caused by the denial of access to a section of the Property due to...expropriation." The Purchaser did NOT claim against the Lawyer for contribution and indemnity for the damages and costs claimed against the Purchaser in the Nuisance Action. The Lawyer pleads by way of defence that he took all reasonable steps within the standards of a reasonably competent lawyer, that if the sign was illegal the Purchaser's rights are against the Vendor and that the Purchaser will be compensated by the expropriating authorities. The Lawyer does NOT plead that the sign is lawful.

(d) The Second Vendor Action

10 Finally, on April 6, 2010 the Purchaser commenced a second action against the Vendor (action CV-10-400470) for a declaration that the agreement of purchase and sale is rescinded or damages in the alternative plus punitive damages as a result of false representations about the planned expropriation ("the "Second Vendor Action.") The Purchaser pleads that information indicating that the Vendor likely had prior knowledge of the pending expropriation did not come to its attention until February 2010. The Vendor has yet to deliver a statement of defence. It may bring a summary judgment motion.

The Status of the Actions

11 In the Nuisance Action, discovery has been completed and a status hearing was adjourned to August 11, 2010 pending the results of this motion. If the actions are not joined, the Nuisance Action is ready to be set down for trial subject to an agreement on a mediator and mediation date to satisfy the requirements of the new Toronto Practice Direction. Supersign will also have to be noted in default before a trial record can be filed. The Solicitor's Negligence Action is almost 10 months old and has not progressed beyond pleadings. There has been no exchange of affidavits of documents and no examinations for discovery. The Second Vendor Action is four months old and no defence has yet been delivered. There may be a summary judgment motion.

12 I note that the Purchaser is represented by the Blaney McMurtry firm in the Nuisance Action and in both the First and Second Vendor Actions; however it is represented by the Drudi Alexiou Kuchar firm in the Solicitor's Negligence Action.

The Motion

13 The Purchaser (by its lawyers Blaney McMurtry) moves before me for consolidation or trial together of the Nuisance Action, the Solicitor's Negligence Action and the Second Vendor Action. The Purchaser really seeks trial together rather than a formal consolidation. The motion is supported by the Purchaser's other lawyers and by the Neighbour. It is opposed by the Vendor and by the Lawyer. If the Nuisance Action is not joined the Purchaser (both law firms) and the Lawyer support trial together of the Second Vendor Action and the Solicitor's Negligence Action, but this is opposed by the Vendor. (This alternate order would not involve the Neighbour.)

The Law

14 The motion is brought under rule 6.01 which provides:

6.01(1) Where two or more proceedings are pending in the court and it appears to the court that,

(a) they have a question of law or fact in common;

(b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or

(c) for any other reason an order ought to be made under this rule, the court may order that,

(d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or

(e) any of the proceedings be,

(i) stayed until after the determination of any other of them, or

(ii) asserted by way of counterclaim in any other of them.

(2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay...

15 The motion is also to be informed by section 138 of the Courts of Justice Act which states:

> 138. As far as possible, multiplicity of legal proceedings shall be avoided.

However "this does not mean that there may be an indiscriminate joinder of parties, and of causes of action, but it indicates the spirit in which such a matter...is to be approached."[13]

16 Counsel have provided me with several cases dealing with bifurcation of issues within a single action (for example severing issues of liability and damages). The oft-quoted statement by the Court of Appeal in *Elcano* on a bifurcation motion that "it is a basic right of a litigant to have all issues in dispute resolved in one trial"[14] may also apply to a motion to consolidate or order trial together of several separate actions provided of course that the issues in the various actions to be resolved in one trial are sufficiently related. Several court decisions dealing with bifurcation set out a list of factors that the court should consider in determining whether severance of issues and ordering separate trials for each issue is just and expeditious.[15] Counsel has submitted that the court adapt the same list of factors in determining whether to order trial together of separate actions. In my view, considerations for bifurcating issues in an action are not necessarily applicable to a motion for consolidation or trial together of two or more actions, although they may provide some guidance. Other court decisions have referenced some relevant considerations in exercising the court's discretion to order trial together, although I have not been provided with any decision summarizing the factors courts have considered on such motions.

17 In my view the proper approach on a motion for consolidation or trial together is to first ascertain whether the moving party has satisfied one or more of the three "gateway" criteria set out in rule 6.01(1)(a), (b) or (c) and then consider all relevant factors as well as section 138 of the *Courts of Justice Act* which directs the court to avoid a multiplicity of proceedings whenever possible, in order to exercise the court's discretion and make such order as is just. I will attempt to set out a list of factors courts have considered on motions for trial together as well as some of the "bifurcation factors" modified appropriately to reflect that this is a motion to try actions together, not sever issues within an action. I point out that the list that follows are considerations for ordering trial together of various actions, which is the relief sought on this motion, and not full consolidation of various actions,[16] for which some different factors may apply.

18 A non-exhaustive list of some of the considerations on ordering trial together may, depending on the circumstances,

include:

> (a) the extent to which the issues in each action are interwoven;
>
> (b) whether the same damages are sought in both actions, in whole or in part;
>
> (c) whether damages overlap and whether a global assessment of damages is required;
>
> (d) whether there is expected to be a significant overlap of evidence or of witnesses among the various actions;
>
> (e) whether the parties the same;
>
> (f) whether the lawyers are the same;
>
> (g) whether there is a risk of inconsistent findings or judgment if the actions are not joined;
>
> (h) whether the issues in one action are relatively straight forward compared to the complexity of the other actions;
>
> (i) whether a decision in one action, if kept separate and tried first would likely put an end to the other actions or significantly narrow the issues for the other actions or significantly increase the likelihood of settlement;
>
> (j) the litigation status of each action;
>
> (k) whether there is a jury notice in one or more but not all of the actions;
>
> (l) whether, if the actions are combined, certain interlocutory steps not yet taken in some of the actions, such as examinations for discovery, may be avoided by relying on transcripts from the more advanced action;
>
> (m) the timing of the motion and the possibility of delay;
>
> (n) whether any of the parties will save costs or alternatively have their costs increased if the actions are tried together;
>
> (o) any advantage or prejudice the parties are likely to experience if the actions are kept separate or if they are to be tried together;
>
> (p) whether trial together of all of the actions would result in undue procedural complexities that cannot easily be dealt with by the trial judge;
>
> (q) whether the motion is brought on consent or over the objection of one or more parties.

Analysis

19 I first consider whether the actions have a question of law or fact in common (rule 6.01(1)(a)) or if the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences (rule 6.01(1)(b)).

(a) Relief Arising out of the Same Transactions or Occurrences: Rule 6.01(1)(b)

20 With respect to rule 6.01(1)(b) the Purchaser argues that what ties the three actions together is a common transaction, namely the purchase of the Property. I agree that the purchase of the Property is the transaction that gives rise both to the Second Vendor Action, where the Purchaser alleges misrepresentations and breach of warranty on the purchase respecting the pending expropriation, and the Solicitor's Negligence Action, where the Purchaser alleges that its lawyer was negligent when representing it on the purchase by failing to ascertain that an expropriation was pending and by failing to ascertain that a permit had not been obtained for the sign. The purchase of the Property on the other hand, has no bearing on the Nuisance Action, which has its origin in the erection of the offending sign after the sale to the Purchaser closed and its continued

impingement on the Neighbour's sign. The Nuisance Action involves dealings between the Purchaser and the Neighbour. The dealings between the Purchaser and Vendor or between the Purchaser and Lawyer have no bearing on the issues between the Purchaser and the Neighbour. In fact, the Second Vendor action is not concerned with the sign issue at all, only the expropriation issue.

21 Furthermore the rule requires that "the relief claimed" in each action arise out of the same transaction. The relief claimed in the Second Vendor Action, setting aside the agreement of purchase and sale and damages arising from the expropriation, and the relief claimed in the Solicitor's Negligence Action, loss of income arising from the expropriation and from being unable to draw income from the offending sign both arise from the purchase of the Property and the misrepresentations of the Vendor about a pending expropriation and the negligence of the Lawyer in failing to ascertain the pending expropriation and the fact that there was no permit for the sign. The relief claimed in the Nuisance Action is damages to the Neighbour and arises from the Purchaser's billboard blocking his own sign. It is particularly noteworthy that in neither the Second Vendor Action nor the Solicitor's Negligence Action does the Purchaser claim contribution and indemnity for any costs or judgment that may be awarded against it in the Nuisance Action. It is also worth noting that the Purchaser had an opportunity to issue a third party claim against either or both of the Vendor or Lawyer in the Nuisance Action for contribution and indemnity for any damages that the Neighbour may recover against the Purchaser for the offending sign, but failed to do so.

22 Interestingly, the "relief claimed" in the First Vendor Action did include a claim for contribution and indemnity for any costs or judgment awarded against it in the Nuisance Action as a result of the offending sign. The First Vendor Action did not raise the expropriation issue. There would have been a strong argument to tie the Nuisance Action and the First Vendor Action together in a common trial, but no motion for trial together had been brought and the First Vendor Action has now been dismissed on a summary judgment motion.

23 I therefore conclude that the relief claimed in the Nuisance Action does not arise from the same transaction, occurrence or series of transactions or occurrences as the Second Vendor Action or the Solicitor's Negligence Action. On the other hand the relief claimed in the Second Vendor Action and the Solicitor's Negligence Action both arise out of the same transaction - the purchase of the Property.

(b) Common Question of Fact or Law: Rule 6.01(1)(a)

24 I next consider whether the three actions have a question of law or fact in common within the meaning of rule 6.01(1)(a). There are no issues of fact or law in common between the Nuisance Action and the Second Vendor Action. The first involves the Neighbour's damages arising from an offending sign and the second involves damages, primarily loss of income, suffered by the Purchaser from a failure to disclose a pending expropriation. There potentially could have been an issue of mixed fact and law between the Nuisance Action and the Solicitor's Negligence Action, namely, was the sign unlawful? The Lawyer however, does not defend his action on the basis that the sign was not unlawful. Rather, he claims whether or not there was a permit and whether or not the sign complied with Ministry requirements, he complied with the appropriate standard of care and that if the sign was illegal the Purchaser's rights are against the Vendor. Based on the current pleadings, Mr. Youd, the lawyer for the Lawyer, has undertaken to the court that he will not challenge the legality of the sign at trial in his action and is content that the Lawyer be bound by any findings in that regard made by the court in the Nuisance Action. Further, any breach of duty by the Lawyer in failing to determine the absence of a permit for the sign is not a fact in issue in the Nuisance Action, and whether the sign has caused problems to the Neighbour is not a fact in issue in the Solicitor's Negligence Action.

25 I therefore conclude that the Nuisance Action does not have an issue of fact or law in common with either the Second Vendor Action or the Solicitor's Negligence Action. On the other hand the Second Vendor Action and the Solicitor's Negligence Action have a common fact - that the Property may have been sold at a time when there was a pending expropriation, a fact allegedly withheld by the Vendor and a fact that the Lawyer allegedly should have discovered.

(c) Any Other Reason: Rule 6.01(1)(c)

26 No "other reasons" have been advanced by the Purchaser to order trial together so as to invoke rule 6.01(1)(c) other

than a submission that some of the witnesses will be the same. Clearly the Purchaser would be a witness, both at discovery and at trial in all three actions. It is difficult to imagine what evidence the Lawyer might have that could have any relevance to the issues in the Nuisance Action. The issues in the Nuisance action are whether the billboard sign in fact was erected without a permit, whether the billboard was erected contrary to Ministry guidelines, whether the Purchaser's sign in fact impedes the view of the Neighbour's sign and whether the Neighbour has suffered damages as a result. The extent to which the Lawyer made all necessary searches is not relevant. The Vendor may have some evidence as to the obtaining of the permit, since the lease with Supersign was signed and the foundation for the billboard was installed before the closing; however it is the fact of the nuisance after the sign was erected, which was after the closing, that is the issue in the Nuisance Action. Whether the Vendor misrepresented the permit to the Purchaser is not relevant to the Nuisance Action. The Vendor's testimony, if any, would thus be minimal at the trial of the Nuisance Action. The Vendor's testimony in the Second Vendor Action would not be about the sign, but about the expropriation. The Neighbour may have evidence to give at the trial of the Second Vendor Action as to the date he became aware of the Ministry's intention to expropriate for purposes of road widening, but his testimony would be just one of a number of nearby property owners or tenants abutting the highway with evidence to give as to notification of expropriation. The Neighbour would have no evidence to give in the Solicitor's Negligence Action or the Second Vendor Action about the issues in the Nuisance Action or the damages suffered by the impugned sign (since contribution and indemnity for the Neighbour's losses have not been claimed in either of these two actions) and in fact the sign is not an issue at all in the Second Vendor Action. I have not been advised of any other witnesses that may be required to testify at any of the trials.

27 There were no submissions as to whether the Lawyer may have relevant evidence to give at the trial of the Second Vendor Action or whether the Vendor may have relevant evidence to give at the trial of the Solicitor's Negligence Action if those actions were kept separate. Conceivably the Lawyer may have some evidence in the Second Vendor's Action about the Vendor's representations in the purchase documents.

28 In my view the court should consider the factors outlined earlier in these reasons, particularly to the extent that the Purchaser may be relying on "other reasons" for joinder as set out in rule 6.01(1)(c).

> (a) The issues in the Nuisance Action are not at all interwoven with the other two actions. They are distinct and different. The issues in the Nuisance action are whether the billboard impeded the Neighbour's sign and caused the Neighbour damage. The issues in the other two actions involve losses to the Purchaser on the purchase of the Property arising out of the Vendor's misrepresentations in one action and lawyer's negligence in the other. The issues in the Lawyer Action and Second Vendor Action are also quite different from each other, but they both involve damages to the Purchaser arising out of the purchase of the Property and the Lawyer pleads that the Purchaser should look to the Vendor for his damages.
>
> (b) The damages in the Nuisance action are unrelated to the damages claimed in the other two actions, as there is no claim for contribution and indemnity for the damages that may be awarded in the Nuisance Action. On the other hand, the damages claimed by the Purchaser for loss of income arising out of the expropriation is the same or similar in both the Solicitor's Negligence Action and the second Vendor Action, whether caused by the Vendor's misrepresentations or the Lawyer's negligence or both. Of course in the Solicitor's Negligence Action there are additional damages claimed for loss of income arising out of the illegal sign and in the Second Vendor Action rescission of the agreement of purchase is also claimed.
>
> (c) As noted, the damages in the Solicitor's Negligence Action and the Second Vendor Action overlap, but are unrelated to the damages in the Nuisance action.
>
> (d) I have already dealt with overlapping witnesses. Only the Purchaser is known to be a witness in all three actions. The Neighbour will be a witness only in the Nuisance Action, although he may have some evidence in Second Vendor Action, not about issues relating to the nuisance or to the sign, but as one of a number of nearby property owners as to the time they were notified of a pending expropriation. The Lawyer would be a witness primarily only in the Solicitor's Negligence Action and the Vendor would be a witness primarily only in the Second Vendor Action. I have been advised of no other witnesses.
>
> (e) The only party that is the same in all three actions is the Purchaser. Each of the Neighbour, the Vendor and the Lawyer are each a party in only one action.

(f) The only lawyer that is the same in more than one action is Mr. Meisels, who represents the Purchaser in the Nuisance Action and in the Second Vendor Action. He does not represent the Purchaser in the Solicitor's Negligence Action. No other lawyer appears in more than one action.

(g) There would be no risk of inconsistent findings or judgment if the Solicitor's Negligence Action and the Second Vendor Action are not tried together with the Nuisance Action. In the Nuisance Action the court will determine if the Purchaser's sign unlawfully impeded the Neighbour's sign and the damages, if any, arising therefrom. These are not issues in the other two actions, there is no claim for contribution to those damages, and a result no finding thereon will be made. On the existing pleading the Lawyer in the Solicitor's Negligence Action does not assert and will not seek a finding that the impugned sign was lawful and the Second Vendor Action does not concern the sign. A determination of whether there was a known plan for expropriation at the time of the closing of the purchase however may possibly need to be made in both the Solicitor's Negligence Action and the Second Vendor Action and thus a risk of inconsistent findings within those two actions if tried separately.

(h) The issues in the Nuisance Action are quite straightforward and nuisance is a strict liability cause of action. There is no need to find negligence or misrepresentations. The other two actions are more complex. The Solicitor's Negligence Action requires the determination of a standard of care and whether there has been a breach of the duty of care and the Second Vendor Action requires a determination whether misrepresentations were knowingly made.

(i) A decision in the Nuisance Action will not put an end to the other two actions as the damages claimed, and the claimants, are quite different. On the other hand if the Purchaser is successful in the Second Vendor Action and is able to collect, this would make the claim against the Lawyer, at least on the expropriation issue, moot.

(j) The litigation status in the Nuisance action is much further advanced and once a mediation is booked, the action can be set down for trial. The Solicitor's Negligence Action has not gone beyond pleadings and pleadings are not yet complete in the Second Vendor Action.

(k) There is no jury notice at this time in any of the actions and this is not a factor.

(l) Only the Nuisance Action has had examinations for discovery. Neither the Lawyer nor the Vendor is a party to that action and neither participated in the discoveries of the Neighbour and the Purchaser. The issues being very different in the other two actions, examinations for discovery will not be either eliminated or shortened by use of the transcripts in the Nuisance Action even if the actions were joined.

(m) The Purchaser waited until the Nuisance Action was ready to be set down for trial and a status hearing approaching to bring this motion. In fact he waited until July 2009 to bring the Solicitor's Negligence Action and April 2010 to bring the Second Vendor Action. There was no effort to join the First Vendor Action before it was dismissed. There was no attempt to bring third party proceedings against the Vendor or the Lawyer. On the other hand the only proceeding that will be delayed by joinder is the Nuisance Action. The parties to that action do not complain about delay. In fact the Neighbour supports the Purchaser's motion.[17]

(n) The Purchaser will save costs if he has only to try one set of actions. The costs of the Neighbour will increase if he must sit through unrelated proceedings in the Solicitor's Negligence Action and Second Vendor Action. The costs of each of the Vendor and the Lawyer will increase if they must sit through unrelated proceedings in the Nuisance Action.

(o) The Lawyer and the Vendor will suffer prejudice in the form of increased costs if their actions are joined with an unrelated proceeding. The Neighbour may suffer prejudice by delay if the actions are joined, but he supports the joinder and waives any such prejudice. There may have been some prejudice to the Purchaser if the actions are joined since he has waived privilege in the Solicitor's Negligence Action by suing his lawyer, and in the absence of joinder, production of privileged communications could have been avoided in the Nuisance Action and the Second Vendor Action. The Purchaser however, through both of his lawyers, agrees to waive privilege in all actions if the motion to join the actions is successful. There may be some prejudice to the Purchaser since if the actions are kept separate he will have the costs of three separate trials (or two if the Solicitor's Negligence Action and Second Vendor Action are joined), yet it was clearly the Purchaser's decision to commence two separate actions (actually three including the First Vendor Action which was dismissed) after he was named as defendant in the Nuisance

Action, rather than issuing a third party claim or alternatively commencing a single proceeding as against the Vendor and the Lawyer. Whether or not the actions are joined the Purchaser will be paying two separate lawyers as he retained different counsel in the Solicitor's Negligence Action.

(p) While trying the Solicitor's Negligence Action and the Second Vendor Action with the Nuisance Action would add a layer of procedural complexity, I cannot say that such complexity is undue or that it cannot dealt with appropriately by the trial judge.

(q) The Purchaser moves to join all three actions but if that is refused consents to joinder of the Solicitor's Negligence Action and the Second Vendor Action. The Neighbour consents to join all three actions, but if that is refused has no interest in whether the Solicitor's Negligence Action and the Second Vendor Action are tried together. The Lawyer objects to joining all three actions but consents to joining the Solicitor's Negligence Action and the Second Vendor Action, and in fact reminds the court that the Lawyer encouraged the Purchaser to seek his damages from the Vendor. The Vendor objects to joining all three actions and also objects to joining the Solicitor's Negligence Action and the Second Vendor Action. He intends to move for summary judgment or other pre-trial dismissal.

Conclusion

29 The moving party has failed to meet the test under any of rules 6.01(1)(a), (b) or (c) for joining the Nuisance Action with the other two actions. There are no common issues of fact or law as between the Nuisance Action on one hand and either the Solicitor's Negligence Action or the Second Vendor Action on the other hand. The relief claimed in the Nuisance Action arises out of a different transaction than the other two actions. In terms of avoiding multiplicity of proceedings as mandated by section 138 of the Courts of Justice Act, it was a decision of the Purchaser to commence three separate actions in addition to the action in which he was named as defendant and not to commence third party proceedings, which was open to him to do at the appropriate time. He may now be out of time to issue a third party claim or to amend the Solicitor's Negligence Action or Second Vendor's Action to add a claim for contribution and indemnity for the damages in the Nuisance Action.[18] There is in my view no "other reason" that justifies joining these actions. The equitable factors almost all favour non-joinder. In my view the grounds for not joining the Nuisance Action with either or both of the Solicitor's Negligence Action and the Second Vendor Action, as set out in these reasons, is overwhelming.

30 In my view however there is good reason to order trial together of the Solicitor's Negligence Action and the Second Vendor Action given the overlap of damages, the fact that both actions arise out of the purchase of the Property and both deal with damages caused by the expropriation (although in the Solicitor's Negligence Action additional damages are claimed arising out of the illegality of the sign), and the fact that both are at an early stage with no examinations for discovery having been conducted. There can be a single discovery of the Purchaser on his damages. Two different claims for the same loss could promote settlement. If the Vendor brings a successful summary judgment motion that may end the joinder, but at this time it is speculative.

Costs

31 The moving Purchaser sought costs of the motion, but only as against the Lawyer. The Lawyer sought costs of the motion, but only as against the Purchaser. The Vendor sought costs against the Purchaser, but having delivered no material, only for counsel fee at the hearing of the motion. The solicitors for the Purchaser in the Solicitor's Negligence Action did not seek costs. The Neighbour did not seek costs.

32 The Purchaser brought this motion for an order that the Nuisance Action, the Solicitor's Negligence Action and the Second Vendor Action be consolidated or tried together or consecutively. It was supported by the Neighbour and the lawyer for the Purchaser in the Solicitor's Negligence Action. It was opposed by the Lawyer and the Vendor. That motion was unsuccessful. The Lawyer and the Vendor, who successfully opposed the motion, should have their costs as against the Purchaser on a partial indemnity scale.

33 It was the court that asked counsel near the conclusion of the motion whether an order for trial together of only the Solicitor's Negligence Action and the Second Vendor Action should be made if the motion to join all three actions failed. Although this was supported by the Purchaser (both counsel) and the Lawyer and opposed only by the Vendor (the Neighbour was not involved in those two actions), it was not the focus of the motion and in my view should play no bearing on the issue of costs. It certainly cannot be considered a "victory" for the Purchaser.

34 The Lawyer produced a Costs Outline for $2,275 fees, $750 counsel fees plus $549.89 disbursements and GST for a total of $3,726.14. Because the hearing took longer than had been estimated he asks to increase the counsel fee to $1200, which would increase the total to $4198.64. The issues on the motion were of average complexity. The motion was important to the Lawyer who did not want to be forced to participate in unrelated actions. The claim against the Lawyer is for $2,000,000. Costs were increased by the manner in which the Purchaser brought a multiplicity of proceedings. Counsel for the Lawyer prepared a short responding record and was the only party to prepare a factum. Mr. Youd (a 1987 call) claims a partial indemnity rate of $225 and Ms. Patrick (a 2005 call) who prepared the factum claims a partial indemnity rate of $100, both of which are reasonable. The time spent does not appear to be unreasonable. The fixing of costs however is more than an arithmetic exercise of multiplying hours spent by hourly rates. Costs of $4198 on a motion for trial together in my view exceed what may be reasonably anticipated by the losing party, but not excessively so. In my view costs of $3,500 inclusive of disbursements and GST would be fair and reasonable in the circumstances.

35 The Vendor did not prepare a Costs Outline as clearly mandated by rule 57.01(6). He prepared no material. Although he successfully opposed the motion, counsel for the Lawyer took the lead on the opposition. I would award costs to the Vendor of $750 inclusive of GST representing counsel fee on the motion.

Order

36 It is ordered as follows:

(1) The motion for an order that actions 07-CV-337088, CV-09-383666 and CV-10-400470 be consolidated or tried together or one after the other is dismissed.

(2) Actions CV-09-383666 and CV-10-400470 shall be tried together or one after the other as the trial judge may determine. This order is without prejudice to any motion brought in either action for summary disposal of the action.

(3) The plaintiffs 1721789 Ontario Inc. and David Mehrasa in action CV-09-383666 shall pay to the defendant Daniel Bernstein his costs of this motion within 30 days fixed in the sum of $3,500.

(4) The plaintiffs 1721789 Ontario Inc. and David Mehrasa in action CV-10-400470 shall pay to the defendants 985091 Ontario Ltd. and Gidda their costs of this motion within 30 days fixed in the sum of $750.

(5) The Lawyers for all parties in action 07-CV-337088 shall attend the status hearing scheduled for August 11, 2010 unless before that date the plaintiff has (a) filed form 24.1A indicating the name of mediator and date of mediation and (b) set the action down for trial.

Motion dismissed.

Footnotes

[1] The property owner had also previously commenced an action against the vendor for misrepresentations about the legality of the sign, but that action was dismissed on a summary judgment motion.

[2] In some instances "Purchaser" refers only to 172 and at other times to 172 and Mehrasa, but it is of no consequence for purpose of the motion before me.

[3] In some instances "Vendor" refers only to 985 and at other times to 985 and Gidda, but it is of no consequence for purpose of the motion before me.

[4] Master Glustein refused to add 985 as a defendant to the Neighbour's action on the basis that there was no evidence that the sign had been erected prior to the closing of the sale to the Purchaser but without prejudice to move again on better material. That was never done.

[5] Paragraph 50 of July 16, 2009 endorsement.

[6] Paragraph 57 of July 16, 2009 endorsement

[7] Paragraph 57 of July 16, 2009 endorsement

[8] Paragraph 57 of July 16, 2009 endorsement and paragraph 3(b) of the September 21, 2009 endorsement.

[9] Paragraph 3(b) of the September 21, 2009 endorsement.

[10] Paragraph 62 of July 16, 2009 endorsement

[11] Paragraph 5 of the September 21, 2009 endorsement

[12] Court of Appeal decision January 12, 2010 paragraph 8.

[13] *McKenzie v. Cramer*, [1947] O.R. 196 (Ont. Master) at paragraph 9.

[14] *Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler & Mills* (1986), 9 C.P.C. (2d) 260 (Ont. C.A.)

[15] See for example *Bourne v. Saunby* (1993), 23 C.P.C. (3d) 333 (Ont. Gen. Div.) at pg. 342 and *General Refractories Co. of Canada v. Venturedyne Ltd.*, [2001] O.J. No. 746, 6 C.P.C. (5th) 329 (Ont. S.C.J.) at paragraph 16.

[16] Consolidation of one or more actions involves combing two or more actions into a single action, so that only one action continues throughout the litigation and there is only one action to be tried. Ordering trial together keeps the actions separate but requires that they be tried together or consecutively, typically as the trial judge directs.

[17] The Neighbour admittedly supports the motion in order to have more deep pockets at the table. This is a strange position for the Neighbour to take as on the existing state of the pleadings there is no claim against the Vendor or the Lawyer for the Neighbour's damages either directly by the Neighbour or by way of indemnity claim by the Purchaser. Joinder can only serve to delay the Neighbour's action which is ready to be set down for trial.

[18] See section 18 of the *Limitations Act, 2002*, S.O. 2002, C. 24, Schedule B which appears to require that claims for contribution and indemnity for the relief advanced against the Purchaser in the Nuisance Action be brought within 2 years of the date the Purchaser was served with the statement of claim in the Nuisance Action.

Tab 7

2015 ONSC 6051
Ontario Superior Court of Justice

Grist v. Meaford (Municipality)

2015 CarswellOnt 14881, 2015 ONSC 6051, 258 A.C.W.S. (3d) 481

Geoff Grist and Pauline Grist and Francis Richardson and The Corporation of the Municipality of Meaford and Penelope Joan Seaman, K. Orville Boyd, James Broatch Rathbun, Judith Elizabeth Rathbun, Oliver Grant Rathbun, Napier Charles Rathbun, Andrew James Rathbun, Joselyn Rathbun Gravlee et al

André J.

Heard: September 17, 2015
Judgment: September 30, 2015
Docket: Owen Sound CV-13-254

Counsel: R. Uukkvi, for Plaintiffs, Moving Parties
P. Smith, for Defendant, Respondent
J. Croome, for Defendants, Plaintiffs, Penelope Joan Seaman, K. Orville Boyd, James Broatch Rathbun, Judith Elizabeth Rathbun, Oliver Grant Rathbun, Napier Charles Rathbun, Andrew James Rathbun, Joselyn Rathbun Gravlee

***André J.*:**

1 Geoff Grist and Pauline Grist (”the Grists”), the plaintiffs in this action (”Richardson Action”), bring a motion for an order to consolidate this action with a related matter (the “Meaford Action”), and to adjourn the pre-trial and trial of the Richardson Action currently scheduled for the October 30, 2015, trial sittings. The Grists, whose position is supported by the Rathbun Plaintiffs, submit that failure to consolidate would be significantly prejudicial to them, give rise to issue estoppel, result in conflicting factual findings and would result in an inefficient use of judicial resources. The defendant, Francis Richardson, opposes the motion and submits that consolidation is inappropriate, given that the two actions are grossly dissimilar, and would be highly prejudicial to him. Mr. Richardson also urges the court to deny the motion given the Grists’ failure to seek leave, pursuant to s. 48.04 of the *Rules of Civil Procedure*, prior to bringing this motion.

Overview

2 The Meaford Action was commenced as a claim by the Town of Meaford (”the Town”) in 2007 against a number of defendant landowners for a declaration that a portion of their respective lands were properly established as a public highway on account of a municipal by-law enacted in 1854. The Grists and a number of other landowners, including the Rathbun Plaintiffs, responded by commencing a counterclaim against the town of Meaford.

3 In 2011, my brother justice, Daley J., dismissed the Town’s action on a motion for summary judgment, a decision that the Court of Appeal ultimately upheld on February 27, 2013. The Meaford Action is now a counterclaim for damages against the Town, based on the manner in which it enforced the 1854 by-law against the Grists and the other counter-claimants.

4 The Richardson Action arose out of the Meaford Action. At the time that the Town initiated its claim against the Grists and other landowners, Mr. Richardson served as the Town’s Mayor and member of its executive. In October 2010, the Grists initiated an action against Mr. Richardson for abuse of office, conflict of interest and his personal involvement in the

enforcement of the 1854 by-law against them. They alleged that Mr. Richardson improperly abused his position as Mayor, and interfered with their enjoyment of two cottage properties they owned and sought damages in the amount of $2,550,000 against Mr. Richardson. This matter has been set for trial during the October 30, 2015, trial sittings of the court.

Change of Counsel

5 The Grists retained the law firm of WeirFoulds LLP when they initially commenced their action against Mr. Richardson. The solicitor/client relationship between the two, however, broke down in 2015. The Grists retained their present counsel, Cassels, Brock & Blackwell LLP in July 2015. The Grists' new counsel only received the files from the Richardson Action on or about August 15, 2015, and have not yet received the files in the Meaford Action from their counterparts at WeirFoulds. Furthermore, the Grists' counsel have not had sufficient time to obtain an expert's report to support the Grists' claim for damages in the Richardson Action.

Analysis

6 This motion raises the following issues:

(1) Are the Grists required to seek leave to bring this motion?

(2) Should the Richardson and Meaford Actions be consolidated?

Issue No. One: Are the Grists required to seek leave from the Court to bring this motion?

The Law

7 Rule 48.04 states that:

48.04 (1) Any party who has set an action down for trial and any party who has consented to the action being placed on a trial list shall not initiate or continue any motion or form of discovery without leave of the court.

(2) Subrule (1) does not,

(a) relieve a party from complying with undertakings given by the party on an examination for discovery;

(b) relieve a party from any obligation imposed by,

(i) rule 30.07 (disclosure of documents or errors subsequently discovered),

(ii) rule 30.09 (abandonment of claim of privilege),

(iii) rule 31.07 (failure to answer on discovery),

(iv) rule 31.09 (disclosure of information subsequently obtained),

(v) rule 51.03 (duty to respond to request to admit),

(vi) rule 53.03 (service of report of expert witness); or

(vii) Revoked: O. Reg. 131/04, s. 13.

(c) preclude a party from resorting to rule 51.02 (request to admit facts or documents).

8 The test for granting leave was set out in *Hill v. Ortho Pharmaceutical (Canada) Ltd.*, [1992] O.J. No. 1740, 11 C.P.C. (3d) 236 (Ont. Gen. Div.):

> The authorities make it clear that setting down a matter for trial is not a mere technicality of procedure. Before it can be vacated to permit any further discovery or interlocutory proceedings, there must be a substantial and unexpected change in circumstances such that a refusal to make an order under section 48.04(1) would be manifestly unjust.

See also *Canadian Gasket & Supply Inc. v. Industrial Gasket & Shim Co.*, [2009] O.J. No. 3913 (Ont. S.C.J.); *Machado v. Pratt & Whitney Canada Inc.*, [1993] O.J. No. 2741, 16 O.R. (3d) 250 (Ont. Gen. Div.); *Cooke v. Toivonen*, 2011 ONSC 1315, 105 O.R. (3d) 232 (Ont. S.C.J.); *Grainger (Litigation Guardian of) v. Grainger* (2009), 85 M.V.R. (5th) 262 (Ont. S.C.J.), at para. 23; *MacRae v. Dreuniok*, [2007] O.J. No. 3283, 52 C.P.C. (6th) 104 (Ont. S.C.J.), at para. 19.

9 Many courts however, have eschewed the rigidity and relative inflexibility of the rule established in the *Hill* case.

10 For example, in *Gloucester Organization Inc. v. Canadian Newsletter Managers Inc.* (1995), 21 O.R. (3d) 753 (Ont. Gen. Div.), at para. 9, Borins J. indicated that the test "will vary and will depend on the nature of the leave requested and the circumstances of the case".

11 Similarly, the court in *Tanner v. Clark*, [1999] O.J. No. 581, 30 C.P.C. (4th) 358 (Ont. Gen. Div.), at para. 26, noted that:

> An interlocutory matter that can be raised before the trial judge, is to be distinguished from serious matters affecting substantive rights. In the case of the former, a higher threshold is appropriate before leave is granted to bring closure to claims in the interests of certainty and predictability. Once a trial date has been set, the test of substantial and unexpected change in circumstances makes sense for routine interlocutory matters. However, where substantive rights are affected, the merits of the requested relief become a fundamental consideration to ensure the case is fully canvassed at trial. At the same time, full consideration shall be given to any prejudice to the party opposing the motion that cannot be compensated for by costs.

12 Additionally, Boswell J. noted in *Todd Family Holdings Inc. v. Gardiner*, 2013 ONSC 2461 (Ont. S.C.J.), at para. 39, that: "Granting leave is a discretionary remedy, to be exercised having regard to the general principle set out in rule 1.04": see*Kernohan v. York (Regional Municipality)*, 2009 CanLII 9422, (2009), 77 C.P.C. (6th) 391 (Ont. S.C.J.). This rule provides that the court is obliged to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Applying the Law to the Facts of This Case

13 The Grists submit that leave is not required in this case given that the Meaford Action has not been set down for trial.

14 They assert, in the alternative, that it is in the interests of justice to grant leave to bring the motion. This is so given that their new counsel has not had sufficient time to prepare for the trial and insufficient time to present evidence regarding the quantum of damages they seek.

15 Mr. Richardson, on the other hand, maintains that he has waited a considerable period for his trial and that an adjournment of this matter would cause him untold prejudice.

16 In my view, leave should be granted to bring this motion whether justified on the basis of a substantial and unexpected change in circumstances or simply on the basis of trial fairness. The Grists' new counsel was not involved in the setting of a trial date in the Richardson Action. He has not received all the files in the action, let alone review it. Allowing the matter to proceed to trial as scheduled would affect trial fairness in that it may prevent the Grists from calling evidence regarding any damage they may have suffered. Additionally, proceeding as scheduled would have the unfortunate result of penalizing the Grists because of a change in their counsel.

17 The resultant delay in the Richardson Action may prejudice Mr. Richardson but not in a manner that affects his ability to make full answer and defence to the allegations the Grists have made against him. Neither would the adjournment adversely affect his pecuniary interest given both the Meaford and Richardson Actions are insured claims which are being defended by the same insurance company. Additionally, while Mr. Richardson may be inconvenienced by any adjournment of the trial, such inconvenience does not amount to prejudice: see *Fenix Developments G.P. Inc. v. Willemse*, [1994] O.J. No. 73, 23 C.P.C. (3d) 376 (Ont. Gen. Div. [Commercial List]), at para. 9.

18 For the above reasons, the Grists are granted leave to file their motion.

Issue No. Two: Should the Richardson and Meaford Actions be consolidated?

19 Mr. Richardson's counsel submit that it should not. He relies on the following reasons for his position:

(1) The Actions are dissimilar in that whereas the Meaford Action is grounded in the tort of negligence, the Richardson Action is not.

(2) The matters are not interrelated as the Grists' suggest.

(3) The Meaford Action has been at a standstill for more than two years while the Richardson Action is ready for trial.

(4) Whereas examinations for discovery in the Richardson Action were completed in January 2012, documentary discovery in the Meaford Action has not even commenced.

(5) While the Richardson Action involves a very narrow issue revolving around Mr. Richardson's action; the Meaford Action is "far more complex" and deals with the voting record of an "entire municipal council".

20 The Grists, supported by the Rathbun Plaintiffs, submit that consolidation is warranted for the following reasons:

(1) Rules 6.01 of the *Rules of Civil Procedure*.

(2) The relief claimed arises from the same set of facts.

(3) Failure to consolidate would prejudice the Grists, Seaman, Orvilles, Rathbun and Boyds.

(4) Findings of fact in the Richardson Action could give rise to issue estoppel and conflicting factual findings.

(5) The witnesses in both actions are virtually identical.

(6) Consolidation would result in the efficient use of limited judicial resources.

(7) Consolidation would result in significant savings in that both the Town of Meaford and Mr. Richardson are represented by counsel for the same insurance company.

The Law

21 Rule 6.01 provides that:

6.01 (1) Where two or more proceedings are pending in the court and it appears to the court that,

(a) they have a question of law or fact in common;

(b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or

occurrences; or

(c) for any other reason an order ought to be made under this rule, the court may order that,

(d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or

(e) any of the proceedings be,

(i) stayed until after the determination of any other of them, or

(ii) asserted by way of counterclaim in any other of them.

(2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay and, for that purpose, the court may dispense with service of a notice of listing for trial and abridge the time for placing an action on the trial list.

22 Section 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, (the "CJA"), provides that:

> As far as possible, multiplicity of legal proceedings shall be avoided.

23 The underlying policy of Rule 6.01 is to avoid a multiplicity of proceedings, to promote expeditious and inexpensive determination of disputes and to avoid inconsistent judicial findings: see *Pilon v. Janveaux*, [2000] O.J. No. 4743 (Ont. S.C.J.), at para. 6; *Coulls v. Pinto* [2007 CarswellOnt 7050 (Ont. Master)], 2007 CanLII 46242, at para. 18.

24 In *Abegweit Potatoes Ltd. v. J.B. Read Marketing Inc.*, [2003] P.E.I.J. No. 80 (P.E.I. C.A.), at para. 23, McQuaid J. A. noted that:

> In assessing whether there is a common question of fact or law common to both proceedings so as to meet the threshold test for granting one of the remedies in Rule 6.01(1)(d), the focus should be on whether there is a common issue of fact or law that bears sufficient importance in relation to the other facts or issues in the proceedings which would render it desirable that the matters be consolidated, heard at the same time or after each other.

25 In considering whether or not to consolidate two actions pursuant to Rule. 6.01(1) the court must consider s. 138 of the CJA and the following factors:

(1) The extent of the difference or commonality of the facts or issues in the proceedings;

(2) The status of the progress of the several proceedings; and

(3) The convenience or inconvenience, in terms of time, money, due process and administration, of bringing the proceedings together.

Drabinsky v. KPMG, [1999] O.J. No. 3630 (Ont. S.C.J.); *McKee v. Thistlethwaite*, [2003] O.J. No. 2850 (Ont. S.C.J.); *Da Costa v. TD Home and Auto Insurance Co.*, 2014 ONSC 6066 (Ont. S.C.J.), at para. 13.

26 Furthermore, in*Logtenberg v. ING Insurance Co.*, [2008] O.J. No. 3394 (Ont. S.C.J.), the court considered the following questions in determining the propriety of or otherwise consolidation:

i. Will the order sought create a savings in pretrial procedures?

ii. Will there be a real reduction in the number of trial days taken up by the trials being heard at the same time?

iii. What is the potential for a party to be seriously inconvenienced by being required to attend a trail in which that party may have only a marginal interest?

iv. Will there be real savings in experts' time and witness fees?

v. Is one of the actions at a more advanced state than the other?

vi. Will the order result in a delay of one of the actions?

vii. Are any of the actions proceeding in a different fashion?

Factors Weighing in Favour of Consolidation

27 The following factors favour consolidation of the two actions:

1. Commonalities of the Facts and Issues

28 Both Actions deal with the conduct of the Meaford councillors in enforcing the 1854 by-law on the properties of the Grists and other defendants in the Meaford Action. While the Richardson Action deals specifically with the role of Francis Richardson in the enforcement of the by-law, the facts and issues in that Action are the same as that in the Meaford Action.

2. Witnesses

29 The witnesses in both actions will basically be the same. The Grists maintain that they intend to call members of the Town of Meaford executive as witnesses in the Richardson Action. These councillors are all expected to be called as witnesses in the Meaford Action. Indeed in a May 22, 2013, motion to transfer the Richardson Action from Toronto to Owen Sound, counsel for Francis Richardson indicated in his motion materials that he intended to call "all Meaford councillors during the relevant time period" as witnesses in the trial.

3. Savings in Court Time

30 Consolidation would save a considerable amount of court time in that these witnesses would not be required to testify about the same events in two separate proceedings.

4. Inconsistent Factual Findings

31 Consolidation could eliminate the possibility of inconsistent credibility findings posed by having two separate proceedings.

5. Issue Estoppel

32 Issue estoppel bars the re-litigation of issues previously decided in court in another proceeding where the same question has been decided, the decision was final and the parties to the decision or their privies were the same persons as the parties to proceedings in which the estoppel was raised: see *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.), at paras. 25, 33.

33 The plaintiffs who are suing the Town of Meaford may be prejudiced by not being able to raise relevant issues in their

lawsuit if the Richardson Action proceeds as scheduled.

Factors Militating Against Consolidation

1. Different Stages of Proceedings

34 The Richardson Action is on the verge of trial while the Meaford Action is in its preliminary stages.

2. Delay in Richardson Action

35 Consolidation will inevitably delay or lead to a postponement of the Richardson Action. Counsel for the Grists maintain that consolidation may only result in a delay of approximately six months. However, it is more likely that the delay could be much longer.

3. Replication of Procedural Steps

36 Consolidation would likely result in the replication of steps already completed in the Richardson Action such as the examinations for discovery. This could result in additional time and expense.

4. Prejudice

37 Consolidation could be prejudicial to Francis Richardson in that he would have to wait for a much longer period to respond to allegations that he abused his position as a public officer while serving as Mayor of the Town of Meaford.

Conclusion

38 Weighing the factors for and against consolidation, I have decided to exercise my discretion by ordering a consolidation of the Richardson and Meaford Actions. Doing so will not have serious financial repercussions on Mr. Richardson. Even if consolidation is not ordered, the matter would still have to be adjourned, given the Grists recent change of counsel. Additionally, consolidation will achieve a significant saving in court time and will eliminate the likely possibility of inconsistent factual findings if these matters are tried separately.

39 Accordingly, I order that the Richardson Action and the Meaford Action be consolidated, or heard at the same time or one immediately after the other, as the trial judge may direct.

Costs

40 On consent, costs are reserved to the trial judge.

Motion granted.

Tab 8

2010 ONSC 2843
Ontario Superior Court of Justice [Commercial List]

Penson Financial Services Canada Inc. v. Connacher

2010 CarswellOnt 3398, 2010 ONSC 2843, [2010] O.J. No. 2114, 188 A.C.W.S. (3d) 956

PENSON FINANCIAL SERVICES INC. (Plaintiff) and DAVID CONNACHER, DAVENPORT CAPITAL PARTNERS LTD. formerly known as LEEWARD HEDGE FUNDS INC., JET HEDGE FUND LP, MICHAEL BRENDANT KYNE, BURNAC CAPITAL CORPORATION and LORNE BURNETT (Defendants)

Pepall J.

Judgment: May 20, 2010
Docket: 09-8425-00CL, 09-8426-00CL

Counsel: Douglas Harrison, Jennifer Cantwell for Plaintiff
Joel Wiesenfeld, Andrew Gray for Defendants, Davenport Capital Partners Ltd., Jet Hedge Fund LP, Michael Brendan Kyne ("the Davenport Defendants")
P.E. Du Vernet for Defendants, Burnac Corporation, Lorne Burnett ("the Burnett Defendants")
James Szumski for Trustee in Bankruptcy of Evergreen Capital Partners Inc.

***Pepall J.*:**

Endorsement

1 The Plaintiff, Penson Financial Services Canada Inc.("Penson"), is an investment dealer. It served as carrying broker for Evergreen Capital Partners Inc. ("Evergreen"), a securities dealer. As such, Penson provided administrative and financial support for Evergreen's operations. Evergreen filed an assignment in bankruptcy on December 2, 2008. Section 163 *Bankruptcy and Insolvency Act* examinations were conducted by the Trustee in Bankruptcy with respect to the Evergreen Estate and were filed in court. In June, 2009, Penson issued its statement of claim against the Davenport Defendants and the Burnett Defendents. In July, 2009, Penson obtained a section 38 *Bankruptcy and Insolvency Act* order permitting it to commence a second action on behalf of Evergreen's creditors against the same Defendants. Penson commenced that second action in August, 2009. In both actions, Penson alleges that the Defendants engaged in a pattern of improper and fraudulent trading in securities. The claims allege that the Defendant, David Connacher, a former employee of Evergreen, traded securities through Evergreen's proprietary and average price accounts for the benefit of the Davenport and Burnett Defendants. Penson alleges that the principals of the corporate Defendants, Michael Kyne and Lorne Burnett, were long-time close friends of Mr. Connacher and lent Mr. Connacher significant sums of money while Mr. Connacher was employed at Evergreen. The Statements of Claim state that a loss occurred when certain trades were not settled and Penson, as the carrying broker for Evergreen, was obliged to settle those trades leaving Evergreen indebted to Penson. Penson claims damages of $33 million in both actions. In the first Penson action, Penson claims damages as a result of breaches of duties owed to, and contracts involving, Penson. In the second action, Penson claims damages as a result of breaches of duties owed to, and contracts involving, Evergreen.

2 Motions are brought by the Davenport Defendants and the Burnett Defendants. They may be grouped as follows: (1) motions for directions and consolidation; (2) motions for inspection of documents; (3) motions for particulars; and (4) a motion to dismiss or strike the conspiracy claim against the Burnett Defendants. I will address each grouping in turn.

Directions / Consolidation Motions

3 Rule 6.01 of the Rules of Civil Procedure governs the consolidation of actions. Here, the allegations and facts in the two actions are very similar. There are common questions of law and the relief arises from the same series of transactions. The same counsel represent the plaintiffs in both actions and the defendants in both actions. No material prejudice was identified that would result from a consolidation of the two actions. Having two parallel actions results in an unnecessary multiplicity of proceedings. It would be more convenient, efficient, and cost effective to have a consolidated action and I so order.

4 The request that the claims of the Burnett Defendants be severed is premature. This order is without prejudice to those Defendants to bring that part of their motion back on at a later date if they see fit.

Inspection of Documents

5 Rule 30.04 of the Rules of Civil Procedure governs requests to inspect documents. The Davenport Defendants made a request to inspect documents referred to in the Statements of Claim and outlined those documents in Schedule "A" attached to its notice of motion. Penson states that it has produced specific documents referred to in its pleadings. I agree that it need not do more than that. See in this regard *Robinson v. Can-Ex*[1], Production of documents referred to in pleadings is of course distinct from a request for particulars.

6 The documents referred to in paragraphs 3, 15, 27, 28 and 57 of Schedule "A" have been produced. Penson is searching for the documents in paragraph 52 (with respect to action number 09-381300) and 53 with a view to producing them. There is no document as described in paragraph 26. No documents need to be produced with respect to paragraphs 31 (a) (c) (f), 45, 46, 53 (i) and 64 (in action number 09-381300) in response to the request to inspect documents referred to in pleadings. That said, all of these requests with the exception of paragraph 64 (in action 09-381300) are the proper subject matter of a request for particulars.

7 The Burnett Defendants also made a request to inspect documents referred to in the Statements of Claim. Penson has produced the documents referred to in paragraphs 1.E(a), 3 and 15 of the Statement of Claim in action number 09-381300. No others need be produced as documents referred to in pleadings.

Particulars

8 Particulars are to be ordered if they are not within the knowledge of the party demanding them and they are necessary to enable that party to plead: *Physicians Services Inc. v. Cass*[2]; *Obonsawin v. Canada*[3]. Rule 25.06(8) also provides that where fraud, misrepresentation, breach of trust, malice or insult is alleged, the pleading must contain full particulars.

9 The claims assert that Mr. Connacher engaged in fraud in concert with the other Defendants. The securities trading fraud is at the heart of the litigation. It seems to me that particulars of the subject trades as outlined in Mr. Gray's letter of August, 2009, and attached as Schedule "A" to the notice of motion of the Davenport Defendants, should be provided as well as particulars of the trades, buys and sells requested by the Burnett Defendants.

10 The Davenport Defendants do not ask for particulars other than the aforementioned. The Burnett Defendants do seek additional particulars but they did not file any affidavit in support on the need for additional particulars and whether they are within their own knowledge. In my view, the pleading is not so bald that the additional particulars requested by the Burnett Defendants need be provided. This particulars order is sufficient to enable the Burnett Defendants to file a statement of defence.

Conspiracy Claim Against Burnett Defendants

11 The Burnett Defendants submit that Penson's conspiracy claims against them are improperly pleaded. They state that

the pleadings fail to disclose a cause of action for conspiracy; fail to allege specific overt acts by each of the Burnett Defendants; the pleading against Mr. Burnett personally is bald; no particulars or records of the impugned transactions have been pleaded or produced; the allegations are wholly lacking in specifics; and in essence, Penson has failed to meet the four part test set forth in the case law. They submit that Penson has pleaded conspiracy as a legal conclusion without providing material facts and sufficient particulars to sustain that conclusion. They ask that the conspiracy claim against the Burnett Defendants be struck. In addition, they submit that there is no plea sufficient to attach liability to Mr. Burnett personally. There is no allegation of conduct that is tortious in itself or that exhibits a separate identity of interest from that of Burnac Corporation. They rely on Rules 21 and 25.

12 Penson maintains that its pleading of conspiracy satisfies the four requirements outlined in the case law. It is not plain and obvious that the claims could not possibly succeed and they are sufficiently particularized.

13 As mentioned, the Burnett Defendants move pursuant to Rule 21 and Rule 25. On a motion to strike out all or part of a pleading, the court must accept all of the facts pleaded therein as proven unless patently ridiculous or incapable of proof: *Falloncrest Financial Corp. v. Ontario*[4]. The threshold for sustaining a pleading under Rule 21.01(1)(b) is not a high one: Hanson *Hanson v. Bank of Nova Scotia*[5]. The Statement of Claim must be read generously, with allowance for inadequacies due to drafting deficiencies. For a claim to be struck for disclosing no reasonable cause of action, the moving party must prove that it is plain and obvious that the claim discloses no reasonable cause of action: *Hunt v. T & N plc*[6].

14 A pleading of conspiracy must set out:

(1) the parties and their relationship with one another;

(2) the agreement to conspire and its purpose or object;

(3) the overt acts alleged to have been done in furtherance of the conspiracy and these are to be described with clarity and precision, and

(4) an allegation of injury and damage caused to the plaintiff as a result of the conspiracy:

Normart Management Ltd. v. West Hill Redevelopment Co.[7]

15 Rule 25.06(1) mandates a minimum level of material fact disclosure and if this level is not reached, the remedy is a motion to strike out the pleading. A proper pleading of conspiracy should enable a defendant to know the case he or she must meet. Conspiracy is a serious claim. A recitation of a series of events coupled with an assertion that they were intended to injure the plaintiff is insufficient, nor is it appropriate to lump some or all of the defendants together into a general allegation that they conspired: *Normart Management Ltd.*[8] and *J.G. Young & Son Ltd. v. TEC Park Ltd.*[9].

16 In this case, the backround facts are described in paragraphs 11 to 23 of the Penson Statement of Claim and paragraphs 12 to 26 of the second Statement of Claim. The specific conspiracy pleading against the Burnac Defendants is found in paragraphs 34 to 40 of the Penson Statement of Claim and paragraphs 37 to 43 of the second Statement of Claim.

17 Penson pleads that Mr. Burnett, on behalf of Burnac Corporation, completed an Evergreen New Corporate Client Application Form which granted trading authority solely to Mr. Burnett and his brother and that the account was a Delivery-Against-Payment account and non-discretionary in nature. Penson states that Mr. Connacher and Mr. Burnett conspired with each other at dates and times not known to Penson but known to the said parties. Penson then provides some particulars.

18 While Penson acknowledges that the dates and times of these acts are not detailed in its pleadings, it attributes this to the nature of a conspiracy - namely, that conspirators keep their tracks well concealed from the victims. On this point, it relies on Molloy J.'s statement in *Meditrust Healthcare Inc. v. Shoppers Drug Mart* [1998 CarswellOnt 5285 (Ont. Gen. Div.)] (23 February 1998), Toronto 97-CU-121572 at para. 9: "A conspiracy by its very nature is undertaken in secrecy...it is almost impossible for the victim to know at the outset such details as who met with whom, when and what specifically was

discussed."

19 In my view, Penson has identified the parties and their relationship. As to the agreement to conspire and its purpose or object, Penson pleads in paragraphs 34 of the Penson Statement of Claim and 37 in the second Statement of Claim:

> Connacher and Burnett (individually and on behalf of Burnac) combined to advance their interests at the expense of Evergreen and Penson through the participation and prohibited discretionary trading and other unlawful and fraudulent trading practices directed towards Evergreen. Connacher and Burnett knew or ought to have known that such unlawful and fraudulent conduct would cause, and did cause, injury.

20 It seems to me that once the particulars ordered are delivered, the pleading should meet the necessary threshold requirements.

21 As to the overt acts, these are pleaded. The conduct consisted of (1) allocating primarily winning trades to Burnac, usually after the trades had already been completed in the market, as a result of which Burnac had the benefit of speculating at Evergreen's and ultimately Penson's expense; (2) allocating sells to Burnac when no such sells had actually been made in the market by Evergreen, effectively causing Evergreen to be the client's counterparty; and (3) allocating trades to Burnac at prices that did not correspond to the market, almost always benefitting Burnac to the detriment of Evergreen and Penson. Further examples are outlined at paragraphs 61 to 64 of Penson's factum. Again, once the particulars ordered are delivered, any shortcoming in the pleading will be addressed.

22 Lastly, there clearly is an allegation of injury and damage caused to Penson as a result of the conspiracy.

23 The next issue to consider is whether the conspiracy claim against Mr. Burnett should be sustained. In this regard, based on *Normart Management Ltd. v. West Hill Redevelopment Co.*[10], there must be some conduct alleged that is either tortious in itself or exhibits a separate identity of interest from that of the corporation.

24 While there are general conclusory references to Mr. Burnett, there is no allegation that he was acting outside the scope his authority or failing to act in the best interests of Burnac. Indeed, the trading activity is alleged to be either in or for the account of Burnac. The *Normart* requirements have not been met. In my view, the claim against Mr. Burnett should be struck with leave to amend.

Costs

25 At the completion of argument, counsel made submissions on costs, however, as the results have been mixed, they are inapplicable. In the circumstances, the parties should attempt to resolve the issue of costs themselves failing which they may make brief (not to exceed two pages) written submissions.

Footnotes

1 [2000] O.J. No. 3350 (Ont. S.C.J.).

2 [1971] 2 O.R. 626 (Ont. C.A.), at 627.

3 [2001] O.J. No. 369 (Ont. S.C.J.) at para. 33.

4 (1995), 27 O.R. (3d) 1 (Ont. C.A.), at 7 .

5 (1994), 19 O.R. (3d) 142 (Ont. C.A.), at 145 .

[6] [1990] 2 S.C.R. 959 (S.C.C.).

[7] (1998), 37 O.R. (3d) 97 (Ont. C.A.)

[8] S*upra* at para. 21

[9] (1999), 48 C.P.C. (4th) 67 (Ont. S.C.J.).

[10] *Supra*, footnote 8.

Tab 9

2014 ONSC 3393
Ontario Superior Court of Justice

Timminco Ltd., Re

2014 CarswellOnt 9328, 2014 ONSC 3393, 14 C.B.R. (6th) 113, 242 A.C.W.S. (3d) 764

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

In the Matter of a Plan of Compromise or Arrangement of Timminco Limited and Bécancour Silicon Inc.

Morawetz R.S.J.

Heard: July 22, 2013
Judgment: July 7, 2014
Docket: CV-12-9539-00CL

Counsel: Jane Dietrich, Kate Stigler for Board of Directors, except John Walsh
Kenneth D. Kraft for Chubb Insurance Company of Canada
James C. Orr for Plaintiff, St. Clair Pennyfeather in the Class Action
Maria Konyukhova for Timminco Entities
Robert Staley for John Walsh
Linc Rogers for Monitor

***Morawetz R.S.J.*:**

Introduction

1 On May 14, 2009, Kim Orr Barristers PC, counsel to the representative plaintiff Mr. St. Clair Pennyfeather ("Plaintiff's Counsel"), initiated the proposed class action (the "Class Action"), which names as defendants Timminco Limited ("Timminco"), a third party, Photon Consulting LLC, and certain of the directors and officers of Timminco, (the "Directors").

2 The Class Action focusses on alleged public misrepresentations that Timminco possessed a proprietary metallurgical process that provided a significant cost advantage in manufacturing solar grade silicon for use in manufacturing solar cells.

3 Mr. Pennyfeather alleges that the representations were first made in March 2008, after which the shares of Timminco gained rapidly in value to more than $18 per share by June 5, 2008. Subsequently, Mr. Pennyfeather alleges that as Timminco began to acknowledge problems with the alleged proprietary process, the share price fell to the point where the equity was described as "penny stock" prior to its delisting in January 2012.

4 In the initial order, granted January 3, 2012 in the *Companies' Creditors Arrangement Act*., R.S.C. 1985, c. C-36, as amended (the "CCAA") proceedings, Timminco sought and obtained stays of all proceedings including the Class Action as against Timminco and the Directors (the "Initial Order").

5 Timminco also obtained a Claims Procedure Order on June 15, 2012 (the "CPO"). Among other things, the CPO established a claims-bar date of July 23, 2012 for claims against the Directors. Mr. Pennyfeather did not file a proof of claim

by this date.

6 No CCAA plan has been put forward by Timminco and there is no intention to advance a CCAA plan.

7 Mr. Pennyfeather moves to lift the stay to allow the Class Action to be dealt with on the merits against all named defendants and, if necessary, for an order amending the CPO to exclude the Class Action from the CPO or to allow the filing of a proof of claim relating to those claims.

8 The Class Action seeks to access insurance moneys and potentially the assets of Directors.

9 The respondents on this motion, (the Directors named in the Class Action), contend that the failure to file a claim under the CPO bars any claim against officers and directors or insurance proceeds.

10 Neither Timminco nor the Monitor take any position on this motion.

11 For the reasons that follow, the motion of Mr. Pennyfeather is granted and the stay is lifted so as to permit Mr. Pennyfeather to proceed with the Class Action.

The Stay and CPO

12 The Initial Order contains the relevant stay provision (as extended in subsequent orders):

> 24. This Court Orders that during the Stay Period... no Proceeding may be commenced or continued against any former, current or future directors or officers of the Timminco Entities with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Timminco Entities whereby the directors or officers are alleged under any law to be liable in their capacities as directors or officers for the payment or performance of such obligations, **until a compromise or arrangement in respect of the Timminco Entities, if one is filed, is sanctioned by this court or is refused by the creditors of the Timminco Entities or this Court.**
>
> [emphasis added]

13 In May and June 2012, The Court approved sales transactions comprising substantially all of the Timminco Entities' assets. In their June 7, 2012 Motion, the Timminco Entities sought an extension of the Stay Period to "give the Timminco Entities sufficient time to, among other things, close the transactions relating to the Successful Bid and carry out the Claims Procedure". The Timminco Entities sought court approval of a proposed claims procedure to "identify claims which may be entitled to distributions of potential proceeds of the ... transactions..." The Timminco entities took the position that the Claims Procedure was "a fair and reasonable method of determining the potential distribution rights of creditors of the Timminco Entities".

14 The mechanics of the CPO are as follows. Paragraph 2(h) of the CPO defines the Claims Bar Date as 5:00 p.m. on July 23, 2012. "D&O Claims" are defined in para. 2(f)(iii):

> Any existing or future right or claim of any person against one or more of the directors and/or officers of the Timminco Entity which arose or arises as a result of such directors or officers position, supervision, management or involvement as a director or officer of a Timminco Entity, whether such right, or the circumstances giving rise to it arose before or after the Initial Order up to and including this Claims Procedure whether enforceable in any civil, administrative, or criminal proceeding (each a "D&O Claim") (and collectively the "D&O Claims"), including any right:
>
> > a. relating to any of the categories of obligations described in paragraph 9 of the Initial Order, whether accrued or falling due before or after the Initial Order, in respect of which a director or officer may be liable in his or her capacity as such;
> >
> > b. in respect of which a director or officer may be liable in his or her capacity as such concerning employee entitlements to wages or other debts for services rendered to the Timminco Entities or any one of them or for

vacation pay, pension contributions, benefits or other amounts related to employment or pension plan rights or benefits or for taxes owing by the Timminco Entities or amounts which were required by law to be withheld by the Timminco Entities;

c. in respect of which a director or officer may be liable in his or her capacity as such as a result of any act, omission or breach of duty; or

d. that is or is related to a penalty, fine or claim for damages or costs.

Provided however that in any case "Claim" shall not include an Excluded Claim.

15 The CPO appears to bar a person who fails to file a D&O Claim by the Claims Bar Date from asserting or enforcing the claim:

19. This Court orders that any Person who does not file a proof of a D&O Claim in accordance with this order by the claims-bar date **or such other later date as may be ordered by the Court**, shall be forever barred from asserting or enforcing such D&O Claim against the directors and officers and the directors and officers shall not have any liability whatsoever in respect of such D&O Claim and such D&O Claim shall be extinguished without any further act or notification.

[emphasis added]

Mr. Pennyfeather's Position

16 Mr. Pennyfeather advances a number of arguments. Most significantly, he argues that it is not fair and reasonable to allow the defendants to bar and extinguish the Class Actions claims through the use of an interim and procedural court order. He submits that the respondents attempt to use the CCAA in a tactical and technical fashion to achieve a result unrelated to any legitimate aspect of either a restructuring or orderly liquidation. The operation of the fair and reasonable standard under the CCAA calls for the exercise of the Court's discretion to lift the stay and, if necessary, amend the CPO to either exclude the Class Action claims or permit submissions of a class proof of claim.

17 In support of this argument, Mr. Pennyfeather adds that there is no evidence that any of the Directors who are defendants in the class action contributed anything to the CCAA process, and that the targeted insurance proceeds are not available to other creditors. Thus, he submits, a bar against pursuing these funds benefits only the insurance companies who are not stakeholders in the restructuring or liquidation.

18 Mr. Pennyfeather advances a number of additional arguments. Because I am persuaded by this first submission, it is not necessary to discuss the additional arguments in great detail. However, I will give a brief summary of these additional arguments below.

19 First, Mr. Pennyfeather submits, since the stay was ordered, he has attempted to have the stay lifted as it relates to the Class Action.

20 Second, Mr. Pennyfeather submits that the CPO did not permit the filing of representative claims, unlike, for example, claims processed in *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 ONSC 1078, 100 C.B.R. (5th) 30 (Ont. S.C.J. [Commercial List]). Representative claims are generally not permitted under the CCAA and the solicitors for the representative plaintiff do not act for class members prior to certification (see: *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 218 (Ont. S.C.J. [Commercial List])). Therefore, Mr. Pennyfeather submits that the omission in the order obtained by the Timminco entities, of the type of provision contained in the *Sino-Forest* Claims Order, precluded the action that they now assert should have been taken.

21 Third, Mr. Pennyfeather responds to the significant argument made by the responding parties that the CPO bars the

claim. He submits that the Class Action, which alleges, *inter alia*, misrepresentations and breaches of the *Securities Act*, R.S.O. 1990, c. S.5, is unaffected by the CPO. There are several reasons for this. First, the CPO excludes claims that cannot be compromised as a result of the provisions of s. 5.1(2) of the CCAA. Alternatively, even if Mr. Pennyfeather and other class members are not creditors pursuant to section 5.1(2), he submits that Parliament has clearly intended to exclude claims for misrepresentation by directors regardless of who brought them. In addition, insofar as the Class Action seeks to recover insurance proceeds, the CPO did not, according to Mr. Pennyfeather, affect that claim.

22 In summary, Mr. Pennyfeather's most significant argument is that the CCAA process should not be used in a tactical manner to achieve a result collateral to the proper purposes of the legislation. The rights of putative class members should be determined on the merits of the Class Action, which are considerable given the evidence. Further, the lifting of the stay is fair and reasonable in all of the circumstances.

Directors' Position

23 Counsel to directors and officers named in the proposed class action, other than Mr. Walsh (the "Defendant Directors") submit there are three issues to be considered on the motion: (a) should the CPO be amended to grant Mr. Pennyfeather the authority to file a claim on behalf of the class members in the D&O Claims Procedure? (b) if Mr. Pennyfeather is granted the authority to file a claim on behalf of the class members, should the claims-bar date be extended to allow him the opportunity to file a late claim against the Defendant Directors? and (c) if Mr. Pennyfeather is permitted to file a late claim against the Defendant Directors, should the D&O stay be lifted to allow the proposed class action to proceed against the Defendant Directors?

24 The Defendant Directors take the position that: (a) Mr. Pennyfeather does not have the requisite authority and/or right to file a claim on behalf of the class action members and the CPO and should not be amended to permit such; (b) if Mr. Pennyfeather is granted the authority to file a claim on behalf of the class members, the claims-bar date should not be extended to allow Mr. Pennyfeather to file a late claim; and (c) if Mr. Pennyfeather is permitted to file a late claim, the D&O stay should not be lifted to allow the proposed class action to proceed against the Defendant Directors.

25 The Defendant Directors counter Mr. Pennyfeather's arguments with a number of points. They take the position that while they were holding office, they assisted with every aspect of the CCAA process, including (i) the sales process through which the Timminco Entities sold substantially all of their assets and obtained recoveries for the benefit of their creditors; and (ii) the establishment of the claims procedure, resigning only after the claims-bar date passed.

26 The Defendant Directors also submit that Mr. Pennyfeather has been aware of, and participated in, the CCAA proceedings since the weeks following the granting of the Initial Order. They submit that at no time prior to this motion did Mr. Pennyfeather take any position on the claims procedures established to seek the authority to file a claim on behalf of the class members. They submit that, at this point, Mr. Pennyfeather is asking the court to exercise its discretion to (i) amend the CPO to grant him the authority to file a claim on behalf of the class members; (ii) extend the claims-bar date to allow him to file such claim; and (iii) lift the stay of proceedings. They submit that Mr. Pennyfeather asks this discretion be exercised to allow him to pursue a claim against the Defendant Directors which remains uncertified, is in part statute barred, and lacks merit.

27 Counsel to the Defendant Directors submits that the D&O Claims Procedure was initiated for the purpose of determining, with finality, the claims against the directors and officers. They submit that the D&O Claims Procedure has at no time been contingent on, tied to, or dependent on the filing of a Plan of Arrangement by the Timminco Entities.

28 Simply put, the Defendant Directors submit that the CPO sets a claims-bar date of July 23, 2012 for claims against Directors and Mr. Pennyfeather did not file any Proof of Claim against the Defendant Directors by the claims-bar date. Accordingly, they submit that the claims against the Defendant Directors contemplated by the Class Action are currently barred and extinguished by the CPO.

29 The arguments put forward by Mr. Walsh are similar.

30 Counsel to Mr. Walsh attempts to draw similarities between this case and *Sino-Forest*. Counsel submits this is a case

where Mr. Pennyfeather intentionally refused to file a Proof of Claim in support of a securities misrepresentation claim against Timminco and its directors and officers.

31 They further submit that Mr. Pennyfeather is asking for the Court to exercise its discretion in his favour to lift the stay of proceedings, in order to allow him to pursue a proceeding which has been largely, if not entirely neutered by the Court of Appeal (leave to appeal to the Supreme Court of Canada dismissed). They point out that just like in *Sino-Forest*, to lift the stay would be an exercise in futility where the Court commented that "there is no right to opt out of any CCAA process...by virtue of deciding, on their own volition, not to participate in the CCAA process", the objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding.

32 Counsel to Mr. Walsh also takes the position that Mr. Pennyfeather's only argument is a strained effort to avoid the plain language of the CPO in an effort to say that his claim is an "excluded claim" and therefore a Proof of Claim was never required. Even if Mr. Pennyfeather was right, counsel to Mr. Walsh submits that Mr. Pennyfeather still would have been required to file a Proof of Claim, failing which his claim would have been barred. Under the CPO, proofs of such claims were still called for, even if they were not to be adjudicated.

33 They note that Mr. Pennyfeather was aware of the CCAA proceeding and the Initial Order. As early as January 17, 2012, counsel to Mr. Pennyfeather contacted counsel for Timminco, asking for consent to lift the Stay.

34 Counsel contends that the "excluded claim" language that Mr. Pennyfeather relies on is not found in the definition of D&O Claim. Under the terms of the CPO, the language is a carve-out from the larger definition of "claim", not the subset definition of D&O Claim. As a result, counsel submits that proofs of claim are still required for D&O Claims, regardless of whether they are excluded claims. In that way, the universe of D&O Claims would be known, even if excluded claims would ultimately not be part of a plan.

35 Mr. Walsh also takes the position that Mr. Pennyfeather made an intentional decision not to file a claim. Mr. Walsh emphasizes that Mr. Pennyfeather had full notice of the motion for the CPO and chose not to oppose or appear on the motion. Further, at no time did Mr. Pennyfeather request the Monitor apply to court for directions with respect to the terms of the CPO.

36 Mr. Walsh submits he is prejudiced by the continuation of the Class Action and he wants to get on with his life but is unable to do so while the claim is extant.

Law and Analysis

37 For the purposes of this motion, I must decide whether the CPO bars Mr. Pennyfeather from proceeding with the Class Action and whether I should lift the stay of proceedings as it applies to the Class Action. For the reasons that follow, I conclude that the CPO should not serve as a bar to proceeding with the Class Action and that the stay should be lifted.

38 As I explain below, the application of the claims bar order and lifting the stay are discretionary. This discretion should be exercised in light of the purposes of both claims-bar orders and stays under the CCAA. A claim bar order and a stay under the CCAA are intended to assist the debtor in the restructuring process, which may encompass asset realizations. At this point, Timminco's assets have been sold, distributions made to secured creditors, no CCAA plan has been put forward by Timminco, and there is no intention to advance a CCAA plan. It seems to me that neither the stay, nor the claims bar order continue to serve their functional purposes in these CCAA proceedings by barring the Class Action. In these circumstances, I fail to see why the stay and the claim bar order should be utilized to obstruct the plaintiff from proceeding with its Class Action.

The Purpose of Stay Orders and Claims-Bar Orders

39 For the purposes of this motion, it is necessary to consider the objective of the CCAA stay order. The stay of proceedings restrains judicial and extra-judicial conduct that could impair the ability of the debtor company to continue in business and the debtor's ability to focus and concentrate its efforts on negotiating of a compromise or arrangement:

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.).

40 Sections 2, 12 and 19 of the CCAA provide the definition of a "Claim" for the purposes of the CCAA and also provide guidance as to how claims are to be determined. Section 12 of the CCAA states

> 12. The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

The use of the word "may" in s. 12 indicates that fixing deadlines, which includes granting a claims bar order, is discretionary. Additionally, as noted above the CPO provided at para. 19 that a D&O Claim could be filed on "such other later date as may be ordered by the Court".

41 It is also necessary to return to first principles with respect to claims-bar orders. The CCAA is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.

42 Adherence to the claims-bar date becomes even more important when distributions are being made (in this case, to secured creditors), or when a plan is being presented to creditors and a creditors' meeting is called to consider the plan of compromise. These objectives are recognized by s. 12 of the CCAA, in particular the references to "voting" and "distribution".

43 In such circumstances, stakeholders are entitled to know the implications of their actions. The claims-bar order can assist in this process. By establishing a claims-bar date, the debtor can determine the universe of claims and the potential distribution to creditors, and creditors are in a position to make an informed choice as to the alternatives presented to them. If distributions are being made or a plan is presented to creditors and voted upon, stakeholders should be able to place a degree of reliance in the claims bar process.

44 Stakeholders in this context can also include directors and officers, as it is not uncommon for debtor applicants to propose a plan under the CCAA that compromises certain claims against directors and officers. In this context, the provisions of s. 5.1 of the CCAA must be respected.

45 In the case of Timminco, there have been distributions to secured creditors which are not the subject of challenge. The Class Action claim is subordinate in ranking to the claims of the secured creditors and has no impact on the distributions made to secured creditors. Further, there is no CCAA plan. There will be no compromise of claims against directors and officers. I accept that at the outset of the CCAA proceedings there may very well have been an intention on the part of the debtor to formulate a CCAA plan and further, that plan may have contemplated the compromise of certain claims against directors and officers. However, these plans did not come to fruition. What we are left with is to determine the consequence of failing to file a timely claim in these circumstances.

46 In the circumstances of this case, i.e., in the absence of a plan, the purpose of the claims bar procedure is questionable. Specifically, in this case, should the claims bar procedure be used to determine the Class Action?

47 In my view, it is not the function of the court on this motion to determine the merits of Mr. Pennyfeather's claim. Rather, it is to determine whether or not the claims-bar order operates as a bar to Mr. Pennyfeather being able to put forth a claim. It does not act as such a bar.

48 It seems to me that CCAA proceedings should not be used, in these circumstances, as a tool to bar Mr. Pennyfeather from proceeding with the Class Action claim. In the absence of a CCAA proceeding, Mr. Pennyfeather would be in position to move forward with the Class Action in the usual course. On a principled basis, a claims bar order in a CCAA proceeding, where there will be no CCAA plan, should not be used in such a way as to defeat the claim of Mr. Pennyfeather. The determination of the claim should be made on the merits in the proper forum. In these circumstances, where there is no CCAA plan, the CCAA proceeding is, in my view, not the proper forum.

49 Similar considerations apply to the Stay Order. With no prospect of a compromise or arrangement, and with the sales process completed, there is no need to maintain the status quo to allow the debtor to focus and concentrate its efforts on negotiating a compromise or arrangement. In this regard, the fact that neither Timminco nor the Monitor take a position on this motion or argue prejudice is instructive.

Applicability of Established Tests

50 The lifting of a stay is discretionary. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of (a) the balance of convenience; (b) the relative prejudice to the parties; and (c) where relevant, the merits of the proposed action: *Canwest Global Communications Corp., Re*, 2011 ONSC 2215, 75 C.B.R. (5th) 156 (Ont. S.C.J. [Commercial List]), at para. 27.

51 Counsel to Mr. Walsh submit that courts have historically considered the following factors in determining whether to exercise their discretion to consider claims after the claims-bar date: (a) was the delay caused by inadvertence and, if so, did the claimant act in good faith? (b) what is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay; (c) if relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing? and (d) if relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

52 These are factors that have been considered by the courts on numerous occasions (see, for example, *Sino-Forest*; *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), *Blue Range Resource Corp., Re*, 2000 ABCA 285, 193 D.L.R. (4th) 314 (Alta. C.A.) , leave to appeal to S.C.C. refused, (S.C.C.); *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (2008), 48 C.B.R. (5th) 41 (Ont. S.C.J.); and *Ivorylane Corp. v. Country Style Realty Ltd.*, [2004] O.J. No. 2662 (Ont. S.C.J. [Commercial List])).

53 However, it should be noted that all of these cases involved a CCAA Plan that was considered by creditors.

54 In the present circumstances, it seems to me there is an additional factor to take into account: there is no CCAA Plan.

55 I have noted above that certain delay can be attributed to the CCAA proceedings and the impact of *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90 (Ont. C.A.), at the Court of Appeal. That is not a full answer for the delay but a partial explanation.

56 The prejudice experienced by a director not having a final resolution to the proposed Class Action has to be weighed as against the rights of the class action plaintiff to have this matter heard in court. To the extent that time constitutes a degree of prejudice to the defendants, it can be alleviated by requiring the parties to agree upon a timetable to have this matter addressed on a timely basis with case management.

57 I have not addressed in great detail whether the CPO requires excluded claims to be filed. In my view, it is not necessary to embark on an analysis of this issue, nor have I embarked on a review of the merits. Rather, the principles of equity and fairness dictate that the class action plaintiff can move forward with the claim. The claim may face many hurdles. Some of these have been outlined in the factum submitted by counsel to Mr. Walsh. However, that does not necessarily mean that the class action plaintiff should be disentitled from proceeding.

58 In the result, the motion of Mr. Pennyfeather is granted and the stay is lifted so as to permit Mr. Pennyfeather to proceed with the Class Action. The CPO is modified so as to allow Mr. Pennyfeather to file his claim.

Motion granted.

Tab 10

2015 BCSC 1199
British Columbia Supreme Court

Credit Suisse AG v. Great Basin Gold Ltd.

2015 CarswellBC 1953, 2015 BCSC 1199, [2015] B.C.W.L.D. 5426, 256 A.C.W.S. (3d) 590, 27 C.B.R. (6th) 32

Credit Suisse AG, Petitioner and Great Basin Gold Ltd., Respondent

Fitzpatrick J.

Heard: June 9, 2015
Judgment: July 10, 2015
Docket: Vancouver S134749

Counsel: S. Dvorak, R. Jacobs, J. Dietrich for Linden Advisors LP, Crystalline Management Inc. and Wolverine Asset Management, LLC
M. Clemens, Q.C. for Patrick Cooke, Estate of David M.S. Elliott, Octavia Matloa, Terrence Barry Coughlan, Harry Wayne Kirk, Joshua C. Ngoma, Walter T. Segsworth, Anu Dhir, Philip Kotze and Ronald Thiessen
J.K. McEwan, Q.C., J. Hughes for Ferdinard Dippenaar, Lourens van Vuuren, Willem Beckmann, Philip N. Bentley, Bheki Khumalo and Dana Roets
P. Rubin for Credit Suisse AG

***Fitzpatrick J.*:**

Introduction

1 This application concerns the scope of a stay of proceedings ordered by the court arising from the granting of a receivership order as against the respondent, Great Basin Gold Ltd. (”Great Basin”).

2 The issue is whether the proper interpretation of the stay provision is such that it includes a stay of proceedings in favour of the former directors and officers of Great Basin.

3 Linden Advisors LP, Crystalline Management Inc. and Wolverine Asset Management, LLC (collectively, the “Applicant Creditors”), had previously commenced an action against Great Basin’s directors and officers and the issue of the stay has been recently raised. The Applicant Creditors now seek clarification concerning the proper interpretation of the receivership order, namely, whether the stay prevents them from continuing with their action, save with leave of the court.

Background Facts

The Insolvency Proceedings

4 On September 19, 2012, Great Basin applied for and was granted creditor protection under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the “*CCAA*”). Despite the filing having taken place in Vancouver, British Columbia, Great Basin’s gold-mining operations, through its subsidiaries, were principally located elsewhere. Various properties were held around the world, but the principal assets were gold mines in Nevada and South Africa.

5 On the filing date, I granted an initial order, as is typically granted in *CCAA* proceedings (the “Initial Order”). I

remained seized of the *CCAA* proceedings and would issue all of the court orders in those proceedings and in the later receivership proceedings as discussed in these reasons.

6 The Initial Order imposed a stay of proceedings against or in respect of Great Basin or affecting the "Business" and "Property" of Great Basin:

> 15. Until and including October 19, 2012 or such later date as this Court may order (the "Stay Period"), no action, suit or proceeding in any court or tribunal (each, a "Proceeding") against or in respect of [Great Basin] or the Monitor, or affecting the Business or the Property, shall be commenced or continued except with the written consent of [Great Basin] and the Monitor or with leave of this Court, and any and all Proceedings currently under way against or in respect of [Great Basin] or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

7 "Property" was defined in the Initial Order as "current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof". Great Basin was ordered to continue to carry on its business in the ordinary course (defined as the "Business").

8 In addition, the Initial Order provided for a stay of proceedings as against the directors and officers of Great Basin in respect of pre-filing matters:

> 22. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against the directors or officers of [Great Basin] with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of [Great Basin] whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of a such obligations, until a compromise or arrangement in respect of [Great Basin], if one is filed, is sanctioned by this Court or is refused by the creditors of [Great Basin] or this Court. Nothing in this Order, including in this paragraph, shall prevent the commencement of a Proceeding to preserve any claim against a director or officer of [Great Basin] that might otherwise be barred or extinguished by the effluxion of time, provided that no further step shall be taken in respect of such Proceeding except for service of the initiating documentation on the applicable director or officer.

9 By June 28, 2013, the *CCAA* proceedings had run their course with sales of the major gold-mining assets having been concluded or substantially underway. On that date, this Court granted an order terminating the *CCAA* proceedings at the request of Great Basin and with the support of its largest secured creditor, the petitioner Credit Suisse AG (the "Termination Order"). The Termination Order specifically provided that the stays of proceedings as set out above in paragraphs 15 and 22 of the Initial Order were terminated and set aside.

10 Concurrent with the termination of the *CCAA* proceedings, on June 28, 2013, Credit Suisse AG applied to the Court and was granted an order (the "Receivership Order"), appointing a receiver over the "Property" of Great Basin, who was defined as the "Debtor".

11 The definition of "Property" in the Receivership Order was different than that found in the Initial Order. The term was defined as "all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof." This definition of "Property" was consistent with the wording of the model receivership order published on the Court's website, and also consistent with the language found in s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, which is the statutory authority for the appointment of the receiver.

12 The central issue on this application arises from the terms of the Receivership Order which imposed a stay of proceedings against or "in respect of" Great Basin and the Property, as defined:

> 12. No Proceedings against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court; provided, however, that nothing in this Order shall prevent any Person from commencing a Proceeding regarding a claim that

might otherwise become barred by statute or an existing agreement if such Proceeding is not commenced before the expiration of the stay provided by this paragraph and provided that no further step shall be taken in respect of Proceeding except for service of the initiating documentation on the Debtor and the Receiver.

13 Under the Receivership Order, FTI Consulting Canada Inc. was appointed receiver and manager (the "Receiver").

14 The evidence at the June 28, 2013 hearing - at which time the Termination Order and the Receivership Order were granted - referred to the following relevant circumstances:

a) the stay of proceedings under the Initial Order was set to expire on June 30, 2013;

b) no extension of the *CCAA* proceedings was being sought by Great Basin as there was no prospect for a restructuring of Great Basin and there was no on-going business being conducted by Great Basin. As such, there was no need to continue the *CCAA* proceedings and incur the cost of doing so;

c) the remaining directors and officers of Great Basin were set to resign on the earlier of June 30, 2013 or the date on which the *CCAA* proceedings were terminated. This was tied to the expiry of the then-existing insurance policy in place for the directors and officers of Great Basin; and

d) it was considered necessary that a receiver be appointed to complete the remaining matters that were outstanding in the *CCAA* proceedings. Those matters included causing Great Basin's subsidiaries in other jurisdictions to finalize the sales of the principal gold-mining assets through insolvency proceedings in those jurisdictions. Specifically:

i. in May 2013, the Hollister gold mine in Nevada had been sold through insolvency proceedings commenced under chapter 11 of the *United States Bankruptcy Code*, 11 U.S.C. and it was anticipated that certain administrative matters needed to be finalized to conclude those proceedings; and

ii. the sales process of the Burnstone mine in South Africa was underway at the time pursuant to business rescue proceedings commenced in South Africa. Those sale proceedings had not been completed, and it was contemplated that a sale would require later transactions to be completed by Great Basin and certain Cayman Islands subsidiaries.

15 Paragraph 23 of the Initial Order provided that Great Basin indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers on account of legal defence costs after the commencement of the *CCAA* proceedings. As security for this obligation, the directors and officers were granted a "Directors' Charge" as against Great Basin's "Property" (as defined in the Initial Order) limited to $500,000. The Director's Charge was granted priority behind the "Administration Charge" but ahead of the "DIP Lenders' Charge" for the interim financing.

16 Pursuant to paragraph 22 of the Termination Order, the Directors' Charge continued to attach to the "Property" as defined in the Initial Order. The priorities of the various court-ordered charges were further addressed in the Receivership Order, but the Directors' Charge remained second in priority only behind the Administration Charge.

Action Brought by the Applicant Creditors

17 On August 14, 2014, the Applicant Creditors commenced an action in this Court against the former directors and officers of Great Basin (the "Action"). In essence, the Applicant Creditors allege that various public disclosures, including financial statements, prospectuses and press releases made by Great Basin contained misrepresentations and omissions. The Applicant Creditors allege that the directors and officers breached their common-law, statutory and fiduciary duties and obligations owed to certain stakeholders of Great Basin, including the Applicant Creditors. They seek damages in the amount of $40 million plus interest.

18 As counsel for the directors and officers point out, there is some emphasis in the Action on the disclosure in a November 2009 prospectus issued by Great Basin for certain unsecured convertible debentures in which the Applicant

Creditors invested. There are also allegations concerning the public disclosure made before and after that offering.

19 In addition, on January 9, 2015, Credit Suisse AG commenced a claim against some directors and officers of Great Basin in the Second Judicial District Court of the State of Nevada. Similar to the action commenced by the Applicant Creditors, Credit Suisse AG alleges that the officers and directors misrepresented certain matters relating to Great Basin, which Credit Suisse AG relied upon in granting significant loans to Great Basin, both prior to and after the *CCAA* proceedings began. Credit Suisse AG also alleges that the officers and directors "recklessly mismanaged" Great Basin's subsidiaries.

20 In May 2015, counsel for the officers and directors advised counsel for the Applicant Creditors of their position that the Applicant Creditors had filed the Action in violation of the stay of proceedings granted per paragraph 12 of the Receivership Order. Among other things, the directors and officers asserted that, given the allegations about public disclosures made by Great Basin, and the indemnities that Great Basin gave to each of the officers and directors, the stay applied. Counsel for the officers and directors therefore took the position that the Receivership Order stayed the Action unless and until written consent was obtained from the Receiver or leave was obtained from this Court.

21 Initially, there was some issue about why the matter of the stay was only being raised some time following the commencement of the Action in August 2014. However, counsel for the officers and directors advised that the Receivership Order had only recently come to their attention in May 2015, which explanation I accept. In my view, nothing arises from any delay in bringing forward the issue as the matter can be addressed on its merits.

22 Certain of the defendants in the Action, being officers and directors appointed prior to the *CCAA* proceedings, intend to file response material denying any wrongdoing. Specifically, they contend that the acts that are the subject of the Action are "the acts of [Great Basin] and not the acts of the [officers and directors]". In addition, they propose to file a counterclaim alleging that the Action is in breach of the trust indenture by which the Applicant Creditors invested in Great Basin. That trust indenture provided that there would be no recourse against certain persons, including directors and officers.

23 Other defendants in the Action, being directors and officers appointed after the *CCAA* proceedings began, also intend to file response material. They also contend that the representations and conduct that are the subject of the Action were "representations made by or conduct of [Great Basin], not these Defendants personally". They also propose to file a counterclaim alleging that the Action is in breach of the trust indenture by which the Applicant Creditors invested in Great Basin.

The Issue

24 The Applicant Creditors dispute the interpretation of paragraph 12 of the Receivership Order advanced by the directors and officers that they require leave of the court in order to proceed with the Action. Nevertheless, in order to clarify the matter, the Applicant Creditors now bring this application for a declaration that the stay of proceedings does not operate to stay the Action and that no leave is required.

25 The Receiver has indicated that it takes no position in respect of this application so, obviously, no consent to bring the Action is forthcoming to obviate the issue.

Discussion

26 The parties agree that the Receivership Order is to be interpreted in accordance with the approach as set out in *Yu v. Jordan*, 2012 BCCA 367 (B.C. C.A.):

> [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.

27 All of the aspects leading to and including the granting of the Receivership Order - the pleadings, relevant circumstances and language of the order itself - are considerably interrelated in this case. In my view, all aspects support the conclusion that the Receivership Order did not stay the Action against the directors and officers.

(i) Pleadings

28 The pleadings that are relevant here include the backdrop of the *CCAA* proceedings, the terms of the Initial Order and, later still, the Receivership Order and the Termination Order.

29 In the *CCAA* context, imposing a stay of proceedings is generally seen as a critical component of the relief sought by the debtor company in preserving the *status quo* while a company attempts to restructure. The need for a stay of proceedings against creditors of the debtor company seems evident enough; however, it is also well-recognized that a stay of proceedings against third parties could, in some cases and, indeed, often does, equally assist in achieving the objectives of the *CCAA*.

30 In addition, the need to cast a large net in terms of protecting the debtor's ownership and management of its assets pending reorganization is generally seen as justifying the typical broad definition of "Property", as is found in the Initial Order.

31 Early cases tended to rely on inherent jurisdiction as the jurisdictional basis for a stay as against third parties. In that regard, the comments of Tysoe J. (as he then was) in *Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257 at 268 (S.C.) are instructive in that such a stay must be important to the reorganization process and the court must weigh the relative prejudice arising from the stay:

> Hence, it is my view that the inherent jurisdiction of the Court can be invoked for the purpose of imposing stays of proceedings against third parties. However, it is a power that should be used cautiously. In *Westar* Macdonald J. relied upon the Court's inherent jurisdiction to create a charge against Westar's assets because he was of the view that Westar would have no chance of completing a successful reorganization if he did not create the charge. I do not think that it is a prerequisite to the Court exercising its inherent jurisdiction that the insolvent company will not be able to complete a reorganization unless the inherent jurisdiction is exercised. But I do think that the exercise of the inherent jurisdiction must be shown to be important to the reorganization process.
>
> In deciding whether to exercise its inherent jurisdiction the Court should weigh the interests of the insolvent company against the interests of the parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the Court should decline to exercise its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the Court that it should not exercise its discretion under s. 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).
>
> [Emphasis added.]

32 Stays of proceedings in favour of former or current directors and officers of a debtor company in *CCAA* proceedings were and are common. Such a stay is seen as consistent in achieving the policy objective of furthering the debtor company's restructuring efforts. A stay of proceedings in favour of officers and directors affords some protection to those individuals, in that it acts as an inducement to remain involved in the restructuring, which is benefited by the directors' and officers' knowledge and expertise. Other benefits include avoiding the allocation of time and resources to defend such proceedings at the expense of and detriment to the restructuring itself.

33 In 2005, the *CCAA* was amended to provide the court with express statutory authority to stay proceedings against directors and officers with respect to pre-filing matters:

> 11.03(1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this

> Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

34 It can be seen that the provision in the Initial Order staying actions against the directors and officers (paragraph 22) substantially tracks the language of s. 11.03(1).

35 The rationale of the court in *Re Woodward's* continues to be applied in *CCAA* proceedings and, in particular, to the consideration as to whether stays in favour of officers and directors will be continued or lifted.

36 In *Nortel Networks Corp., Re* (2009), 57 C.B.R. (5th) 232 (Ont. S.C.J. [Commercial List]), at 239 , Morawetz J. upheld a stay of proceedings in favour of certain directors and employees of Nortel:

> In my view, the Nortel restructuring is at a critical stage and the energies and activities of the Board should be directed towards the restructuring. I accept the argument of Mr. Barnes on this point. To permit the ERISA Litigation to continue at that time would, in my view, result in a significant distraction and diversion of resources at a time when that can be least afforded. It is necessary in considering whether to lift the stay, to weigh the interests of the Applicants against the interests of those who will be affected by the stay. Where the benefits to be achieved by the applicant outweighs the prejudice to affected parties, a stay will be granted. (See: *Woodwards Limited (Re)* (1993) 17 C.B.R. (3d) 236 (B.C.S.C.).)

37 Importantly, the court in *Re Nortel* emphasized that the stay was intended only as a postponement of the claims being brought or continued: *Nortel* at 239. The postponement aspect is consistent with s. 11.03(1) of the *CCAA* and paragraph 22 of the Initial Order, which contemplate the continuation of the stay until such time as a compromise or arrangement is either accepted or refused by the creditors and the court.

38 As Dewar J. stated in *Puratone Corp., Re*, 2013 MBQB 171 (Man. Q.B.), whether the stay will be lifted or continued is to be considered in the context of the nature and timing of the *CCAA* process before the court: para. 15. In that case, the court noted that the *CCAA* proceedings did not result in a restructuring but, rather, a liquidation of the assets with proceeds to be distributed. As such, the court, in considering relative prejudice, found that the balance of convenience favoured lifting the stay to allow the action against Puratone and the directors and officers to proceed "sooner rather than later": para. 38.

39 It is in this context that the Termination Order and Receivership Order must be considered. In a situation similar to that in *Re Puratone*, by June 2013, much of the policy objectives underlying the stay in favour of Great Basin's directors and officers in the Initial Order had been spent. The receivership presented a sea change of sorts in the sense that a pure liquidation of the remaining assets was the focus and, importantly, the remaining liquidation efforts were to be handled by the Receiver and not by the directors and officers of Great Basin. In that regard, the focus of the Receivership Order was to protect the activities of the Receiver and the assets under its administration. The stay of proceedings found in paragraph 12 of the Receivership Order accomplished that, in part, along with the stay of proceedings in paragraph 13, and the specific stay as against the Receiver in paragraph 11.

40 It is not unheard of that *CCAA* proceedings simply segue into receivership proceedings with little regard to or change in the relief granted in court orders in terms of the effect of those orders on third parties. However, a receivership is a fundamentally different type of proceeding and the objectives to be achieved in each type of proceeding must be considered in terms of how third parties are to be affected. That is not to say that a stay of proceedings against third parties will never be appropriate in a receivership; rather, the court must be cognizant, as was stated in *Re Woodward's*, that the stay power should be used cautiously, and there must be some cogent reason underlying the interference with the rights of those third parties in either a *CCAA* or receivership proceeding.

41 That brings me more specifically to the Termination Order which must be considered alongside the Receivership Order. What can be gleaned from both these orders, when considered in the context of the Initial Order, is that counsel did what was expected of them, in that they carefully considered what relief was appropriate going forward, with or without amendment, and what relief should be terminated. This was the substance of the hearing on June 28, 2013 when the two

orders were granted.

42 It is significant that paragraph 15 of the Initial Order contained a broader stay protection for Great Basin than the stay in the Receivership Order since it provided for a stay "against or in respect of [Great Basin] or the Monitor, or affecting *the Business* or the Property" [emphasis added]. Even with this broader stay protection, the Initial Order contained a separate stay of proceedings against directors and officers at paragraph 22, which supports the interpretation that the broader stay did not provide this protection to the officers and directors.

43 In contrast, the Receivership Order included more limited stay protection for Great Basin's Property, which need only have been acquired for or used in relation to its business. It did not, as did the Initial Order, refer to the stay of proceeding in relation to any action that might affect Great Basin's "Business". This is understandable since it was expected that Great Basin would continue its "Business" in the *CCAA* proceedings: Initial Order at para. 4. This is also consistent with the evidence at the June 28, 2013 hearing that Great Basin had ceased to conduct any business by the time of the receivership.

44 Finally, it cannot be ignored that there was neither an application for nor an order for a separate stay of proceedings against the directors and officers in the Receivership Order as there was in the Initial Order. To the opposite effect, that provision was specifically terminated by the Termination Order. I agree with the Applicant Creditors that this change must be given some meaning. The directors and officers assert that they were not represented by counsel at the June 28, 2013 hearing. However, it must be inferred that they were well-aware of the protections afforded to them by reason of the *CCAA* proceedings (including the specific stay and the granting of the Directors' Charge), and that they either were or could have been, with some due diligence, aware of how matters were to be transitioned to the receivership.

45 At the very least, their knowledge of the expiry of the director and officer insurance policy, coupled with their resignations at the same time, would have highlighted to them that changes were afoot in terms of their participation in the proceedings and the protections that they had enjoyed to that time.

(ii) Language of the Receivership Order

46 It is clear enough that the Receivership Order does not include any express language imposing a stay of proceedings in favour of Great Basin's directors and officers. This is in contrast to paragraph 22 of the Initial Order.

47 Counsel for the directors and officers rely on the wording of paragraph 12 of the Receivership Order in arguing that there is a stay of proceedings "in respect of" both Great Basin and the Property, as defined. They contend that this wording is broad enough to include the Action now commenced by the Applicant Creditors.

48 In *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743 (S.C.C.), at 751, Major J. discussed the Court's earlier consideration of the phrase "in respect of":

> [A plain] reading is supported by Dickson J.'s interpretation of almost identical language in *Nowegijick v. The Queen* [1983] 1 S.C.R. 29, at p. 39:
>
> > The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. [Emphasis added.]

49 The extent of the scope of that phrase was, however, tempered by the later comments of the Court in *Sarvanis v. Canada*, 2002 SCC 28 (S.C.C.):

> [22] It is fair to say, at the minimum, that the phrase "in respect of" signals an intent to convey a broad set of connections. The phrase is not, however, of infinite reach. Although I do not depart from Dickson J.'s view that "in respect of" is among the widest possible phrases that can be used to express connection between two legislative facts or circumstances, the inquiry is not concluded merely on the basis that the phrase is very broad.

Further, the Court in *Sarvanis* discussed that the phrase "in respect of" must be considered by "looking to the context in which the words are found": see paras. 23-26.

50 What then is the connection between the terms of the Receivership Order, being Great Basin and its Property, and the Action?

51 Firstly, the directors and officers argue that the Action is "in respect of" Great Basin because the allegations concern the corporate actions of Great Basin, specifically as to the issuance of the 2009 prospectus by which the misrepresentations were said, at least in part, to have been made. As I have outlined above, the substance of the defences raised in the Action is that the directors and officers were acting in the course of their duties in those capacities and that, therefore, any misrepresentations are the misrepresentations of Great Basin and not of the directors and officers personally.

52 Specifically, the officers and directors contend that the officer and director defendants in the Action could easily be replaced by simply naming Great Basin as a defendant given the causes of action advanced. While that may be true, one might wonder about the utility of doing so since the Applicant Creditors obviously have a more direct cause of action against Great Basin given the creditor/debtor relationship that currently exists.

53 The reality is that Great Basin is not named as a defendant in the Action even though it could have been.

54 Further, I appreciate that the officers and directors have substantive defences to the Action. Those defences include that the directors and officers were only acting in the course of their duties and that they acted in a manner consistent with what the law requires. Negligence claims will be met with the contention that the business judgment rule applies; allegations of breach of fiduciary and statutory duties will be met with the contention that their duties are owed to Great Basin, not to the Applicant Creditors as creditors, or that the claims are statute-barred.

55 Even so, a plain reading of the pleadings in the Action supports the view that the allegation is that the directors and officers are *personally* liable for the actions or omissions by each of them. Accordingly, while many of the factual circumstances upon which those allegations are made involve Great Basin, that does not mean that the Action is "in respect of" Great Basin.

56 As the Applicant Creditors contend, if the language "in respect of" a corporate debtor is to be interpreted so broadly to encompass such claims against its directors and officers arising from their actions in that capacity, then a separate stay of proceedings against directors and officers (as was granted in the Initial Order) would never be required.

57 The argument of the directors and officers is also not assisted by the circumstances of the trust indenture issued by Great Basin that provided that there would be no recourse or personal liability against others, including directors and officers. Again, that document may form an important plank of the directors' and officers' defence against personal liability, but the fact that Great Basin issued that trust indenture does not mean that there is an inextricable connection between Great Basin and the Action.

58 Secondly, the directors and officers argue that their claim is "in respect of" Great Basin's Property, as defined in the Receivership Order. I would observe at the outset that the definition of Property in the Receivership Order is considerably narrower than that found in the Initial Order. As I will discuss below, that is an important factor in many aspects, including in interpreting the scope of the stay of proceedings imposed in both the *CCAA* and receivership proceedings.

59 The directors and officers also argue that this claim is "in respect of" Great Basin's Property arising from the circumstances of the indemnity agreement that Great Basin executed in favour of the directors and officers. However, if the Applicant Creditors are successful in the Action, they will recover judgment against the directors and officers personally, not against Great Basin to the extent that it may recover from its Property. At best, the indemnity agreement forms an independent contractual basis upon which the directors and officers might seek recovery from Great Basin. I agree that a third-party action by the directors and officers against Great Basin would obviously engage the stay of proceedings found in the Receivership Order. It seems clear enough why no such claim has been advanced, given that the directors and officers would in any event be unlikely to recover any judgment obtained given the substantial losses of even the secured creditors.

60 The directors and officers argue that the Action is "in respect of" Great Basin's Property since the Directors' Charge

was continued over the Property by the terms of the Termination Order and the Receivership Order. This represents a more substantial connection between the Action and Great Basin's Property than the above arguments, but is answered by the same points raised in relation to the indemnity. Again, this is an independent claim that might be advanced by the directors and officers against Great Basin and the Property. The fact that the directors and officers might in the future advance claims against the Property secured by the Directors' Charge, does not change the characterization of the claims of the Applicant Creditors which are not against Great Basin's Property.

61 In these circumstances, I cannot discern any connection or relationship between the relief sought in the Action and Great Basin and the Property, as defined in the Receivership Order. A plain reading of the Receivership Order evidences that the stay of proceedings was intended to maintain order in the realization proceedings that were then to be conducted by the Receiver in liquidating the assets of Great Basin. No issues are raised in the Action that directly affect the process by which that liquidation is to be accomplished by the Receiver.

(iii) Applicable Circumstances

62 Much of what I have discussed above includes the particular circumstances that were in existence leading up to the June 2013 hearing when the relief sought was granted in the Receivership Order.

63 To summarize, the *CCAA* proceedings had ceased to serve any purpose in that no restructuring was on the horizon. The only activities being conducted at the end were the sales of the gold-mining assets, and it was argued before the court that the proper person to conduct those later activities was a receiver. In that vein, the directors and officers were set to depart the scene in that their services were no longer required.

64 Indeed, upon the court order appointing the Receiver, the powers of the directors and officers ceased: see *Business Corporations Act*, S.B.C. 2002, c. 57, s. 105.

65 In that sense, the rationale behind continuing the stay of proceedings in favour of the directors and officers evaporated. There remained no useful purpose in continuing the stay in their favour. The matter of prejudice was not particularly argued before the court on June 28, 2013. However, in the main, the court would have intuitively recognized that a third party having a claim against the directors and officers would be prejudiced by the continuation of the stay and no corresponding prejudice was asserted by the directors and officers in terms of discontinuing the stay.

66 To put it another way, no evidence was presented upon which the court could have exercised its discretion in terms of continuing the extraordinary remedy of preventing actions being brought against Great Basin's directors and officers in the changed circumstances at play in June 2013.

67 The directors and officers place considerable reliance on the reasoning and results found in *Sutherland v. Reeves*, 2014 BCCA 222 (B.C. C.A.). The court in that case had appointed a receiver, not to liquidate assets to pay debt, but to wind down the business and affairs of Tangerine, a limited partnership. Mr. Sutherland and Mr. Reeves, the main participants in the limited partnership, had substantial disputes concerning Tangerine's affairs. A stay of proceedings was imposed "in respect of" Tangerine and its property (as defined). Later still, Mr. Sutherland filed an action against Mr. Reeves alleging fraud in relation to the cancellation of shares in the general partner company and termination of a management services agreement. The Court of Appeal found that the interpretation of the stay of proceedings found in the receivership order should have prevented the filing of the later action.

68 While the analysis of the Court of Appeal is of some assistance on this application, I consider that the unique circumstances found in *Sutherland* do not support a similar result here in that they provided an entirely different context in which to interpret a very different receivership order.

69 Firstly, the definition of "Property" in the receivership order in *Sutherland* was stated by the court to be "undeniably broad" in that it referred to the "business, affairs, undertaking and assets" of Tangerine, which appears to have been operating as a business: para. 35. This expansive definition was clearly intended to encompass the entire business activities of Tangerine which had become dysfunctional by reason of the relationship of Mr. Sutherland and Mr. Reeves. The broader terms of "business" and "affairs" at issue in *Sutherland* are not found in the Receivership Order, consistent with the lack of

business activity of Great Basin and the intention to simply liquidate assets to pay debt.

70 Secondly, it was evident that, although Mr. Sutherland had not named Tangerine as a defendant in his later action, his allegations were, in substance, about the infighting that had led to the receivership order in the first instance. Further, the relief sought included that relating to the shareholdings in Tangerine. The court found that Mr. Sutherland's action inherently involved the affairs and business of Tangerine, or was "in respect of" Tangerine: para. 36.

71 Thirdly, the Court also found that Mr. Sutherland was obviously trying to do indirectly what he had been prevented from doing directly. His later action was the same as had been previously pled even before the receivership order and, as such, the order was characterized to capture such allegations: para. 37.

72 What can be inferred from the decision in *Sutherland* is that the court was attempting to bring order to a complex corporate situation which was chaotic and hamstrung by fighting between the parties. Mr. Sutherland was attempting to thwart that objective and his action had the potential to negatively affect the efforts of the receiver in dealing with the assets and business. In that sense, the objective behind the receivership order was more akin to the situation addressed by the Initial Order. Here, by the time of the Receivership Order, order had been achieved and the overall objective was to empower the Receiver, not the directors and officers, to continue the liquidation process.

73 What does resonate from the decision in *Sutherland*, but by way of distinction, is the court's conclusion that Mr. Sutherland's later action threatened to disturb the receivership process: para. 48. In contrast, there was no evidence at the time of the hearing on June 28, 2013 that the stay of proceedings in favour of the officers and directors was needed to protect the receivership process.

74 On a final note, the court in *Sutherland* noted that Mr. Sutherland was only being prevented from bringing his action until the end of the receivership process: para. 50. By that time, the salutary effect of the stay would have been achieved and there would have been no longer any need to prejudice Mr. Sutherland by its terms.

75 Similarly, here, the salutary effect of the stay in favour of Great Basin's directors and officers ended upon the granting of the Receivership Order.

Conclusion

76 I declare that the stay of proceedings in paragraph 12 of the Receivership Order does not apply to the Action for the above reasons. The Applicant Creditors are awarded their costs of the application as against the directors and officers on Scale B.

Application granted.

Tab 11

2009 CarswellOnt 7882
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 7882, [2009] O.J. No. 5379, 183 A.C.W.S. (3d) 634, 61 C.B.R. (5th) 200

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Pepall J.

Heard: December 8, 2009
Judgment: December 15, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Alex Cobb, Shawn Irving for CMI Entities
Alan Mark, Alan Merskey for Special Committee of the Board of Directors of Canwest
David Byers, Maria Konyukhova for Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders
K. McElcheran, G. Gray for GS Parties
Hugh O'Reilly, Amanda Darrach for Canwest Retirees and the Canadian Media Guild
Hilary Clarke for Senior Secured Lenders to LP Entities
Steve Weisz for CIT Business Credit Canada Inc.

***Pepall J.*:**

Relief Requested

1 The CCAA applicants and partnerships (the "CMI Entities") request an order declaring that the relief sought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.1 and GS VI AA One Parallel Holding S.ar.1 (the "GS Parties") is subject to the stay of proceedings granted in my Initial Order dated October 6, 2009. The GS Parties bring a cross-motion for an order that the stay be lifted so that they may pursue their motion which, among other things, challenges pre-filing conduct of the CMI Entities. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors support the position of the CMI Entities. All of these stakeholders are highly sophisticated. Put differently, no one is a commercial novice. Such is the context of this dispute.

Background Facts

2 Canwest's television broadcast business consists of the CTLP TV business which is comprised of 12 free-to-air television stations and a portfolio of subscription based specialty television channels on the one hand and the Specialty TV Business on the other. The latter consists of 13 specialty television channels that are operated by CMI for the account of CW Investments Co. and its subsidiaries and 4 other specialty television channels in which the CW Investments Co. ownership interest is less than 50%.

3 The Specialty TV Business was acquired jointly with Goldman Sachs from Alliance Atlantis in August, 2007. In January of that year, CMI and Goldman Sachs agreed to acquire the business of Alliance Atlantis through a jointly owned acquisition company which later became CW Investments Co. It is a Nova Scotia Unlimited Liability Corporation (”NSULC”).

4 CMI held its shares in CW Investments Co. through its wholly owned subsidiary, 4414616 Canada Inc. (”441”). According to the CMI Entities, the sole purpose of 441 was to insulate CMI from any liabilities of CW Investments Co. As a NSULC, its shareholders may face exposure if the NSULC is liquidated or becomes bankrupt. As such, 441 served as a “blocker” to potential liability. The CMI Entities state that similarly the GS parties served as “blockers” for Goldman Sachs’ part of the transaction.

5 According to the GS Parties, the essential elements of the deal were as follows:

(i) GS would acquire at its own expense and at its own risk, the slower growth businesses;

(ii) CW Investments Co. would acquire the Specialty TV Business and that company would be owned by 441 and the GS Parties under the terms of a Shareholders Agreement;

(iii) GS would assist CW Investments Co. in obtaining separate financing for the Specialty TV Business;

(iv) Eventually Canwest would contribute its conventional TV business on a debt free basis to CW Investments Co. in return for an increased ownership stake in CW Investments Co.

6 The GS Parties also state that but for this arrangement, Canwest had no chance of acquiring control of the Specialty TV Business. That business is subject to regulation by the CRTC. Consistent with policy objectives, the CRTC had to satisfy itself that CW Investments Co. was not controlled either at law or in fact by a non-Canadian.

7 A Shareholders Agreement was entered into by the GS parties, CMI, 441, and CW Investments Co. The GS Parties state that 441 was a critical party to this Agreement. The Agreement reflects the share ownership of each of the parties to it: 64.67% held by the GS Parties and 35.33% held by 441. It also provides for control of CW Investments Co. by distribution of voting shares: 33.33% held by the GS Parties and 66.67% held by 441. The Agreement limits certain activities of CW Investments Co. without the affirmative vote of a director nominated to its Board by the GS Parties. The Agreement provides for call and put options that are designed to allow the GS parties to exit from the investment in CW Investments Co. in 2011, 2012, and 2013. Furthermore, in the event of an insolvency of CMI, the GS parties have the ability to effect a sale of their interest in CW Investments Co. and require as well a sale of CMI’s interest. This is referred to as the drag-along provision. Specifically, Article 6.10(a) of the Shareholders Agreement states:

> Notwithstanding the other provisions of this Article 6, if an Insolvency Event occurs in respect of CanWest and is continuing, the GS Parties shall be entitled to sell all of their Shares to any *bona fide* Arm’s Length third party or parties at a price and on other terms and conditions negotiated by GSCP in its discretion provided that such third party or parties acquires all of the Shares held by the CanWest Parties at the same price and on the same terms and conditions, and in such event, the CanWest Parties shall sell their Shares to such third party or parties at such price and on such terms and conditions. The Corporation and the CanWest Parties each agree to cooperate with and assist GSCP with the sale process (including by providing protected purchasers designated by GSCP with confidential information regarding the Corporation (subject to a customary confidentiality agreement) and with access to management).

8 The Agreement also provided that 441 as shareholder could transfer its CW Investments Co. shares to its parent, CMI, at any time, by gift, assignment or otherwise, whether or not for value. While another specified entity could not be dissolved, no prohibition was placed on the dissolution of 441. 441 had certain voting obligations that were to be carried out at the direction of CMI. Furthermore, CMI was responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

9 On October 5, 2009, pursuant to a Dissolution Agreement between 441 and CMI and as part of the winding-up and

distribution of its property, 441 transferred all of its property, namely its 352,986 Class A shares and 666 Class B preferred shares of CW Investments Co., to CMI. CMI undertook to pay and discharge all of 441's liabilities and obligations. The material obligations were those contained in the Shareholders Agreement. At the time, 441 and CW Investments Co. were both solvent and CMI was insolvent. 441 was subsequently dissolved.

10 For the purposes of these two motions only, the parties have agreed that the court should assume that the transfer and dissolution of 441 was intended by CMI to provide it with the benefit of all the provisions of the CCAA proceedings in relation to contractual obligations pertaining to those shares. This would presumably include both the stay provisions found in section 11 of the CCAA and the disclaimer provisions in section 32 .

11 The CMI Entities state that CMI's interest in the Specialty TV Business is critical to the restructuring and recapitalization prospects of the CMI Entities and that if the GS parties were able to effect a sale of CW Investments Co. at this time, and on terms that suit them, it would be disastrous to the CMI Entities and their stakeholders. Even the overhanging threat of such a sale is adversely affecting the negotiation of a successful restructuring or recapitalization of the CMI Entities.

12 On October 6, 2009, I granted an Initial Order in these proceedings. CW Investments Co. was not an applicant. The CMI Entities requested a stay of proceedings to allow them to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of 8% Noteholders had agreed on terms of such a transaction that were reflected in a support agreement and term sheet. Those noteholders who support the term sheet have agreed to vote in favour of the plan subject to certain conditions one of which is a requirement that the Shareholders Agreement be amended.

13 The Initial Order included the typical stay of proceedings provisions that are found in the standard form order promulgated by the Commercial List Users Committee. Specifically, the order stated:

> 15. THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.
>
> 16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

14 The GS parties were not given notice of the CCAA application. On November 2, 2009, they brought a motion that, among other things, seeks to set aside the transfer of the shares from 441 to CMI or, in the alternative, require CMI to perform and not disclaim the Shareholders Agreement as if the shares had not been transferred. On November 10, 2009 the GS parties purported to revive 441 by filing Articles of Revival with the Director of the CBCA. The CMI Entities were not notified nor was any leave of the court sought in this regard. In an amended notice of motion dated November 19, 2009 (the

"main motion"), the GS Parties request an order:

> (a) Setting aside and declaring void the transfer of the shares from 441 to CMI;
>
> (b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by these CCAA proceedings in any way whatsoever;
>
> (c) in the alternative to (a) and (b), an order directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer;
>
> (d) in the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer, may not be disclaimed by CMI pursuant to section 32 of the CCAA or otherwise; and
>
> (e) if necessary, a trial of the issues arising from the foregoing.

15 They also requested an order amending paragraph 59 of the Initial Order but that issue has now been resolved and I am satisfied with the amendment proposed.

16 The CMI Entities then brought a motion on November 24, 2009 for an order that the GS motion is stayed. As in a game of chess, on December 3, 2009, the GS Parties served a cross-motion in which, if required, they seek leave to proceed with their motion.

17 In furtherance of their main motion, the GS Parties have expressed a desire to examine 4 of the 5 members of the Special Committee of the Board of Directors of Canwest. That Committee was constituted, among other things, to oversee the restructuring. The GS Parties have also demanded an extensive list of documentary production. They also seek to impose significant discovery demands upon the senior management of CanWest.

Issues

18 The issues to be determined on these motions are whether the relief requested by the GS Parties in their main motion is stayed based on the Initial Order and if so, whether the stay should be lifted. In addition, should the relief sought in paragraph 1(e) of the main motion be struck.

Positions of Parties

19 In brief, the parties' positions are as follows. The CMI Entities submit that the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order. In addition, the relief sought by them involves "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order. The stay is consistent with the purpose of the CCAA. They submit that the subject matter of the motion should be caught so as to prevent the GS parties from gaining an unfair advantage over other stakeholders of the CMI Entities and to ensure that the resources of the CMI Entities are devoted to developing a viable restructuring plan for the benefit of all stakeholders. They also state that CMI's interest in CW Investments Co. is a significant portion of its enterprise value. They state further that their actions were not in breach of the Shareholders Agreement and in any event, debtor companies are able to organize their affairs in order to benefit from the CCAA stay. Furthermore, any loss suffered by the GS Parties can be quantified.

20 In paragraph 1(e) of the main motion, the GS parties seek to prevent CMI from disclaiming the obligations of 441 that existed immediately prior to the transfer of the shares to CMI. If this relief is not stayed, the CMI Entities submit that it should be struck out pursuant to Rule 25.11(b) and (c) as premature and improper. They also argue that section 32 of the CCAA provides a procedure for disclaimer of agreements which the GS Parties improperly seek to circumvent.

21 Lastly, the CMI Entities state that the bases on which a CCAA stay should be lifted are very limited. Most of the

grounds set forth in *Canadian Airlines Corp., Re*[1] which support the lifting of a stay are manifestly inapplicable. As to prejudice, the GS parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise on an insolvency default. In contrast, the prejudice to the CMI Entities would be debilitating and their resources need to be devoted to their restructuring. The GS Parties' rights would not be lost by the passage of time. The GS Parties' motion is all about leverage and a desire to improve the GS Parties' negotiating position submits counsel for the CMI Entities.

22 The Ad Hoc Committee of Noteholders, as mentioned, supports the CMI Entities' position. In examining the context of the dispute, they submit that the Shareholders Agreement permitted and did not prohibit the transfer of 441's shares. Furthermore, the operative obligations in that agreement are obligations of CMI, not 441. It is the substance of the GS Parties' claims and not the form that should govern their ability to pursue them and it is clearly encompassed by the stay. The Committee relies on *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*[2] in support of their position on timing.

23 The Special Committee also supports the CMI Entities. It submits that the primary relief sought by the GS parties is a declaration that their contracts to and with CW Investments cannot or should not be disclaimed. The debate as to whether 441 could properly be assimilated into CMI is no more than an alternate argument as to why such disclaimer can or cannot occur. They state that the subject matter of the GS Parties' motion is premature.

24 The GS Parties submit that the stay does not prevent parties affected by the CCAA proceedings from bringing motions within the CCAA proceedings themselves. The use of CCAA powers and the scope of the stay provided in the Initial Order and whether it applies to the GS Parties' motion are proper questions for the court charged with supervising the CCAA process. They also argue that the motion would facilitate negotiation between key parties, raises the important preliminary issue of the proper scope and application of section 32 of the CCAA, and avoids putting the Monitor in the impossible position of having to draw legal conclusions as to the scope of CMI's power to disclaim. The court should be concerned with pre-filing conduct including the reason for the share transfer, the timing, and CMI's intentions.

25 Even if the stay is applicable, the GS parties submit that it should be lifted. In this regard, the court should consider the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action. The court should also consider whether the debtor company has acted and is acting in good faith. The GS Parties were the medium by which the Specialty TV Business became part of Canwest. Here, all that is being sought is a reversal of the false and highly prejudicial start to these restructuring proceedings. It is necessary to take steps now to protect a right that could be lost by the passage of time. The transfer of the shares exhibited bad faith on the part of Canwest. 441 insulated CW Investments Co. and the Specialty TV Business from the insolvency of CMI and thereby protected the contractual rights of the GS Parties. The manifest harm to the GS Parties that invited the motion should be given weight in the court's balancing of prejudices. Concerns as to disruption of the restructuring process could be met by imposing conditions on the lifting of a stay as, for example, the establishment of a timetable.

Discussion

(a) Legal Principles

26 First I will address the legal principles applicable to the granting and lifting of a CCAA stay.

27 The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

> 11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> > (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
> >
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

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

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

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

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

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

28 The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of the CCAA: *Stelco Inc., Re*[3] and the key element of the CCAA process: *Canadian Airlines Corp., Re*[4] The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose. As noted in *Lehndorff General Partner Ltd., Re*[5] , the power to grant a stay extends to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company. As stated by Farley J. in that case,

> "It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed....The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors."[6] (Citations omitted)

29 The all encompassing scope of the CCAA is underscored by section 8 of the Act which precludes parties from contracting out of the statute. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*[7] in this regard.

30 Two cases dealing with stays merit specific attention. *Campeau v. Olympia & York Developments Ltd.*[8] was a decision granted in the early stages of the evolution of the CCAA. In that case, the plaintiffs brought an action for damages including the loss of share value and loss of opportunity both against a company under CCAA protection and a bank. The statement of claim had been served before the company's CCAA filing. The plaintiff sought to lift the stay to proceed with its action. The bank sought an order staying the action against it pending the disposition of the CCAA proceedings. Blair J. examined the stay power described in the CCAA, section 106 of the Courts of Justice Act[9] and the court's inherent jurisdiction. He refused to lift the stay and granted the stay in favour of the bank until the expiration of the CCAA stay period. Blair J. stated that the plaintiff's claims may be addressed more expeditiously in the CCAA proceeding itself.[10] Presumably this meant through a claims process and a compromise of claims. The CCAA stay precludes the litigating of claims comparable to the plaintiff's in *Campeau*. If it were otherwise, the stay would have no meaningful impact.

31 The decision of *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* is also germane to the case before me. There, the Bank demanded payment from the debtor company and thereafter the debtor company issued instant trust deeds to qualify for protection under the CCAA. The bank commenced proceedings on debenture security and the next day the company sought relief under the CCAA. The court stayed the bank's enforcement proceedings. The bank appealed the order and asked the appellate court to set aside the stay order insofar as it restrained the bank from exercising its rights under its security. The B.C. Court of Appeal refused to do so having regard to the broad public policy objectives of the CCAA.

32 As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"[11], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*[12]. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.[13]

33 Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Canadian Airlines Corp., Re*[14]and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).

4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

7. There is a real risk that a creditor's loan will become unsecured during the stay period.

8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

9. It is in the interests of justice to do so.

(b) Application

34 Turning then to an application of all of these legal principles to the facts of the case before me, I will first consider whether the subject matter of the main motion of the GS Parties is captured by the stay and then will address whether the stay should be lifted.

35 In analyzing the applicability of the stay, I must examine the substance of the main motion of the GS Parties and the language of the stay found in paragraphs 15 and 16 of my Initial Order.

36 In essence, the GS Parties' motion seeks to:

(i) undo the transfer of the CW Investments Co. shares from 441 to CMI or

(ii) require CMI to perform and not disclaim the Shareholders Agreement as though the shares had not been transferred.

37 It seems to me that the first issue is caught by the stay of proceedings and the second issue is properly addressed if and when CMI seeks to disclaim the Shareholders Agreement.

38 The substance of the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order which prohibits the commencement of all proceedings against or in respect of the CMI Entities, or affecting the CMI Business or the CMI Property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order.

39 When one examines the relief requested in detail, the application of the stay is clear. The GS Parties ask first for an order setting aside and declaring void the transfer of the shares from 441. As the shares have been transferred to the CMI Entities presumably pursuant to section 6.5(a) of the Shareholders Agreement, this is relief "affecting the CMI Property". Secondly, the GS Parties ask for a declaration that the rights and remedies of the GS Parties in respect of the obligations of 441 are not affected by the CCAA proceedings. This relief would permit the GS Parties to require CMI to tender the shares for sale pursuant to section 6.10 of the Shareholders Agreement. This too is relief affecting the CMI Entities and the CMI Property. Thirdly, they ask for an order directing CMI to perform all of the obligations that bound 441 prior to the transfer. This represents the exercise of a right or remedy against CMI and would affect the CMI Business and CMI Property in violation of paragraph 16 of the Initial Order. This is also stayed by virtue of paragraph 15. Fourthly, the GS Parties seek an order declaring that the obligations that bound 441 prior to the transfer may not be disclaimed. This both violates paragraph 16 of the Initial Order and also seeks to avoid the express provisions contained in the recent amendments to the CCAA that address disclaimer.

40 Accordingly, the substance and subject matter of the GS Parties' motion are certainly encompassed by the stay. As Mr. Barnes for the CMI Entities submitted, had CMI taken the steps it did six months ago and the GS Parties commenced a lawsuit, the action would have been stayed. Certainly to the extent that the GS Parties are seeking the freedom to exercise their drag along rights, these rights should be captured by the stay.

41 The real question, it seems to me, is whether the stay should be lifted in this case. In considering the request to lift the stay, it is helpful to consider the context and the provisions of the Shareholders Agreement. In his affidavit sworn November 24, 2009, Mr. Strike, the President of Corporate Development & Strategy Implementation of Canwest Global and its Recapitalization Officer, states that the joint acquisition from Alliance Atlantis was intensely and very carefully negotiated by the parties and that the negotiation was extremely complex and difficult. "Every aspect of the deal was carefully scrutinized, including the form, substance and precise terms of the Initial Shareholders Agreement." The Shareholders Agreement was finalized following the CRTC approval hearing. Among other things:

- Article 2.2 (b) provides that CMI is responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

- Article 6.1 contains a restriction on the transfer of shares.

- Article 6.5 addresses permitted transfers. Subsection (a) expressly permits each shareholder to transfer shares to a parent of the shareholder. CMI was the parent of the shareholder, 441.

- Article 6.10 provides that notwithstanding the other provisions of Article 6, if an insolvency event occurs (which includes the commencement of a CCAA proceeding), the GS Parties may sell their shares and cause the Canwest parties to sell their shares on the same terms. This is the drag along provision.

- Article 6.13 prohibits the liquidation or dissolution of another company[15] without the prior written consent of one of the GS Parties[16].

42 The recital of these provisions and the absence of any prohibition against the dissolution of 441 indicate that there is a good arguable case that the Shareholders Agreement, which would inform the reasonable expectations of the parties, permitted the transfer and dissolution.

43 The GS Parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise upon an insolvency default. As stated in *San Francisco Gifts Ltd., Re*[17] *:*

"The Initial Order enjoined all of San Francisco's landlords from enforcing contractual insolvency clauses. This is a

common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to proceedings in the first place."[18]

44 Similarly, in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*[19] , one of the debtor's joint venture partners in certain petroleum operations was unable to rely on an insolvency clause in an agreement that provided for the immediate replacement of the operator if it became bankrupt or insolvent.

45 If the stay were lifted, the prejudice to CMI would be great and the proceedings contemplated by the GS Parties would be extraordinarily disruptive. The GS Parties have asked to examine 4 of the 5 members of the Special Committee. The Special Committee is a committee of the Board of Directors of Canwest. Its mandate includes, among other things, responsibility for overseeing the implementation of a restructuring with respect to all, or part of the business and/or capital structure of Canwest. The GS Parties have also requested an extensive list of documentary production including all documents considered by the Special Committee and any member of that Committee relating to the matters at issue; all documents considered by the Board of Directors and any member of the Board of Directors relating to the matters at issue; all documents evidencing the deliberations, discussions and decisions of the Special Committee and the Board of Directors relating to the matters at issue; all documents relating to the matters at issue sent to or received by Leonard Asper, Derek Burney, David Drybrough, David Kerr, Richard Leipsic, John Maguire, Margot Micillef, Thomas Strike, and Hap Stephen, the Chief Restructuring Advisor appointed by the court. As stated by Mr. Strike in his affidavit sworn November 24, 2009,

> The witnesses that the GS Parties propose to examine include the most senior executives of the CMI Entities; those who are most intensely involved in the enormously complex process of achieving a successful going concern restructuring or recapitalization of the CMI Entities. Myself, Mr. Stephen, Mr. Maguire and the others are all working flat out on trying to achieve a successful restructuring or recapitalization of the CMI Entities. Frankly, the last thing we should be doing at this point is preparing for a forensic examination, in minute detail, over events that have taken place over the past several months. At this point in the restructuring/recapitalization process, the proposed examination would be an enormous distraction and would significantly prejudice the CMI Entities' restructuring and recapitalization efforts.

46 While Mr. McElcheran for the GS Parties submits that the examinations and the scope of the examinations could be managed, in my view, the litigating of the subject matter of the motion would undermine the objective of protecting the CMI Entities while they attempt to restructure. The GS Parties continue to own their shares in CW Investments Co. as does CMI. CMI continues to operate the Specialty TV Business. Furthermore, CMI cannot sell the shares without the involvement of the Monitor and the court. None of these facts have changed. The drag along rights are stayed (although as Mr. McElcheran said, it is the cancellation of those rights that the GS Parties are concerned about.)

47 A key issue will be whether the CMI Parties can then disclaim that Agreement or whether they should be required to perform the obligations which previously bound 441. This issue will no doubt arise if and when the CMI Entities seek to disclaim the Shareholders Agreement. It is premature to address that issue now. Furthermore, section 32 of the CCAA now provides a detailed process for disclaimer. It states:

> 32.(1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.
>
> (2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.
>
> (3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

48 Section 32, therefore, provides the scheme and machinery for the disclaimer of an agreement. If the monitor approves the disclaimer, another party may contest it. If the monitor does not approve the disclaimer, permission of the court must be obtained. It seems to me that the issues surrounding any attempt at disclaimer in this case should be canvassed on the basis mandated by Parliament in section 32 of the amended Act.

49 In my view, the balance of convenience, the assessment of relative prejudice and the relevant merits favour the position of the CMI Entities on this lift stay motion. As to the issue of good faith, the question is whether, absent more, one can infer a lack of good faith based on the facts outlined in the materials filed including the agreed upon admission by the CMI Entities. The onus to lift the stay is on the moving party. I decline to exercise my discretion to lift the stay on this basis.

50 Turning then to the factors listed by Professor McLaren, again I am not persuaded that based on the current state of affairs, any of the factors are such that the stay should be lifted. In light of this determination, there is no need to address the motion to strike paragraph 1(e) of the GS Parties' main motion.

51 The stay of proceedings in this case is performing the essential function of keeping stakeholders at bay in order to give the CMI Entities a reasonable opportunity to develop a restructuring plan. The motions of the GS Parties are dismissed (with the exception of that portion dealing with paragraph 59 of the Initial Order which is on consent) and the motion of the CMI Entities is granted with the exception of the strike portion which is moot.

52 The Monitor, reasonably in my view, did not take a position on these motions. Its counsel, Mr. Byers, advised the court that the Monitor was of the view that a commercial resolution was the best way to resolve the GS Parties' issues. It is difficult to disagree with that assessment.

Insolvent entities' motion granted; motion and cross-motion of moving party dismissed.

Footnotes

[1] (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.).

[2] (B.C. C.A.) at p. 4.

[3] (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 36.

[4] (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.).

[5] (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

[6] Ibid, at p. 32.

[7] Supra, note 2

[8] (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.).

[9] R.S.O. 1990, c.C.43.

[10] Supra, note 6 at paras. 24 and 25.

[11] (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

[12] (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

[13] Ibid, at para. 68.

[14] Supra, note 3.

[15] This was 4414641 Canada Inc. but not 4414616 Canada Inc., the company in issue before me.

[16] Specifically, GS Capital Partners VI Fund, L.P.

[17] (2004), 5 C.B.R. (5th) 92 (Alta. Q.B.) at para.37.

[18] Ibid, at para. 37.

[19] (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.).

Tab 12

2013 MBQB 171
Manitoba Court of Queen's Bench

Puratone Corp., Re

2013 CarswellMan 360, 2013 MBQB 171, [2013] M.J. No. 247, 229 A.C.W.S. (3d) 632, 295 Man. R. (2d) 55

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

In the Matter of: A Plan of Compromise or Arrangement of The Puratone Corporation, Pembina Valley Pigs Ltd. and Niverville Swine Breeders Ltd. (the "Applicants")

Dewar J.

Judgment: July 8, 2013
Docket: Winnipeg Centre CI 12-01-79231

Counsel: David Jackson, for Puratone Corporation
J.J. Burnell, for Bank of Montreal
Jeffrey Lee, Sandra Zinchuk, for Farm Credit Canada
Richard Schwartz, Jason Harvey, for ITB Claimants
Ross McFadyen, for Deloitte Touche Inc.
David Kroft, Aaron Challis, for Directors and Officers

***Dewar J.*:**

1 On September 12, 2012, an Initial Order was pronounced by me in a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "CCAA") filed on that date by three of the companies within the Puratone umbrella, namely The Puratone Corporation, Pembina Valley Pigs Ltd., and Niverville Swine Breeders Ltd. (hereinafter "Puratone").

2 The Puratone Group of companies ran a commercial hog production business. Their business included the breeding, farrowing, finishing and marketing of hogs. In order to carry on this business, Puratone needed grain to be used in feed for its hogs.

3 This motion involves 17 farming operators who claim priority to some of the proceeds of sale of the assets of the companies covered by the within CCAA proceedings. The lead farming operator, Interlake Turkey Breeders Ltd. claims to be a part of the steering committee for a group of farmers who supplied grain to the Puratone Group of Companies within two weeks of the filing of this CCAA proceeding. I will hereinafter refer to the group of farmers as "the ITB Claimants".

4 The Initial Order contained many of the usual provisions, including stay provisions as follows:

> **NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY**
>
> 18. THIS COURT ORDERS that until and including October 12, 2012, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.
>
> **NO EXERCISE OF RIGHTS OR REMEDIES**

19. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

26. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

5 Although the Initial Order included the stay provisions for only 30 days ending October 12, 2012, the stays have been extended as a result of a series of motions whilst Puratone has been undergoing its "restructuring". The restructuring referred to has essentially involved the sale of substantially all of its assets to Maple Leaf Foods Inc. on a going concern basis. That sale was approved by the court on November 8, 2012 and closed on December 17, 2012. As part of the order approving the sale, I ordered that the proceeds of sale should be paid to the Monitor to be held pending receipt of a Distribution Order. On March 12, 2013, I granted an order authorizing the distribution of most of the net proceeds from the sale of the assets. The creditors who received funds from the Distribution Order were as follows:

a) Bank of Montréal	$17,726,173;
b) Farm Credit Corporation	$15,817,303
c) Manitoba Agricultural Services Corporation (MASC)	$1,041,524

6 The sworn pre-CCAA claim of Bank of Montréal before receiving this distribution was $43,322,558. The sworn pre-CCAA claim of the Farm Credit Corporation (FCC) before receiving this distribution was $41,025,891.76. The sworn pre-CCAA claim of MASC before receiving the distribution was $5,263,767.

7 There are therefore significant shortfalls being sustained by each of the major secured creditors.

8 The Monitor has retained a sum in an amount of $6,753,765 from the net proceeds. Of this amount, $1,573,765 has been withheld to deal with an issue that has arisen with the purchaser out of the sale and to that extent, as against Puratone and its creditors, the purchaser has the first claim against those funds. A further $5,000,000 was also recommended to be held back. These monies, in addition to whatever might be obtained from the relatively small number of assets yet to be liquidated, are intended to serve as a general holdback pending completion of the CCAA proceedings including the continued realization of remaining assets, resolution of the dispute with the purchaser and potential legal actions.

9 One of the potential legal actions is a claim by the ITB Claimants ("the ITB Claim"). At the time of the application of the Monitor for a Distribution Order, a motion was brought by the ITB Claimants requesting that $903,250.50 be withheld from any distribution to the major secured creditors, and requesting leave to commence an action against Puratone and its directors and/or officers in order to make the said claim. On its initial return date, I adjourned the motion of the ITB Claimants while authorizing the distribution set out above, which contemplated the holdback that had been recommended by the Monitor. I set time frames for the parties to provide briefs and any further affidavit material. On April 10, 2013 the ITB Claimants filed a further notice of motion which amplified their requests. The matter came on for hearing on April 11, 2013 at which time, after hearing submissions, I reserved judgment.

10 The claim of the ITB claimants is that they supplied grain to Puratone on an individual contract basis on various dates

between August 29 and September 11, 2012, a period within two weeks of the filing of the CCAA proceeding. It is alleged that the grain was used by Puratone to feed the hogs that were ultimately sold to Maple Leaf Foods Inc. as part of the going concern sale ultimately approved by the court. The ITB Claimants argue that at the time of the supply transactions, Puratone was gearing up for its CCAA application and must have then known that it would have been unable to pay for the grain once an Initial Order was pronounced. In essence, the claim of the ITB Claimants boils down to allegations that Puratone acquired the grain when it had no intention of paying for it. As a result, the ITB claimants argue that they have causes of action against Puratone entitling them to:

> a) damages for fraudulent misrepresentation on the part of Puratone;
>
> b) a claim [an order] under s. 234 of *The Corporations Act*, C.C.S.M. c. C225, that Puratone's conduct was oppressive as regards the plaintiffs;
>
> c) a declaration that an implied or constructive trust exists in favour of the plaintiffs, and that Puratone and its secured creditors were unjustly enriched by the feed supplied by the plaintiffs;
>
> d) a declaration that the secured creditors claims are subordinate to those of the plaintiffs, and/or that in equity they subordinated their security to the ITB Claimants;
>
> e) a declaration that Puratone and its directors and officers wrongfully and/or fraudulently caused Puratone to obtain feed from the plaintiffs which they knew would not be paid for;
>
> f) a declaration that the secured creditors colluded with Puratone and/or its directors and officers to, in effect, wrongfully obtain feed which they knew would not be paid for; and
>
> g) a declaration that the secured creditors indemnified, in fact or at law, Puratone and/or its directors and officers by supporting and participating in a process that was designed to ensure that the secured creditors received the benefit of the feed without having to pay for it.

Analysis

11 A stay of proceedings is normally included in an Initial Order in order to permit an applicant to proceed with its restructuring (including, in some cases, its liquidation) without continually being harassed by creditors who are dissatisfied with the state of their outstanding accounts. The theory behind the stay order is that it will allow the applicant to devote its full time, efforts and resources to presenting and executing a restructuring plan which is in the best interests of the creditors generally, rather than fighting rearguard actions against individual creditors who are trying to collect their individual accounts.

12 A stay of proceedings however can be lifted in the appropriate case, but those cases will be the subject of judicial consideration which normally involves a balancing of stakeholder interests.

13 The CCAA does not set out a specific test identifying the circumstances in which the stay of proceedings should be lifted. Rather, it is in the discretion of the supervising CCAA judge whether a proposed action should be allowed to proceed. Apart from giving the judge the authority to grant the stay, the only guidelines expressed in the CCAA respecting such a stay order are found in section 11.02(3) which says:

> (3) The court shall not make the order unless
>
> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

14 In *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKCA 72, [2007] 9 W.W.R. 79 (Sask. C.A.), the Saskatchewan Court of the Appeal indicated that there must be "sound reasons", consistent with the scheme of the CCAA, to relieve against the stay. In the search for "sound reasons", the court suggested the following considerations:

a) the balance of convenience;

b) the relative prejudice to the parties; and

c) the merits of the proposed action.

It also indicated that, "The supervising CCAA judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6)".

15 In my respectful view, these considerations are all to be viewed together and in the context of the nature and timing of the CCAA process before the court. The same request may very well receive a different reception in the case of an application for the lifting of a stay early in a CCAA proceeding that contemplates a true restructuring than in the case of an application brought late in a CCAA proceeding that involves only the sale of assets. In the former situation, the existence of a contemporaneous action might jeopardize the ability of the company to restructure as intended. In the latter case, the restructuring, such as it is, has been accomplished and the only issue being left to sort through is who is entitled to the money. In my view, a court would be more receptive to lifting the stay in the latter case than in the former.

The stay respecting claims against Puratone

16 The motion of the ITB Claimants was opposed by Bank of Montréal and FCC. They essentially argued that the ITB Claimants had not demonstrated the existence of a cause of action with enough of a reasonable prospect of success to justify a delay in the distribution of the holdback monies to the secured creditors. In short they focused on the third of the considerations described in *ICR Commercial Real Estate (Regina) Ltd.*. They argued that the proposed claim of the ITB Claimants for a constructive trust respecting some of the assets of Puratone would fail for a number of reasons, namely:

a) The sale of grain by the ITB Claimants involved transactions that do not qualify for the application of the doctrines of unjust enrichment, or equitable subordination. These transactions were essentially commercial transactions as between buyer and seller. It was argued that an unpaid seller is simply a debtor of Puratone. Although Puratone has received a benefit, the normal buyer-seller relationship provides a juristic reason for the benefit, and therefore the doctrine of unjust enrichment does not apply. Furthermore the banks argued that the doctrine of equitable subordination has never been recognized in Canada.

b) The secured creditors are to be viewed as *bona fide* third parties with a commercial interest in the assets of Puratone and the ITB Claimants should not be entitled to jump the queue from the status of unsecured creditors and receive a priority ahead of secured creditors who hold valid and properly registered securities.

c) It is impossible to trace the grain into the hogs that were ultimately sold during the CCAA proceedings. Therefore, the ITB Claimants have no claim to the proceeds of sale of the hogs.

17 Counsel for the ITB Claimants has argued that this situation is a relatively new phenomenon. Historically, CCAA proceedings involved the restructuring of a company to permit it to carry on its business. CCAA proceedings in days gone by were not intended to be used where there were no future plans for the company. Counsel for the ITB Claimants argued that in this case, the plan was always to liquidate the assets in a controlled way in order to maximize the return to the secured creditors, but with the expectation that a shortfall would invariably occur to the secured creditors. He submitted that it must have been well known to Puratone as well as its secured creditors and directors and officers that at the time that the grain was supplied by the ITB claimants, Puratone was deeply underwater to its secured creditors. He argued that the evidence of knowledge of such insolvent condition can be inferred by the large shortfall suffered by Bank of Montréal and FCC notwithstanding a going concern sale which was negotiated during the CCAA proceedings only two months after the feed was supplied by the ITB Claimants. Counsel submits that CCAA applications of the scale of this proceeding are not prepared

overnight, and that at the time of the supply of grain, Puratone would have been preparing its CCAA materials and would have known that the CCAA proceedings would only yield a sale which resulted in large secured creditor deficiencies. He argued that at the time of these contracts of supply, there was no likelihood that the ITB claimants would receive any of their money. He argued that by ordering the grain under these circumstances, essentially Puratone was perpetrating a fraud on the ITB claimants.

18 It was urged upon me by counsel for the two banks that the case authorities require a judge to scrutinize the claim which a creditor intends to advance before lifting the stay in a CCAA proceeding. It was argued that the authorities suggest that the test to be employed in lifting a CCAA stay is more than the test used in striking out a statement of claim as disclosing no cause of action or being frivolous and vexatious, but does not require prospective plaintiffs to demonstrate a *prima facie* case. The terms "reasonable cause of action" or "tenable case" have sometimes been used.

19 In the *ICR* case, at paragraph 64 and 65, Jackson, JA wrote:

> [64] Koch J. used *prima facie* case, which he equated with tenable cause of action. "Tenable cause of action" is taken from Ground J.'s decision in Ivaco, but Ground J. used "reasonable cause of action" or "tenable case," as comparable terms and as only one of four criteria to be considered. The use of "*prima facie* case" defined as "tenable cause of action" is not particularly helpful as the words have been used in different contexts with different purposes in mind. Even in the context of bankruptcy where specific guidelines are given, and the courts have had long experience with the application of the tests, the debate continues as to what is meant by *prima facie* case and whether it is too high of a standard to apply in determining whether an action may be commenced.
>
> [65] Koch J. was clearly correct to hold that the threshold established by s. 173 of *The Queen's Bench Rules* is too low. On the other hand, it is also important not to decide the case. The purpose for passing on the claim is not to determine whether it will or will not succeed, but to determine whether the plan of arrangement should be delayed or further compromised to accommodate a future claim, or some other step need be taken to maintain the integrity of the CCAA proceeding.
>
> (Emphasis added)

20 When I scrutinize the proposed claim of the ITB Claimants against Puratone, I conclude that its dismissal is not a foregone conclusion. The ITB Claimants raise a point which so far as I am aware has not been addressed by this court. Here, the court is faced with a CCAA proceeding which has had from the outset all of the earmarks of a liquidation proceeding. The affidavit of Raymond Hildebrand, sworn September 12, 2012 underlying the request for the Initial Order as well as the Pre-Filing Monitor's Report outlined the financial difficulties being experienced by Puratone, the reasons for those difficulties, as well as the efforts that had been made by Puratone and its restructuring professionals to deal with them. Some of the efforts had included a Sales and Solicitation Process ("SISP"), a process designed to find people who were willing to inject money into Puratone either through a going concern sale of assets or in equity injection. Those efforts failed.

21 In the Pre-Filing Report of Deloitte & Touche Inc., the then Proposed Monitor wrote:

> 46 The Proposed Monitor has been advised that the SISP, as originally proposed, failed to result in a successful investment or sale transaction. Accordingly, the SISP has been terminated and replaced with a short-term, expedited strategy to complete a sale of the business, or parts thereof, which will be undertaken by the Applicants with the assistance of the Proposed Monitor (the "Sales Process").

22 The Initial Order was granted based on information, *inter alia*, that the major secured creditors were Bank of Montréal and FCC. As indicated earlier, less than three months later, the parties were recommending a sale which would result in large secured creditor shortfalls. The ITB Claimants argue that this result must have been contemplated by Puratone at the time that the ITB Claimants supplied their grain to Puratone. This raises the interesting question as to whether that expectation was in the mind of Puratone at the time that the grain was supplied, and if so, whether the ITB Claimants are entitled to any relief from Puratone other than a meaningless monetary judgment. It raises the issue whether a company with exposed secured creditors should be incurring credit at a time when it is preparing to make a CCAA application.

23 The ITB claimants request a constructive trust over the assets of Puratone that were sold during the CCAA proceeding which, if ordered, would erode the assets over which the banks claim security by the amount of the unpaid accounts of the ITB Claimants. A constructive trust has been recognized as a remedy against a debtor in the event that there has been a fraud. In Peter D. Maddaugh and John D. McCamus, The Law of Restitution, (looseleaf), Volume 1, at paragraph 5:200.30, the following is written:

> Chancery's willingness to impose a constructive trust in circumstances where a fraud has been perpetrated is by no means a modern development. No preexisting fiduciary relationship need be established for this category of constructive trust and, indeed, a breach of trust or other fiduciary obligation is, in itself, simply one form of equitable fraud. As Lord Westbury explained in *McCormick v. Grogan*: "it is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud." And, in *Westdeutsche Landesbank Girozentrale v. Islington L.B.C.*, Lord Browne-Wilkinson recognized that "when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity". For example, one who acquires property by theft or fraudulent misrepresentation may be held a constructive trustee of the misappropriated property.

24 The question arises whether there is any practical reason for permitting the ITB Claimants to make their claim against Puratone at this time. Courts will generally not impose a constructive trust where the remedy jeopardizes the priority of innocent parties for value. In this regard, see *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), where LaForest J says:

> 197 ...In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, *supra*, had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. Among the most important of these will be that it is appropriate that the plaintiff receive the priority accorded to the holder of a right of property in a bankruptcy....

The banks argue that there is no evidence that they are anything but innocent parties in these circumstances. Counsel for the two banks argue that there is no affidavit evidence adduced by the ITB Claimants that indicates that the banks were knowledgeable about any fraudulent intent on the part of Puratone, even if such existed. They argue that the court should not lift the stay simply on the basis that the ITB Claimants make such an unsubstantiated allegation. Rather it is argued that the banks should, for the purpose of this motion, be assumed to have had no knowledge of any bad intent that is alleged to have been possessed on the part of Puratone, and that being the case, there is no prospect, let alone a reasonable prospect, that the ITB Claimants will be successful in obtaining a constructive trust at the end of the day.

25 The problem which I see with this submission is that evidence of the knowledge of the banks at the material times is a factual matter that is not readily apparent. Evidence such as that would normally only surface during the discovery process in civil litigation. The banks have chosen to file no affidavit material in this motion. It seems too high a threshold to require the ITB Claimants to demonstrate the knowledge of the banks at the material times on this motion. For current purposes, it is sufficient to conclude that given the size of the troubled loans, a reasonable inference is that the two banks who appeared to oppose the ITB Claimants motion would have been aware of the pending CCAA proceedings before they were filed, and at the time that the grain was being supplied, bank representatives would have had more than a cursory understanding of the business of Puratone and its financial difficulties. Whether the banks were aware that Puratone was purchasing grain on other than a COD basis after the decision had been made to apply for a CCAA order, and if so, whether the banks were in any position to do anything about it, is currently unknown. I do not say that the ITB Claimants will prevail in demonstrating the necessary knowledge in the fullness of time, but they have a claim which raises interesting issues, and they should be given the opportunity to pursue it sooner rather than later, especially when the existence of the claim will not jeopardize any restructuring.

26 What then of the other considerations enumerated by Jackson JA in the *ICR* case?

27 The merits of the claim against Puratone aside for the moment, the ITB Claim essentially translates into a priority

claim between competing creditors. There is no restructuring plan which is being put at risk in this case. This proceeding is almost over. There are a few assets left to be liquidated, but that process will not be put at risk by the existence of the proposed claim by the ITB Claimants. Indeed, the Monitor confirms as such when in its latest report, it observed:

> 20. The Monitor understands that the general purpose of a stay of proceedings under the CCAA is to maintain the *status quo* for a period of time in order that a debtor company (and its directors and officers) can focus on restructuring efforts without undue interference.
>
> 21. Substantially all of the undertaking, property and assets of the Applicants have been sold and it is not anticipated that any formal restructuring will occur. In these circumstances, subject to the proviso which follows with respect to the role of the Monitor should litigation ensue, the Monitor is of the view that there would be no particular prejudice to the CCAA Proceedings if the stay of proceedings is lifted to enable ITB to initiate and proceed with an action against the Applicants and the directors and/or officers of the Applicants.

28 The proviso of the Monitor was simply that it not be required to retain any role in the litigation, if it was allowed to proceed.

29 Accordingly, the balance of convenience favors the ITB Claimants.

30 What then is the prejudice to be suffered if the claim were permitted to proceed at this time? The real prejudice in this case is that if the ITB Claimants are entitled to commence their action now against Puratone and the secured creditors, there could be a delay in the distribution of the holdback monies to the secured creditors. The banks would essentially be deprived of their use of the monies during the litigation and the return on the monies while sitting in the Monitor's trust account would not match what the banks might earn on those monies were they in hand.

31 On the other hand, if I do not permit the claim to be made at this time, the ITB Claimants would be forced to await the end of the CCAA proceeding before commencing their claim. By that time, there would be no money left in Puratone. It all will have been paid to the secured creditors, with at least the tacit acknowledgment by the court that those creditors were entitled to those monies ahead of anyone else. A result such as this is inconsistent with the notion that in a CCAA proceeding, creditors have resort to the supervising court to adjudicate on priority disputes.

32 Any prejudice created by the delay in distribution of funds can easily be alleviated by analogy to the Court Rules respecting prejudgment garnishment. In effect, that is the result which is being sought by the ITB Claimants. Although *Queen's Bench Rule* 46.14 (1) permits garnishment before judgment, Rule 46.14 (3) reads as follows:

> 46.14(3) An order under subrule (1) (Form 46D) may include,
>
> (a) a requirement that the plaintiff post security in a form and amount to be determined by the court; and
>
> (b) such other terms and conditions as may be just.

33 There is no doubt that the secured creditors are *prima facie* entitled to the proceeds of these proceedings. They have valid security agreements which have been properly registered. The ITB Claimants seek to challenge their priority not on the basis that the banks are not secured creditors, but on the basis of factual circumstances that would make it equitable to provide the ITB Claimants with a priority over the secured creditors. There are factual impediments to their claim for unjust enrichment and potentially legal impediments to their claim for equitable subordination and tracing. If I give them the right to make those claims, and those claims are not successful, the delays which those claims might cause to the timely receipt of monies by the secured creditors should not go unaddressed. This can be done by requiring the ITB Claimants to each file an undertaking whereby they would be liable to pay either or both of the banks damages arising from the delay in the payment of the holdback monies attributable to their claim. I am therefore ordering that out of the general holdback monies the amount of $903,250.50 be dedicated to the ITB Claim and not be paid out without further order of court, which presumably will occur either after the claim has been resolved or upon sufficient evidence being demonstrated that it has not been prosecuted in a timely way. Counsel may try and agree on the form of the undertaking as to damages, but may come back to me should

agreement not be reached.

34 As regards Puratone, I therefore make the following orders:

a) Out of the general holdback monies, the sum of $903,250.50 and any interest accrued thereon since March 12, 2013 shall be segregated in an interest bearing account designated as the ITB Claim Monies.

b) Leave is given to the ITB Claimants to commence the action against Puratone described at Schedule A of their notice of motion dated April 10, 2013, provided:

(1) they issue it within 40 days after the date of signing of the Order that evidences this decision, and

(2) Prior to the issuance of the Statement of Claim, each named plaintiff will file an undertaking as to damages for its pro rata share of any damages sustained by Bank of Montréal and/or FCC arising from any delay after July 31, 2013 in the distribution of its portion of the ITB Claim monies to Bank of Montréal and/or FCC caused by the issuance of the ITB Claim.

35 If a claimant does not file the requested undertaking as to damages, I will consider that such claimant has abandoned its claim and the ITB Claim Monies may be reduced by the amount of that claimant's claim.

The Proposed Claim against the directors and/or officers

36 The claim of the ITB Claimants against the directors and/or officers similarly finds its roots in the allegations of fraud made against Puratone. Counsel for the directors and officers relies upon the case of *People's Department Stores Ltd. (1992) Inc., Re*, 2004 SCC 68, [2004] S.C.J. No. 64 (S.C.C.), drawing from it the principle that deference ought to be given to the decisions that directors make as they fulfill their functions. Notwithstanding that case, there is an argument to be made that where a company has committed a fraud, be it legal or equitable, knowledge on the part of directors of such conduct by officers or employees of the company may make the directors vicariously and/or personally liable.

37 Again, evidence of the actual knowledge of the directors and/or the officers is not readily apparent without the ability to inquire into the records of the company through the discovery process. For the same reasons that I expressed as regards the two banks, requiring the ITB Claimants to adduce evidence on this motion of the directors' and officers' knowledge is too high a threshold to impose. A reasonable inference is that at least some of the directors and officers would have known that a CCAA proceeding was being prepared within the two week period prior to the CCAA filing, and at least some of the directors and officers would have had intimate knowledge of the financial constraints of the company and the efforts which the company was employing to solve them during the two week period prior to the filing of the CCAA proceeding. That reasonable inference in my view is sufficient to conclude that the proposed claim against the directors and/or officers is not necessarily doomed to fail. This case, as with many, will depend on facts not currently available to the court.

38 Additionally, the balance of convenience favors the ITB Claimants, and I see no prejudice to the directors and officers facing the ITB claim sooner rather than later.

39 In my view there are sound reasons to justify lifting the stay to permit the ITB Claimants to issue the proposed claim against the officers and are directors, providing it is issued within 40 days after the date of signing of the Order that evidences this decision. It will however be necessary for the claimants to name the particular individuals who they propose to sue, recognizing that they may expose themselves to costs, possibly on a solicitor and own client basis, for every person that they unsuccessfully sue.

Going Forward

40 I have contemplated that the claim should be commenced by one statement of claim, naming at least Puratone and the named officers and directors. The normal Rules of the Court should be followed with the additional requirement that the

action will be case managed. A case management conference before me shall be set up within 30 days of the close of pleadings, or earlier upon written request of any party.

41 If necessary, the costs of this motion shall be determined by me upon the resolution of the ITB Claims.

Motion granted.

2014 MBCA 13
Manitoba Court of Appeal

Puratone Corp., Re

2014 CarswellMan 30, 2014 MBCA 13, [2014] M.J. No. 25, 237 A.C.W.S. (3d) 297, 303 Man. R. (2d) 15, 600 W.A.C. 15, 9 C.B.R. (6th) 59

The Puratone Corporation, Pembina Valley Pigs Ltd. and Niverville Swine Breeders Ltd. (Applicants) Respondents and Farm Credit Canada (Respondent) Applicant

The Puratone Corporation, Pembina Valley Pigs Ltd. and Niverville Swine Breeders Ltd. (Applicants) Respondents and Bank of Montreal (Respondent) Applicant

MacInnes J.A., In Chambers

Heard: November 27, 2013
Judgment: January 27, 2014
Docket: AI 13-30-08010, AI 13-30-08011

Proceedings: allowing leave to appeal *Puratone Corp., Re* (2013), *(*sub nom. *Puratone, Re)* 295 Man. R. (2d) 55, 2013 CarswellMan 360, 2013 MBQB 171 (Man. Q.B.)

Counsel: J.M. Lee, Q.C. for Applicant, Farm Credit Canada
G.B. Taylor, J.J. Burnell for Applicant, Bank of Montreal
R.W. Schwartz, J.S. Harvey for Respondents, ITB Claimants
R.A. McFadyen for Deloitte & Touche Inc.

***MacInnes J.A., In Chambers*:**

1 Farm Credit Canada (FCC) and Bank of Montreal (BMO) each move for leave to appeal the order made July 8, 2013, (the lift stay and holdback order) in proceedings under the *Companies' Creditors Arrangement Act* (the *CCAA*).

Background

2 The Puratone Corporation, Pembina Valley Pigs Ltd., and Niverville Swine Breeders Ltd., each of whom carried on business as part of the Puratone Group of Companies (Puratone), ran a commercial hog production business, which included the breeding, farrowing, finishing and marketing of hogs.

3 Puratone was experiencing serious financial difficulties, and on September 12, 2012, it commenced proceedings under the *CCAA* to obtain protection from its creditors and to enable it to continue business operations while it attempted a financial restructuring or, failing that, a sale of the business.

4 An order (the initial order) was made that day, which granted a stay of proceedings by creditors against Puratone and its officers and directors. As well, the initial order appointed Deloitte & Touche Inc. monitor of Puratone (the monitor). Further, the judge who granted the initial order became the supervising judge (the judge) for all matters arising thereafter in the *CCAA* proceedings.

5 By order made November 8, 2012 (the approval and vesting order), the judge approved the sale of substantially all of Puratone's assets, including its hogs, to Maple Leaf Foods Inc. The sale closed December 17, 2012.

6 By the approval and vesting order, all of Puratone's rights, title and interest in and to the assets sold vested absolutely in Maple Leaf, free and clear of all encumbrances including security interests of Puratone's creditors. The order also provided that, for the purpose of determining the nature and priority of encumbrances (including security interests) the net proceeds from the sale of the assets would stand in the place of the assets sold.

7 Puratone's primary secured lenders were FCC and BMO. FCC's primary security consisted of Puratone's real property and the operating assets. As at the date of the initial order, FCC was owed approximately 40.3 million dollars. BMO's primary security consisted of the sow and hog inventory, as well as the book debts (or accounts receivable) of Puratone. As at the date of the initial order, BMO was owed approximately 40.9 million dollars.

8 The ITB claimants are a group of 17 farmers represented by Interlake Turkey Breeders Ltd. who, in the approximate two-week period preceding the granting of the initial order, supplied feed to Puratone for its hogs. The value of the feed supplied totalled $903,250.50.

9 By motion dated March 7, 2013, the monitor sought an order (the interim distribution order) authorizing the interim distribution of the sale proceeds to each of FCC, BMO and Manitoba Agricultural Services Corporation (MASC), another secured creditor, subject to a general holdback of five million dollars pending completion of the *CCAA* proceedings. The monitor's motion was accompanied by a report that stated that FCC, BMO and MASC each had valid and enforceable security interests in the assets of Puratone, and that such security interests ranked in priority to all other claims that could be made to Puratone's assets. That report also indicated that each of FCC, BMO and MASC would incur significant shortfalls on their outstanding indebtedness.

10 By motion dated March 11, 2013, the ITB claimants sought an order lifting the stay of proceedings to allow the ITB claimants to sue the officers and directors of Puratone, and directing that $903,250.50 of the sale proceeds be imposed with a constructive trust in favour of the ITB claimants, or otherwise be withheld from distribution.

11 Both motions were dealt with on March 12, 2013. The judge granted the interim distribution order sought by the monitor and declined to hold back any additional sale proceeds (other than the general holdback). The judge adjourned the ITB claimants' motion for hearing to April 11, 2013.

12 The ITB claimants filed a second motion on April 10, 2013. An appendix was attached to the second motion outlining, very generally, the proposed action which would be commenced by the ITB claimants against the officers and directors of Puratone, and as well, possibly against FCC and BMO.

13 Both the second motion and the adjourned motion were heard on April 11, 2013. The judge reserved decision and on July 8, 2013, ordered (the lift stay and holdback order) that the stay of proceedings be lifted, thus permitting the ITB claimants to sue the officers and directors of Puratone, and that $903,250.50 from the general holdback be dedicated to the proposed claim of the ITB claimants and not be paid out without further order of the court.

14 It is from that decision that the motion for leave to appeal has been brought pursuant to ss. 13 and 14(1) of the *CCAA*, which provide:

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

originated.

The Test for Granting Leave to Appeal

15 In *Winnipeg Motor Express Inc., Re*, 2008 MBCA 133, 236 Man. R. (2d) 3 (Man. C.A. [In Chambers]), Monnin J.A. wrote (at paras. 13-14):

> Prior to dealing with the merits of the leave application itself, it is useful to briefly review the underlying principles of the **CCAA**. Such guidance can be found in the Alberta Court of Appeal decision of **Smoky River Coal Ltd. et al., Re** (1999), 237 A.R. 326, 197 W.A.C. 326, 175 D.L.R. (4th) 703; 1999 ABCA 179 (C.A.). Writing for the court, Hunt, J.A., said (at paras. 51-53):
>
> > "This interpretation is supported by the legislative objectives underlying the **CCAA**. The purpose of the **CCAA** and the proper approach to its interpretation have been described as follows:
> >
> > > The **CCAA** is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the **CCAA** to make order [sic] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. [Per Farley, J., in **Lehndorff General Partner Ltd. (Re)** (1993), 17 C.B.R. (3d) 24 (Ont. Ct. (Gen. Div.)) at 31.]
> >
> > "As has been noted often, the **CCAA** was enacted by Parliament in 1933 during the height of the Depression. At that time, corporate insolvency led almost inevitably to liquidation because that was the only option available under legislation such as the **Bankruptcy Act**, R.S.C. 1927, c. 11, and the **Winding-Up Act**, R.S.C. 1927, c. 213. In the result, shareholder equity was destroyed, creditors received very little, and the social evil of unemployment was exacerbated. The **CCAA** was intended to provide a means of enabling the insolvent company to remain in business: **Hongkong Bank of Canada v. Chef Ready Foods Ltd.** (1990), 4 C.B.R. (3d) 311 (B.C.C.A.); **Quintette Coal**, [(1991), 7 C.B.R. (3d) 165 (B.C.S.C.)].
> >
> > "The courts have underscored that the **CCAA** requires account to be taken of a number of diverse societal interests. Obviously, the **CCAA** is designed to 'provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both': **Lehndorff General Partner Ltd., Re**, supra, at 31. It is intended to 'prevent any manoeuvers for positioning among creditors during the interim period which would give the aggressive creditor an advantage to the prejudice of others who were less aggressive and would further undermine the financial position of the company making it less likely that the eventual arrangement would succeed': **Meridian**, [(1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.)], at 114. But the **CCAA** also serves the interests of a broad constituency of investors, creditors and employees: **Chef Ready**, supra, at 320; **Quintette Coal**, supra, at 314. These statements about the goals and operation of the **CCAA** support the view that the discretion under s. 11(4) should be interpreted widely."
>
> Within the general context just described, the test to be applied on a leave application under the **CCAA** is a narrow one and, as will be demonstrated, it is to be applied selectively and sparingly. Wittmann, J.A., of the Alberta Court of Appeal sets out the test in **Canadian Airlines Corp., Re** (2000), 261 A.R. 120, 225 W.A.C. 120, 80 Alta. L.R. (3d) 213; 2000 ABCA 149, in these words (at paras. 6-7):
>
> > "The criterion to be applied in an application for leave to appeal pursuant to the **CCAA** is not in dispute. The general criterion is embodied in the concept that there must be serious and arguable grounds that are of real and significant interest to the parties: **Multitech Warehouse Direct Inc., Re** (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.),

at 63; **Smoky River Coal Ltd., Re** (1999), 237 A.R. 83 (Alta. C.A.); **Blue Range Resource Corp., Re** (1999), 244 A.R. 103 (Alta. C.A.); **Blue Range Resource Corp., Re** (2000), 15 C.B.R. (4th) 160 (Alta. C.A. [In Chambers]); **Blue Range Resource Corp., Re** (2000), 15 C.B.R. (4th) 192 (Alta. C.A. [In Chambers]).

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

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

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

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

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

. . .

16 Clearly, and as a general rule, leave to appeal a decision given by a judge under the *CCAA* is to be granted sparingly. But that is not to say that leave cannot be granted. The application of the general rule will depend upon the circumstances of a given case, and particularly, the state of the *CCAA* proceedings.

17 In *Edgewater Casino Inc., Re*, 2009 BCCA 40, 265 B.C.A.C. 274 (B.C. C.A.), Tysoe J.A. considered the general rule in light of comments made by MacFarlane J.A. in *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]) at paras. 30-32, and the four factors to be considered on a leave application under the *CCAA*. He wrote (at paras. 18-22):

This is not to suggest that I disagree with the above comments of Macfarlane, J.A., in **Pacific National Lease**. To the contrary, I agree with his comments, but I do not believe that he established a special test for **CCAA** orders. Rather, his comments are a product of the application of the usual standard used on leave applications to orders that are typically made in **CCAA** proceedings and a recognition of the special position of the supervising judge in **CCAA** proceedings. In particular, a consideration of the third and fourth of the above factors will result in leave to appeal from typical **CCAA** orders being given sparingly.

The third of the above factors involves a consideration of the merits of the appeal. In non-**CCAA** proceedings, a justice will be reluctant to grant leave where the order constitutes an exercise of discretion by the judge because the grounds for interfering with an exercise of discretion are limited: see **Silver Standard Resources Inc. v. Joint Stock Co. Geolog et al.**, [1998] B.C.A.C. Uned. 140; [1998] B.C.J. No. 2298 [QL] (C.A. Chambers). Most orders made in **CCAA** proceedings are discretionary in nature, and the normal reluctance to grant leave to appeal is heightened for two reasons alluded to in the comments of Macfarlane, J.A.

First, one of the principal functions of the judge supervising the **CCAA** proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavouring to balance the various interests. Secondly, **CCAA** proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances. These considerations are reflected in the comment made by Madam Justice Newbury in **New Skeena Forest Products** [(2005), 210 B.C.A.C. 247] that "[a]ppellate courts also accord a high degree of deference to decisions made by Chambers judges in **CCAA** matters and will not exercise their own discretion in place of that already exercised by the court below" (para. 20).

The fourth of the above factors relates to the detrimental effect of an appeal on the underlying action. In most

non-**CCAA** cases, the events giving rise to the underlying action have already occurred, and a consideration of this factor involves the prejudice to one of the parties if the trial is adjourned or if the action cannot otherwise move forward pending the determination of the appeal. **CCAA** proceedings are entirely different because events are unfolding as the proceeding moves forward and the situation is constantly changing - some refer to **CCAA** proceedings as "real-time" litigation.

The fundamental purpose of **CCAA** proceedings is to enable a qualifying company in financial difficulty to attempt to reorganize its affairs by proposing a plan of arrangement to its creditors. The delay caused by an appeal may jeopardize these efforts. The delay may also have the effect of upsetting the balance between competing stakeholders that the supervisory judge has endeavoured to achieve.

18 Tysoe J.A. continued (at para. 24):

As a result of these considerations, the application of the normal standard for granting leave will almost always lead to a denial of leave to appeal from a discretionary order made in an ongoing **CCAA** proceeding. However, not all of the above considerations will be applicable to some orders made in **CCAA** proceedings. Thus, in **Westar Mining** [(1993), 22 B.C.A.C. 106], McEachern, C.J.B.C., while generally agreeing with the comments made in **Pacific National Lease**, believed that the considerations mentioned by Macfarlane, J.A., were not applicable in that case because the **CCAA** proceeding had effectively come to an end with the sale of the principal assets of the debtor company. Madam Justice Newbury made a similar point in **New Skeena Forest Products** at para. 25 (which was a hearing of an appeal, not a leave application), although she found it unnecessary to decide the appeal on the point.

19 In the circumstances here, it is my view that the judge's decision, being a discretionary decision, should be accorded considerable deference, but it is also my view that it need not be given the very substantial or special deference normally accorded a decision of a *CCAA* judge, as the *CCAA* proceedings are virtually at an end and it is conceded by all parties that an appeal, if granted, will not unduly hinder the progress of the *CCAA* proceedings.

20 In their respective motions for leave to appeal, FCC and BMO advanced various grounds, including as regards that portion of the lift stay and holdback order lifting the stay so as to permit the ITB claimants to sue the officers and directors of Puratone. Both advised, however, that they were not seeking leave to appeal that portion of the lift stay and holdback order and, accordingly, I do not propose to deal with it.

21 Rather, I will address only the actual issue which both FCC and BMO propose to appeal, if leave is granted; namely, that portion of the lift stay and holdback order which required that, out of the general holdback monies, the sum of $903,250.50 be dedicated to the proposed claim of the ITB claimants and segregated in an interest-bearing account, not to be paid out without further order of the court.

Argument

22 FCC asserts that the judge proceeded on the erroneous assumption that, were he to grant an order lifting the stay, an order to hold back the funds would automatically follow. It argues that whether to lift a stay of proceedings to permit litigation to proceed, and whether to withhold from distribution the amount claimed in that litigation, are two separate and distinct issues.

23 FCC submits that the judge erred by awarding the ITB claimants a prejudgment remedy as part of the lift stay and holdback order, without any consideration of whether such a remedy was appropriate.

24 It says that the effect of dedicating $903,250.50 from the general holdback to the proposed claim of the ITB claimants is to improperly reorder priorities in the *CCAA* proceedings. This, it argues, is a point of significance to *CCAA* practice, as such an order is unprecedented in the *CCAA* jurisprudence and will create a heightened level of uncertainty for secured creditors who may, thus, be less inclined to support a company seeking either to reorganize or to sell its assets as a result of financial difficulties. It says that without support from their secured creditors, debtor companies will be unable to restructure

under the *CCAA*.

25 FCC also asserts that the proposed appeal with respect to the order for holdback of the funds is a point of significance to the action itself. It argues that the practical effect of the holdback portion of the lift stay and holdback order is to elevate the unproven unsecured claim of the ITB claimants ahead of the proven secured claim of FCC and BMO. It says that the judge found that FCC and BMO were *prima facie* entitled to all of the sale proceeds. However, having done so, he then effectively denied each of them access to nearly one million dollars by effectively elevating the unsecured claim of the ITB claimants to a status ahead of, or at least equal to, the proven secured claims of FCC and BMO.

26 FCC submits that, if leave to appeal were granted, the appeal to follow is *prima facie* meritorious by reason of the fact that the judge made the holdback portion of the lift stay and holdback order without giving any consideration to whether there was a legal basis for so doing, which it asserts there was not, on the evidence before the judge. Lastly, it says that the proposed appeal will not unduly hinder the progress of the *CCAA* proceedings, which are at an end. Thus, there are no ongoing restructuring efforts that would be put at risk.

27 BMO also argues that the point on the proposed appeal is of great significance to the *CCAA*. It says that there is no necessary connection between the two orders, that is, the lifting of the stay of proceedings and the holding back of proceeds. It asserts that the two matters require consideration of quite separate issues and factors, and the conduct of distinct parties; namely, Puratone and its officers and directors on the one hand, and BMO and FCC on the other.

28 BMO submits that the lifting of the stay of proceedings did not involve it or FCC, as there was never a stay of proceedings against either of them. The ITB claimants could have sued them at any time. But, it says the matter of the holdback required independent consideration by the judge of the factors relevant to the exercise of his discretion as regards the holdback of funds from BMO and FCC.

29 BMO asserts that the judge's reasons for judgment demonstrate no separate consideration of the proper circumstances under which the proven and accepted interest of a secured creditor ought to be interfered with in the context of a motion for such relief by an unsecured or subordinate creditor; no reference to a test of any kind to be applied to a motion for such relief from a subordinate or unsecured creditor to justify interference with the established rights of a secured creditor in receiving the proceeds of its security; and no consideration of any of the elements of such a test.

30 BMO argues that the judge's decision is important to the *CCAA* practice for its precedential value. It says that, on the basis of the decision, it appears open for any subordinate or unsecured creditor that has supplied goods or services in some period reasonably proximate to the *CCAA* filing, to obtain an order that funds, to which a secured creditor has proven its prior ranking and entitlement, be held back and not distributed to the secured creditor pending action over an indeterminate period.

31 BMO asserts that without the application of a qualifying test of some substance, there is the meaningful risk that the supervisory function of the *CCAA* court could be overwhelmed by creditors trying to position themselves for settlement.

32 BMO argues that the point of the intended appeal is significant to this *CCAA* proceeding as the holdback of funds delays distribution to BMO and FCC, whose *prima facie* entitlements were accepted by the judge, and delays, for an indeterminate period, the completion and winding up of the *CCAA* process, all in circumstances where both BMO and FCC are capable of funding judgments against them should the ITB claimants succeed in an action against them.

33 BMO submits that an order to hold back funds from a party *prima facie* entitled to such funds, is not one which ought to be made lightly. It refers to Queen's Bench Rule 45.02, which provides:

> **45.02** Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

34 BMO refers to *Manning v. Chornoboy* (1994), 96 Man. R. (2d) 274 (Man. Q.B.) at para. 8, where the court considered the four criteria in arriving at its decision on a motion for the preservation of funds under Rule 45.02, namely:

a) whether there is a serious issue with regard to the entitlement of the funds;

b) whether it is reasonably possible that the funds would otherwise be put beyond the reach of this court should the plaintiff succeed;

c) the hardship that may be suffered by the parties; and

d) the balance of convenience.

35 BMO argues that while *Manning* was not decided in the context of a *CCAA* application, the criteria ought to be the same. Parties *prima facie* entitled to their property ought not to be deprived of that property unless (1) there is a serious issue as to entitlement; (2) there is some reasonable risk that the property will be dissipated or otherwise inaccessible should the moving party be successful at trial; and (3) there should be a consideration of the hardship to each party. It submits that the judge ought to have demonstrably considered and applied a test at least as stringent as the aforementioned in the exercise of discretion to hold back funds from BMO and FCC and that, had he done so, the ITB claimants would have wholly failed, on the record, to meet this test.

36 BMO argues that the fundamental basis upon which the money was held back was the judge's determination that when he scrutinized the proposed claim of the ITB claimants against Puratone, he concluded that its dismissal was not a foregone conclusion. However, argues BMO, in the circumstances here, that is not enough. While the ITB claimant's might be entitled to establish a constructive trust *vis-à-vis* Puratone, which BMO denies, in order to have an entitlement to the monies held back, the ITB claimants must also displace the priority interests of BMO and FCC.

37 To that end, BMO argues that, in order to succeed in a claim for unjust enrichment, the ITB claimants will need to establish:

a) an enrichment;

b) a corresponding deprivation; and

c) an absence of any juristic reason for the enrichment.

38 It notes, in particular, that with respect to criterion c), a two-stage test is to be employed. First, the ITB claimants must establish that no juristic reason for the enrichment, from an "established category" existed to deny recovery, but even if they were able to meet that hurdle, it creates only a presumption of unjust enrichment which, at the second stage of the test, is rebuttable.

39 BMO asserts that it and FCC, on the record before the judge, would be able to rebut the presumption in stage two of the analysis, as both BMO and FCC are arm's-length parties with first ranking prior, registered security interests. BMO says that the juristic reason referred to in criterion c) for the establishment of an unjust enrichment is not limited to the person enriched and the person deprived, that is Puratone and the ITB claimants. Rather, the juristic reason may arise out of a relationship between the person enriched and some other person, and need not be tied to the person who asserts the unjust enrichment. That is, in this case, the juristic reason may be found in the pre-existing legal rights held by BMO and FCC to the ITB claim money. This, argues BMO, was a point never averted to or considered by the judge in making the holdback portion of the lift stay and holdback order and in failing to do so, it submits that he erred.

40 The ITB claimants agree that the test articulated in *Winnipeg Motor Express Inc., Re* (at para. 14) is the relevant test to be applied when considering whether to grant leave to appeal a decision of a supervising judge in a *CCAA* proceeding. It argues that the test is a narrow one to be applied selectively and sparingly, and that great deference is to be provided to the *CCAA* supervising judge.

41 The thrust of their argument pertains to the judge's decision that the dismissal of the proposed claim of the ITB claimants against Puratone was not a foregone conclusion. But the ITB claimants agree that the holdback portion of the lift stay and holdback order is a distinct issue from the decision to lift the stay, and concede that the judge did not embark upon

any separate analysis of whether or when it would be appropriate to hold back any such proceeds from distribution. They assert that, in the circumstances of this case, and once the stay was lifted, it naturally followed that the value of ITB claimants' claim would continue to be held back, while the rest of the general holdback money would be distributed accordingly.

42 They also acknowledge that an appeal of the judge's decision would not hinder the *CCAA* application.

Analysis and Decision

43 I am prepared to grant leave to FCC and BMO. I must, therefore, be circumspect in the comments which I make, as the case will now proceed to appeal before a panel of this court.

44 As I stated previously, this is a discretionary decision of the judge and the starting point for review is, and on appeal will be, one of considerable discretion.

45 Nonetheless, it is agreed by all parties that the issue of holdback is a discrete issue from that of the lifting of the stay. In my view, the issue whether to grant a holdback in respect of the ITB claimants' claim raises a question of law. And, it is agreed that the judge did not expressly address that issue. Nor does it appear that he considered the issue.

46 For purposes of this leave application, I am satisfied that FCC and BMO have met the criteria for leave as enunciated by Monnin J.A. in *Winnipeg Motor Express Inc., Re* (and by other judges in other cases arising under the *CCAA*).

47 I am of the view that the leave application raises a question of importance to the practice, and of significance to the action and the parties. As well, I am satisfied that the appeal is not frivolous, and I note that all parties agree, given the state of the instant proceedings, that an appeal will not hinder their progress.

48 Thus, I am prepared to grant leave on the following question:

> Did the judge err in ordering that the sum of $903,250.50, being the ITB claimants' claim, be segregated within the general holdback money and withheld from distribution to FCC and BMO?

49 FCC and BMO will have their costs of this motion.

Motions granted.

Tab 13

2016 ONSC 6777
Ontario Superior Court of Justice

Kuchar v. Midland (Town)

2016 CarswellOnt 17517, 2016 ONSC 6777, 272 A.C.W.S. (3d) 866, 62 M.P.L.R. (5th) 342

MICHAL KUCHAR and 1646551 ONTARIO INC. (Applicants) and THE CHIEF BUILDING OFFICIAL OF THE CORPORATION OF THE TOWN OF MIDLAND, TERRY PAQUETTE and LORNE WITTS (Respondents)

Stinson J.

Heard: October 27, 2016
Judgment: November 4, 2016
Docket: Toronto CV-16-548555

Counsel: S. Dale Denis, for Applicants, Moving Parties
Leo F. Longo, for Respondent, Terry Paquette, Chief Building Official of the Town of Midland
Alfred Schorr, for Respondent, Lorne Witts

***Stinson J.*:**

1 This is a motion under s. 25(7) of the *Building Code Act, 1992*, S.O. 1992, c. 23. It seeks a stay of an Order to Comply issued pursuant to s. 12 of the *Building Code Act* by the respondent, the Chief Building Official of the Town of Midland, in respect of a house owned by the respondent Lorne Witts and his wife Franca Witts. The house was constructed in 2011 under contract with the applicant, 1646551 Ontario Inc. (”164”). The applicant Michal Kuchar is the principal of 164; for ease of reference I will refer to Kuchar and 164 jointly as the “Builder”.

2 As a newly built house, the house was subject to a warranty under the Ontario *New Home Warranties Plan Act*, R.S.O. 1990, c. O.31. After they took possession, the Witts made a number of complaints to Tarion Warranty Corporation, the administrator of the new home warranty plan, regarding alleged deficiencies in the construction. They asserted these deficiencies were covered by the warranty. One complaint, in particular, has given rise to a multiplicity of proceedings, including the present one. Specifically, the Witts assert that all exterior insulation and finishes on the house (”Stucco”) were not installed in compliance with the *Ontario Building Code*. As a consequence, they claim, the warranty was breached and all Stucco should be removed and replaced.

3 Tarion did not agree with the complaint regarding the Stucco and took the position that there was no breach of warranty and no basis for the Witts’ claim. As a result, on September 30, 2014, the Witts initiated a proceeding before the Licence Appeal Tribunal (the “LAT Appeal”) in which they sought to appeal the determination of Tarion that there were no warrantable defects with the Stucco. The parties to the LAT Appeal are the Witts, Tarion and 164.

4 Although the LAT Appeal was initiated by the Witts more than two years ago, it has not yet come to a hearing. Three hearing dates have been scheduled, but so far the appeal hearing has not proceeded: April 15, 2005 (adjourned at the Witts’ request); October 26, 2015 (also adjourned at the Witts’ request); and March 7, 2016. In advance of the March 7, 2016 date, 164 brought a motion for production. The Witts’ representative was unable to respond to it on a timely basis. As a result, the March 7, 2016 hearing date was vacated and the hearing of the production motion was scheduled for that date, but not heard. Ultimately, some eight months later, the Witts consented to the production order. (I note that, if the Witts had consented to the production order in the first place, the adjournment of the hearing set for March 7, 2016 would likely have been

unnecessary.)

5 In due course, in late June 2016, new hearing dates were fixed for the LAT Appeal: a full week has been set aside, starting December 5, 2016, less than six weeks from now. The parties have been working towards that event. The central issue at that hearing will be whether the Stucco is or is not subject to a warranty claim under the new home warranty plan — specifically, whether this aspect of the house was constructed in accordance with the *Ontario Building Code*.

6 Despite having commenced the LAT Appeal, the Witts decided to pursue other avenues to obtain a remedy in respect of their complaints regarding the Stucco. One such avenue was a complaint to the Chief Building Official of the Town of Midland ("CBO") concerning the adequacy of the construction. Initially, the CBO went no further than to require inspections and reports in respect of the Stucco. Ultimately, on February 23, 2016, the CBO issued an Order to Comply ("OTC") which required all the Stucco to be removed and replaced. The OTC was directed to Lorne Witts and to Kuchar.

7 In response to the OTC, on March 11, 2016, the Builder commenced this application: it is an appeal to a single judge of the Superior Court of Justice of the OTC under s. 25(1) of the *Building Code Act* (the "OTC Appeal"). In the OTC Appeal, the Builder seeks to set aside the OTC on the ground that it should not have been issued because the construction *did* comply with the *Building Code*. In addition, the Builder asserts that the decision-making process of the CBO was tainted by reason of certain information improperly supplied to it by the Witts, as described below.

8 In addition to their LAT Appeal and their complaint to the CBO, the Witts decided to pursue criminal charges against Kuchar. Specifically, by means of the procedure under the *Criminal Code* for commencing a private prosecution, they sought to initiate a prosecution for fraud, asserting that Kuchar had forged a letter from a supplier purporting to attest to the qualities of the materials used for the Stucco. A Justice of the Peace conducted an *in camera pre-enquete* hearing, but declined to authorize the prosecution.

9 Subsequently, and despite an undertaking not to do so, the Witts provided copies of the *in camera* proceedings before the Justice of the Peace during the course of the *pre-enquete* to several parties, including the CBO. This is one of the grounds, among others, relied upon by the Builder in the OTC Appeal to assert that the decision-making process by the CBO was tainted, such that the OTC should be set aside.

10 The decision by the Witts to improperly share the transcripts of the *pre-enquete* resulted in yet additional litigation. Once the Builder discovered what had been done, it issued a statement of claim against the Witts claiming, among other relief, an interlocutory injunction. That order was granted on consent by Matheson J. on June 1, 2016. The Witts have now delivered a statement of defence and counterclaim in that proceeding in which, among other relief, they claim damages relating to the construction of the house, including complaints regarding the Stucco.

11 It may thus be seen that the dispute over the Stucco has spawned a multiplicity of proceedings, involving considerable factual overlap. Recognizing this fact, in June 2016, the Builder and the CBO agreed that it would be most efficient to postpone the OTC Appeal until the outcome of the LAT Appeal was known. Their reasoning was that the fundamental issue in both is whether the Stucco did or did not comply with the *Building Code*. The LAT Appeal will be a detailed inquiry into that subject, before a specialized tribunal. The Witts, Tarion and the Builder will have an opportunity to present evidence. Should the LAT Appeal determine that there was non-compliance with the *Building Code*, the LAT will order Tarion to respond to the warranty claim. Thus, the OTC and the OTC Appeal would, for all intents and purposes, become moot since Tarion (or the Builder) would be required to perfom the very remedial work that is the subject of the OTC.

12 Despite the willingness of the Builder and the CBO to, in effect, defer the determination of the principal issue raised on the OTC Appeal to the outcome of the LAT Appeal, the Witts were unwilling to agree. Instead, they instructed their lawyer to attend in Civil Practice Court to obtain a date for the argument of the OTC Appeal. That date has now been fixed for November 29, 2016. In the face of that upcoming return date and the soon-to-follow hearing date for the LAT Appeal, the Builder, supported by the Town, has brought this motion for a stay of the OTC. If the stay is granted, they ask that the hearing of the OTC Appeal be adjourned until the outcome of the LAT Appeal is known.

13 Witts opposes the stay and any adjournment of the OTC Appeal. Witts argues that the test for a stay prescribed by the Supreme Court of Canada in *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.) ("*RJR-Macdonald*") is applicable to a situation such as this, but is not met. While he concedes that there is a serious issue to

be tried, he argues that there is no irreparable harm, and more importantly that the balance of convenience does not favour the granting of the stay.

14 What the Court was dealing with in *RJR-Macdonald* was a request by one party to stay the effect of a court order made by the Court of Appeal for Québec, the effect of which was to require the applicants to comply with new regulatory requirements imposed under the *Tobacco Products Control Act* regarding the packaging of cigarettes. In that case, the dispute concerned regulations passed by the Governor in Council; the availability of interlocutory relief had already been adjudicated. The stay that was sought would, in effect, have suspended the operation of a judicial decision that had been issued following a hearing process in which both sides were represented.

15 The present case can be distinguished from *RJR-Macdonald* on several grounds. Firstly, there has been no hearing on the merits, nor any judicial consideration of the validity of the OTC, even on a preliminary or interlocutory basis. Thus, the stay under s. 25(7) of the *Building Code Act* does not seek to suspend rights that have been previously determined in a judicial process.

16 Secondly, the CBO - the party who issued the OTC and ordinarily would be expected to uphold it and oppose any attempt to set aside or suspend its operation - supports the request for a stay. Counsel for the CBO noted that the dispute in this case is not a safety issue, but rather a technical compliance issue. Thus, while the CBO acknowledges his obligation to enforce the *Building Code* and to ensure that builders discharge their responsibilities, the CBO further recognizes that in the exercise of his discretion, he should have the benefit of the best available information. The hearing before the LAT and the decision of that tribunal will provide just that. The two principal adversaries, the Builder and the Witts, will have an opportunity to present a complete record and argument before an expert and independent tribunal.

17 Thirdly, and most importantly, the principal basis for the OTC Appeal is the very same issue that is pending in another proceeding initiated by the Witts, namely, the LAT Appeal. Thus, the underlying basis for the request for the stay is not the assertion by the Builder that that the operation of the OTC should be suspended while it prosecutes its own appeal to this court, but rather that the process originally initiated by the Witts (the LAT Appeal) should be permitted to run its course, and a decision rendered, before the parties are put to the time, trouble and expense of arguing the OTC Appeal. In other words, the Builder submits, it would be duplicative, inefficient and inappropriate to force it to proceed with this application while the fundamental underlying issues are in the process of being litigated in another proceeding previously commenced by the Witts. Thus, what the Builder is seeking — supported by the CBO - is a temporary stay of the OTC along with an adjournment of the OTC Appeal, pending the outcome of the LAT Appeal.

18 In *Astrazeneca Canada Inc. v. Mylan Pharmaceuticals ULC*, 2011 FCA 312, [2011] F.C.J. No. 1607 (F.C.A.) Stratas J.A. contrasted a request for a stay that amounted to a court enjoining another body from exercising its jurisdiction, with the situation where a court is asked not to exercise its jurisdiction until some time later. He observed (at para. 5) as follows:

> There is a material difference between these two things and different considerations apply:
>
> > *This Court enjoining another body from exercising its jurisdiction.* When we do this, we are forbidding another body from going ahead and exercising the powers granted by Parliament that it normally exercises. In short, we are forbidding that body from doing what Parliament says it can do. As the Supreme Court recognized in RJR-MacDonald Inc., this is unusual relief that requires satisfaction of a demanding test. Two parts of that test are particularly demanding. First, there must be persuasive, detailed and concrete evidence of irreparable harm: Stoney First Nation v. Shotclose, 2011 FCA 232 (F.C.A.) at paragraphs 47-49; Canada (Superintendent of Bankruptcy) v. MacLeod, 2010 FCA 84 (F.C.A.) at paragraphs 14-22. Second, there must be a demonstration, through evidence, of inconvenience that outweighs public interest considerations, such as the right of the other body to discharge the mandate given to it by Parliament: RJR-MacDonald, supra at pages 343-347.
> >
> > *This Court deciding not to exercise its jurisdiction until some time later.* When we do this, we are exercising a jurisdiction that is not unlike scheduling or adjourning a matter. Broad discretionary considerations come to bear in decisions such as these. There is a public interest consideration - the need for proceedings to move fairly and with due dispatch - but this is qualitatively different from the public interest considerations that apply when we forbid another body from doing what Parliament says it can do. <u>As a result, the demanding tests prescribed in *RJR-MacDonald* do not apply here.</u> This is not to say that this Court will lightly delay a matter. It all depends on

> the factual circumstances presented to the Court. In some cases, it will take much to convince the Court, for example where a long period of delay is requested or where the requested delay will cause harsh effects upon a party or the public. In other cases, it may take less. [Italicized emphasis in original; underlining for emphasis added.]

19 I agree with those comments and consider them applicable to the motion before me. What I am being asked to do is, in effect, decide not to exercise jurisdiction to hear the OTC Appeal until a later time. I therefore conclude that the tests prescribed in *RJR-MacDonald* are inapplicable.

20 In *Hollinger International Inc. v. Hollinger Inc.*, [2004] O.J. No. 3464 (Ont. S.C.J. [Commercial List]) at para. 5, Farley J. summarized the relevant factors a court will consider when deciding whether to issue a temporary stay pending the resolution of another proceeding:

> (a) whether there is substantial overlap of issues in the two proceedings;
>
> (b) whether the two cases share the same factual background;
>
> (c) whether issuing a temporary stay will prevent unnecessary and costly duplication of judicial and legal resources; and
>
> (d) whether the temporary stay will result in an injustice to the party resisting the stay.

See, more recently, *Catalyst Fund Ltd. Partnership II v. IMAX Corp.*, [2008] O.J. No. 3776 (Ont. S.C.J.) and *Dadouch v. Bielak*, 2011 ONSC 1583, [2011] O.J. No. 1095 (Ont. S.C.J.).

21 Courts will also be reluctant to grant a stay if the result of the stay is to deny the plaintiff access to the courts or to substantially delay or impair the plaintiff's right to have his or her case heard: *Campeau v. Olympia & York Developments Ltd.*, [1992] O.J. No. 1946 (Ont. Gen. Div.).

22 Against the foregoing legal backdrop, I turn to a consideration of the factors relevant to the granting of a temporary stay in the present case.

(a) Whether there is substantial overlap of issues in the two proceedings

23 As outlined above, the principal issue in the LAT Appeal initiated by the Witts is whether the Stucco was or was not compliant with the *Building Code*. Both factual and expert evidence will be adduced before the LAT in relation to that issue. The very same question will arise in the course of the OTC Appeal. This means that the LAT and this court will be asked to review and reach conclusions in respect of the same evidence and same issue.

24 In my view, there is a substantial overlap of the issues in the two proceedings.

(b) Whether the two cases share the same factual background

25 The answer to this question is self-evident. The only additional factual issue raised in the OTC Appeal is the assertion that the decision making process of the CBO was somehow tainted by the conduct of the Witts. That issue would become moot if the Stucco is found to be compliant with the *Ontario Building Code*.

(c) Whether issuing a temporary stay will prevent unnecessary and costly duplication of judicial and legal resources.

26 As I have noted, the LAT Appeal will decide the question whether the Stucco was or was not compliant with the *Building Code*. As such, having the court examine the same issue would amount to a duplication of resources. Significantly, the LAT is a specialized tribunal, whose members have expertise in these matters. To date, the parties have exchanged considerable documentation and information as well as expert reports and a further expert report is due to be forthcoming shortly from Tarion. Extensive efforts have been expended to date in scheduling, managing and preparing for the conduct of that hearing.

27 To require and expect the parties to go through, in effect, the same exercise before the court in relation to the issue of whether the Stucco was compliant with the *Building Code* would plainly be a duplication of effort. It is also conceivable that different conclusions could be reached by the court and by the LAT, a result that should be avoided.

(d) Whether the temporary stay will result in an injustice to the party resisting the stay

28 The Witts oppose the stay on the ground that, if it is granted, they will be forced to proceed with the LAT Appeal. They argue that, absent the stay, they would be able to rely on the OTC to support their case that the Stucco does not meet the requirements of the *Building Code*. They also argue that, in the OTC Appeal and the motion for a stay, the onus is on the Builder, whereas in the LAT Appeal they have the burden. This is a juridical advantage and it would be unfair to deprive them of it.

29 I do not accept the Witts' submissions on this point. First of all, I do not accept that the existence of the OTC will, in any way, be determinative of the issues to be decided by the LAT. Put another way, this is not a situation in which the principles of *res judicata* would apply, given that Tarion is not a party to the present proceedings. Additionally, there are other bases upon which the Builder disputes the propriety of the OTC, which have as their origin the improper conduct of the Witts in releasing the confidential transcripts of the *pre-enquete* hearing. (I pause to observe that, given their past conduct, it seems incongruous for the Witts to complain about unfairness.)

30 More importantly, the Witts are the ones who have delayed, repeatedly, the hearing of the LAT Appeal. But for their requests for adjournments and their unwillingness to produce documents voluntarily, the LAT Appeal would have been conducted and the decision on that appeal received long ago, quite possibly before the issuance of the OTC. It therefore does not lie in their mouth to complain that it is unfair to them for the very process which they initiated over two years ago, the LAT Appeal, to be determined before forcing the other parties to proceed with the OTC Appeal.

Conclusion and Disposition

31 The foregoing analysis supports the conclusion that a temporary stay of the OTC is warranted in this case. To hold otherwise would result in unnecessary and costly duplication of judicial and legal resources in relation to litigation of the same issues. As I have mentioned, the LAT is a specialized tribunal that is far more familiar with the technical features of the *Building Code* and related complex topics and thus is a tribunal more suited for the resolution of this dispute.

32 For these reasons, I conclude that a temporary stay should be granted of the OTC pursuant to s. 25(7) of the *Building Code Act*, and I so order. As well, I direct that the hearing of the OTC Appeal be adjourned until the outcome of the LAT Appeal and any appeals therefrom is known. The OTC will be stayed until the outcome of the OTC Appeal or such other time as a judge of the Superior Court of Justice may direct.

Costs

33 The Builder submitted a bill of costs seeking partial indemnity costs of $51,253.16. In submissions, counsel sought $20,000. The Town seeks no costs. The costs outline prepared on behalf of the Witts sought costs of $8,738 inclusive of disbursements and tax. It may thus be seen that there is a wide divergence between the parties' positions.

34 There is no question that this was a hard fought motion. The material was extensive. Detailed factums were exchanged. The argument consumed well over a half day. The Builder achieved success in obtaining the stay.

35 Counsel for the Builder noted that considerable effort was expended on its behalf, given the need to address assertions of impropriety previously made by the Witts. That said, a considerable portion of the material filed in support of the stay motion was comprised of material previously filed on the interlocutory injunction motion. In that proceeding, the order was ordered to pay costs of $30,000.

36 Recognizing that the Builder bore the onus on the motion today and therefore was responsible for framing and advancing the arguments in support, I acknowledge that it is reasonable to anticipate that its costs would be greater than those incurred by the Witts. Taking into account the amount of time spent, the results obtained, the importance of the issues and the reasonable expectations of the losing party, I would fix the Builder's costs at the all-inclusive sum of $14,000. I order that sum to be paid within 30 days.

Motion granted.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985 c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUEBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041, ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

Court File No. CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

BRIEF OF AUTHORITIES OF THE LITIGATION INVESTIGATOR
(Re Appointment of Litigation Trustee, Lifting of Stay, and Other Relief, Returnable Dec. 3, 2018)

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