

2018 QCCA 504  
Cour d'appel du Québec

Joint Venture c. Iannitello et Associés inc.

2018 CarswellQue 2458, 2018 QCCA 504, 291 A.C.W.S. (3d) 467, EYB 2018-292545

**Joint Venture formed of Bouygues Building Canada Inc. and Kenaidan Contracting Ltd., Appellants-Applicants, v. Iannitello et Associés inc., Respondent-Syndic, and Les Sols Sportica inc., Impleaded Party-Debtor**

Marcotte J.C.A., Hogue J.C.A., Rancourt J.C.A.

Heard: 13 december 2017

Judgment: 29 march 2018

Docket: C.A. Qué. Montréal 500-09-026213-165

Counsel: Mtre Nicholas Scheib, for Appellants

Mtre Geeta Narang, for Appellants

Mtre Jonathan Warin, Mtre Laurence Carrière, for Respondent

Mtre Eric Jacques Ouimet, for Impleaded Party

Subject: Insolvency

**Table of Authorities**

**Cases considered by Marie-Josée Hogue J.C.A., Geneviève Marcotte J.C.A., Jocelyn F. Rancourt J.C.A.:**

*AbitibiBowater inc., Re* (2011), 2011 QCCS 4284, 2011 CarswellQue 8946 (C.S. Que.) — referred to  
*Corp. Mount Real, Re* (2007), 2007 QCCS 351, 2007 CarswellQue 624 (C.S. Que.) — referred to  
*Credifinance Securities Ltd., Re* (2011), 2011 ONCA 160, 2011 CarswellOnt 1218, 74 C.B.R. (5th) 161, (sub nom. *DSL Capital Corp. v. Credifinance Securities Ltd.*) 277 O.A.C. 377 (Ont. C.A.) — referred to  
*Eagle River International Ltd., Re* (2001), 2001 SCC 92, 2001 CarswellQue 2725, 2001 CarswellQue 2726, 30 C.B.R. (4th) 105, (sub nom. *Sam Lévy & Associates Inc. v. Azco Mining Inc.*) 207 D.L.R. (4th) 385, (sub nom. *Lévy (Sam) & Associés Inc. v. Azco Mining Inc.*) 280 N.R. 155, (sub nom. *Sam Lévy & Associés Inc. v. Azco Mining Inc.*) [2001] 3 S.C.R. 978, 2001 CSC 92 (S.C.C.) — considered  
*LLS America LLC (Trustee of) v. Grande* (2013), 2013 BCSC 1745, 2013 CarswellBC 2892 (B.C. S.C.) — referred to  
*Meubles Poitras (2002) Inc., Re* (2013), 2013 QCCS 1131, 2013 CarswellQue 2385 (C.S. Que.) — distinguished  
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*Microbiz Corp. v. Classic Software Systems Inc.* (1996), 45 C.B.R. (3d) 40, 1996 CarswellOnt 4988 (Ont. Gen. Div.) — referred to  
*Roberts v. Picture Butte Municipal Hospital* (1998), 1998 CarswellAlta 646, 64 Alta. L.R. (3d) 218, 23 C.P.C. (4th) 300, 227 A.R. 308, [1999] 4 W.W.R. 443, 1998 ABQB 636 (Alta. Q.B.) — referred to  
*Ted Leroy Trucking Ltd., Re* (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1 (S.C.C.) — considered  
*Title v. Canadian Asset Based Lending Enterprise (Cable) Inc.* (2011), 2011 ONCA 715, 2011 CarswellOnt 12253, 108 O.R. (3d) 71, 285 O.A.C. 167, 343 D.L.R. (4th) 465, 85 C.B.R. (5th) 234 (Ont. C.A.) — referred to

**Statutes considered by Marie-Josée Hogue J.C.A., Geneviève Marcotte J.C.A., Jocelyn F. Rancourt J.C.A.:**

*Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), ch. B-3

art. 66 — referred to

art. 135(1) — referred to

art. 135(4) — considered

*Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. (1985), ch. C-36

**Marcotte J.C.A.; Hogue J.C.A.; Rancourt J.C.A.:**

1 On appeal from the judgment rendered on May 3, 2016 by the Superior Court, District of Iberville (the Honourable Madam Justice Marie-Anne Paquette), dismissing the Motion to contest the trustee's disallowance of claims and for directions as to trial of issues and other requested relief, with legal costs.

2 For the reasons of Justice Marcotte, with which Justices Hogue and Rancourt concur, *THE COURT*:

3 *DISMISSES* the Appeal;

4 *WITH* legal costs.

**Marcotte J.C.A.:**

5 The judgment under appeal<sup>1</sup> dismissed the Appellants' Motion to contest the Trustee's disallowance of a proof of claim and concluded that the Trustee had full authority to deal with the claim.

6 In June 2014, Les Sols Sportica inc. entered into a contract with the Appellants, members of a Joint Venture (collectively "*the Joint Venture*"), to supply and install a synthetic track surfacing on competition sites for the Pan Am Games to be held in Toronto in the summer of 2015. The contract stipulated that it is governed by the laws of Ontario.

7 Claiming that the Joint Venture had failed to deliver the work site in accordance with the schedule and under the conditions stipulated in the contract, Sportica sent a notice of fundamental breach to the Joint Venture on October 24, 2014, and left the work site. The Joint Venture responded with a notice of default, asserting that Sportica had illegally abandoned the work and repudiated the contract, and announced its intention to seek remedies should Sportica fail to correct the situation within a 2-day delay.

8 On January 6, 2015, Sportica filed a *Notice of intention to make a proposal* under the *Bankruptcy and Insolvency Act* ("BIA")<sup>2</sup> before the Quebec Superior Court, in the District of Iberville.

9 The Respondent Trustee was named under the *Notice of intention to make a proposal*.

10 On March 5, 2015, Sportica filed a lien action against the Joint Venture before the Superior Court of Ontario claiming \$503 790.40 in unpaid work and damages.

11 On March 20, 2015, Sportica filed a proposal which was approved by the creditors on April 19, 2015, and by the Superior Court on May 14, 2015. It provided for a \$30 000 distribution amongst Sportica's ordinary creditors in proportion to their respective claims.

12 On July 9, 2015, the Joint Venture submitted a proof of claim to the proposal Trustee for an unsecured claim of \$3 773 704.04 based on the illegal termination of the contract. The proof of claim comprising some 126 pages was prepared by the Joint Venture's Ontario attorneys and included a detailed summary of the claim and supporting documents as well as written communications between the parties including invoices.

13 Upon receipt, the Trustee sought independent legal advice on the validity of the proof of claim from a member of the Ontario Bar. Further to obtaining the legal opinion of Me Vikki Andrighetti on July 29, 2015, the Trustee issued a Notice of Disallowance on July 30, 2015, which reproduced the following summary conclusions of the legal opinion:

BKJV [the Joint Venture] failed to fulfill its obligations under its agreement with Sportica, namely by failing to deliver the work site to Sportica in accordance with the contractual work schedule and under conditions set forth in the agreement particularly in relation to asphalt quality and climate conditions;

This failure was serious and substantial in nature, as it impeded Sportica's ability to execute its fundamental obligations under the agreement, including its obligation to install the track surface when in temperatures below 13°C, and to deliver an IAAF certified track and surface with completion dates;

The conditions prevailing as a result of BKJV's delays in delivering the work site to Sportica were materially different than those contemplated in the tender documents and required a radically different and unforeseen performance from Sportica than that contemplated by the agreement, and one which imposed a significantly higher degree of risk on Sportica with respect to the outcome of its work than that reasonably expected at the time Sportica agreed to enter into the contract, and frustrated the contract.

Sportica therefore had sufficient reason to terminate the agreement, and was not in breach of contract toward BKJV in doing so.

14 On August 12, 2015, the Joint Venture filed a defence and cross-claim in the Ontario proceedings alleging the illegal termination of the contract and claiming again the amount of \$3 773 704.04 against Sportica.

15 On August 24, 2015, the Trustee sent a *Notice of suspension of the proceedings* under section 69 BIA to the Joint Venture. The following day, the Joint Venture initiated a lawsuit against Sportica's performance bond insurer, Intact, before the Ontario Superior Court.

16 On August 29, 2015, the Joint Venture filed a *Motion to contest the Trustee's dismissal of Petitioner's claims and for directions as to trial of issues and other requested relief* pursuant section 135(4) BIA before the Quebec Superior Court, claiming that the Trustee was ill-suited to make any informed, reasoned determination because of the complex factual and legal nature of the claim. It asserted that the Trustee had made a premature and summary determination on the validity of the proof of claim, that it had failed to initiate a full fact-finding and adversarial adjudication process and that the forum best suited was the Ontario civil courts, where the parties were engaged in proceedings and where the project was located and relevant facts occurred.

17 The Quebec Superior Court judge summarized the relevant facts and issues and concluded that the appeal brought under section 135(4) BIA did not require a *de novo* hearing and could proceed on the basis of the evidence as submitted to the Trustee. This was so, especially given the Joint Venture's acknowledgement that it had "thoroughly proven [its] facts via the detailed sworn [statement of] facts and ample documentary evidence produced" and given that the parties had agreed to file in the court record the Trustee's affidavit and supporting documents as well as his out of court examination on same. She held that proceeding on the basis of the evidence as submitted would not result in an injustice to the Joint Venture and would serve to achieve a balance between the need for the creditor to be heard and make his case, and the need for efficiency. In fact, in her view, proceeding to a *de novo* hearing on the claim or requiring that a full-blown trial take place on same, whether in Ontario or in Quebec, would "even run contrary to the necessary efficiency of the claims adjudication process set up in the BIA and would defeat the underlying principles of this Act"<sup>3</sup>.

18 The judge also concluded that the Joint Venture had failed to meet its burden of demonstrating an error of law or a palpable and overriding error of fact on the part of the Trustee who conducted a reasonable investigation and properly enumerated the grounds for disallowing the proof of claim. There were no breaches of the principles of natural justice in the Trustee's analysis of the claim or in his approach to the submissions and evidence submitted by the Joint Venture. In her view, prior to concluding that the Joint Venture's claim could not be sustained because Sportica had sufficient reason to terminate the Agreement, the

Trustee had considered the proof of claim and its supporting documents with adequate seriousness, discussed the relevant facts with representatives of Sportica and sought and relied on a thorough and substantiated legal review of all factual and legal grounds raised by the Joint Venture.

19 The judge also noted that the initial dispute with the Joint Venture had been identified as the main cause of the insolvency of Sportica and that the 3.7 million dollar proof of claim would have had a major impact on the proposal and eventual distribution amongst its creditors.

20 She dismissed the Joint Venture's submission that the Trustee should have referred the matter to the Ontario civil courts for a full trial on the issue, holding that it would be inconsistent with insolvency laws and would defeat their purpose. She concluded that the fact that Sportica's insolvency proceedings were launched in Québec and that there is ongoing litigation with the Joint Venture in Ontario had no bearing on the Trustee's authority to decide on the proof of claim. She cited excerpts of Supreme Court of Canada decisions in *Sam Lévy & Associés Inc. v. Azco Mining Inc.*<sup>4</sup> and *Century Services Inc. v. Canada (P.G.)*<sup>5</sup>, to illustrate the need for a single proceeding model and command center in insolvency proceedings.

21 She determined that the Trustee was not required to proceed with a hearing of the parties in order to decide on the Joint Venture's proof of claim and that his disallowance of same was a reasonable decision which should not be overturned.

22 In my opinion, the judge did not commit any reviewable error in dismissing the Motion as she did and in confirming the Trustee's disallowance as well as his authority on the matter.

23 By submitting a proof of claim to the Trustee and appealing the disallowance, the Joint Venture attorned to the jurisdiction of the Quebec Superior Court sitting in bankruptcy matters<sup>6</sup>. It could hardly blame the Trustee after the fact as it did for having decided on the validity of the claim as submitted, since the Trustee was obliged to do so<sup>7</sup>. The Joint Venture did not seek permission to continue the Ontario proceedings with a view to qualifying its contingent claim prior to filing a proof of claim with the Trustee.

24 There is no issue as to the Trustee's power to suspend its decision on the proof of claim or refer it to the Ontario Superior Court. The Joint Venture did not request that it do so in a timely fashion. Rather, it raised the possibility of a referral to the Ontario courts as part of its appeal from the Trustee's disallowance. Had the Trustee accepted its claim, I venture to say, it would not have sought any referral to Ontario.

25 The Quebec Superior Court judge could have suspended adjudication of the appeal of the notice of disallowance pending the outcome of the proceedings before the Ontario Superior Court<sup>8</sup>. However, she refused to exercise such discretion and her decision was not unreasonable. Said decision rests on the premise that the Trustee could adjudicate the claim based on the exhaustive evidence submitted, which was comprised of the following: i) a detailed summary of the claim as prepared by the Joint Venture's own attorneys setting out the contractual framework, (ii) a specific reference to the relevant contractual provisions as well as the Joint Venture's list of alleged misstatements on the part of Sportica, with a copy of all supporting materials as selected by the Joint Venture, including emails and letters exchanged between Sportica and the Joint Venture, (iii) laboratory reports on site conditions, (iv) correspondence between the Joint Venture and Infrastructure Ontario and (v) details of costs incurred with third party subcontractors hired to replace Sportica further to the termination of the contract.

26 The Joint Venture has not demonstrated how this information would have been so incomplete as to cause an injustice as a result of the judge's decision to forego a full-blown trial or *de novo* hearing.

27 None of the cases cited by the Joint Venture in support of a full-blown hearing have any similarity with the case at hand. They were decided in a different context, where the need for a hearing or trial-like process may have been justified, whether in the context of allegations of fraudulent misrepresentations or a fraudulent scheme where credibility was at issue, or where an extensive claim adjudication process was provided for under the *Companies Creditors' Arrangement Act*<sup>9</sup>.

28 In the case at hand, no full-blown trial was necessary and the judge did not err in concluding as she did that the Trustee had carried out a proper adjudication process.

29 Nor did she err in dismissing the Joint Venture's argument that the Trustee's determination of the validity of the claim was made in an "urgent and summary manner". His decision to disallow the claim was well reasoned and it was based on an adequate review of the material submitted in support of the proof of claim, on which he sought a proper and independent legal opinion.

30 The Joint Venture asserts that the Trustee ignored and discounted the facts raised in the proof of claim and the applicable law. Yet, it is unable to point out to any discounted fact or to any specific error.

31 More specifically, the submission that the legal opinion relied upon by the Trustee contains no legal analysis is devoid of merit and the Joint Venture fails to show any discrepancy in the facts considered in same. It also fails to describe additional oral evidence which it proposed to bring to provide a fuller context to the adjudication process.

32 Hence, the argument that the Trustee failed in his duty to act equitably has no basis in fact or in law.

33 Whether the Trustee's Disallowance and the judgment under appeal will constitute an *estoppel* or *res judicata* is a matter that may well be germane in the Ontario proceedings. It is not however appropriate for this Court to hypothesize on the treatment to be given by another tribunal.

34 Finally, the case of *Re Meubles Poitras (2002) inc. (Syndic de)*<sup>10</sup> is of no assistance to the Joint Venture as the circumstances were different. In that case, Sears was appealing the Trustee's disallowance of its proof of claim in the bankruptcy of Meubles Poitras. The National bank as assignee of Meubles Poitras' book of debts had instituted proceedings in Ontario claiming 2 million dollars from Sears.

35 Justice Schragger of the Quebec Superior Court judge, as he then was, granted Sears' motion to suspend the appeal pending the outcome of the Ontario litigation, recognizing that there was a risk of contradictory judgments between the Quebec and Ontario Courts and that the Quebec suit would not put an end to the dispute between the parties. Indeed, if the Ontario court determined that the assignment of book debts in favour of the Bank was not valid or opposable to Sears, it would serve to bring equity for the mass of unsecured creditors in the bankrupt estate, as the accounts due from Sears would revert back to the Trustee of Meubles Poitras.

36 For these reasons, I propose to dismiss the appeal with legal costs.

#### Footnotes

1 [Sols Sportica inc. \(Syndic de\), 2016 QCCS 2109 \[Judgment under appeal\]](#).

2 R.S.C. 1985, c. B-3.

3 Judgment under appeal, *supra*, note 1, para. 22.

4 [\[2001\] 3 RCS 978, 2001 CSC 92](#).

5 [\[2010\] 3 RCS 379, 2010 CSC 60](#).

6 [Microbiz Corp. v. Classic Software Systems Inc.](#), 1996 CanLII 8276 (ON SC), para. 3; [Roberts v. Picture Butte Municipal Hospital](#), 1998 ABQB 636, para. 24; [Canlau International \(Barbados\) Corp. v. Atlas Securities Inc. \(Liquidator of\)](#), 2002 CanLII 49606, para. 63; [Title v. Canadian Asset Based Lending Enterprise \(CABLE\) Inc.](#), 2011 ONCA 715, para. 15; [LLS America LLC \(Trustee of\) v. Grande](#), 2013 BCSC 1745, para. 25.

7 Section 66 and 135(1) BIA.

- 8 *Re Meubles Poitras (2002) inc. (Syndic de)*, 2013 QCCS 1131, confirmed in appeal in 2013 QCCA 1671.
- 9 See *Credifinance Securities Limited v. DSLC Capital Corp.*, 2011 ONCA 160; *Corporation Mount Real (Syndic de)*, 2007 QCCS 351; *AbitibiBowater inc. (Arrangement relatif à)*, 2011 QCCS 4284.
- 10 *Meubles Poitras (2002) inc. (Syndic de)*, see *supra*, note 8.

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