APPENDIX

LIST OF AUTHORITIES

TAB	DESCRIPTION
1.	*Municipal Government Act,* RSA 2000, c M-26
2.	*Credit Suisse AG v Great Basin Gold Ltd.,* 2015 BCSC 1199
3.	*G.E. Canada Equipment Financing G.P. v Atikokan Forest Products Ltd.,* 2011 ONSC 2992
4.	*Okotoks (Town) v Foothills (Municipal District) No. 31,* 2012 ABQB 53

Province of Alberta

MUNICIPAL GOVERNMENT ACT

Revised Statutes of Alberta 2000
Chapter M-26

Current as of June 17, 2021

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

(d) transport and transportation systems;

(e) businesses, business activities and persons engaged in business;

(f) services provided by or on behalf of the municipality;

(g) public utilities;

(h) wild and domestic animals and activities in relation to them;

(i) the enforcement of bylaws made under this or any other enactment, including any or all of the following:

(i) the creation of offences;

(ii) for each offence, imposing a fine not exceeding $10 000 or imprisonment for not more than one year, or both;

(iii) providing for the imposition of a penalty for an offence that is in addition to a fine or imprisonment so long as the penalty relates to a fee, cost, rate, toll or charge that is associated with the conduct that gives rise to the offence;

(iv) providing that a specified penalty prescribed under section 44 of the *Provincial Offences Procedure Act* is reduced by a specified amount if the penalty is paid within a specified time;

(v) providing for imprisonment for not more than one year for non-payment of a fine or penalty;

(vi) providing that a person who contravenes a bylaw may pay an amount established by bylaw and if the amount is paid, the person will not be prosecuted for the contravention;

(vii) providing for inspections to determine if bylaws are being complied with;

(viii) remedying contraventions of bylaws.

1994 cM-26.1 s7

Powers under bylaws

8 Without restricting section 7, a council may in a bylaw passed under this Division

(a) regulate or prohibit;

(b) deal with any development, activity, industry, business or thing in different ways, divide each of them into classes and deal with each class in different ways;

(c) provide for a system of licences, permits or approvals, including any or all of the following:

(i) establishing fees for licences, permits and approvals, including fees for licences, permits and approvals that may be in the nature of a reasonable tax for the activity authorized or for the purpose of raising revenue;

(ii) establishing fees for licences, permits and approvals that are higher for persons or businesses who do not reside or maintain a place of business in the municipality;

(iii) prohibiting any development, activity, industry, business or thing until a licence, permit or approval has been granted;

(iv) providing that terms and conditions may be imposed on any licence, permit or approval, the nature of the terms and conditions and who may impose them;

(v) setting out the conditions that must be met before a licence, permit or approval is granted or renewed, the nature of the conditions and who may impose them;

(vi) providing for the duration of licences, permits and approvals and their suspension or cancellation for failure to comply with a term or condition or the bylaw or for any other reason specified in the bylaw;

(c.1) establish and specify the fees, rates, fares, tariffs or charges that may be charged for the hire of taxis or limousines;

(d) provide for an appeal, the body that is to decide the appeal and related matters.

1994 cM-26.1 s8;1998 c24 s2

Guides to interpreting power to pass bylaws

9 The power to pass bylaws under this Division is stated in general terms to

(a) give broad authority to councils and to respect their right to govern municipalities in whatever way the councils consider appropriate, within the jurisdiction given to them under this or any other enactment, and

(f) must contain policies respecting the protection of agricultural operations, and

(g) may contain policies respecting the provision of conservation reserve in accordance with section 664.2(1)(a) to (d).

(4) Repealed 2020 c39 s10(19).

RSA 2000 cM-26 s632;RSA 2000 c21(Supp) s4;2008 c37 s11; 2015 c8 s62;2016 c24 s98;2017 c13 s2(16);2020 c39 s10(19)

Area Structure Plans

Area structure plan

633(1) For the purpose of providing a framework for subsequent subdivision and development of an area of land, a council may by bylaw adopt an area structure plan.

(2) An area structure plan

(a) must describe

(i) the sequence of development proposed for the area,

(ii) the land uses proposed for the area, either generally or with respect to specific parts of the area,

(iii) the density of population proposed for the area either generally or with respect to specific parts of the area, and

(iv) the general location of major transportation routes and public utilities,

and

(b) may contain any other matters, including matters relating to reserves, as the council considers necessary.

(3) Repealed 2020 c39 s10(20).

RSA 2000 cM-26 s633;2015 c8 s63;2017 c13 s1(56); 2020 c39 s10(20)

Area Redevelopment Plans

Area redevelopment plans

634(1) A council may

(a) designate an area of the municipality as a redevelopment area for the purpose of any or all of the following:

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

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Miscellaneous

Respondent GB was granted creditor protection under Companies' Creditors Arrangement Act CCAA — Initial order imposed stay of proceedings against or in respect of GB or affecting business and property of GB — Initial order provided stay of proceedings as against directors and officers of GB in respect of pre-filing matters — Order terminating CCAA proceedings was granted and termination order specifically provided that stays of proceedings in initial order were terminated and set aside — Applicant creditors commenced action against GB's directors and officers — Receivership order was granted and imposed stay of proceedings against or in respect of GB and property — Creditors brought application for clarification concerning proper interpretation of receivership order — Receivership order did not stay action against directors and officers — Initial order contained broader stay protection for GB than stay in receivership order — Even with broader stay protection, Initial Order contained separate stay of proceedings against directors and officers that supported interpretation that broader stay did not provide protection to officers and directors — Receivership order included more limited stay protection — Plain reading of pleadings in action supported view that allegation was that directors and officers were personally liable for actions or omissions by each of them — While many of factual circumstances upon which those allegations were made involved GB, that did not mean that action was "in respect of" GB — There was no connection or relationship between relief sought in action and GB and property as defined in receivership order.

APPLICATION by creditors for clarification of stay provisions of receivership order.

***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.

2011 ONSC 2992
Ontario Superior Court of Justice

G.E. Canada Equipment Financing G.P. v. Atikokan Forest Products Ltd.

2011 CarswellOnt 5826, 2011 ONSC 2992, 204 A.C.W.S. (3d) 554, 79 C.B.R. (5th) 278

G.E. Canada Equipment Financing G.P. (Applicant) and Atikokan Forest Products Ltd. (Respondent)

Morawetz J.

Heard: May 13, 2011
Oral reasons: May 13, 2011
Docket: 10-9041-00CL

Counsel: Liz Pillon for Applicant
Eunice Machado for Ministry of the Attorney General
Matthew Gottlieb for Abitibi Bowater
Tracy Sandler, Artem Miakichev for PricewaterhouseCoopers Inc., Receiver of the Respondent

Subject: Civil Practice and Procedure; Insolvency; Natural Resources; Corporate and Commercial; Public; Property

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings
Lifting of stay — Company held sustainable forest license (SFL) for Crown forest — Company owed Crown $3.09 million — Company became insolvent — Receiver was appointed — Stay was issued — Crown brought motion for leave to initiate proceedings to cancel insolvent company's SFL — Motion granted — Stay lifted to permit Crown to take steps necessary to cancel SFL — Crown had authority and basis to terminate SFL — Receiver lacked authority to transfer SFL — Insolvent company no longer had interest in any wood supply — There was no value to SFL in absence of wood supply — In view of provisions of s. 59 of Crown Forest Sustainability Act, 1994, province had right to cancel SFL — There was no purpose to be served in delaying inevitable result.
Natural resources --- Timber — Timber licences — Miscellaneous
Company held sustainable forest license (SFL) for Crown forest — Company owed Crown $3.09 million — Company became insolvent — Receiver was appointed — Stay was issued — Crown brought motion for leave to initiate proceedings to cancel insolvent company's SFL — Motion granted — Stay lifted to permit Crown to take steps necessary to cancel SFL — Crown had authority and basis to terminate SFL — Receiver lacked authority to transfer SFL — Insolvent company no longer had interest in any wood supply — There was no value to SFL in absence of wood supply — In view of provisions of s. 59 of Crown Forest Sustainability Act, 1994, province had right to cancel SFL — There was no purpose to be served in delaying inevitable result.

MOTION by Crown to lift stay and initiate cancellation of sustainable forest license held by insolvent company.

***Morawetz J.*:**

1 The Crown seeks leave to initiate the process of cancelling Sustainable Forest Licence No 542441 ("Sapawe SFL"), held by Atikokan for the Sapawe Forest. The Crown wants to initiate proceedings for the following reasons:

(a) The stay is interfering with the Provinces' ability to manage the forest;

(b) Atikokan cannot meet its obligations to maintain its obligations under its SFL;

(c) Under s. 59 of the Crown Forest Sustainability Act ("CFSA"), the Province has the right to cancel the Sapawe SFL on the basis that:

i. Atikokan is insolvent;

ii. Atikokan owes the Crown $3.090M for Crown resources harvested under the Sapawe SFL and other Crown forests;

(d) The Province has concluded a wood supply competition by which Crown forest resources were allocated. Such competition included the wood previously available to Atikokan under the Sapawe SFL;

(e) Atikokan has no significant commercial interest in the Sapawe Forest. Atikokan executed a release in favour of the Province releasing:

i. claims regarding the inclusion of wood from Sapawe forest management unit in the wood supply competition;

ii. claims regarding the award of wood in the competition; and

iii. consenting to an amendment to the Sapawe SFL;

(f) Pursuant to s. 35 of the CFSA, the Sapawe SFL may not be transferred or assigned or otherwise disposed of by Atikokan without the approval of the Minister. The Province has advised that the Minister does not intend to grant such approval.

2 Counsel to the Crown submits:

(1) The Minister has authority to terminate the Sapawe SFL.

(2) PwC, Receiver of Atikokan, does not have the authority to transfer or sell the Sapawe SFL.

(3) No viable alternative satisfactory to the Minister has been provided.

(4) There is no real value to the SFL in the absence of a wood allocation.

(5) The balance of convenience favours the Crown. The Ministry has a mandate to sustain the forest and counsel submits that it has the authority to act in the proposed manner.

3 The motion is opposed by the Receiver and by G.E.

4 The Receiver takes the position the Sapawe SFL has value to the estate. The Receiver has been pursuing sale transactions and has attempted to engage the Ministry in a dialogue to consider an alternative to that proposed by the Ministry. However, it is clear that the Ministry has not altered its position over the past few weeks.

5 G.E. supports the Receiver. G.E. also raises issues relating to the decision making process at the Ministry. G.E. has both a secured and unsecured position. However, to the extent that the G.E. security purports to cover the Sapawe SFL, it is essential to note that section 35(1) of the CFSA provides that a charge or other disposition of a forest resource licence is not valid without the written consent of the Minister. The consent of the Minister was not obtained in respect of the G.E. security interest.

6 G.E. takes the position that the licence or the licensee's rights in respect of the licence constitutes personal property for the purposes of the PPSA and is capable of being subject to a security interest under the PPSA. To accept this submission requires the court to ignore the lack of consent under s. 35(1). I am not prepared to do this. In my view, it is clear that the purported security interest in favour of G.E. in the absence of the consent is not valid. The interest of Atikokan in the SFL, if any, is therefore unencumbered.

7 The issue for determination is whether the Crown should be granted leave to initiate the process of cancelling the SFL. In my view, leave should be granted for the following reasons:

1. The Ministry has the authority and basis to terminate the licence.

2. The Receiver acknowledged that it does not have the authority to transfer the licence.

3. Although Atikokan holds a Sapawe SFL, Atikokan no longer has an interest in any wood supply. Pursuant to the Release, executed in September 2010, Atikokan's wood supply commitment was terminated. Further, Atikokan was not a successful bidder in the wood supply competition. There is no value to the Sapawe SFL in the absence of wood supply, according Mr. Hayhurst. At 23 of his affidavit, Mr. Hayhurst states:

> 23. Following the Wood Supply Competition, Atikokan does not have a wood supply from the Sapawe Forest and therefore no longer has any significant remaining commercial interest in the Sapawe SFL.

The requirement to have wood supply as well as a SFL creates a situation which is different from that expressed in *Saulnier (Receiver of) v. Saulnier*, 2008 SCC 58 (S.C.C.), where there was a proprietary interest in the fish caught according to the terms of the licence and subject to the Minister's regulation.

In this case, having a SFL is of no real value in the absence of a wood allocation.

4. In view of the provisions of s. 59 of the CFSA, the Province has the right to cancel the Sapawe SFL. Atikokan is insolvent and owes the Crown $3.09M.

8 In my view, the outcome of the process is not in doubt. There is no purpose to be served in delaying the inevitable. The Ministry has the statutory right to take the actions that it proposes and there is no indication that the passage of further time will alter its stated intentions.

9 It is appropriate, in my view, to recognize reality and to lift the stay to permit the Ministry to take the steps necessary to cancel the Sapawe SFL. The Ministry's motion is granted. An order shall issue to give effect to the foregoing.

Motion granted.

End of Document

2012 ABQB 53
Alberta Court of Queen's Bench

Okotoks (Town) v. Foothills (Municipal District) No. 31

2012 CarswellAlta 189, 2012 ABQB 53, [2012] A.W.L.D. 2009,
[2012] A.J. No. 100, 212 A.C.W.S. (3d) 547, 532 A.R. 237

Town of Okotoks, Applicant and Municipal District of Foothills No 31 and Alberta Foothills Properties Ltd., Respondent

T.F. McMahon J.

Heard: January 17, 2012
Judgment: January 23, 2012
Docket: Calgary 1101-07464

Counsel: Gilbert J. Ludwig, Wilson Laycraft, Frederick A. Laux, Q.C., for Applicant
Joanne Klauer, for Respondent, Municipal District of Foothills No 31
K. Hugh Ham, Jennifer Sykes, for Respondent, Alberta Foothills Properties Ltd.

Subject: Public; Civil Practice and Procedure; Municipal

Headnote

Municipal law --- Attacks on by-laws and resolutions — Practice and procedure — Miscellaneous

Limitation periods — Municipalities O and MD made agreements for development of adjoining area to their border — MD passed bylaw which O claimed allowed for population density greater than set out in agreement — O brought application for declaration that bylaw contravened development agreement and was invalid — Application dismissed — Proceedings took form of judicial review and not application for declaration — Attempt to colour proceedings as application for declaration was attempt to avoid limitation period — Appeal was out of time — Time limit in s. 537 of Municipal Government Act had been exceeded for issues to which it applied — Section 537 applied only to procedural and not substantive issues — Issue was properly considered under R. 3.15(2) of Alberta Rules of Court, as matter was not that bylaw was ultra vires of municipal power but that decision to approve development proposal conflicted with agreement — Claim was time-barred under R. 3.15(2).

APPLICATION by municipality that bylaw passed by other municipality was invalid.

***T.F. McMahon J.*:**

Nature of the Application

1 The Town of Okotoks ("Okotoks") applies for a declaration that a bylaw of the Municipal District of Foothills No 31 ("MD") is invalid and void pursuant to section 536 of the *Municipal Government Act*, RSA 2000, c. M-26 ("*MGA*"). The second Respondent on this Application is Alberta Foothills Properties Ltd. ("the Developer") is the developer involved with the land in question.

2 Okotoks and the MD are adjacent municipalities.

3 In 1998, each municipality enacted a bylaw entering into an inter-municipal development agreement ("IDP") pursuant to section 631 of the *MGA*. The IDP dealt with the land use and density limits for lands along the common border of the MD and Okotoks. In early 2010, the two municipalities also entered into a joint planning agreement ("JPA") with the objective of creating a long-term development strategy and successful joint planning.

4 On August 11, 2010, the MD passed Bylaw 25/2010 which adopted an Area Structure Plan ("ASP") allowing for a development known as Wind Walk. Okotoks says that the ASP permits urban-style development and density on the border lands which is contrary to the IDP and the JPA. The proposal would see the development of 458 residential units and 80,300 square feet of commercial space.

5 The IDP by section 631 and the ASP by section 633 are statutory plans — that is, they are contemplated by the *MGA*. The JPA is an agreement between the two municipalities.

6 Okotoks seeks an order declaring the Bylaw void on four grounds:

1. Breach of section 638 of the *MGA*.

2. Breach of the provisions of the IDP adopted by Okotoks and the MD.

3. Breach of the JPA signed by Okotoks and the MD.

4. That the bylaw was passed in a manner contrary to fair procedure.

Factual Background

7 The first public hearing by the MD for the Wind Walk ASP opened on September 3, 2009. Okotoks voiced its concerns with the proposal. In January 2010, the JPA was entered into. It provided certain lands, including the Wind Walk lands, would be the subject of joint planning. On February 11, 2010, the MD re-opened the public hearing. Okotoks repeated its concerns with the proposal. The MD passed the first reading of the ASP on February 18, 2010.

8 Okotoks continued its objections saying, amongst other things, that the proposal was contrary to the JPA. On August 11, 2010, the MD gave second and third reading approval to the Wind Walk ASP after holding an in-camera meeting with the developer.

9 By an email of August 12, 2010, the MD advised Okotoks that third and final reading had been given to Bylaw 25/2010 authorizing adoption of the Wind Walk ASP.

10 On September 9, 2010, Okotoks filed an appeal to the Municipal Government Board regarding the ASP pursuant to section 690 of the *MGA*. The appeal was heard between June 6 - 16, 2011 on the merits. As at this date, that hearing has not been concluded.

11 In December 2010, and again in January 2011, the two municipalities engaged in mediation as required by section 690. The mediation was unsuccessful.

12 This originating Notice of Motion was filed June 3, 2011.

13 The essential argument made by Okotoks is that the Wind Walk ASP would permit much higher density than would be permitted by the IDP or the JPA. The IDP would permit lower density country residential development. Thus Okotoks argues that the ASP and the IDP are inconsistent and so contrary to section 638 of the *MGA*.

14 This Court has said in considering section 638 that inconsistency exists only where compliance with one bylaw will necessarily mean non-compliance with the other: *Barker v. Palmer*, 2005 ABQB 815 (Alta. Q.B.), at para 30. The MD and the Developer say that while the IDP and the JPA reference country residential, they do not preclude other forms of development and that in the opinion of the MD, there is no inconsistency.

Statutory Provisions and Rules

MGA, Challenging Bylaws and Resolutions

Application to the Court of Queen's Bench

536(1) A person may apply to the Court of Queen's Bench for

(a) a declaration that a bylaw or resolution is invalid, or

(b) an order requiring a council to amend or repeal a bylaw as a result of a vote by the electors on the amendment or repeal.

(2) A judge may require an applicant to provide security for costs in an amount and manner established by the judge.

Procedure

537 A person who wishes to have a bylaw or resolution declared invalid on the basis that

(a) the proceedings prior to the passing of the bylaw or resolution, or

(b) the manner of passing the bylaw or resolution

does not comply with this or any other enactment must make an application within 60 days after the bylaw or resolution is passed.

Validity relating to public participation

538 Despite section 537, a person may apply at any time

(a) for a declaration that a bylaw is invalid if

(i) the bylaw is required to be put to a vote of electors and the vote has not been conducted or if the bylaw was not given the required approval in such a vote,

(ii) the bylaw is required to be advertised and it was not advertised, or

(iii) a public hearing is required to be held in respect of the bylaw and the public hearing was not held,

or

(b) for an order requiring a council to pass a bylaw as a result of a vote by the electors.

MGA, Intermunicipal Development Plans

631(1) Two or more councils may, by each passing a bylaw in accordance with this Part or in accordance with sections 12 and 692, adopt an intermunicipal development plan to include those areas of land lying within the boundaries of the municipalities as they consider necessary.

(2) An intermunicipal development plan

(a) may provide for

(i) the future land use within the area,

(ii) the manner of and the proposals for future development in the area, and

(iii) any other matter relating to the physical, social or economic development of the area that the councils consider necessary,

and

(b) must include

(i) a procedure to be used to resolve or attempt to resolve any conflict between the municipalities that have adopted the plan,

(ii) a procedure to be used, by one or more municipalities, to amend or repeal the plan, and

(iii) provisions relating to the administration of the plan.

MGA, Plans consistent:

638 All statutory plans adopted by a municipality must be consistent with each other.

MGA, Intermunicipal Disputes:

690(1) If a municipality is of the opinion that a statutory plan or amendment or a land use bylaw or amendment adopted by an adjacent municipality has or may have a detrimental effect on it and if it has given written notice of its concerns to the adjacent municipality prior to second reading of the bylaw, it may, if it is attempting or has attempted to use mediation to resolve the matter, appeal the matter to the Municipal Government Board by

(a) filing a notice of appeal and statutory declaration described in subsection (2) with the Board, and

(b) giving a copy of the notice of appeal and statutory declaration described in subsection (2) to the adjacent municipality

within 30 days after the passing of the bylaw to adopt or amend a statutory plan or land use bylaw.

(2) When appealing a matter to the Municipal Government Board, the municipality must state the reasons in the notice of appeal why a provision of the statutory plan or amendment or land use bylaw or amendment has a detrimental effect and provide a statutory declaration stating

(a) the reasons why mediation was not possible,

(b) that mediation was undertaken and the reasons why it was not successful, or

(c) that mediation is ongoing and that the appeal is being filed to preserve the right of appeal.

Rules of Court

Originating application for judicial review

3.15(1) An originating application must be filed in the form of an originating application for judicial review if the originating applicant seeks from the Court any one or more of the following remedies against a person or body whose decision, act or omission is subject to judicial review:

(a) an order in the nature of mandamus, prohibition, certiorari, quo warranto or habeas corpus;

(b) a declaration or injunction.

> (2) Subject to rule 3.16 [Originating application for judicial review: habeas corpus], an originating application for judicial review to set aside a decision or act of a person or body must be filed and served within 6 months after the date of the decision or act, and rule 13.5 [Variation of time periods] does not apply to this time period.

A Preliminary Issue

15 Okotoks insists through one of its counsel that this is not a judicial review but an application for a declaration only. Counsel insist that what is sought is not an order quashing the bylaw but merely a declaration that the bylaw is invalid or beyond the MD's powers. The argument is made in the face of the Originating Notice of Motion which is styled as an "Application for Judicial Review" and which describes itself as "an application brought pursuant to section 536 of the Municipal Government Act, RSA 2000, c. M-26 and Judicial Review to declare a bylaw invalid and void". In addition, Rule 3.15(1)(d) requires that a party seeking a declaration proceed by an application for a judicial review.

16 The argument is made, I conclude, in an effort to spin the application away from the limitation issues raised by section 3.15(2).

17 I have no doubt that this is in fact an originating application for a judicial review and so Rule 3.15(2) can apply.

18 In any event, the authorities are clear that Rule 3.15(2) applies to applications framed as being for declaratory relief: *Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)*, 2011 ABCA 29 (Alta. C.A.), at para 23, quoting from *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2004 ABQB 655 (Alta. Q.B.):

> I accordingly conclude that seeking a declaration is not an effective strategy to avoid the six-month limitation period for quashing a decision.

Limitations Issue

19 The MD and the Developer first argue that Okotoks is out of time in bringing this application. They rely on the 60-day limitation in section 537 of the *MGA* and the six-month limitation in Rule 3.15(2). The impugned bylaw was passed August 11, 2010. This originating Notice of Motion was filed June 3, 2011 so that both time periods have been exceeded. Okotoks argues that neither limitation applies to this case.

A. Section 537 of the MGA

20 Okotoks argues that this section is limited to appeals on procedural issues and not substantive issues such as the validity or legality of a bylaw. Okotoks points to the language in the section "the proceedings prior to the passing of the bylaw" and "the manner of passing the bylaw" as confirming that the limitation is restricted to appeals on procedural issues. They say there is no limitation in the *MGA* as to appeals on substantive issues.

21 Reliance is placed upon *Urban Development Institute v. Rocky View (Municipal District No. 44)*, 2002 ABQB 651 (Alta. Q.B.) where the Court said at para 32:

> Thus, it does not appear that this section applies to cases where the substance of the bylaw itself is being challenged as invalid. Rather, the Legislature intended it to apply to procedural grounds of challenge only. As the question here is whether the Bylaw exceeds the authority of the MD as provided for in the Municipal Government Act and not whether the actual procedure in passing the Bylaw was appropriate, the limitation period set out in section 537 does not apply.

22 In that case, the MD had by bylaw imposed "transportation infrastructure fees" which were challenged as being *ultra vires* of the MD.

23 In *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2002] 8 W.W.R. 51 (Alta. C.A.), the Alberta Court of Appeal held that section 537 did not apply where a city bylaw purported to restrict the number of taxi licences because

"the basis for the requested declaration of invalidity is that the City acted beyond its power, not that the City failed to comply with the *MGA* or another enactment in the proceedings prior to the passage of the Bylaw, or the manner of passing it." (Para 163) That decision was reversed on other grounds by the Supreme Court of Canada reported at [2004] 1 S.C.R. 485 (S.C.C.).

24 The MD relies upon *Associated Cab Limousine Ltd. v. Calgary (City)*, 2003 ABCA 215 (Alta. C.A.). The Court declared invalid a bylaw passed in a closed meeting and overturned a Queen's Bench decision made in Chambers in which it held that the application was time-barred by virtue of section 537. In doing so, however, the Court of Appeal said at para.22:

> Section 537 of the MGA requires a person who wishes to have a bylaw or resolution declared invalid because procedural requirements were not met, to "make an application within 60 days after the bylaw or resolution is passed." That time limit does not apply in this case because the defect is not merely procedural.

25 I conclude that section 537 deals solely with procedural issues. The only procedural issue raised by Okotoks here relates to the in-camera meeting between the MD and the Developer after the public hearing and before final passage of the bylaw. The result is that section 537 does not bar the remaining issues. I will deal with the in-camera issue separately.

B. Rule 3.15(2)

26 The first argument of Okotoks is that Rule 3.15 is inapplicable because they seek declaratory relief and not judicial review. I have already disposed of that argument.

27 The real issue is whether an inconsistency within the meaning of section 638 goes to jurisdiction, or is it a decision or act to which Rule 3.15(2) applies?

28 The Alberta Court of Appeal in *United Taxi* at para 162 said in relation to the predecessor rule:

> But Rule 753.11(1) is inapplicable. No relief is sought to set aside "a decision or act". What is sought is a declaration of invalidity of parts of a bylaw due to lack of jurisdiction. In such cases, R.753.11(2) does not affect the ability of a court to decide the municipality lacked the jurisdiction under its constituent legislation.

29 More recently, in *Athabasca Chipewyan*, the Alberta Court of Appeal dealt with judicial review of five oil & gas leases granted by the Minister of Energy to Shell Canada Ltd. The motion was brought by the Band outside the six-month limitation period. At the Court of Queen's Bench, the motion was summarily dismissed. That decision was upheld by the Court of Appeal. In doing so, the Court quoted at length from *Papaschase* in which Slatter J. (as he then was) at paras. 113 and 114, said:

> In my view the better interpretation is that the limitation period prevents all challenges to the decision, including the ability to challenge the alleged voidness of the decision. In the end, this is largely a matter of statutory interpretation: when the Legislature enacted the limitation period, did it intend to apply it only to errors of law on the face of the record, or also to jurisdictional errors? The purpose of the limitation period is to bring certainty to administrative decisions, and there is no obvious reason why the Legislature would exempt a large body of decisions from the rule.

30 The Court in *Papaschase* was faced by an application by descendants of an Indian band asserting a void or wrongful surrender of certain lands more than a century ago. The Court in *Athabasca Chipewyan* at page 23 characterized the situation in *Papaschase* as an attack on "an administrative decision or act".

31 Okotoks does not attack the authority of the MD to pass a bylaw authorizing an ASP. The MD clearly has the statutory authority to do so. This is a different case from a municipality which levies a development fee when it had no jurisdiction to do so (*Urban Development Institute*). The *MGA* grants a municipality the authority to pass a bylaw adopting an ASP.

32 The issue taken here by Okotoks is with the content of this ASP, some of which it says conflicts in a planning sense with the IDP and so contravenes section 638 of the *MGA*. That is, the objection is not that the MD has no authority to pass an ASP bylaw but that the planning details of this particular ASP may conflict with the other statutory plan, the IDP. "As long as the

delegate acts *bona fide*, the courts will generally be very reluctant to second guess its opinion, with the result that it is impossible to assert that the delegate's action is *ultra vires*." Jones and De Villars, "Principles of Administrative Law", 5th ed., pg. 144.

33 Put yet another way, it is not that an ASP bylaw is *ultra vires* the MD but that the decision of the MD to approve this particular development proposal conflicts in some way with the IDP. That in my view is a decision of the MD which is within the contemplation of Rule 3.15(2).

34 If this were not so, the Developer argues with some justification, then it would never have certainty that its planned development could proceed, even as it invested time and money into planning, design and construction. In this context, the Developer quotes *Love v. Flagstaff (County) Subdivision & Development Appeal Board*, 2002 ABCA 292 (Alta. C.A.), at para 27:

> Central to these values is the need for certainty and predictability in planning law. Although expropriation of private property is permitted for the public, not private, good in clearly defined and limited circumstances, private ownership of land remains one of the fundamental elements of our Parliamentary democracy. Without certainty, the economical development of land would be an unachievable objective. Who would invest in land with no clear indication as to the use to which it could be put? Hence the importance of land use bylaws which clearly define the specific uses for property and any limits on them.

35 In so far as the particulars of the ASP may be detrimental to Okotoks, they have the remedy afforded by section 690 of the *MGA*.

36 Accordingly I find that the relief sought by Okotoks is time-barred by Rule 3.15(2).

The In-camera Meeting

37 Had I found otherwise in respect of Rule 3. 15(2), I would have to consider whether section 538(a)(iii) gave Okotoks a remedy. Given my decision that all of Okotoks claims are barred by Rule 3.15(2) this and the other issues need not be considered.

Result

38 At the conclusion of argument, counsel discussed reserving this decision on the merits until after the receipt of a decision expected from the Municipal Government Board. However, given my decision on the limitation issue, awaiting the decision of the Municipal Government Board is no longer necessary.

39 The application is dismissed.

40 Costs, if not agreed to, may be spoken to.

Application dismissed.