Court File No. CV-16-11257-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PT HOLDCO, INC., PRIMUS TELECOMMUNICATIONS CANADA, INC., PTUS, INC., PRIMUS TELECOMMUNICATIONS, INC., AND LINGO, INC.

BRIEF OF AUTHORITIES OF BANK OF MONTREAL AS AGENT FOR THE SYNDICATE

(Re: Motion of Zayo Canada Inc. Returnable August 9, 2016)

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As Agent for the Syndicate

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Jurisprudence

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Secondary Sources

17. Angela Swan, *Canadian Contract Law*, 3rd Ed. (Markham: LexisNexis, 2012)

18. G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Scarborough: Carswell, 2011)

19. Kevin P. McElcheran, *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005)

20. *Statutory Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Industry Canada, 2014)

TAB 1

2012 BCSC 760
British Columbia Supreme Court [In Chambers]

Can-Pacific Farms Inc., Re

2012 CarswellBC 1528, 2012 BCSC 760, [2012] B.C.W.L.D. 5551, 215 A.C.W.S. (3d) 636, 94 C.B.R. (5th) 152

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

In the matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 and the Business Corporation Act, S. B.C. 2002, c. 57

And In the matter of Can-Pacific Farms Inc., Petitioner

Burnyeat J.

Heard: March 29-30, 2012
Oral reasons: March 30, 2012
Docket: Vancouver S121930

Counsel: K.E. Siddall for Petitioner
G. Thompson, M.C. Verbrugge for Canadian Imperial Bank of Commerce

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.i General principles

Headnote

Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Initial application — Grant of stay — General principles

Debtor was farming company that was having financial difficulties — Debtor entered into forbearance agreements with mortgagee to avoid foreclosure — Agreements included covenant not to file for protection under Companies' Creditors Arrangement Act — Debtor allegedly breached forbearance agreements — Debtor failed to pay proceeds of particular crop and sale of equipment to mortgagee — Attempts to sell property had proven unsatisfactory — Debtor brought application for initial order under Act — Application granted in part — Debtor's need to hire numerous part-time workers to harvest current crop was interest that should be protected — Debtor's failure to disclose material facts was not condoned but did not result in denial of relief — Mortgagee's firm reluctance to approve any plan that debtor might offer was not proper basis for denying initial relief — Debtor was not permitted to have $100,000 administrative charge rank ahead of interest of creditors — If debtor's projections were accurate, it would not need administrative charge — Principal of debtor was required to pay amounts expended by mortgagee for security observers — Proposed monitor was approved despite its prior involvement with debtor — Avoiding delay and further costs outweighed monitor's potentially compromised independence.

Table of Authorities

Cases considered by *Burnyeat J.*:

Encore Developments Ltd., Re (2009), 2009 BCSC 13, 2009 CarswellBC 84, 52 C.B.R. (5th) 30 (B.C. S.C.) — considered

Hester Creek Estate Winery Ltd., Re (2004), 2004 BCSC 345, 2004 CarswellBC 542, 50 C.B.R. (4th) 73 (B.C. S.C. [In Chambers]) — considered

Hickman Equipment (1985) Ltd., Re (2002), 2002 CarswellNfld 154, 34 C.B.R. (4th) 203, 214 Nfld. & P.E.I.R. 126, 642 A.P.R. 126 (Nfld. T.D.) — considered

Laidlaw Inc., Re (2002), 2002 CarswellOnt 790, 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]) — considered

Pacific Shores Resort & Spa Ltd., Re (2011), 2011 BCSC 1775, 2011 CarswellBC 3500, 75 C.B.R. (5th) 248 (B.C. S.C. [In Chambers]) — followed

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 1068, 11 C.B.R. (4th) 122 (Ont. Gen. Div. [Commercial List]) — considered

Stokes Building Supplies Ltd., Re (1992), 13 C.B.R. (3d) 10, 100 Nfld. & P.E.I.R. 114, 318 A.P.R. 114, 1992 CarswellNfld 20 (Nfld. T.D.) — considered

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11.7 [en. 1997, c. 12, s. 124] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — considered

s. 23(1) — referred to

Farm Debt Mediation Act, S.C. 1997, c. 21
Generally — referred to

APPLICATION by debtor for initial order under *Companies' Creditors Arrangement Act*.

***Burnyeat J.*:**

1 This application is for an initial order in proceedings brought under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*Act*"). I am asked to make a declaration that the Petitioner is a corporation to which the *Act* applies. I am satisfied that is the case. The second order requested is that the Petitioner be permitted to file a formal plan with the Court for the approval of its creditors and that I order as a "comeback date" April 30, 2012.

2 The application is opposed by the first mortgagee, Canadian Imperial Bank of Commerce, who, along with the second mortgagee, is owed roughly $8 million. The application is supported by some of the unsecured creditors of the Petitioner and by a lien holder.

3 The opposition on behalf of the Canadian Imperial Bank of Commerce relates in part to the failure of the Petitioner to make disclosure. In particular, the following is not disclosed in the materials:

> (a) The Petitioner, through its principal, Mr. Kooner, has failed to disclose numerous breaches under the various forbearance agreements that were entered into with the Canadian Imperial Bank of Commerce, including a covenant not to file for protection under the *Act* in consideration of the forbearance shown;
>
> (b) The fact that the 2011 berry crop proceeds of between a two and four million dollars which should have been received by the Canadian Imperial Bank of Commerce were used otherwise, including depositing the proceeds with a different financial institution;
>
> (c) The fact that the proceeds from the sale of equipment of the Petitioner have been received but not applied in accordance with the security held by the Canadian Imperial Bank of Commerce and the fact that other equipment of the Petitioner is being advertised for sale;
>
> (d) The fact that there was a recent payment to prior or to subsequent creditors of as much as $250,000; and
>
> (e) The fact that there was a filing by the Petitioner under the *Farm Debt Mediation Act.*

4 It is submitted that the failure to disclose all material facts should lead to a refusal of the Court to make the order that is sought: *Hester Creek Estate Winery Ltd., Re* (2004), 50 C.B.R. (4th) 73 (B.C. S.C. [In Chambers]), and *Encore Developments Ltd., Re* (2009), 52 C.B.R. (5th) 30 (B.C. S.C.).

5 Both of those decisions involved setting aside initial orders that had been obtained on an *ex parte* basis. These decisions are based on the assumption that, when you appear on an *ex parte* basis, it is incumbent upon an applicant to reveal to the Court anything that might have the possibility of influencing the decision that the Court is asked to make and that, if complete material disclosure is not made, the *ex parte* order may be set aside.

6 With the change made to the *Act*, the initial order is not made on an *ex parte* basis. Having said that, it is incumbent upon a petitioning company to present fully the factual basis upon which the relief under the *Act* is sought. The making of any order under the *Act* is discretionary. That discretion should rarely be exercised in favour of an applicant who has not fully disclosed all of the material facts. It is still incumbent upon a petitioning company to bring forward everything that might be material or might affect the decision of the Court. I am satisfied that the Petitioner has not done so here.

7 The Canadian Imperial Bank of Commerce also raises the issue that there is no broad interest to be protected here. At this point in the berry growing season, there are only two full-time employees of the Petitioner so that it is only their ongoing interest which needs to be protected. Having said that, the berry operation is such that hundreds will be called upon this summer on a part-time basis to harvest the crop and make it available for sale. I take into account that this is an interest which should be protected.

8 The Canadian Imperial Bank of Commerce submits that any plan brought forward is doomed to fail as it will oppose any plan. I cannot accede to that argument. I think that argument has been generally discredited by various court decisions. The example I gave is that, if the plan foolishly said, "we will pay to the bank twice as much as it is owed", I am quite confident that even the Bank would vote for such a plan.

9 I agree with the observations in *Pacific Shores Resort & Spa Ltd., Re*, [2011] B.C.J. No. 2482 (B.C. S.C. [In Chambers]). The argument raised is an argument that should meet with no favour before the Court in these circumstances on the first order sought, although it may be given some credence on the comeback order:

> This argument is also part of the "doomed to failure" argument of [the creditor]. I have been referred by [the creditor] to *Hunters Trailer & Marine Ltd. (Re)*, 2000 ABQB 952, as authority for the proposition that unless there is equity in the assets beyond that owed to secured creditors, a *CCAA* order is only appropriate if the secured creditors are supportive of it.
>
> To the contrary, at para. 19 of that case, the Court states quite clearly that a recalcitrant creditor should not necessarily prevent the granting of an order under the *CCAA*. This approach is consistent with the comments of Madam Justice Newbury in *Forest & Marine* who stated, in the face of a major secured creditor's insistence that it would vote against any plan:
>
> > [27] I am not aware of any authority that permits a creditor to forestall an application under the Act on this basis, and I doubt Parliament intended that the Court's exercise of its statutory jurisdiction could be neutralized in this manner.
>
> (at paras. 40-41)

10 I realize that what is being attempted by the Petitioner comes after some 19 months of default under the security of the Canadian Imperial Bank of Commerce. It is an attempt to find financing to pull the whole situation "out of the fire". Since default, there has been an order *nisi* of foreclosure with a redemption period that expired almost a year ago and an order for sale which has produced two offers neither of which would pay the secured creditors in full and neither of which had the subject clauses removed so that they could proceed.

11 The Petitioner submits that it will make major advances between now and when they report back to the Court on April 30, 2012. The Petitioner submits it will have the proceeds of up to $333,000 from the sale of a property, that there will be sales of other assets which may occur, and that Mr. Kooner is committed to putting these funds into the company so that the company has sufficient cash flow to meet the cash flow requirements that are set out in the materials before the Court. Mr. Kooner is also prepared to advance sufficient funds to allow $11,000 a month to be available to the Canadian Imperial Bank of Commerce and $6,000 per month to be available for the second mortgagee.

12 The position of all of the creditors will be enhanced by April 30, 2012 if there can be the investment contemplated. The payments contemplated will maintain the status quo in the interim. In all of the circumstances, I will make the order that is sought. The comeback motion will be heard by me at 9:00 a.m. on April 30, 2012.

13 The Petitioner also seeks an administrative charge in the amount of $100,000 which would rank ahead of the interest of the creditors. In the circumstances, I am satisfied that no administrative charge should be granted at this time. The funds that Mr. Kooner says will be available will allow those costs to be covered. Not granting an administrative charge is one way of assuring that the status quo will be maintained so that, along with the payment of $17,000 per month to the secured creditors, the position of the secured creditors will be no worse than it is presently. The sums of $11,000 and $6,000 will be payable in certified funds payable to each of the two mortgagees no later than close of business on April 2, 2012, and then no later than close of business on April 27, 2012.

14 The stay of proceedings already ordered in the foreclosure proceedings including the application for the appointment of a receiver in those proceedings will be extended to 4:00 p.m. on April 30, 2012. I make no order staying the ability of the Canadian Imperial Bank of Commerce to continue with the order for conduct of sale which was granted by this court some considerable time ago.

15 In addition to the requirement of the payment of $17,000, the costs previously incurred by the Canadian Imperial Bank of Commerce to hire security observers will be borne by Mr. Kooner by the payment of the sum of $36,000 to counsel for the Canadian Imperial Bank of Commerce no later than close of business on April 4, 2012. Further costs of security observers will also be paid by Mr. Kooner.

16 The secured creditors will be at liberty to apply on three days' clear notice if the sums set out above have not been paid in accordance with the order made.

17 The Petitioner makes the further application that Murphy & Associates, Trustee in Bankruptcy, be appointed as Monitor to report to the Court and the creditors of the Petitioner regarding the arrangements that will be made by the Petitioner and the progress in that regard.

18 While I have no doubt about the ability of Murphy & Associates to fulfill the role of being a monitor, I have grave reservations of about whether it is appropriate for Murphy & Associates to be appointed as Monitor. Murphy & Associates has been a consultant to the Petitioner. The financial records which are before the Court have been prepared with the assistance of Murphy & Associates. It is also apparent that the Plan which will be forthcoming has been prepared in its initial stages with the assistance of Murphy & Associates.

19 A monitor under proceedings under the *Act* has an obligation to act independently: *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); *Royal Oak Mines Inc., Re* (1999), 11 C.B.R. (4th) 122 (Ont. Gen. Div. [Commercial List]); *Laidlaw Inc., Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]). The role of a monitor is also set out by the Learned Author of *Commercial Insolvency in Canada* (Markham, ON: LexisNexis Butterworths, 2005):

> The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any part in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors. (at p. 236)

20 The Monitor must not only be impartial but also must appear to be impartial so that the confidence of creditors and members of the general public can be assured. Pursuant to s. 23(1) of the *Act*, a monitor must carry out a number of functions in relation to a company as prescribed under the *Act* or as the court may direct.

21 Section 11.7(2) of the *Act* places restrictions on who may serve as a monitor by excluding an auditor, accountant, legal counsel of the debtor if they acted as such within the previous two years. Those excluded from acting as monitors may be appointed "... with the permission of the court and on any conditions that the court may impose ..." (s. 11.7(2) of the *Act*). Murphy & Associates was not the auditor for the Company and, accordingly, does not have the intimate knowledge of the financial affairs of the Company which would be available to an auditor or an accountant for the Company. Decisions reached both prior to and after the enactment of s. 11.7 of the *Act* have come to opposite conclusions as to whether it appropriate for an auditor to be appointed as a monitor. While Murphy & Associates is not the auditor for the company, the decisions do reflect the debate of about whether or not it is appropriate to appoint as a monitor a company or an individual that has had prior dealings with the petitioning company.

22 In *Stokes Building Supplies Ltd., Re* (1992), 13 C.B.R. (3d) 10 (Nfld. T.D.), the Court dismissed the application of a company to appoint its auditor as a monitor because the auditor lacked the requisite degree of "independence" that was necessary and that "... as agent of the Court, is independent of the parties." (at p. 15).

23 In *Hickman Equipment (1985) Ltd., Re* (2002), 34 C.B.R. (4th) 203 (Nfld. T.D.), the Court came to the opposite conclusion about whether an auditor could also be appointed as a monitor:

> Permitting the auditor of a company to act as its monitor under a reorganization plan under the *CCAA* is merely a recognition of the commercial realities at play when a company is forced to seek protection under the *CCAA*. Under the *CCAA*, relief from one's creditors is not automatic. There is no automatic stay of proceedings against the applicant company by creditors merely because it has applied for such relief. The relief must be granted by the order of the Court after the application is filed and after the applicant company has declared and publically filed documents declaring that it is insolvent. Therefore, in order to prepare for a *CCAA* application, the applicant

> company will usually require the continuing assistance of its own accountants and auditors. These professionals would most likely be the accounting professionals most knowledgeable about the affairs and business of the applicant company and most competent to promptly assembly the requisite information and plans to support the initial application for relief under the *CCAA*. A mandatory requirement that the auditor of an applicant company not be permitted to serve as monitor would, in most cases, result in considerable additional delay because the proposed monitor (not being familiar with the affairs of the company) would need to be brought up to speed. This extra work would obviously result in a duplication of expense for a company which is already cash strapped. Most importantly, it would delay a *CCAA* application being made on a timely basis, resulting in obvious risk of adverse moves being made against the applicant company by its creditors before it can obtain court protection.
>
> Cognizant of these commercial realities and the fact that creditors were cancelling dealership agreements and commencing legal action against Hickman, this Court was satisfied to confirm the appointment of Deloitte & Touche Inc. as Monitor.
>
> (at paras. 8-9)

24 It is difficult to come to the conclusion that Murphy & Associates is "independent of the parties" when it has served as the advisor to the Company. While the advice that Murphy & Associates provided to the Company may be viewed by the Company as invaluable, it cannot be said that Murphy & Associates is the most knowledgeable about the affairs and business of the Company. Murphy & Associates has not served as the auditor or the accountant for the Company.

25 However, Murphy & Associates has had the opportunity of reviewing the financial affairs of the Company and has come to a satisfactory arrangement regarding the payment for services rendered to date. Because I am not prepared to order the administrative charge of $100,000 requested, any monitor will have to look to the principals of the Company for a retainer to cover its costs. Accordingly, it is not possible today to both appoint a different monitor and make the initial order sought by the Petitioner. Any different monitor will not have had the opportunity of negotiating an appropriate retainer to cover the cost of the obligations imposed upon the Monitor.

26 In order to avoid a delay and in order to avoid the cost of expenses already incurred which would have to be repeated by a different monitor, the appointment of Murphy & Associates as Monitor is made.

27 Without laying down a general rule that it is inappropriate for a petitioner to seek the appointment as a monitor of a financial adviser that has been working with a petitioner to prepare proceedings under the *Act*, such an appointment should not be made as a general rule.

Application granted in part.

End of Document

TAB 2

Most Negative Treatment: Distinguished
Most Recent Distinguished: San Francisco Gifts Ltd., Re | 2004 ABQB 705, 2004 CarswellAlta 1241, [2004] A.J. No. 1062, 134 A.C.W.S. (3d) 239, 42 Alta. L.R. (4th) 352, [2004] A.W.L.D. 579, 359 A.R. 71, 5 C.B.R. (5th) 92 | (Alta. Q.B., Sep 28, 2004)

2000 CarswellAlta 623
Alberta Court of Queen's Bench

Canadian Airlines Corp., Re

2000 CarswellAlta 623, [2000] A.W.L.D. 642, [2000] A.J. No. 1693, 19 C.B.R. (4th) 12

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

In the Matter of the Business Corporations Act (Alberta) S.A. 1981, c. B-15, As Amended, Section 185

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

Paperny J.

Judgment: May 12, 2000 *
Docket: Calgary 0001-05071

Proceedings: refused leave to appeal *Canadian Airlines Corp., Re*, 2000 ABCA 149, 80 Alta. L.R. (3d) 213 (Alta. C.A. [In Chambers])

Counsel: *A.L. Friend, Q.C.*, *H.M. Kay, Q.C.*, and *R.B. Low, Q.C.*, for Canadian Airlines.
V.P. Lalonde and *Ms M. Lalonde*, for AMR Corporation.
S. Dunphy, for Air Canada.
P.T. McCarthy, Q.C., for PricewaterhouseCoopers.
D. Nishimura, for Resurgence Asset Management LLC.
E. Halt, for Claims Officer.
A.J. McConnell, for Bank of Nova Scotia Trust Company of New York and Montreal Trust Co. of Canada.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.4 Appeals

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Creditors of corporation gave corporation concessions worth $200 million in exchange for assurance from airline that creditors would cease to be affected by CCAA proceedings — Concessions were reflected in promissory notes assigned to airline in exchange for its guarantee of aircraft leases — Representative of 60 per cent of unsecured noteholders in corporation brought application for order that all unsecured claims held or controlled

by airline be placed in separate class from other unsecured claims for voting purposes, and for order striking portion of reorganization plan — Application dismissed — Class of creditors should include all those with commonality of interest — Commonality of interest refers to rights creditor has vis-à-vis debtor — "Interest" does not include personality or identity of creditor, and absent bad faith, motivation of creditor for supporting plan is not classification issue — Proper point at which to consider effect of airline's status as assignee of unsecured debt was at fairness hearing — Legal rights of unsecured noteholders and airline were essentially same — Votes cast by airline should be tabulated separately to provide evidentiary record for fairness hearing — Propriety of airline voting to share in pool of cash funded by it for benefit of unsecured creditors was also issue best considered at fairness hearing — Provision of plan that released directors, officers and others should not be struck at classification stage as fairness of proposed compromises or claims was issue for fairness hearing — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered by *Paperny J.*:

Fairview Industries Ltd., Re (1991), 11 C.B.R. (3d) 71, (sub nom. *Fairview Industries Ltd., Re (No. 3))* 109 N.S.R. (2d) 32, (sub nom. *Fairview Industries Ltd., Re (No. 3))* 297 A.P.R. 32 (N.S. T.D.) — considered

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 72 C.R. (N.S.) 20 (Alta. Q.B.) — considered

Northland Properties Ltd., Re (1988), 31 B.C.L.R. (2d) 35, 73 C.B.R. (N.S.) 166 (B.C. S.C.) — considered

Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, 34 B.C.L.R. (2d) 122, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363 (B.C. C.A.) — considered

NsC Diesel Power Inc., Re (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (N.S. T.D.) — considered

Savage v. Amoco Acquisition Co. (1988), 59 Alta. L.R. (2d) 260, 68 C.B.R. (N.S.) 154, 40 B.L.R. 188, (sub nom. *Amoco Acquisition Co. v. Savage)* 87 A.R. 321 (Alta. C.A.) — considered

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — considered

Sovereign Life Assurance Co. v. Dodd (1891), [1891-4] All E.R. Rep. 246, [1892] 2 Q.B. 573 (Eng. C.A.) — applied

Wellington Building Corp., Re, 16 C.B.R. 48, [1934] O.R. 653, [1934] 4 D.L.R. 626 (Ont. S.C.) — distinguished

Woodward's Ltd., Re (1993), 20 C.B.R. (3d) 74, 84 B.C.L.R. (2d) 206 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — considered

s. 5.1 [en. 1997, c. 12, s. 122] — referred to

s. 5.1(3) [en. 1997, c. 12, s. 122] — considered

APPLICATION by unsecured creditors of corporation for order that unsecured claims held by Air Canada should be placed in separate class from other unsecured creditors, and for order striking portion of reorganization plan.

***Paperny J.* (orally):**

1 Resurgence Asset Management LLC "Resurgence" appeared on behalf of holders of approximately 60 percent of the unsecured notes issued by Canadian Airlines Corporation in the total amount of $100 million U.S. These unsecured note holders are proposed to be classified as unsecured creditors in the plan that is the subject of these proceedings.

2 Resurgence applied for the following relief:

1. An order lifting the stay of proceedings against Canadian Airlines Corporation and Canadian Airlines International Ltd. (respectively "CAC" and "CAIL" and collectively called "Canadian") to permit Resurgence to commence and proceed with an oppression action against Canadian, Air Canada and others.

2. Further, and in the alternative, Resurgence sought the same relief described in item one above in the context of the C.C.A.A. proceedings.

3. An order that any and all unsecured claims held or controlled, directly or indirectly by Air Canada shall be placed in a separate class and either not allowed to be voted at all, or, alternatively, allowed to be voted in separate class from all other affected unsecured claims.

4. An order that there be a separation in class between creditors of CAC and CAIL

5. An order striking Section 6.2(2)(ii) of the plan on the basis that it is contrary to the C.C.A.A.

3 Resurgence abandoned the application described in item 1 above, and the application in item 2 was addressed in my ruling given May 8, 2000, in these proceedings.

Standing

4 Prior to dealing with the remaining issues of classification, voting and Section 6.2(2)(ii) of the plan, the issue of standing needs to be addressed. This was a matter of some debate, largely in the context of the first two applications. Canadian argued that Resurgence was only a fund manager and did not hold the unsecured notes, beneficially or otherwise, and, accordingly, did not have standing to make any of the applications. The evidence establishes that Resurgence is not the legal owner and the evidence of beneficial ownership is equivocal.

5 Canadian has not raised this issue on any of the previous occasions on which Resurgence has been before the court in these proceedings. There has been a consent order involving Resurgence and Canadian.

6 In my view, it is not appropriate now for Canadian to suggest that Resurgence does not represent the interests of the holders of 60 percent of the unsecured notes and essentially seek a declaration that Resurgence is a stranger to these proceedings.

7 I am not prepared to dismiss the applications of Resurgence on classification, voting and amending the plan out of hand on the basis of standing.

8 Resurgence was also supported in these applications by the senior secured note holders. For the purposes of these applications, I accept that Resurgence is representing the interests of 60 percent of the unsecured note holders.

Classification of Air Canada's Unsecured Claim

9 By my April 14, 2000 order in these proceedings, I approved transactions involving CAIL, a large number of aircraft lessors and Air Canada, which achieved approximately $200 million worth of concessions for CAIL. In exchange for granting the concession, each creditor received a guarantee from Air Canada and the assurance that the creditor would immediately cease to be affected by the C.C.A.A. proceedings.

10 These concessions or deficiency claims were quantified and reflected in promissory notes which were assigned to Air Canada in exchange for its guarantee of the aircraft leases. The monitor approved the method of quantifying these claims and recognized the value of the concessions to Canadian. In that order I reserved the issue of classification and voting to be determined at some later date. The plan provides for two classes of creditors, secured and unsecured.

11 The unsecured class is composed of a number of types of unsecured claims, including aircraft financings, executory contracts, unsecured notes, litigation claims, real estate leases and the deficiencies, if any, of the senior secured note holders.

12 In one portion of the application, Resurgence seeks to have Air Canada vote the promissory notes in separate class and relied on several factors to distinguish the claims of other Affected, Unsecured Creditors from Air Canada's unsecured claim, including the following:

> 1. The Air Canada appointed board caused Canadian to enter into these C.C.A.A. proceedings under which Air Canada stands to gain substantial benefits in its own operations and in the merged operations and ownership contemplated after the compromise of debts under the plan.
>
> 2. Air Canada is providing the fund of money to be distributed to the Affected Unsecured Creditors and will, therefore, end up paying itself a portion of that money if it is included in the Affected Unsecured Creditors' class and permitted to vote.
>
> 3. Air Canada gave no real consideration in acquiring the deficiency claims and manufactured them only to secure a 'yes' vote.

13 Air Canada and Canadian argue that the legal right associated with Air Canada's unsecured promissory notes and with the other Affected, Unsecured Claims, are the same and that the matters raised by Resurgence, as relating to classification, are really matters of fairness, more appropriately dealt with at the fairness hearing. Air Canada and Canadian emphasized that classification must be determined according to the rights of the creditors, not their personalities.

14 The starting point in determining classification is the statute under which the parties are operating and from which the court obtains its jurisdiction. The primary purpose of the C.C.A.A. is to facilitate the re-organization of insolvent companies, and this goal must be given proper consideration at every stage of the C.C.A.A. process, including classification of claims; see, for example, *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.)

15 Beyond identifying secured and unsecured classes, the C.C.A.A. does not offer any guidance to the classification of claims. The process, instead, has developed in the case law.

16 A frequently cited description of the method of classification of creditors for the purposes of voting on a plan, under the C.C.A.A., is *Sovereign Life Assurance Co. v Dodd* (1891), [1892] 2 Q.B. 573 (Eng. C.A.).

17 At page 583 (Q.B.), Bowen, L.J. stated:

> The word 'class' is vague and to find out what is meant by it, we must look at the scope of the section which is a section enabling the court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with the view to their common interest.

This test has been described as the "commonality of interest" test. All counsel agree that this is the test to apply in classification of claims under the C.C.A.A. However, there is a dispute on the types of interests that are to be considered in determining commonality.

18 Generally, the cases hold that classification is a fact-driven determination unique to the circumstances of every case, upon which the court should be loathe to impose rules for universal application, particularly in light of the flexible and remedial jurisdiction involved; see, for example, *Re Fairview Industries Ltd.* (1991), 11 C.B.R. (3d) 71 (N.S. T.D.)

19 The majority of the cases presented to me, held that commonality of the interest is to be determined by the rights the creditor has vis-a-vis the debtor. Courts have also found it helpful to consider the context of the proposed plan and treatment of creditors under a liquidation scenario. In the absence of bad faith, motivation for supporting or rejecting a plan is not a classification issue in the authorities.

20 In considering what interests are included in the commonality of interest test, Forsyth J., in *Norcen Energy Resources Ltd.* (Supra) had to determine whether all the secured creditors of the company ought to be included in one class. The creditors all had first-charge security and the same method of valuation was applied to each secured claim in order to determine security value under the plan. The distinguishing features were submitted to be based on the difference in the security held, including ease of marketability and realization potential. In holding that a separate class was not necessary, Forsyth J., said at page 29:

> Different security positioning and changing security values are a fact of life in the world of secured financing. To accept this argument would again result in a different class of creditor for each secured lender.

In doing so, Forsyth J. rejected the "identity of the interest" approach in which creditors in a class must have identical interests.

21 It was also submitted in *Norcen Energy Resources Ltd.* that since the purchaser under the plan had made financing arrangements with the Royal Bank, the bank had an interest not shared by the other secured creditors. Forsyth J., held that in the absence of any allegation that the Royal Bank was not acting bona fide in considering the benefit of the plan, the secured creditors could not be heard to criticize the presence of the Royal Bank in their class.

22 Forsyth J., also emphasized in *Norcen Energy Resources Ltd.* that the commonality test cannot be considered without also considering the underlying purpose of the C.C.A.A., which is to facilitate reorganizations of insolvent companies. To that end, the court should not approve a classification scheme which would make a reorganization difficult, if not impossible, to achieve. At the same time, while the C.C.A.A. grants the court the authority to alter the legal rights of parties other than the debtor company without their consent, the court will not permit a confiscation of rights or an injustice to occur.

23 The *Norcen Energy Resources Ltd.* approach was specifically adopted in British Columbia in *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), where it was held that various mortgagees with different mortgages against different properties were included in the same class.

24 In *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.) the Alberta Court of Appeal rejected the argument that shareholders who have private arrangements with the applicant or who are brokers or officers or otherwise in a special position vis-a-vis the debtor company, should be put in a special category.

25 At page 158 the court stated in regard to the test applied to classification:

> We do not think that this rule justifies the division of shareholders into separate classes on the basis of their presumed prior commitment to a point of view. The state of facts, common to all, is that they are all offered this proposal, face as an alternative the break-up of this apparently insolvent company and hold shares that appear to be worthless on break-up. In any event, any attempt to divide them on the basis suggested, would be futile. One would have as many groups as there are shareholders.

The commonality of interest test was addressed by the British Columbia Supreme Court in *Re Woodward's Ltd.* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.). Tysoe J. rejected the identity of interest approach and held that it was permissible to include creditors with different legal rights in the same class, so long as their legal rights were not so dissimilar that it was still possible for them to vote with a common interest.

26 Tysoe J. went on to find that legal interests should be considered in the context of the proposed plan and that it was also necessary to examine the legal rights of creditors in the context of the possible failure of the plan.

27 In other words, "interest" for the purpose of classification does not include the personality or identity of the creditor, and the interests it may have in the broader commercial sphere that might influence its decision or predispose it to vote in a particular way; rather, "interest" involves the entitlement of the debt holder viewed within the context of the provisions of the proposed plan. In that regard, see *Woodward's Ltd.* at page 212.

28 In *Fairview Industries Ltd.* , the court held that in classification there need not be a commonality of interest of debts involved, so long as the legal interests were the same. Justice Glube (as she then was) stated that it did not automatically follow that those with different commercial interests, for example, those with security on "quick" assets, are necessarily in conflict with those with security on "fixed" assets. She stated that just saying there is a conflict is insufficient to warrant separation.

29 In *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.) at 626 like *Norcen Energy Resources Ltd.*, the "identity of interests" approach was rejected. The court preserved a class of creditors which included debenture holders, terminated employees, realty lessors and equipment lessors.

30 Borins J. held that not every difference in the nature of the debt warrants a separate class and that in placing a broad and purposive interpretation on the C.C.A.A., the court should "take care to resist approaches which would potentially jeopardize a potentially viable plan." He observed that "excessive fragmentation is counterproductive to the legislative intent to facilitate corporate reorganization" and that it would be "improper to create a special class simply for the benefit of an opposing creditor which would give that creditor the potential to exercise an unwarranted degree of power." (p. 627).

31 In summary, the cases establish the following principles applicable to assessing commonality of interest:

> 1. Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test;
>
> 2. The interests to be considered are the legal interests the creditor holds qua creditor in relationship to the debtor company, prior to and under the plan as well as on liquidation;
>
> 3. The commonality of these interests are to be viewed purposively, bearing in mind the object of the C.C.A.A., namely to facilitate reorganizations if at all possible;

4. In placing a broad and purposive interpretation on the C.C.A.A., the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans.

5. Absent bad faith, the motivations of the creditors to approve or disapprove are irrelevant.

6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

32 With this background, I will make several observations relating to the reasons asserted by Resurgence that distinguish Air Canada from the rest of the Affected Unsecured Creditors.

33 The first two reasons given relate to interests of Air Canada extraneous to its legal rights as a unsecured creditor. The third reason relates largely to the further assertion that Air Canada should not be allowed to vote at all. The matter of voting is addressed more specifically later in these reasons.

34 The factors described by Resurgence distinguish between Air Canada and other unsecured creditors relate largely to the fact that Air Canada is the assignee of the unsecured debt. In my view, that approach is to be discouraged at the classification stage. To require the court to consider who holds the claim, as distinct from what they hold, at that point would be untenable. I note that Mr. Edwards recognizes in 1947 in his article, "*Reorganizations under the Companies Creditors Arrangement Act*", (1947), 25 Cdn. Bar Rev. 587, and observe this concern is heightened in the current commercial reality of debt trading.

35 Resurgence also asserted that a court should avoid placing creditors with a potential conflict of interest in the same class and relies on *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.), a case in which the court considered a potential conflict of interest between subcontractors and direct contractors. To the extent this case can be seen as decided on the basis of the distinct legal rights of the creditors, I agree with the result. To the extent that the case determined that a class could be separated based on a conflict of interest not based on legal right, I disagree. In my view, this would be the sort of issue the court should consider at the fairness hearing.

36 Resurgence also relied on the decisions of the British Columbia Supreme Court in *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 166 (B.C. S.C.), a case decided prior to *Norcen Energy Resources Ltd.*. In that case the court held that a subsidiary wholly owned by Northland Bank was incorporated to purchase certain bonds from Northland in exchange for preferred shares and was not entitled to vote. The court found that would be tantamount to Northland Bank voting in its own reorganization and relied on *Re Wellington Building Corp.*, [1934] O.R. 653, 16 C.B.R. 48 (Ont. S.C.) In this regard. I would note that the passage relied upon at page 5 in that case, in *Wellington Building Corp* (Supra) dealt with whether the scheme, as proposed, was unfair.

37 All creditors proposed to be included in the class of Affected, Unsecured Creditors, are all unsecured and are treated the same under the plan. All would be treat similarly under the BIA. The plan provides that they will receive 12 cents on the dollar. The Monitor opined that in liquidation unsecured creditors would realize a maximum of 3 cents on the dollar. Their legal interests are essentially the same. Issue is taken with the presence of Air Canada, supporter and funder of the plan, also having taken an assignment of a substantial, unsecured claim. However, absent bad faith, who creditors are is not relevant. Air Canada's mere presence in the class does not in and of itself constitute bad faith.

38 Further, all of these methods of distinguishing Air Canada's unsecured claim at their core are fundamentally issues of fairness which will be addressed by the Court at the fairness hearing on June 5, 2000. I am prepared to give serious consideration to these matters at that time and direct that there be a separate tabulation of the votes cast by Air Canada arising from any assignments of promissory notes they have taken, so that there is an evidentiary record to assist me in assessing the fairness of the vote when and if I am called upon to sanction the plan. This approach was taken by Justice Forsyth in *Norcen Energy Resources Ltd.*, and in my view is consistent with the underlying purpose of the C.C.A.A. I wish to emphasize that the concerns raised by Resurgence will form part of the assessment of the overall fairness of the plan.

39 Permitting the classification to remain intact for voting purposes will not result in a confiscation of rights of or injustice to the unsecured note holders. Their treatment does not at this point depart from any other Affected Unsecured Creditors and recognizes the similarity of legal rights. Although based on different legal instruments, the legal rights of the unsecured note holders and Air Canada are essentially the same. Neither has security, nor specific entitlement to assets. Further, the ability of all of the Affected Unsecured Creditors to realize their claims against the debtor companies, depend in significant part, on the company's ability to continue as a going concern.

40 The separate tabulation of votes will allow the "voice" of unsecured creditors to be heard, while at the same time, permit rather than rule out the possibility that a plan might proceed.

41 It is important to preserve this possibility in the interests of facilitating the aim of the C.C.A.A. and protecting interests of all constituents. To fracture the class prior to the vote, may have the effect of denying the court jurisdiction to consider sanctioning a plan which may pass the fairness test but which has been rejected by one creditor. This would be contrary to the purpose of the C.C.A.A.

Separating the Claims Against CAC and CAIL

42 Resurgence briefly argued that since Air Canada's debt is owed by CAIL only, it could only look to CAIL's assets in a bankruptcy and would not be able to look to any CAC assets. In contrast, Resurgence suggested that the unsecured note holders are creditors of both CAIL under a guarantee, and CAC under the notes. Resurgence submitted that the resulting difference in legal rights destroys the commonality of interests.

43 There is insufficient evidence to suggest that the unsecured note holders are also creditors of CAIL. Counsel referred only to a statement made by Mr. Carty on cross-examination that there was an "unsecured guarantee". However, no documents have been brought to my attention that would support this statement and, in of itself, the statement is not determinative. In any case, I do not have sufficient evidence before me to conclude that there would be a meaningful difference in recoveries for unsecured creditors of CAC and CAIL in the event of bankruptcy. I, therefore, cannot conclude on this basis that rights are being confiscated, unlike Tysoe J.'s ability to do so in *Re Woodward's Ltd.* Simply looking to different assets or pools of assets will not alone fracture a class; some unique additional legal right of value in liquidation going unrecognized in a plan and not balanced by others losing rights as well is needed on the analysis of Tysoe J.

44 I recognize the struggle between the unsecured note holders, represented by Resurgence on one side, and Air Canada and Canadian on the other. Resurgence fears the inclusion of Air Canada and the Affected Unsecured Creditors' class will swamp the vote. Air Canada and Canadian fear that exclusion of Air Canada will result in the voting down of a plan which, in their view, otherwise stands a realistic chance of approval. As unsecured creditors, they do share similar legal rights. As supporters or opponents of the plan, they may well have distinctly different financial or strategic interests. I believe that in the circumstances of this case, these other interests and their impact on the plan, are best addressed as matters of fairness at the June 5, 2000 hearing, and in this way, the concerns will be heard by the court without necessarily putting an end to the entire process.

Voting

45 Although my decision on classification makes it clear that I will permit Air Canada to vote on the plan, I wish to comment further on this issue. Air Canada submitted that it should be entitled to vote the face value of the promissory notes which represent deficiency claims assigned to it from aircraft lessors in the same fashion as any other creditor who has acquired the claims by assignment. All parties accept that deficiency claims such as these would normally be included and voted upon in an unsecured claims class. The request by Resurgence to deny them a vote would have the effect of varying rights associated with those notes.

46 The concessions achieved in the re-negotiation of the aircraft leases, represent value to CAIL. The methodology of calculation of the claims and their valuation was reviewed by the Monitor and this is not being challenged. Rather, it is because it is Air Canada that now holds them, that it is objectionable to Resurgence. Resurgence asserts that Air Canada manufactured the assignment so it could preserve a 'yes' vote. This, in my view, is a matter going to fairness. Is it fair for Air Canada to vote to share in the pool of cash funded by it for the benefit of unsecured creditors? That matter is best resolved at the fairness hearing.

47 Resurgence relied on *Northland Properties Ltd.* in which a wholly owned subsidiary of the debtor company was not allowed to vote because to do so would amount to the debtor company voting in its own reorganization. The corporate relationship between Air Canada and CAIL can be distinguished from the parent and wholly owned subsidiary in *Northland Properties Ltd.*. Air Canada is not CAIL's parent and owns 10 percent of a numbered company which owns 82 percent of CAIL. Further, as noted above, the court in *Northland Properties Ltd.* apparently relied on the passage from *Wellington Building Corp* which indicated in that case the court was being asked to approve a plan as fair. Again, the basis on which Resurgence seeks to deprive Air Canada of its vote is really an issue of fairness.

Section 6(2)(2) of the Plan

48 Resurgence wishes me to strike out Section 6(2)(2) of the plan, which essentially purports to provide a release by affected creditors of all claims based in whole or in part on any act, omission transaction, event or occurrence that took place prior to the effective date in any way relating to the debtor companies and subsidiaries, the C.C.A.A. proceeding or the plan against:

1. The debtor companies and its subsidiaries;

2. The directors, officers and employees;

3. The former directors, officers and employees of the debtor companies and its subsidiaries; or

4. The respective current and former professionals of the entities, including the Monitor, its counsel and its current officers and directors, et cetera. Resurgence submits that this provision constitutes a wholesale release of directors and others which is beyond that permitted by Section 5.1 of the C.C.A.A. CAIL and CAC submit that the proposed release was not intended to preclude rights expressly preserved by the statute and are prepared to amend the plan to state this.

49 Section 5.1(3) of the C.C.A.A. provides that the court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

50 In this application of Resurgence, the court must deal with two issues: One, what releases are permitted under the statute; and, two, what releases ought to be permitted, if any, under the plan.

51 In my view, I will be in a better position to assess the fairness of the proposed compromise of claims which is drafted in extremely broad terms, when I consider the other issues of fairness raised by Resurgence. Accordingly, I leave that matter to the fairness hearing as well.

52 In summary, the application contained in paragraph (d) of the Resurgence Notice of Motion is dismissed. The application in paragraph (e) is adjourned to June 5, 2000.

Application dismissed.

Footnotes

* Leave to appeal refused 2000 ABCA 149, 80 Alta L.R. (3d) 213, 19 C.B.R. (4th) 33 (Alta C.A. [In Chambers]).

End of Document

TAB 3

1997 CarswellOnt 3077
Ontario Court of Justice, General Division

Canadian Imperial Bank of Commerce v. Wilson

1997 CarswellOnt 3077, 35 B.L.R. (2d) 273, 36 O.T.C. 200, 72 A.C.W.S. (3d) 1026

Canadian Imperial Bank of Commerce, Plaintiff and Donald Woodrow Wilson, Defendant

Wilkins J.

Heard: May 30, 1997
Judgment: July 25, 1997
Docket: C36790/96

Counsel: *Mark Noreau*, for the Plaintiff.
J. Waldo Baerg, for the Defendant.

Subject: Contracts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Contracts

V Mistake
V.4 Distinction between mutual mistake and unilateral mistake

Headnote

Contracts --- Formation of contract — Mistake — Distinction between mutual mistake and unilateral mistake

Two borrowers secured bank loan with mortgage on borrower's real property — Person with name similar to first borrower took out loan from same bank for smaller amount — Borrowers went into default and bank requested payment of outstanding amount — First borrower sent offer to settle and bank accepted — Bank realized acceptance was based on indebtedness of person with similar name, informed first borrower of error and intention to proceed with power of sale — Bank's motion for summary judgment for outstanding indebtedness dismissed and first borrower's motion for summary judgment for discharge of mortgage granted — Offer to settle was reasonable in context of financial hardship and possible defences to liability due to bank's conduct — First borrower acted reasonably in assuming bank's acceptance referred to him rather than person with similar name.

Two borrowers acquired a loan for $35,000 from the bank. The loan was secured by a second collateral mortgage on a property owned by the borrowers. A person with a name similar to that of the first of the two borrowers had an unsecured indebtedness with the bank for a lesser amount. The first borrower made payments on the loan for some time, and then went into default. The person with a similar name also went into default on his loan. The bank wrote to the first borrower requesting payment of $32,996.06 as his remaining indebtedness. The first borrower wrote back to the bank stating that the amount of indebtedness claimed by the bank was not consistent with his records. The bank sent the first borrower an offer to settle for $28,000. The first borrower wrote to the bank questioning their calculation of his indebtedness and their conduct in loaning the second borrower additional money which caused an inability to pay off the joint loan. The first borrower offered to settle with the bank for $5,000. The bank accepted the offer. When the first borrower made the $5,000 payment, the bank realized that the acceptance was mistakenly made on the basis of the indebtedness of the person with the name similar to the first borrower's. The bank informed

the first borrower of the mistake and advised that it would be proceeding with the power of sale of the mortgaged property. The bank brought a motion for summary judgment in the amount of the first borrower's outstanding indebtedness. The defendant brought a cross-motion for summary judgement for his counter-claim for an order discharging the mortgage on the basis of his accepted offer to settle.

Held: The bank's motion was dismissed; the first borrower's cross-motion was granted.

The bank's original offer made it clear that the bank was willing to take less than the face value of the first borrower's indebtedness. In view of the assertions made by the first borrower as to the economic hardship involved in selling the mortgaged property, the bank's conduct and the possible defences to his liability for the loan, his lump sum offer of $5,000 was reasonable. The only recognizable error in the bank's letter accepting the borrower's offer was in the reference and file numbers. Any reasonable person reviewing the bank's acceptance letter could not have formed the belief that the letter referred to the indebtedness of a person other than the first borrower. The first borrower never knew or ought to have known that a mistake had been made by the bank until he was informed by the bank. The first borrower acted reasonably in assuming that the acceptance letter referred to him rather than to the indebtedness of someone else. The first borrower was not aware at the time of settlement of the bank's mistake and the agreement entered into by the parties was reasonable.

Table of Authorities

Cases considered by *Wilkins J.*:

Canadian Imperial Bank of Commerce v. Weinman (1992), 6 C.P.C. (3d) 189 (Ont. Gen. Div.) — considered

Lem Estate, Re (1987), 16 C.P.C. (2d) 139 (Ont. Surr. Ct.) — referred to

Rules considered:

Ontario, Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 20 — referred to

R. 20.06(1) — referred to

MOTION by bank for outstanding indebtedness; CROSS-MOTION by defendant for discharge of mortgage.

***Wilkins J.*:**

1 The Canadian Imperial Bank of Commerce ("the bank") brings this motion pursuant to the provisions of Rule 20 of the Rules of Civil Procedure for summary judgment against the defendant Donald Woodrow Wilson.

2 The defendant Donald Woodrow Wilson brings his cross-motion against the bank for summary judgment dismissing the bank's claim and for judgment on that defendant's counter-claim also pursuant to Rule 20.

3 The facts and circumstances on which each party relies for their motion are common to both the motion and the cross-motion.

4 On the 30th of March 1990 Donald Woodrow Wilson together with a co-borrower, Gregory James Dobbie, executed a Bank Plan Note ("the note") which was given by the bank under number 0005-625-218. The note was secured by a second collateral mortgage on a property owned by Donald Woodrow Wilson and his co-borrower Gregory James Dobbie and the charge was registered on or about March 30th, 1990 as instrument 207175.

5 At another time and in another place Donald C. Wilson entered into an unsecured indebtedness of a lesser amount than the indebtedness referred to above. Donald Woodrow Wilson's secured indebtedness was in the amount of $35,000.00. He shall hereinafter be referred to as Big Don. Donald C. Wilson's indebtedness being unsecured and for a lesser amount, he shall hereinafter be referred to as Little Don.

6 Big Don made payments under the terms of his indebtedness to the bank and, from time to time, the note was renewed. On or about December 11 th, 1995 Big Don went into default under his indebtedness to the bank and except for a payment of $171.20 in May of 1996 made no further payments. Unhappy at the failure of Big Don to make payments the bank referred the matter to its solicitor, Audrey Douek, with instructions to commence litigation.

7 As it would happen Little Don also fell upon troubled financial times and the bank saw fit to refer his indebtedness to its solicitor, Audrey Douek, with the appropriate instructions to take steps for collection.

8 On January 3 rd, 1996 the solicitor wrote Big Don advising him of her involvement and requesting payment of $32,996.06 being the present indebtedness to the bank. This correspondence referred to Big Don's account number as 0005 625 218.

9 On January 15 th Big Don wrote back to the solicitor also referring to the same account number. He requested a complete history of payments made under the loan and set out in that correspondence as follows:

> With respect to the balance owing (32,996.06) I definitely dispute these figures. I am at a total loss to understand how an original loan of 33,000.00 granted to joint borrowers can be paid monthly for six years and only reduce the original amount by 3.94

10 On January 23 rd the solicitor wrote back to Big Don referring to his account number and the solicitor's file number 39,543. In that correspondence the solicitor forwarded the complete payment history of the loan and set out an offer to settle as follows:

> At this time, our client is prepared to settle the above-noted matter with you for the lump sum of $28,000.00 to be paid within thirty (30) days from the date of this letter.

11 By correspondence dated February 26, 1996 Big Don wrote a four page letter to the solicitor styling the matter under his account number and making a significant number of complaints about the bank and its calculation of his indebtedness. He set out that he would be most interested in settling with the bank but that in order to do this "you must be a lot more reasonable under the circumstances".

12 Big Don then went on to set out that the original loan had involved his co-borrower who had pledged his car as collateral. From the letter it appears that the major cause for contention between Big Don and the bank was that another branch of the bank had made two loans to his co-borrower and that by increasing the debt load of the co-borrower the bank had directly caused the co-borrower's inability to pay off the joint loan with Big Don. He complained that as a consequence of the conduct of the bank he had been placed in the unfortunate position of being forced to assume full responsibility for the debt and he questioned his legal liability to pay the bank having regard to their conduct.

13 In this letter Big Don also noted that he had already paid over $20,000.00 plus legal expenses on a loan which he was asserting might be unenforceable.

14 Big Don raised various issues which he asserted might put in jeopardy the bank's right to collect as against him and he set out that he had repeatedly attempted to resolve this problem and, under the circumstances, he would not accept full responsibility.

15 With respect to the collateral mortgage he informed the bank that their security was a second mortgage behind a $107,000.00 first mortgage and that the property in question had been listed for sale many times in the previous five years without any offers having been obtained. He gave the bank his opinion that in the current economic slump in the real estate market there was probably no opportunity for "recouping" any of the lost equity in the property.

16 Having set out in some detail his complaints regarding the conduct of the bank and his questions as to the validity of their note security together with his opinion that the value of the property might not be sufficient, I presume, to pay the bank loan, he then set out as follows:

> I am prepared to offer your client one lump sum $5,000.00 payment to conclude this most unfortunate situation.
>
> This would be a fair and equitable solution to any perceived obligation I may have to this loan.
>
> In return for the $5,000.00 my dealings with CIBC would end, a release would be forwarded and the property would be released.
>
> Should CIBC still wish to pursue co-borrower Greg Dobbie, I will provide a list of current assets and business interests.
>
> As you must clearly be aware, the alternatives are not exactly equitable to your client.
>
> I await your response and hope to conclude this matter to our mutual satisfaction.

17 By correspondence dated March 12th, 1996 the solicitor wrote to Big Don. This correspondence is repeated in full below:

> March 12, 1996
>
> Mr. Donald Wilson
>
> R.R. #2
>
> Lyndhurst, Ontario
>
> K0E 1N0
>
> Dear Mr. Wilson:
>
> **Re: Canadian Imperial Bank of Commerce v. WILSON, Donald Your Reference: #8727639534 - Our File # 39214**
>
> We acknowledge receipt of your correspondence together with your offer to settle the above-noted matter for the lump sum of $5,000.00. Please be advised that our client will agree to settle the matter on the following basis:
>
> 1. Our client shall accept a certified cheque payable to Canadian Imperial Bank of Commerce in the sum of $5,000.00 on or before the close of business, March 22, 1996;
>
> 2. Upon receipt of the settlement funds, our client shall provide you with a duly executed Release with respect to this matter.
>
> If the above terms are acceptable, kindly contact the undersigned to confirm same.
>
> We look forward to hearing from you and remain,
>
> Yours very truly,

KRONIS, ROTSZTAIN,

MARGLES, CAPPEL & GERTLER

Per:

Audrey Douek

AD/ar

cc: George Ortencio (Michael Hodiwala)

18 The above reproduced letter had a copy sent to two named persons. There is no evidence as to who those persons might be, however, George Ortencio appears to have been the recipient of other correspondence related to Big Don's loans from the solicitor and a reasonable assumption for the recipient of any such letter to make would be that the two persons to whom copies were sent were probably associated with the bank.

19 The reference number and the file number set out in the style of the letter of March 12th are in fact the number codes related to the collection of the indebtedness of Little Don. The address and postal code are those of Big Don.

20 The letter of March 12th set out a condition that Big Don pay the sum of $5,000.00 to the bank on or before the close of business, March 22nd, 1996.

21 This correspondence further sets out that upon receipt of the monies above the bank would provide a duly executed release "with respect to this matter".

22 The days passed to the 21st of March without any further communication by the bank to Big Don. On the 21st of March Big Don arranged funds in the amount of $5,000.00 and he wrote a letter directing the funds to the Toronto Loan Centre. Late that day Big Don handed the letter and correspondence to his wife with instructions that she was to attend at the bank and pay over the monies on March 22nd.

23 Early on March 22nd Big Don's wife left the home. There is no evidence as to her availability to receive direction or instructions in the interval and sometime around 3 o'clock in the afternoon it would appear that she delivered the cheque and the letter to the branch of the bank in Lyndhurst, Ontario.

24 During the day on March 22nd Big Don called the solicitor to make sure that the collateral mortgage would also be discharged. This was important because the solicitors had issued a notice under the Power of Sale on February 27th with a redemption date of April 12th.

25 The solicitor and Big Don have slightly different recollections of that telephone conversation. The solicitor testified she said she would review her file and get back to Big Don. It is his evidence that she only indicated that she couldn't respond to him about the discharge of the mortgage at that time and would get back to him.

26 After the telephone conversation with Big Don, the solicitor reviewed her file and realized that she had made an error in her acceptance of Big Don's offer to settle in the sum of $5,000.00. It had been accepted by her on the basis that the offer had been made in respect of the indebtedness of Little Don. Having discovered her mistake, the solicitor phoned Big Don somewhere around 1:00 p.m. that day and advised that the bank's acceptance of his offer to settle had been made in error and that the bank could not accept $5,000.00 in full and final settlement of outstanding amounts due on Big Don's note. The solicitor also took the precaution of sending a letter by courier setting out that the acceptance of Big Don's proposal was sent in error and referred to a different loan file, being that of Little Don. This correspondence

further advised that the bank would be proceeding under the Notice of Sale unless they received payment on or before April 12th. This correspondence used the account number for Big Don and a file number which, presumably, is the Big Don file number and differs from the file number on the letter of March 12th, 1996.

27 It is the position of the bank that no settlement took place as a consequence of the nature of the circumstances. The offer and acceptance, the bank asserts, constitute unilateral mistake sufficient to warrant the setting aside of the transaction and for judgment against Big Don on the amount of the outstanding indebtedness.

28 Big Don moves both under Rule 20 for summary judgment dismissing the plaintiff's claim against him on the basis that it has been settled pursuant to the offer and acceptance, and for summary judgment against the bank under the counter-claim which is for an order discharging the charge/mortgage which is collateral security to the indebtedness in issue.

29 On the facts before me it is clear that both parties were interested in settlement of their outstanding disputes. It is apparent from the bank's original offer that it was prepared to take less than the face value of its indebtedness. It is also clear that Big Don regarded the bank's proposal to resolve the issues at a lump sum payment of $28,000.00 as unreasonable by reason of the opinions expressed by himself in his correspondence of February 26th and also in his earlier letter questioning the amount the bank asserted to be outstanding.

30 Reading Big Don's letter of February 26th and looking at his counter-proposal therein, it is apparent that if the assertions made by him were in fact correct and if they had the impact upon his liability which he asserted, then his proposal to resolve the matter in its entirety, including a release and a release in respect of the property, would not be an unreasonable offer. A review of Big Don's correspondence makes it clear that he was of the belief that there were circumstances which might well relieve him entirely from responsibility and that even though the bank was proceeding with a Power of Sale the real estate market for that particular property was so poor, that a sale was unlikely and the value of the property, even if sold, might not yield sufficient money to pay the bank anything in respect of its claims.

31 In the face of a debtor who asserts hardship, possible defences in liability and the reasonable prospect that even if the bank obtains judgment it will never collect, a lump sum offer of $5,000.00 is, in my view, not an unreasonable proposal.

32 In all correspondence prior to the solicitor's letter of March 12th, both parties were accurately referencing the "account number" for Big Don. It is only in the correspondence of the solicitor of March 12th that another "reference number" is used. The solicitor's letter of January 23rd makes reference to a file number. The solicitor's letter of March 12th makes reference to a different file number in respect of the last three digits of a five digit number.

33 The letter of March 12th is directed to Mr. Donald Wilson in Lyndhurst, Ontario. It certainly sets out that it involves the "*Canadian Imperial Bank of Commerce v. Wilson*, Donald" and the operative body of the correspondence clearly relates to and responds to the correspondence of Big Don dated February 26th.

34 Anyone sitting down with Big Don's letter of February 26th and the solicitor's letter of March 12th would, unless they were particularly sharp in looking at the numbers in the title of the letter, have no way of knowing that this correspondence was in any way a mistaken response to the letter sent by Big Don.

35 It was argued that the solicitor's letter only spoke about an executed release whereas Big Don's letter spoke about a release and that the property would be released. To an unrepresented person in the position of Big Don I cannot conceive that that distinction would make any difference whatsoever. Any person reviewing the two pieces of correspondence might come to the conclusion that a release, that is to say a single release, might well be sufficient to accomplish the double form of release requested by Big Don.

36 The fact that the solicitor titled each of the three pieces of correspondence differently would, in my view, somewhat camouflage the differences that appear in the digits of the numbers contained in those reference lines. The mere fact that the letter of March 12th makes a reference to "Your Reference: #8727639534 - Our File #39214" and the letter of January 23rd refers to "Account Number: 0005 625 218, Our File No. 39,543" would not, in my view, even remotely constitute a warning to anyone that the body of the correspondence did not make reference to the letter written by Big Don on February 26th. As the letter was also sent to other persons who someone might reasonably expect to be bank representatives, the inclusion of a number entitled "your reference" could easily be taken by any sensible person as referring to something to do with the people to whom copies were being sent.

37 The solicitor, in her affidavit, sets out that she made a mistake because there was another file in the office involving a debtor of a similar name. It is the thrust of the position of the bank that the solicitor in writing the letter of March 12th is intending to accept a reasonable proposal in respect of the indebtedness of Little Don. There is, however, no evidence contained in that affidavit material to suggest that Little Don had made any proposal for settlement or that any discussions or negotiations for resolution were taking place sufficient to allow any person to form the belief that they were accepting an offer made by a defendant with a similar name.

38 Upon reviewing the terms of Big Don's letter of February 26th any reasonable person could not form the belief that that letter touched on issues related to the indebtedness of any other person other than Big Don and his co-borrower, Dobbie. Beyond the similarity of name there is nothing in the correspondences and telephone contact between Big Don and the solicitor that could in any way give rise to a mistaken belief that the proposal made by Big Don in his letter of February 26th could relate to Little Don or, for that matter, anyone else.

39 In my view, there is no rational or factual circumstance in which to support a basis for the solicitor formulating any misapprehension that the letter of March 12th was in response to any proposal received from Little Don and, having regard to the nature of Big Don's letter of February 26th and the various assertions contained therein, it is wholly understandable that he could receive the letter of March 12th in total good faith and honestly believe that it related to his earlier correspondence. There is certainly no evidence before me to suggest that there was anything in any of the negotiations or correspondences that could place Big Don on any kind of warning where he knew, or ought to have known, that the solicitor had made a wholly unsupported and irrational mistake - a mistake which sits totally out of the entire context of any relationships between any of the various people involved or mistakenly involved as set out in the evidence.

40 It may well be that the solicitor did indeed make some form of mistake. I must confess that I have no understanding as to how the mistake could have been made or, for that matter, that there was indeed any mistake at all. In order to respond to Big Don's letter in a manner which is later claimed to actually be related to an unspecified relationship with Little Don I would think, on the circumstances of this case, the solicitor's mind would have to have been blank and virtually without intent at all. In essence I am saying that virtually only a wholly blank mind could have made the mistake that the solicitor asserts was made having regard to the contents of Big Don's letter of February 26th.

41 As noted above, both parties have framed this motion in terms of the law of unilateral mistake. This conceptual approach seems entirely justified as there is no doubt that at all times Big Don intended to and in fact did attempt to contract for the settlement of the bank's claim against him. The mistake, if any, was made by the solicitor for the bank. In *The Law of Contract in Canada*, Third Edition, (Toronto: Carswell, 1994), Professor Fridman describes the law of unilateral mistake as follows at pp. 260-61:

> ...it is important to distinguish these various kinds of bilateral mistake [mutual and common] from unilateral mistake, where only one party is in error. Here it may be vital to the final result whether the party not in error is aware or unaware of the other party's mistake. If the party not in error knows or ought to know of the other's

> mistake, any purported agreement between them may not be enforceable in equity (whatever its effects may be at common law), on the ground that equity will not permit a party to take advantage of the error in offering or accepting by the other party.
>
> ...As long as the unmistaken party knows of the mistake, without have caused it, that party cannot resist a suit for rectification on the grounds of mistake. The converse of the proposition as to knowledge of the other party's mistake is that if the unmistaken party is ignorant of the other's mistake the contract will be valid and neither recision nor rectification will be possible. Such was the case in *Commercial Credit Corporation v. Newall Agencies Ltd.* (1981), 126 D.L.R. (3d) 728 (B.C.S.C.). The lessor of an automobile, at the lessee's request, indicated the price at which the lessee could purchase the vehicle. The price was erroneously understated. That fact was unknown to the lessee, who paid the stipulated amount and took a transfer of title to the vehicle. It was held that the lessor who sold the vehicle was not entitled to rely on the doctrine of mistake...

As regards the issue of whether the court should adopt an objective or subjective approach to interpreting and analysing the factual context of the case, Professor Fridman comments at pp. 262-63:

> Where there is a bilateral mistake or a unilateral mistake that is unknown to the unmistaken party, the approach of the common law is objective. The courts do not try to find the real, underlying intention of each party, but have "applied the dispassionate and objective test of the reasonable man". The courts examine all the circumstances and decide what sense, if any, must be ascribed to the parties. Where the mistake of one party is known to the other party, the courts will apply a subjective test and will permit evidence of the real intention of the mistaken party to be introduced.

42 On the facts of the case at bar I am of the view that it could not be said that Big Don ever knew or ought to have known that any mistake had been made until such time as he was informed in the telephone conversation at some point around 1:00 p.m. on March the 22nd. By this time the offers and acceptances of each party had been exchanged and a time of approximately 10 days had gone by between the solicitor sending her letter and that telephone conversation. During the intervening time there was nothing to suggest that either party had questioned the conduct of the other or, for that matter, that there was anything about the offer made by Big Don and the acceptance by the solicitor that was anything other than in the ususal course.

43 Moreover, from an objective perspective there is little or no support for any belief on the part of the solicitor that at the time of writing the letter of acceptance to Big Don that the acceptance could be in any way related to Little Don. In terms of the receipt of the acceptance by Big Don there is not, in my view, anything upon which a reasonable person might say that Big Don ought to have known that the solicitor was in some way making a mistake and sending him a proposal related to a person unknown to him and, coincidentally, in the same amount of money and utilizing the same phrase about a release as he had used in his offer.

44 In light of my view that Big Don was not aware, at the time the settlement offer was accepted of the solicitor's purported mistake, cases such as *Lem Estate, Re* (1987), 16 C.P.C. (2d) 139 (Ont. Surr. Ct.) have no application.

45 Turning to the moving party bank's submission that the terms of the settlement offer were so discordant with the magnitude of the debt in issue, in *Canadian Imperial Bank of Commerce v. Weinman* (1992), 6 C.P.C. (3d) 189 (Ont. Gen. Div.) Chapnik J. at p. 194 set out:

> The issue in this case is whether the plaintiff ought to be relieved of the consequences of its own error in these circumstances. In order to make that determination, it is important to review the entire course of dealing between the parties, and in particular, the settlement negotiations, the wording of the offer, and the exchange of correspondence thereafter.

46 In the result Chapnik J. in the *Weinman*decision determined that on its face the agreement that was entered into was wholly unreasonable and it was not unreasonable within the context of the settlement negotiations which had taken place. In the case at bar the issues raised by Big Don in his correspondence in January and again in February raised complaints with respect to the bank and the amount of the indebtedness together with the inability of the bank to recover such that, if true, a reasonable person might think that the bank was significantly at risk not to be able to obtain all of the funds necessary to cover its claim. Having regard to Big Don's comments about the failure of the real estate market a reasonable person might conclude that the Power of Sale being undertaken by the bank would, in all probability, fail and that even if a buyer was found the bank might get significantly less recovery from the sale than the amount of the indebtedness.

47 It was the bank that led off with a proposal to accept less than the full value of the debt. In terms of Big Don's response his proposal was, as I have set out above, not unreasonable. Within the context of the negotiations and in particular having reference to the comments by Big Don, it is my view that the agreement entered into by the parties was in fact reasonable. It was certainly wholly in keeping with the context of the position taken by the debtor.

48 Employing an objective test it is my view that a reasonable person, considering all of the circumstances, could readily agree that the bank had decided to take a bird in the hand rather than an uncollected judgment for a more significant sum.

49 In terms of any prejudice arising from the conduct of the parties there is no third party who has been effected by the agreement to settle. In terms of Big Don he has suffered limited prejudice only to the extent that there has been accumulating interest which would be due and owing in the event he was unsuccessful but in terms of any reliance upon the offer and acceptance he would, if he was unsuccessful, only lose the bargain entered into.

50 From the perspective of the bank they may or may not have made an improvident agreement. There is not sufficient information before me to allow me to know whether or not a settlement of $5,000.00 was anything other than reasonable as supported by the correspondence of Big Don. It may well be that they have lost the right to have a larger judgment but, in the finality of it all they may well have recovered more money than they would ever have seen otherwise.

51 In the result the bank's motion is dismissed, the responding party's motion is granted and the responding party is entitled to a declaration that the note in question has been paid in full. The collateral charge/mortgage is therefore discharged and the moving party is restrained from acting under its Notice of Sale.

52 I turn to the issue of costs. The responding party has been wholly successful and he shall have his costs of the motion under Rule 20.06(1) on the solicitor and client scale and his costs of the cross-motion and the action on the party and party scale. All costs are to be assessed.

Motion dismissed; cross-motion granted.

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TAB 4

1933 CarswellMan 5
Manitoba Court of Appeal

Clark Martin & Co., Re

1933 CarswellMan 5, [1933] 3 W.W.R. 261, [1934] 1 D.L.R. 521, 15 C.B.R. 89, 41 Man. R. 425

In re Clark Martin & Company Limited (In Liquidation)

Prendergast, C.J.M., Dennistoun, Trueman and Richards, JJ.A.

Judgment: October 5, 1933

Counsel: *C. E. Finkelstein* , for appellant, Weiner.
A. T. Hawley, K.C. , for appellant, Whitley.
G. E. Tritschler , for appellant, Federal Grain Company.
H. V. Hudson, K.C. , for respondent, receiver.
C. V. McArthur , for certain margin customers.
A. E. Dilts , for Royal Trust Company.
G. P. R. Tallin , for liquidator.

Subject: Corporate and Commercial; Insolvency; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

VIII Property of bankrupt
VIII.8 Property in hands of bankrupt agent or broker
VIII.8.b Stockbrokers

Headnote
Bankruptcy — Property of bankrupt — Property in hands of bankrupt agent or broker — Stockbrokers

"Sharing Burden of the Loan.".

Application of Maxim.

If on the bankruptcy of a stockbroker it is found that he has wrongfully pledged the securities of customers including both securities purchased outright and those purchased on margin and that, after the pledgee had sold enough of the pledged securities to satisfy his claim, there was a surplus in cash or securities remaining, but not enough to satisfy the claims of the broker's customers, the owners of securities purchased outright but remaining unsold are not entitled, in the distribution of the surplus cash and securities, to claim their securities without making a *pro rata* contribution to the "burden of the loan," nor are the customers who purchased outright entitled to a preference over margin customers; but, in accordance with the principle that "equality is equity" all classes of customers must share equally in the said burden (*In re Carroll & Wright; Ex parte Bain*, 14 C.B.R. 36, [1932] O.R. 474 , applied).

The date of filing the petition to wind up the bankrupt company held to be the date which should be taken for the purpose of fixing the measure of contribution and of proportionate sharing in the fund of all securities pledged by

the bankrupt, except its own property; which, if any was left on hand, should be realized upon and the proceeds paid into the fund.

The judgment appealed from ordered that the interests of customers who might have claimed certain securities but who failed to assert their claims were to go to the liquidator for the benefit of general creditors. There was no appeal on this point and it was held, therefore, not to be necessary to deal with it.

The view of the Canadian Courts is that stockbrokers have no right, without clear authority, to hypothecate the shares of a margin customer for a greater sum than that due from the customer (*Conmee v. Securities Holding Co. and Ames & Co.* (1907), 38 S.C.R. 601 , which has been consistently followed).

Appeals from a judgment by Donovan, J. Appeals dismissed; judgment appealed from affirmed with a variation. By agreement, there were no costs except to the receiver.

The judgment of the Court was delivered by *Richards, J.A.* :

1 This company carried on the business of stockbrokers at Winnipeg. It effected, through Montreal, Toronto, Winnipeg and New York agents or correspondents, the purchase and sale for its customers of bonds, shares and grain. It pledged its own securities and the securities (bonds and shares) of customers to its bank and to each of the above-mentioned agents to secure the total amount of its indebtedness to each of such agents. In all cases the amount of the pledge was greater than the amount owing to the company by any customer.

2 On October 21, 1930, the company petitioned to be wound up under *The Winding-up Act* , R.S.C., 1927, ch. 213. The winding-up order was made and a liquidator was appointed. The bank and the above-mentioned agents sold the securities pledged to them. The bank and the New York agents did not realize more than enough to pay their claims, but the Montreal, Toronto and Winnipeg agents delivered to the liquidator certain stocks and bonds together with some moneys which were in their hands after dis charging the debts owing to them. Customers claimed various securities, or the proceeds thereof, and many conflicting interests arose between themselves and between them and the general creditors. On October 16, 1931, a receiver was appointed to get in and receive all property of any nature or kind whatsoever which was involved in or arose out of the business carried on between the insolvent company and its customers. The liquidator handed to the receiver the securities and money received from the agents.

3 Upon the application of the receiver, interpleader issues were directed in respect of the securities and moneys received from each agent. The parties whose securities had been sold by the agents were claiming contribution from those whose securities had not been sold, and it was considered that, if there was to be contribution, the securities received from each agent must be dealt with separately because of having been subject to a common pledge with the securities sold by such agent. The issues were tried together before Mr. Justice Donovan. Many parties made claims and some who might have done so failed to assert them.

4 It appeared that the company had in its strong box or pledged to the bank and the agents, at the date of its winding-up, securities which, if free of pledge, would have been sufficient to satisfy the claims of all customers for delivery of their securities to them, but the sale of customers' securities by the bank and the New York agents created a shortage, so that the securities held in the strong box and by the Montreal, Toronto and Winnipeg agents did not equal the securities claimed by customers.

5 At the hearing no disputes arose as to any claim for grain purchases or sales or as to the securities in the strong box.

6 It was admitted that all the securities of customers had been pledged either without any authority or for more than was owing by the customers, and therefore all had been wrongfully pledged; but it was claimed by those whose securities had been pledged without authority that they should be preferred to those who owned margined securities in respect to

which there had been a limited right to pledge. The hearing proceeded on the assumption that the pledges to the bank and agents were valid and bound the securities pledged.

7 During the course of the hearing, at the suggestion of the learned trial Judge, the receiver submitted a report showing: (*a*) the state of the account of each customer with the insolvent company, giving the amount of the indebtedness, if any, of the customer to the insolvent company, and, where occasion arose, the *pro rata* share thereof relating to the securities held by each agent; (*b*) his securities that had been held by each agent; (*c*) his securities or the *pro rata* share thereof that had been sold by each agent; (*d*) his securities or the *pro rata* share thereof that had been delivered by each agent to the liquidator and by the liquidator to the receiver; and (*e*) his *pro rata* interest or share in the fund received from each agent based on the value, as at October 21, 1930, of his securities which had been realized upon.

8 The learned trial Judge, without written reasons, held in each issue before him that, all securities having been wrongfully pledged, the equities of the owners were equal; that the burden of the loan should be shared equally, that is, proportionately; that there should be a *pro rata* contribution by the parties whose securities were not sold, based on the value of such securities, and that, failing their election to pay such contribution, their claims to their securities were to be treated as abandoned, the securities were to be sold by the receiver and the proceeds added to the fund in his hands (which I have referred to in what I have called item [e] of his report) and distributed in accordance with the principle of the plan of distribution of such fund followed in the report (*pro rata*) amongst the abandoning claimants, the claimants whose securities had been sold by the pledgee and the liquidator. It should be explained that it was ordered that the interest of those who might have claimed certain securities, but who failed to assert their claims, were to be handed or paid to the liquidator, subject to the same conditions that were imposed on the claimants who did assert their claims.

9 Appeals were lodged claiming that the learned trial Judge erred in failing to order that the parties who had paid in full for their securities or whose securities had been pledged without any authority should be preferred and their claims satisfied in full, and in ordering contribution.

10 In many cases in our Courts attention has been drawn to the fact that there are few Canadian cases regarding stockbrokers; that the English cases do not deal directly with the questions that confront us because the business of stockbrokers is carried on in England in a different manner; that the business is conducted in this country in a manner which closely resembles that which prevails in the United States; and that it is proper to look for guidance to the decisions of the American Courts: *Clarke v. Baillie* (1911), 45 S.C.R. 50 , at 76; *In re Stobie-Forlong-Matthews, Ltd.; Claims of Kern Agencies Ltd.*, 12 C.B.R. 228 , 313, [1931] 1 W.W.R. 304 , 817, 39 Man. R. 476 ; *Johnson v. Solloway*, 13 C.B.R. 359, [1932] 1 W.W.R. 481, 45 B.C.R. 420 ; *In re R. P. Clark & Co. (Vancouver) Ltd.*, 13 C.B.R. 118, [1931] 3 W.W.R. 79, 44 B.C.R. 301 ; and *In re Carroll & Wright; Ex parte Bain*, 14 C.B.R. 36, [1932] O.R. 474 .

11 The leading cases of the United States Courts are collected and discussed by Charles H. Meyer in his book "The Law of Stockbrokers and Stock Exchanges." They decide that claimants, in cases such as we have before us, who have paid for their securities in full are to be preferred to claimants who hold their shares on margin. Judge Augustus N. Hand, of the Circuit Court of Appeals, second circuit (New York), in the case of *In re Kardos* (1928), 27 Fed. (2nd series) 690 , at 694, says:

> It may not at first be easy to see why outright owners should have been treated so much better by the courts than margin traders having valuable equities in securities, since the broker who without special authority repledged the securities of margin customers beyond the amount of his own lien was as guilty of a conversion as though he had pledged the securities of customers who had paid in full. Yet it must have been realized that there was scarcely an active brokerage house, however honest, where the stocks of margin traders were not customarily carried in the blanket loans of the house, and that any other method of conducting business was widely regarded as impracticable. These considerations doubtless subconsciously affected the courts, and moved them to regard margin traders as having in fact accepted the almost inevitable hazards of a rehypothecation of their securities beyond the amount of their own indebtedness, and as having assumed the same status which traders in recent years have commonly agreed to in writing.

12 Canadian Courts, however, have not regarded margin traders as accepting such hazards. In *Conmee v. Securities Holding Co. and Ames & Co.* (1907), 38 S.C.R. 601 , it was held that brokers had no right to hypothecate the shares of a customer for a greater sum than was due from the customer. See also *In re Burge, Woodall & Co.; Ex parte Skyrme*, [1912] 1 K.B. 393, 81 L.J.K.B. 721 . Canadian Courts have consistently followed the Conmee decision, supra.

13 In *In re Bryant, Isard & Co.; Ex parte Turner* (1925), 5 C.B.R. 793 (Ont.) , Holmested, K.C., the Registrar, relying on the *Conmee case, supra* , refused to recognize any preferential distinction between fully-paid-for shares of a customer left with a broker for sale and shares of a customer which had been bought on margin but afterwards fully paid for, all of which had been pledged by the broker with a third party, and directed that moneys received by the trustee in bankruptcy from the pledgee, which were surplus after realization of the customers' shares and payment of the stockbroker's debt to the pledgee, should be divided among the customers in proportion to the amounts realized from their respective shares, on the principle that equality is equity. The Registrar's judgment was upheld by Fisher, J., who is reported at p. 798 of the same volume as stating that it appeared to him to make no difference whatever whether the margin customers were indebted or not because, while the pledging of the fully-paid shares left for sale was illegal, the pledging of the shares of the margin customers was also illegal, for, if there was such indebtedness of the margin customers, it was very far short of the amount for which all the shares were pledged by the stockbroker; and there should be no discrimination in the distribution of the fund, because the act of the broker in each case was illegal.

14 A further appeal to the Ontario Court of Appeal was dismissed (1925), 7 C.B.R. 44, 29 O.W.N. 167 . Masten, J., in delivering the judgment of the Court, stated, at p. 49:

> I agree with Fisher, J., that Bryant, Isard & Co. had no authority to pledge the shares of Burt, of Brice and of Edwards for any sum in excess of the respective indebtedness of each of those customers. The shares were pledged generally to secure a much larger sum, viz., $30,000. *Conmee v. Securities Holding Co. et al*, 38 S.C.R. 601 , establishes that such an attempted pledging was in each case without authority and wrongful. For the present purposes the Court will not distinguish between the wrongful pledging of Turner's shares and the wrongful pledging of the shares of other claimants or grade the different degrees of wrongdoing, and the parties all claim to rank on this common fund in which the results of the wrongful conversion of their several securities have been inextricably blended. In these circumstances the only rule to apply is the equitable rule that each should share in proportion to the amount contributed by his security to this common fund.

15 There does not seem to be any reason for attempting to classify different degrees of illegality or wrongdoing, and in my opinion we should hold against claimants having priority simply because they have paid for their securities in full while other claimants hold their securities on margin, or, in other words, where the equities otherwise are equal.

16 Mr. Meyer's work deals most lucidly in pp. 631 to 636 with the rights of contribution among claimants whose securities have been pledged by the broker or, as it is sometimes called, "sharing the burden of the loan." He states, on p. 631:

> In case after the filing of the petition in bankruptcy the broker's pledgee, in order to satisfy his claim against the broker, sells the securities of some of the broker's customers and leaves the securities of other customers unsold, the customers whose securities remain unsold have no greater rights than the customers whose securities were sold; and if the proceeds of the pledged securities remaining after the pledgee has satisfied his claim are insufficient to satisfy the demands of all claimants of the same class, the securities which survived the liquidation by the pledgee must contribute pro rata to those which did not survive liquidation. This is termed "sharing the burden of the loan."

17 And on p. 632:

> This rule does not rest on contract, or on any principle of joint action or original relationship between the parties whose securities were pledged, but on principles of fundamental justice and equity. It has been invoked by the courts in order that all claimants who are similarly situated may fare equally, and that one whose securities through good

> fortune or through the favour of the pledgee have survived liquidation shall not by that fortuity have an advantage over the others.

18 Mr. Meyer's authorities include *Asylum of St. Vincent de Paul v. McGuire* (1925), 239 N.Y. 375 ; *In re J. C. Wilson & Co.* (1917), 252 Fed. 631 ; *In re Archer, Harvey & Co.* (1923), 289 Fed. 267 , and *In re Toole* (1921), 274 Fed. 337 . A perusal of these cases shows that they are grounded on principles which have always guided our Courts. In *Asylum of St. Vincent de Paul v. McGuire* , the judgment of the Court of Appeal is delivered by Hiscock, C.J. In pp. 381 to 386 the Chief Justice states and discusses the principles and the leading cases to that time. There are many statements that I would like to refer to, but I will quote only one. On p. 382 he is reported as saying:

> The right to contribution here invoked is not dependent on contract or joint action or original relationship between the parties. It is based on principles of fundamental justice and equity. (*Wells v. Miller*, 66 N.Y. 255 ; *Cuyler v. Ensworth*, 6 Paige, 32). And of these principles no one is more explicit and outstanding than the one that where the situation of parties is equal and one has borne more than his just share of the common burden he is entitled to contribution from others who have been dealt with more fortunately. (*Stowell v. Richardson*, 3 Allen 66 ; *Manthey v. Schueler*, 126 Minn. 87 ; *Hodgdon v. Peet*, 122 Minn. 286). This is simply the statement in another form of the principle that equality amongst those similarly situated is equity and all of these principles applied to the facts of this case seem irresistibly to lead to the conclusion that where through mere chance, as we assume, one security owner has been made to bear a larger proportion of a common burden than was his just share, he is entitled to call for contribution and assistance.
>
> We suppose that no one will doubt that if the situation of all of these wrongfully pledged securities had been discovered before the sale of any of them, and the owner of one lot had brought an action in equity to have them marshalled and applied pro rata to the payment of the indebtedness for which they were pledged, such prayer for relief would have been granted. Such relief would have been based upon obvious principles of equity and justice and it seems to us quite inconceivable that the application of those principles is curtailed or destroyed because before the request for equality of treatment is made the pledgee, as a mere matter of chance, has reached out and taken securities of one holder for sale and left those of another intact.

19 The rule seems fair to all and appeals to one's common sense, because, as stated in *In re J. C. Wilson & Co., supra* , at p. 639:

> If, however, it be held that, after a petition in bankruptcy has been filed, the pledgee, by selecting for sale some stocks and not others, can thereby save some stocks intact for the owners without the burden of contribution, and not others, it can readily be seen that the door will be opened for the most indefensible kind of favouritism, and possibly for corrupt bargains between the owners of securities and the pledgee. Indeed, a pledgee of his own motion, without any agreement with owners of securities, could easily safeguard his friends to the detriment of others who were strangers to him.

20 In *In re Toole, supra* , the Circuit Court of Appeals, second circuit, refers to the last-mentioned statement, and is reported at p. 343 as saying:

> We think the conclusion above reached was correct, and that the adoption of the contrary theory would lead many times to unfair practices and work gross injustice. The courts in the United States and England have long acted upon the principle that between different creditors equality is equity. Equality, according to Bracton, constitutes equity itself. All debts are generally deemed by courts of equity to stand in pari jure and are to be paid proportionally. In the case of stock unlawfully pledged and belonging to different owners, the equities are originally equal, and that equality is not disturbed by the fact that the stock of one is sold by the pledgee, while that of the other survives. So the principle of general average applied in maritime and commercial operations, and which required a general contribution to be made by all parties in interests towards a loss which is voluntarily incurred for the benefit of all,

is indicative of the rule which should be applied in a case like this. The principle upon which contribution is founded does not rest upon contract but has its origin in natural law. Story's Equity Jurisprudence, vol. 1, par. 490.

21 Of course, everything belonging to the stockbroker, which was also included in the pledge, must be applied to the pledge before the securities of the claimants can be called upon to contribute: *In re Archer, Harvey & Co., supra* , at p. 272. See also *In re Wiggins, Ltd.; Ex parte Spratt* and *Ex parte Travers*, 12 C.B.R. 386 , at 388, [1931] O.R. 573 , at 581.

22 In *Haggart v. Trustee of Heron* (1930), 11 C.B.R. 163, *(*sub nom. *Haggart v. Trusts and Guar. Co. Ltd.)* 65 O.L.R. 23 , an interpleader issue to decide whether the plaintiff was entitled, free of any claim of the trustee in bankruptcy of the property of a stockbroker, to certain shares, Orde, J.A., scouted the suggestion of right of a contribution, stating that he knew of no such principle outside of maritime law, but adds on p. 169 (p. 28, O.L.R.):

But whether or not any such right or any other right as against the plaintiff can be asserted by any others I am not here called upon to determine. Those rights if they exist cannot be affected by this judgment.

23 *In re Wiggins, Ltd.; Ex parte Robertson* (1930), 12 C.B.R. 105, 66 O.L.R. 391 , was an application by one Robertson for an order directing the return to him by the trustee in bankruptcy of the property of Wiggins, Ltd., of certain bonds deposited by him with the bankrupt company. The application was opposed by the trustee only. Garrow, J., held the case was completely covered by *Haggart v. Trustee of Heron, supra* , and that the applicant was entitled to succeed. The appeal by the trustee is reported in 12 C.B.R. 343 , [1931] O.R. at p. 337. The contention of counsel for the appellant, set out on p. 337, was that the trial Judge erred in directing the trustee to deliver the bonds to the respondent without paying *to the trustee* his *pro rata* share of an indebtedness to the banks to which the bonds were pledged. The Court dismissed the appeal.

24 The judgment of the Court was delivered by Hodgins, J.A., who is reported at p. 345 (p. 340, O.R.) as stating:

With the rights and duties of the trustee regarding the moneys now in his hands derived from the sale of the securities held by the banks, including this sum of $105.32, the Court is not at present concerned. It is suggested that other parties might conceivably intervene to demand a share of it when the fund now in his hands comes to be distributed. But the interest of the banks under the transactions outlined having completely terminated *** it would naturally seem to follow that no basis for a claim by other parties who may have dealt with Wiggins Ltd. can possibly exist in respect to identifiable securities, the property in which has never been divested from the true owner and the possession of which in the hands of the trustee has ceased to have any legal justification.

25 And at p. 347 (p. 342, O.R.):

I would rest my judgment on what I believe to be an entirely satisfactory foundation, namely that when collateral security is deposited with a broker and is by him pledged to a bank for any sum, and the loan from the bank is entirely paid off and at the same time the debt to the broker for which the collateral has been deposited, the rights of both the broker and bank are at an end, and the owner of the collateral is entitled to its return.

I may perhaps in this case draw attention to the fact that the subject-matter of this application was not a sum of money but a tangible piece of property as to which no right not represented by the trustee could intervene.

26 The *Haggart* and *Wiggins* cases, *supra* , were contests between a claimant and a trustee. Apparently there were no other claimants before the Court, but, in each case, only a suggestion that there might be. On that account, any statements, if there are any, in the judgments opposed to contribution between claimants should be considered *obiter dicta* .

27 *In re Carroll & Wright; Ex parte Bain*, 14 C.B.R. 36, [1932] O.R. 474 , is a case similar to this except that the securities were pledged by the stockbrokers with the authority of the customer owners. The headnote in [1932] O.R. i s:

If, after the filing of a petition in bankruptcy against a broker, a bank, to whom the broker has properly pledged shares purchased for customers on margin, sells the securities of some of the broker's customers and leaves the securities of other customers unsold, the customers whose securities remain unsold have no greater rights than the customers whose securities were sold. If the proceeds of the pledged securities remaining after the bank has satisfied its claim are insufficient to satisfy the demands of all claimants of the same class, the securities which survived the liquidation by the pledgee must contribute pro rata to those which did not survive the liquidation.

28 The Registrar in bankruptcy, in dealing with "stocks, securities and cash returned from banks and other brokers after liquidation of stocks pledged for loans and advances," states that, because of lack of authorities in our own Courts, he is inclined to follow the United States decisions, as enunciated in Meyer's Law of Stockbrokers and Stock Exchanges, to which I have referred. On appeal, Sedgewick, J., held that the Registrar was right, and adopted his reasons *in toto* .

29 The last-mentioned case is the only one in our Courts which is almost directly in point. The only difference in the facts appears to be that there the securities were all pledged rightfully and in the case at Bar were all pledged wrongfully. In each case, however, the claimants are all on the same footing, the situation of the parties is equal, and the principle that equality amongst those similarly situated is equity can be applied to both.

30 The law of contribution has been applied by the Courts of England between co-sureties, in maritime law and wherever it seemed equitable. There are a great many cases which state principles, on which it could be held there should be contribution in stockbrokers' cases. The following are some of them: *Sir Will. Harbert's Case* (1584), 3 Co. Rep. 11b, 76 E.R. 647, at 661 and 662; *Dering v. Winchelsea (Earl)* (1787), 1 Cox 318, 29 E.R. 1184 , at 1185; *Barnes v. Racster* (1842), 1 Y. & C.C.C. 401, 11 L.J. Ch. 228, 62 E.R. 944 ; *Gibson v. Seagrim* (1855), 20 Beav. 614, 24 L.J. Ch. 782, 52 E.R. 741 , at 743; *Ker v. Ker* (1869), Ir. R. 4 Eq. 15, at 25 and 28; *Steel v. Dixon* (1881), 17 Ch. D. 825 , at 830 and 831, 50 L.J. Ch. 591; *Leigh v. Dickeson* (1884), 15 Q.B.D. 60 , at 66, 54 L.J.Q.B. 18; *Flint v. Howard*, [1893] 2 Ch. 54 , at 72 and 73, 62 L.J. Ch. 804; *In re Darby's Estate; Rendall v. Darby*, [1907] 2 Ch. 465 , at 468 to 470, 76 L.J. Ch. 689; and *In re Best; Parker v. Best*, [1924] 1 Ch. 42 , at 44, 93 L.J. Ch. 63.

31 The law is well stated in all these cases, but I will quote from the first and last only. In *Sir William Harbert's Case* , at p. 661 of the E.R.:

For a joint lien, which binds the land, shall not survive, or lie only on the survivor, as in case of a joint warranty, where two for them and their heirs warrant lands to another and his heirs, the survivor shall not be only vouched; and the sheriff cannot deliver the land of the one or the other at his pleasure.

32 And at p. 662

So it appears by these cases, that when land shall be charged by any lien, the charge ought to be equal, and one alone shall not bear all the burthen, and the law in this point is grounded on great equity.

33 And in *In re Best; Parker v. Best* , at p. 44:

I think whenever a creditor has alternative remedies against two different persons, as, for example, if a debt is charged on properties not all in the same hands or if, as is the case here, the debt is the personal obligation of a debtor and is charged on property in the hands of some other person, then in all those cases equity intervenes to see that the burden of payment falls on the right shoulders. The question therefore arises in this case on whom the burden ought to fall. Prima facie equality or the imposition of proportionate burdens on different properties charged with a debt is equity, but there may be circumstances which disturb the prima facie distribution of the burden and throw it wholly on one person.

34 Further statements are contained in 13 Halsbury, pp. 69, 70; 7 Halsbury, pp. 270, 271 and 272; 15 Halsbury, p. 528; Snell's Principles of Equity, 19th ed., pp. 280, 282, 475, 476 and 479; and White & Tudor's Leading Cases in Equity, 9th ed., vol. 2, p. 505. The statement on p. 69 of 13 Halsbury is:

> The maxim that "equality is equity" expresses in a general way the object both of law and equity, namely, to effect a distribution of property and losses proportionate to the several claims or to the several liabilities of the persons concerned. For equality in this connection does not mean literal equality, but proportionate equality.

35 The cases of *Leigh v. Dickeson, supra* , and *Johnson v. Wild* (1890), 44 Ch. D. 146 , 59 L.J. Ch. 322, were not decided contrary to the principle but because, in each case, there were special circumstances.

36 It must be considered that the weight of authorities — practically the whole weight — supports the principle of contribution, and I have no doubts in stating that the judgment of the learned trial Judge should be upheld.

37 The date of filing the petition to wind up the bankrupt company should be taken for the purposes of fixing the measure of contribution and of proportionate sharing in the fund of all securities pledged by the bankrupt, except its own property, which, if any is left in hand, should be realized upon and the proceeds paid into the fund. Such date seems to be the only one that could be applied equitably to all securities, and has been adopted by the United States Courts. See *In re J. C. Wilson & Co., supra* , at p. 654. Subject to this variation, the appeals are dismissed. As agreed by all counsel at the hearing, there will be no costs except to the receiver, payable proportionately out of each fund.

38 As has been stated, it was ordered that the interests of customers who might have claimed certain securities but who failed to assert their claim were to go to the liquidator for the benefit of the general creditors.

39 That is in accordance with the United States decisions: Meyer, p. 656. Various reasons assigned by the Courts for so doing are discussed in an article in 45 Harvard Law Review, pp. 82 to 89. In *In re Kern Agencies, Ltd.* (No. 3), 13 C.B.R. 333, [1932] 1 W.W.R. 585 , MacDonald, J., refused to follow the American authorities, and held that the stocks and bonds for which no claims had been asserted must be presumed to be the property of the debtor and so to be first chargeable with the liens of the correspondents.

40 There has been no appeal on this point in the case at Bar, and it is not necessary to consider or discuss it, but it might be mentioned that there is some opinion that the interests of those who could have claimed successfully should not enlarge the interests of the asserting claimants, as if they were the property of the bankrupt debtor, or go to the general creditors, but should be distributed to the persons to whom they belong. The usual reasons for not making claims are dire necessity or the feeling that the interests will be protected by the Courts rather than any election or willingness that others should get any benefit.

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TAB 5

Most Negative Treatment: Distinguished
Most Recent Distinguished: Crofton v. H.M.E. Evans & Co. | 2011 ABQB 158, 2011 CarswellAlta 399, 514 A.R. 172, [2011] A.W.L.D. 1809, 75 C.B.R. (5th) 281, 199 A.C.W.S. (3d) 789, 50 Alta. L.R. (5th) 80 | (Alta. Q.B., Mar 10, 2011)

1995 CarswellOnt 1169
Ontario Court of Justice (General Division), In Bankruptcy

Confederation Treasury Services Ltd., Re

1995 CarswellOnt 1169, [1995] O.J. No. 3993, 37 C.B.R. (3d) 237, 59 A.C.W.S. (3d) 1058

Re bankruptcy of CONFEDERATION TREASURY SERVICES LIMITED

Farley J.

Heard: December 8, 1995
Judgment: December 12, 1995
Docket: Doc. 31-205220

Counsel: *Lyndon A.J. Barnes*, *Gordon Marantz* and *Tristram Mallett*, for UBS Limited and Arm's Length Creditors Committee of Confederation Treasury Services Limited.
Harry Fogul, for Province of Ontario.
Ronald N. Robertson, Q.C., and *Edmond Lamek* for UBS Limited.
William G. Horton and *Daniel V. Macdonald*, for U.S. rehabilitator of Confederation Life Insurance Company.
Benjamin Zarnett and *Gale Rubenstein*, for Peat Marwick Thorne Inc., agent to Superintendent of Financial Institutions, provisional liquidator of Confederation Life Insurance Company.
Bruce Leonard and *John R. Sandrelli* for National Organization of Life and Health Insurance Guaranty Associations.
Charles F. Scott and *Ulli Streit* for Compcorp.
L.A. Wittlin, for Deloitte & Touche Inc., monitor of Confederation Life Ins. Co. pursuant to *Companies' Creditors Arrangement Act*.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIV Administration of estate
XIV.2 Trustees
XIV.2.b Appointment

Headnote

Trustees — Appointment — Motion for replacement nominee for trustee — Petitioning creditor bringing motion to have proposed nominee replaced — Other parties opposing nominee as being party that had done extensive forensic investigation on behalf of group of creditors — Motion granted — No evidence to suggest on-going relationship between creditors' group and nominee — No evidence to show that nominee could not fulfil duties in impartial manner — Nominee already familiar with complex case.

In complex proceedings under the *Companies' Creditors Arrangement Act* ("CCAA"), the stay was lifted for the purpose of hearing a motion for a replacement nominee for the trustee. The proposed replacement nominee had done extensive forensic investigation on behalf of a group of creditors in the CCAA proceedings. Other parties opposed the substitution, fearing that the proposed replacement nominee would not be impartial in the bankruptcy proceedings, given its involvement on behalf of the creditors' group in the CCAA proceedings.

Held:

The motion was granted.

There was no evidence of an on-going relationship between the proposed nominee and the creditors' group that would influence the nominee from its neutral, impartial role as trustee acting in the best interests of the estate. The nominee was familiar with and knowledgeable about the complex and complicated case and there was no reason to disqualify it. To appoint another trustee would cause a significant delay as that trustee became acquainted with the case and a significant duplication of expense.

Table of Authorities

Cases considered:

Batteries Included, Inc., Re (1987), 67 C.B.R. (N.S.) 123 (Ont. S.C.) — *considered*

Bryant, Isard & Co., Re (1923), 4 C.B.R. 41, 24 O.W.N. 597 (S.C.) — *considered*

Cadillac Fairview Inc., Re (February 9, 1995), Doc. B348/94, Farley J. (Ont. Gen. Div. [Commercial List]) — *referred to*

Drash, Re (1930), 11 C.B.R. 402, 38 O.W.N. 295 (C.A.) — *referred to*

Environdyne Industries, Re, 150 B.R. 1008 (Bankr. N.D. Ill. 1993) — *referred to*

Ethier, Re (1991), 7 C.B.R. (3d) 268 (Ont. Bktcy.) — *referred to*

Federal Trust Co. v. Frisina (1976), 28 C.B.R. (N.S.) 201, 20 O.R. (2d) 32, 86 D.L.R. (3d) 591 (S.C.) — *considered*

Gauthier Lumber Ltd., Re (1960), 1 C.B.R. (N.S.) 127 (Que. S.C.) — *referred to*

I. Caron Ltd. v. Robin Hood Mills Ltd. (1935), 17 C.B.R. 101 (Que. S.C.) — *referred to*

Lamb, Re; Ex parte Board of Trade, 1 Mans. 373, 9 R. 636, [1894] 2 Q.B. 805 (C.A.)*considered*

Martin, Re (1888), 5 Morr. 129, 21 Q.B.D. 29 — *referred to*

Micro-Time Management Systems, Re, 102 B.R. 602 (Bankr. E.D. Mich. 1989) — *referred to*

Orzy, Re (1923), 3 C.B.R. 737, 53 O.L.R. 323 at 327, [1924] 1 D.L.R. 250 (C.A.) — *referred to*

Prince Edward Island v. Bank of Nova Scotia (1988), 70 C.B.R. (N.S.) 209, 72 Nfld. & P.E.I.R. 191, 223 A.P.R. 191, 2 T.C.T. 4090 (P.E.I. T.D.), reversed (1989), 77 C.B.R. (N.S.) 113, 81 Nfld. & P.E.I.R. 295, 255 A.P.R. 295, 2 T.C.T. 4304 (P.E.I. C.A.) — *considered*

Quinte Nurseries Ltd., Re (1982), 41 C.B.R. (N.S.) 156 (Ont. S.C.) — *referred to*

REA Holding Corp., Re, 4 Bankr. Ct. Dec. 1249 (Bankr. S.D.N.Y. 1979), reversed 2 B.R. 733 (1980) — *considered*

R.J. Nicol Construction Ltd. (Trustee of) v. Nicol (1995), 30 C.B.R. (3d) 90, 77 O.A.C. 395 (C.A.) — *referred to*

Reed, Re (1980), 34 C.B.R. (N.S.) 83, 28 O.R. (2d) 790, 111 D.L.R. (3d) 506 (C.A.) — *referred to*

Rizzo Shoes (1989) Ltd., Re (1995), 29 C.B.R. (3d) 270 (Ont. Gen. Div. [Commercial List]) — *referred to*

Sharby v. N.R.S. Elgin Realty Ltd. (Trustee of) (1991), 55 C.C.E.L. 305, 41 E.T.R. 193, 3 O.R. (3d) 129 (Gen. Div.) — *referred to*

Shaw Co., Re, 3 C.B.R. 198, 16 Sask. L.R. 275, [1922] 3 W.W.R. 119, 68 D.L.R. 616 (K.B.) — *considered*

Tannis Trading Inc. v. Camco Food Services Ltd. (Trustee of) (1988), 67 C.B.R. (N.S.) 1, 63 O.R. (2d) 775, 49 D.L.R. (4th) 128 (S.C.) — *considered*

W.T. Grant, Re, 4 B.R. 53 (Bankr. S.D.N.Y. 1980) — *considered*

W.T. Grant Co. 1, Re, 699 F.2d 599 (2d. Cir. N.Y. 1983) [cert. denied *Cosoff v. Rodman*, 464 U.S. 822, 70 L. Ed. 2d 97, 104 S. Ct. 89, 52 U.S.L.W. 3262 (1983)] — *referred to*

Western Canada Beverage Corp., Re (1993), 22 C.B.R. (3d) 10 (B.C. S.C.) — *referred to*

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 —

s. 13.3

s. 13.3(2)

s. 14

s. 14.04

s. 43(9)

s. 102(5)

s. 163

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Motion for order replacing nominee for trustee.

Farley J.:

UBS Limited — "UBS"

Arm's Length Creditors Committee — "ALC Committee"

Confederation Treasury Services Limited — "Treasury"

Province of Ontario — "Ontario"

U.S. Rehabilitator of Confederation Life Insurance Company — "Rehabilitator"

National Organization of Life and Health Insurance Guaranty Associations — "NOLA"

Confederation Life Insurance Company — "CLIC"

Peat Marwick Thorne Inc. Agent to the Superintendent of Financial Institutions, Provisional Liquidator of CLIC — "Liquidator"

Deloitte & Touche Inc. — "Deloitte"

Richter & Partners Inc. — "Richter"

BDO Dunwoody Ltd. — "Dunwoody"

Doane Raymond Ltd. — "Doane"

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 as amended — "BIA"

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — "CCAA"

1 Houlden J.A. is supervising the Treasury CCAA proceedings; he lifted the stay for the purpose of my hearing this motion regarding a replacement nominee for the trustee. It is expected that he will lift the stay generally on Dec. 15, 1995 or shortly thereafter once all pressing matters regarding the CCAA proceedings have been dealt with by him. It would then appear that everyone's expectation and desire is that Treasury immediately thereafter be placed in bankruptcy.

2 UBS (the replacement petitioning creditor in the bankruptcy proceedings) moved to amend the petition to nominate Richter as trustee in bankruptcy in place of Deloitte. It also sought a receiving order against Treasury (appointing Richter as trustee) effective immediately following the termination of the CCAA proceedings. As regards the latter motion, it would seem to me that this should be more appropriately dealt with once the CCAA proceedings have terminated. Mr. Barnes argued on behalf of UBS and the ALC Committee; he was supported by Mr. Robertson also acting for UBS and by Mr. Fogul on behalf of Ontario. Deloitte took no part of the argument; it had previously indicated that it was not willing to stand for appointment as trustee (either as sole trustee or in some joint or shared responsibility capacity) unless it had the endorsement of all three major stakeholders — the ALC Committee, Rehabilitator and Liquidator. The ALC Committee was opposed to Deloitte having a role as trustee. Instead it wished to have Richter, a firm which had done extensive forensic investigation on its behalf in the CCAA proceedings, the investigation being essentially of document review but no interviews or examinations. The substitution of Richter as the trustee nominee was opposed by the remaining participants — Mr. Horton for the Rehabilitator, Mr. Zarnett for the Liquidator, Mr. Leonard for NOLA and Mr. Scott for Compcorp; they preferred that Dunwoody or Doane be the substitute since they submitted that Richter was not impartial in the bankruptcy proceedings given its involvement for the ALC Committee in the CCAA proceedings.

3 The Rehabilitator has tabled a motion which obstensively was to be heard at the same time as this motion for an order:

> 1. Declaring that the bankruptcy of [Treasury] shall proceed in accordance with the provisions of the Protocol which is attached as Appendix A [to that motion record].
>
> 2. In the alternative, declaring that section 69.3(1) of [BIA] does not operate with respect to the [Rehabilitator's] claims against [Treasury] as set forth in the draft Statement of Claim attached as Appendix "B" [to that motion record] (the "Ontario Proceedings").
>
> 3. In the further alternative granting the [Rehabilitator] leave to issue and proceed in the Ontario Proceedings; and
>
> 4. such further and other relief as to this Honourable Court seems just.

This motion was certainly premature since the stay had not been lifted for that purpose and it presupposed that the trustee in bankruptcy (once Treasury were declared bankrupt) would be preempted from this motion. I found this quite puzzling, especially since this matter had been previously informally canvassed and the same concerns expressed. This motion was adjourned to a more appropriate time once all interested parties had been canvassed. This overall battle amongst the stakeholders has been fought since the beginning of the CCAA proceedings some sixteen months ago. Despite this intimate, intensive and extensive involvement it was candidly volunteered by the Rehabilitator that the matter was complicated beyond any comprehension and that it could not be even described after all this time. Thus in the Michigan material there were claims advanced by the Rehabilitator on the basis of eleven separate (and distinct) grounds. It would not seem that the Rehabilitator is estopped from pleading in the alternative: see (*Sharby v. N.R.S. Elgin Realty Ltd. (Trustee of)* (1991), 3 O.R. (3d) 129 (Gen. Div.) at pp. 140-1), at least at this stage of the proceedings.

4 I would also note that the estate is of the magnitude of some $630 million dollars, all of which except approximately $30 million dollars (plus or minus a very wide allowance) is in the form of "cash". Thus while the major percentage of the estate has been liquidated, it is clear that there is a sizeable absolute amount of the number of various types of assets to be gathered in, subject to of course assorted disputes. If this latter role were hived off, it would comprise a major bankruptcy estate by itself.

5 It would appear that Richter, Dunwoody and Doane are willing to be considered as nominees. Deloitte has removed itself from the running, based upon its unfulfilled condition. Other firms are conflicted out.

6 Perhaps it is the fact that

> (a) the major stakeholders have been warring in a very negative sense for over a year.
>
> (b) the potential losses for each are quite sizeable, in the hundreds of millions, when each with moral legitimacy looks upon their own "ultimate" situation as an innocent who has been mugged,
>
> (c) there is a great deal of money ($630 million dollars odd) which may be recovered out of the estate.
>
> (d) under certain scenarios it is conceivable that a stakeholder could obtain a benefit before the others and under other scenarios the stakeholder might be shut out from that estate.
>
> (e) tactics may appear at first glance to give more relief (or inflict a negative relief upon the others) than strategies,
>
> (f) stakeholders may be unsure of their comparative positions and interests despite ample opportunity to reflect upon same,
>
> (g) some undisclosed factor(s) or
>
> (h) a combination of some or all of the foregoing,

which has resulted in all concerned attempting to introduce a lot of colour and atmosphere plus premature arguments into these proceedings. I would not think that helpful in the long run, neither for these proceedings in general nor for the interest of the stakeholders so advancing this tinged view of things and trying to set the stage for future battles. However on reflection I trust that counsel and their clients will appreciate that this is unproductive.

7 The ALC Committee and specifically UBS appear to represent creditors of Treasury who loaned funds to Treasury in a commercial situation, taking the benefits of that loan together with its commercial risk. The other side may to some degree or other have claims against the $630 million dollars which may be in the nature of property or trust claim (or something similar) which I will hereafter describe as a proprietary claim which would take some or all of the $630 million dollars out of the estate (and thus away from the potential dividend to be shared amongst the creditors). There also seems to be the possibility of a claim which although a "creditor claim" within the estate is advanced on the basis that it should enjoy a priority and be paid out before the "ordinary" creditor claims, this priority not being of a temporal nature but rather of a preference nature. I think it fair to observe that the rights and entitlements advanced are not so clear cut that, at least at this stage, it would be inappropriate for any trustee to acquiesce and hand over the funds. Unless there is some compromise achieved, it is painfully obvious that there will be litigation. This litigation may be as to a dispute between the trustee and someone claiming that it has a proprietary right which takes assets out of the estate (see the comments of Goodman J.A. in *R.J. Nicol Construction Ltd. (Trustee of) v. Nicol* (1995), 30 C.B.R. (3d) 90 (Ont. C.A.) at p. 94 or it may be a dispute amongst creditors within the estate (see the views of Ferguson J.A. in *Re Orzy* (1923), 3 C.B.R. 737 (Ont. C.A.) at p. 741 and of Hodgins J.A. at p. 738) or a combination thereof. While the trustee would have an active role in the proprietary claim dispute, it would seem to me on a casual observation of the trustee's role in a dispute between creditors in the estate would primarily be that of a true stakeholder (i.e. in its "original" sense of someone who merely holds the stakes being wagered or fought over as opposed to the "modern" additional sense used by the participants here of someone who claims to have a stake in the outcome of these proceedings) and, as may possibly be required, ensure that the participants observe the rules of the game, even if only on a report basis to the court or by asking for advice and directions.

8 In this regard and regard and generally the trustee is an officer of the court. As stated in *Houlden and Morawetz, Bankruptcy Law in Canada* (3rd ed. 1995) at pp. 1-61/2:

> The trustee is an officer of the court and should impartially represent the interests of creditors: *Re Roy* (1963), 4 C.B.R. (N.S.) 275 (C.S. Que.). He should act equitably and, as far as possible, hold an even hand between competing interests of various classes of creditors: *Re Reed* (1980), 34 C.B.R. (N.S.) 83, reversing 32 C.B.R. (N.S.) 203 (Ont. C.A.). In bringing proceedings, such as an application to set aside a fraudulent preference, he should not adopt an adversarial or hostile role: *Touche Ross Ltd. v. Weldwood of Canada Sales Ltd.* (1983), 48 C.B.R. (N.S.) 83, additional reasons at 49 C.B.R. (N.S.) 284 (Ont. S.C.). Rather, he should present the relevant facts to the court in a dispassionate, non-adversarial manner, and leave the matter to the court for decision.
>
> . . . . .
>
> The trustee's obligation is to act for the benefit of the general body of creditors, not just the benefit of unsecured creditors. He must not, therefore, act in a manner which is prejudicial and unfair to the interests of secured creditors: *Re Bell's Ltd.: Bank of Montreal v. Touche Ross Ltd.*, 60 C.B.R. (N.S.) 224, [1986] 4 W.W.R. 211, 48 Sask. R. 241 (Sask. Q.B.).
>
> A trustee in bankruptcy does not function as an agent of the creditors in the ordinary sense, but as an administrative official required by law to gather in and realize on the assets of the bankrupt, and then to divide the proceeds among those entitled thereto in accordance with the scheme set out in the Bankruptcy Act: *Clarkson Co. v. Muir* (1982), 43 C.B.R. (N.S.) 259, 53 N.S.R. (2d) 609, 109 A.P.R. 609 (C.A.).

9 Mr. Barnes submitted that there were two issues before me — firstly that there was no legal impediment against Richter acting as trustee since there was nothing to prevent a person from becoming such merely because of an association

of a nature such as here, where Richter has been acting as a forensic investigator for the ALC Committee (which includes representation of UBS) and secondly that Richter is an appropriate person to nominate (and appoint) in the circumstances.

10 I would observe that Richter does not appear on the material before me to have a problem of possible disqualification pursuant to s. 13.3. of BIA. If there were any potential conflict of interest as set forth in that section, it should disclosed at the time of appointment and at the first meeting of creditors if it falls within s. 13.3(2).

11 S. 43(9) BIA provides that:

> On a receiving order being made, the court shall appoint a licensed trustee as trustee of the property of the bankrupt, having regard, as far as the court deems just, to the wishes of the creditors.

S. 102(5) BIA states:

> The purpose of the first meeting of creditors shall be to consider the affairs of the bankrupt, to affirm the appointment of the trustee or substitute another in place thereof, to appoint inspectors and to give such directions to the trustee as the creditors may see fit with reference to the administration of the estate.

See also s. 14 and s. 14.04 of BIA. I did not find it helpful for Mr. Fogul to point out that Ontario could lead a move to appoint Richter as trustee at the first meeting of creditors if it were not so appointed as trustee upon the receiving order being made since such action would be, to my mind, quite inappropriate if I were to determine in this motion that Richter were for some reason "disqualified" in the circumstances.

12 In *Re Quinte Nurseries Ltd.* (1982), 41 C.B.R. (N.S.) 156 (Ont. S.C.) at p. 160 Saunders J. observed:

> The choice of trustee is for the creditors and, in my opinion, the nominee of the petitioning creditor should be appointed pending the first meeting of creditors when the final determination will be made.

I would be of the view that Registrar Ferron's opening words in *Re Batteries Included, Inc.* (1987), 67 C.B.R. (N.S.) 123 (Ont. S.C.) at p. 123:

> The court is not bound to appoint a trustee named in the petition by the petitioning creditor, nor is the official receiver required to appoint a trustee named by the debtor as the assignee in an assignment.

must be taken in context. In that case he went on to examine the various reasons why he appointed another trustee than the one nominated by the petitioning creditor (recognizing this was an interim appointment until the first meeting of creditors). He observed at p. 124:

> I chose to appoint Yale, Kline, Geary Limited as the trustee in place of Collins Barrow Limited, named in the petition for several reasons, none of which have anything to do with competency and integrity.
>
> In my opinion, in this instance Yale, with whom the debtor filed its assignment, is in a better position to administer the estate. That firm has already been involved in a watching brief for a secured creditor, and has a fairly extensive knowledge of the debtor company.
>
> In addition Yale has identified the company's assets and liabilities, and has in fact prepared a preliminary statement of affairs which accompanied the assignment. That work will not now have to be duplicated.
>
> Further, four creditors of the debtor have expressed a preference for Yale, I suppose because of the above factors, and their wishes should at least be given some standing in the matter.

> Finally, there is a suggestion that the debt owing to petitioning creditor is disputed. It seems to me that it would not be appropriate in these circumstances to appoint Collins Barrow Limited as trustee because of the potential for conflict.

This fits within the philosophy of *Re Drash* (1930) 38 O.W.N. 295 (C.A.) at p. 296. See also *I. Caron Ltd. v. Robin Hood Mills Ltd.* (1935), 17 C.B.R. 101 (C.S. Que.) at p. 102.

13 Houlden J.A. for the court in *Re Reed* (1980), 34 C.B.R. (N.S.) 83 (Ont. C.A.) said at p. 86:

> ... Unless this inquiry is carried out, the credit union may be dealt with unfairly. A trustee in bankruptcy should act equitably and so far as possible hold an even hand between the competing interests of various classes of creditors. As James L.J. said in *Re Condon; Ex parte James* (1874), 9 Ch. App. 609 at 614 (L.JJ.):
>
> > I am of opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors.

See also my view in *Re Rizzo Shoes (1989) Ltd.* (1995), 29 C.B.R. (3d) 270 (Ont. Gen. Div. [Commercial List]) at pp. 277-8 including my observation:

> I think it also fair to observe that in deciding whether or not the trustee has acted properly the court must be careful to judge the trustee's conduct in light of the circumstances as they existed at the time the trustee performed the act or made the decision: see *Cocks v. Chapman*, [1896] 2 Ch. 763 at 777 (C.A.).

14 A trustee may be removed for cause: see *Houlden and Morawetz, supra*, at p. 1-52 where the authors observe:

> "Cause" means misconduct, fraud, dishonesty, becoming bankrupt or otherwise incapable of acting as a trustee: *Re Herman* (1930), 11 C.B.R. 239 at 246. Cause is not, however, restricted to dishonest conduct; misconduct short of dishonesty is sufficient: *Re Bryant Isard* (1923), 4 C.B.R. 41, 24 O.W.N. 597 (S.C.).
>
> Cause exists: (a) if there is conduct showing that it is no longer fit that a person should continue as trustee; (b) if there is a danger to the estate property; (c) if there is a want of reasonable fidelity; (d) if circumstances prevent the creditors from working in harmony with the trustee; (e) if the trustee cannot act impartially; (f) if there has been an excess of power by the trustee; (g) if there has been a lack of *bona fides* by the trustee; or (h) if there has been unreasonable conduct by the trustee in relation to the bankrupt estate. The main principle upon which the jurisdiction of the court is exercised in ordering the removal of the trustee, is the welfare of the creditors and of the bankrupt estate. The trustee must not undertake a duty and put himself in a position that is in conflict with his duty as trustee, or act in a manner that is inconsistent with that duty. If the trustee has placed himself in a position of conflict, he cannot continue as trustee; he must resign or be removed by the court; *Re Commonwealth Investors Syndicate Ltd.* (1986), 61 C.B.R. (N.S.) 147, 69 B.C.L.R. 346 (S.C.), additional reasons at (1986), 62 C.B.R. (N.S.) 308 (B.C.S.C.). In the *Commonwealth* case, the trustee was removed because he had improperly delayed the winding up of the bankrupt estate for several years.
>
> . . . . .
>
> Even if a trustee is not dishonest, the court, if it is of the opinion that he has not acted in the best interests of creditors and that he cannot act in concord with the inspectors, may remove him and appoint a new trustee: *Re Gauthier Lumber Ltd.; Vanasse Tire Ltd. v. Tardif* (1960), 1 C.B.R. (N.S.) 127 (C.S. Que.).
>
> Where a trustee wishes to be relieved of its duties as trustee in bankruptcy, the court can appoint a substitute under s. 14.04. "Cause", in s. 14.04, embraces a trustee who is incapable of acting for any reason: *Re Philip's Manufacturing Ltd.* (1992), 16 C.B.R. (3d) 127 (B.C.S.C.). Where it would be difficult for a trustee to act impartially and impossible for it to sue itself, a substitute trustee will be appointed: *Re Philip's Manufacturing Ltd.*, supra.

In *Re Bryant, Isard & Co., supra*, Fisher J. was quite caustic with his comments about the actions of the trustee, he said at p. 52 [C.B.R.]:

> I find the trustee guilty of misconduct and abuse of his office in making these payments and retaining the cheques.
>
> . . . . .
>
> The trustee who is an officer of the Court, has no right to make free with creditors' moneys committed to his charge.

However he did not remove the trustee, although he sanctioned the trustee with making the estate good on the inappropriate payment and indicated that his order was without prejudice to the creditors removing the trustee. Fisher J. in doing so observed at p. 53:

> The Court, on an application to remove a trustee for cause, exercises a judicial discretion. The sole question for me to determine in this case is whether there is in the evidence submitted, sufficient cause shewn that the trustee, J.L. Thorne, is unfit to be continued as trustee in the administration of this estate. The estate is a large one, with many important and complicated business problems to solve before the estate can be finally wound up, and while it is the duty of the Court to vindicate the law but in doing so to abstain if possible from injury to those who are vitally, and beneficially interested, to inflict a needless injury on them and vindicate some legal principle should be avoided. Here to transfer the administration of the estate would involve the necessity of a large additional expense, and delay. Therefore, notwithstanding my findings, I will not adopt the extreme course of removing the trustee from office for the following reasons:
>
> (1) It would add to the great expense already incurred in this estate.
>
> (2) The trustee is conversant with the estate, and is in a much better position than a new trustee would be in assisting the Crown authorities in the pending criminal proceedings against N.P. Bryant, and also in the civil actions awaiting trial; and
>
> (3) The creditors at the meeting of December 4, 1922, and the inspectors at the meeting in May, 1923, were not in favour of removing the trustee, and counsel representing Ottawa, Toronto and Montreal creditors urged before me that it the wish of their clients that the trustee should not be removed, but if what has come to light on this application should lead the creditors to change their opinions they have power to do so under the Act. An authorized trustee, as I have pointed out, is an officer of the Court and must administer the estate in his charge in accordance with *The Bankruptcy Act*.

So to in appointing a trustee the Court is exercising a judicial discretion. No one should take too lightly the burdens and responsibility of securing such an appointment. The appointment is not a franchise to make money (although a trustee should be rewarded for its efforts on behalf of the estate) nor to favour one party or one side. The trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate. Miquelon J. in *Re Gauthier Lumber Ltd.* (1960), 1 C.B.R. (N.S.) 127 (C.S. Que.) said at pp. 135-6:

> On ne peut certes pas affirmer que l'intimé a été malhonnête. Par ailleurs, la Cour ne peut non plus dire qu'il a été un gérant impartial, chargé qu'il était par la loi, de protéger les intérêts de tous les créanciers. Les créanciers garantis sont généralement en état de se protéger et leurs intérêts sont assez souvent contraires à ceux des créanciers ordinaires. Ce sont ceux-ci que le syndic représénte d'abord et ils ont droit à ce que la conduite d'un syndic solt au-dessus de tout soupçon.

15 McQuaid J. in *Prince Edward Island v. Bank of Nova Scotia* (1988), 70 C.B.R. (N.S.) 209 (P.E.I. T.D.) reversed on other grounds (1989), 77 C.B.R. (N.S.) 113 (P.E.I. C.A.) had concerns about the propriety of appointing a former privately appointed receiver-manager as trustee. His concerns would appear to be expressed as part of his decision in an obiter fashion when he said at p. 220:

> It is clear that, immediately upon his appointment, the trustee in bankruptcy is in full, complete and exclusive control of the bankrupt business and all of the assets thereof, to the total exclusion of the owner, operator or manager of the business. I think it may be said that those erstwhile functionaries, whatever their capacity might have been, become functus upon that appointment. This would clearly include any receiver-manager who might have been in place at the time of the bankruptcy.
>
> It is the duty of the trustee, who is an officer of the court, to represent impartially the interests of all creditors; he is obligated to hold an even hand as between competing classes of creditors; he must act for the benefit of the general body of creditors; he is not an agent of the creditors, but an administrative official required by law to gather in and realize on the assets of the bankrupt and to divide the proceeds in accordance with the scheme of the *Bankruptcy Act* among those entitled. And perhaps most importantly, he must conduct himself in such a manner as to avoid any conflict, real or perceived, between his interest and his duty.
>
> *While it may not be incompatible with the scheme of the Bankruptcy Act, or, indeed, with the role of the trustee in bankruptcy, the propriety of appointing the former receiver-manager as trustee is a matter of serious import. The two functions are certainly incompatible, if not in actual conflict.*
>
> As in this instance, the receiver-manager is, in fact, the nominee of the major creditor, put into place as the watchdog on behalf of that creditor, essentially to preserve and hopefully to realize upon the assets of the business for the benefit of that creditor albeit as the agent of the company. That is normal, prudent business practice, not to be criticized, and something which happens regularly in the world of commerce.
>
> On the other hand, the trustee, who is in actuality an officer of the court, rather than a single creditor's nominee, must represent all creditors, and ensure that conflicting interests are resolved equitably. He must not only act without interest or bias, but must be clearly perceived to be acting without interest or bias.
>
> That perception may be difficult to maintain when he who yesterday was the man of a single creditor must today act, and be seen to act, as the man of all creditors. (Emphasis added).

As seen by the emphasized words he recognizes that such an appointment may not be incompitable with the BIA or the role of a trustee. It would appear on a reading of the case that McQuaid J. was concerned about there were aspects in which as a receiver-manager representing the interests of a secured creditor the firm in question was not recognizing various aspects which it should have as trustee. For instance he states at pp. 221-2:

> ... It is inconceivable to me that Doane Raymond would not know that Doane Raymond was sitting on a cash deposit representing the assets of the firm whose bankruptcy it was administering.
>
> I find it equally difficult to believe that "the funds realized from the sale by the Receiver [i.e., the corporate entity of Doane Raymond] of the assets of Island Jewellers were paid to the Bank without the participation or consent of the Trustee in Bankruptcy [i.e., the corporate entity of Doane Raymond]". Is the local office that large that the right hand does not know what the left hand is doing?

16 In *Federal Trust Co. v. Frisina* (1976), 20 O.R. (2d) 32 (S.C.) Galligan J. raised the question of perception or appearances as to a court appointed receiver-manager (i.e. one which was appointed by the court and not privately) when he observed at p. 35:

> Whatever may be required of a person whom a Court will appoint as receiver-manager of a property I think that such a person must be reasonably competent to perform the duties entrusted to him and must be disinterested and impartial so as to be able to deal with the rights of all persons with an interest in the property in a fair and even-handed manner. It ought to be remembered that a receiver-manager appointed by the Court under s. 19 of the

> *Judicature Act*, becomes an officer of the Court and is therefore very different from a person appointed manager by a mortgagee in possession. That person is simply the agent of the mortgagee.
>
> I think it follows that not only must the receiver-manager appointed by the Court be impartial, disinterested and able to deal with the rights of all interested parties in a fair and even-handed manner, but he ought to appear to have those qualities.
>
> A good part of the argument on the motion was taken up with a discussion of the relative competence of Geisel and Lousbury. If all else were equal, it would seem to me to be sensible to appoint that person whom the Court thought to be the more competent. In this case, it seems that both have sufficient competency to perform the duties of a receiver-manager, but because of the view I take of the case it is unnecessary for me to weigh the relative competence of them.
>
> The evidence discloses two facts that in my opinion seriously mar the appearance of impartiality and disinterestedness which I think Geisel ought to have if he is to be appointed the receiver-manager. I do not intend to cast aspersions upon him by suggesting that, in fact, he would not act impartially and be disinterested, but I do not think he ought to be appointed if circumstances exist which would raise in the mind of a reasonable and intelligent man a real apprehension that he lacked impartiality and disinterestedness.

However it is important to appreciate that the test here is of a reasonable and intelligent man, i.e. one who is objective and who has been informed of all material facts. However in that case it was determined that the receiver-manager in question, as an officer of the court would not pass muster on such an objective test since he had a close and direct business relationship with the second mortgagee applicant as he owed that trust company five million dollars and further that he owned a building which would be in direct competition for tenants with the building which was the subject of the receivership.

17 Thus there would appear to be healthy objective reasons for scepticism about the impartiality appearances in both *Federal Trust* and *Prince Edward Island, supra*, based on actual financial competition and *Federal Trust* and the incapatibility of simultaneously being involved in several roles in *Prince Edward Island.*

18 I think it instructive to read *Tannis Trading Inc. v. Camco Food Services Ltd. (Trustee of)* (1988), 67 C.B.R. (N.S.) 1 (Ont. S.C.) in conjunction with Dr. Morawetz's annotation found at pp. 2-3 of that report. In that case CCL was an audit client of the trustee's organization, which was found to be "an important and valued relationship" (p. 6). At that same page it was determined that "the claims [of the estate] against CCL ... are crucial to the administration of the estate". Saunders J. went on to say at pp. 6-7:

> It appears that the trustee and the inspectors feel that the trustee has acted impartially and will continue to do so. It is likely that such will be the case. That, however, is not the test. In a situation such as this, the court must consider from an objective point of view whether it would be difficult for the trustee to act with impartiality: see *Re Shaw Co.*, 16 Sask. L.R. 275, 3 C.B.R. 198, [1922] 3 W.W.R. 119, 68 D.L.R. 616 (K.B.). In my opinion, the answer in this particular case is clearly in the affirmative. The trustee is, in effect, suing its own client. On the particular facts, I am of the opinion that there is a potential for a conflict of interest and, perhaps more importantly, there is an appearance of conflict. An unsecured creditor seeks the removal of the trustee. There is no suggestion that the request is not bona fide. In my opinion, in the special circumstances of this case, the trustee ought to stand aside or be replaced.

Dr. Morawetz observed at pp. 2-3:

> In ordering that the trustee should be removed, the court relied on the judgment of the Saskatchewan Court of King's Bench in the case of *Re Shaw Co.*, 16 Sask. L.R. 275, 3 C.B.R. 198, [1922] 3 W.W.R. 119, 68 D.L.R. 616, which in turn, relied on the English case of *Re Lamb*, [1894] 2 Q.B. 805, 64 L.J.Q.B. 71 at 74 (C.A.), and held that the court must consider from an objective point of view whether it would be difficult for the trustee to act with impartiality. The court was of the opinion, that there was a potential for a conflict of interest and, perhaps more importantly, there was an appearance of conflict.

> The judgment in the *Shaw Co.* case is very short, and no reference was made to one of the leading Ontario cases, *Re Bryant, Isard & Co.; Ex parte Higginson* (1923), 24 O.W.N. 597, 4 C.B.R. 41 (S.C.). In that case the court considered the removal of a trustee from office to be an extreme course and refused to remove the trustee because: it would add to the great expense already incurred in the estate; a new trustee would not be as conversant with the estate as the present trustee; and neither the inspectors nor the creditors were in favour of removing the trustee. Although in the *Bryant, Isard* case the court did not remove the trustee, the order was made without prejudice to the rights of the creditors to remove the trustee and appoint another in its place if so advised.

See also *Re Ethier* (1991), 7 C.B.R. (3d) 268 (Ont. Bktcy.) at p. 273.

19 In *Shaw, supra*, it should be noted at p. 199 that the trustee had as some (material) shareholders (and a director) persons who were making large claims in the estate of the bankrupt company. As for *Lamb, supra*, the trustee was a creditor of two estates which were in competition with each other as to ownership of the only asset of value as A.L. Smith L.J. said at pp. 820-1:

> Now, what is the salient point in this case? If a man has a pecuniary interest in the success of one estate which is the creditor of another estate, and he has no pecuniary interest in the success of the other estate, and he is called upon to act for both, it seems to me that a prima facie case is made out that he is placed in a difficulty as regards acting with impartiality between the two. It is obvious — everybody knows it who has any knowledge of life — that when a man has a pecuniary interest, his mind is naturally warped in favour of his own interest. It is human nature, and no one can doubt it. Beyond all question Mr. Gregson has a pecuniary interest as a creditor to the amount of 3,000*l.* in the success of Emerson's estate. As regards Lamb's estate he as a creditor has a pecuniary interest of only 400*l.*, and it is said that Emerson's estate is a creditor of Lamb's estate. Standing in this position between the two estates, can it be said with truth that Mr. Gregson's connection with Emerson's estate is not such as to make it difficult for him to act with impartiality towards Lamb's creditors? This is the real question, and that question my brother Vaughan Williams did not put to himself. If he had done so, I think he would have answered it in the same way as I am now doing. We are not suggesting that Mr. Gregson is not a gentleman of probity — not a word has been said about that — but the question is, whether upon the facts of the case the objection of the Board of Trade to his appointment as trustee of Lamb's estate was a valid objection. In my judgment it was.

20 I think it instructive to recall what Cave J. said in *Re Martin* (1888), 21 Q.B.D. 29 at p. 33:

> The objection which is taken here is the third of those objections, namely, that the connection of this trustee with, or his relation to, the bankrupt or his estate makes it difficult for him to act with impartiality in the interests of the creditors generally. It is not easy to lay down any general rule, and indeed it is a question of fact with regard to which it is, to my mind, impossible to lay down any accurate general rule. Every case must depend more or less upon its circumstances, and, having regard to the expressions in the Act, one must see whether the facts are such as to lead to the conclusion that the trustee's connection with or relation to the bankrupt or his estate makes it difficult for him to act with impartiality.

21 Is there such a problem for Richter in these circumstances? I think not if one looks at the situation well informed and objectively. As Tysoe J. in *Re Western Canada Beverage Corp.* (1993), 22 C.B.R. (3d) 10 (B.C. S.C.) stated at p. 18:

> ... It has become fashionable to allege conflicts of interest but the Court will not act out of fashion.

It should almost go without saying (and would not be said but for the unfortunate wrangling history of this case) that once Richter were appointed trustee it bears allegiance to the creditors of the estate as an officer of the Court. It is not beholden to any of the creditors on an individual (or segregated) basis and certainly not to UBS, Ontario or the ALC Committee. Its loyalty is to the creditors as they are found — be it UBS, Ontario, other creditors represented by the ALC Committee, the Rehabilitator or Liquidator — as a collective group. So long as it does so then it will not have a problem with impartiality or conflict of interest.

22 NOLA submitted in its factum that it recommends the appointment of an independent, impartial trustee, citing at p. 6 thereof:

> See 11 U.S.C. s 101(14) (E). *In re Micro-Time Management Systems Inc.*, 102 B.R. 602 (Bankr. E.D.Mich. 1989) (Bankruptcy trustee held disqualified because of professional relationship with and consultant work for a major creditor of estate); *In re Envirodyne Industries Inc.*, 150 B.R. 1008, 1019 (Bankr. N.D. Ill. 1993) ("The key issue is whether the [allegedly disinterested] firm's interest in maintaining the client relationship with Salomon, the substantial party-in-interest, could impair the firm's ability to act with impartiality, even unconscious impartiality.")

This was responded to by American counsel (Chaim Fortgang) for the ALC Committee who faxed a submission as follows:

> In ¶17 of the factum of [NOLA], counsel cites two U.S. Cases for the proposition that under U.S. Law, representation of a creditors' Committee would be a basis to disqualify a professional from acting as trustee or as a professional for a trustee. The cases cited do not so hold at all. They stand for the proposition that prior representation of a *target* in a potential litigation against the target would disqualify a professional from acting on behalf of the estate, because he could not be expected to vigorously pursue a former client. The law in the U.S. clearly permits counsel for a creditors' committee to become counsel to a Trustee after the creditors' committee has been disbanded.
>
> In a case remarkably similar to the instant situation a contested secured claimant objected to counsel for the creditors' committee functioning as counsel for the trustee. It was alleged inter alia, by the contested secured creditor, that counsel for the creditors' committee advised against a settlement of litigation involving subordinating the claim of the secured creditor proposed by the secured creditor and thus was not disinterested.
>
> The court noted that disqualification motions are often used for purely tactical reasons and the impending conflict between the secured creditor and counsel was not a basis for disqualifying counsel for the trustee.
>
> The objecting party argued that the bankruptcy Code intended to disqualify any person who in the slightest degree had some interest or relationship that would color the independent and impartial attitude required by the Code. Thus counsel should be disqualified. The court disagreed and said "It is *clear* that a law firm's prior representation of a Creditors' committee does not disqualify it from representing a trustee in bankruptcy." In a REA Holding Corporation 4 BCD 1249 (Bkptcy S.D.N.Y. 1979). In re W.T. Grant 4 B.R. (53 Bkptcy S.D.N.Y. 1980).
>
> The Court further observed "Indeed, their previous familiarity with this case through their preparations on behalf of the creditors' committee will station this firm in a position where further delay and expense should be eliminated which might otherwise have been incurred if another law firm were brought into this case by the trustee to investigate the underlying events and transactions."
>
> Counsel to NOLA apparently does not appreciate the distinction between having represented an individual creditor with an adverse interest which may be a basis for disqualification and having represented a creditors' committee (which *is* the estate) which *can not* be a basis for disqualification.

23 I have a number of varying observations concerning these submissions. While I appreciate that there are foreign elements in this matter, including American elements, what we have here is the nomination and appointment of a trustee for a bankrupt estate in Canada pursuant to BIA. That process if governed by Canadian law and a Canadian statute. That is not to say that judges of our court are chauvinistic or xenophobic. To the contrary, we will consider foreign jurisprudence in context and specifically where there appears to be a gap in our jurisprudence. As I said however in another case: *Re Cadillac Fairview*, unreported, released Feb. 9, 1995 at p. 7 for somewhat different purposes:

> Recognizing that this is a *CCAA* proceeding which will be governed by Canadian law, perhaps it would be highly desirable for Canadian counsel for all stakeholders to ensure that their clients (and their non-Canadian counsel) appreciate some of the differences between our reorganization law and procedures and that with which they may be more familiar.

When I speak of taking foreign cases in context, one of the most obvious aspects is to consider whether foreign statute law is substantially different in essential elements. However it may be appropriate, keeping in mind that the U.S. legislation has a detailed overwhelming impact on these American cases to review how that jurisdiction views potential conflict situations.

24 Further I would observe that it is unfortunate that it was left up to this court to determine that *REA, supra*, had been ruled upon by the U.S. District Court (S.D.N.Y.) on January 14, 1980 (2 B.R. 733) and the case remanded back to the Bankruptcy Court for reconsideration (as to which see Bankr. L.Rep. (CCH) P67 483, 22 Collier Bankr. Cas. (MB) 1051 (Bankr. S.D.N.Y. 1980)). However it appears to me that this appellate decision was based upon a question of failure to disclose potential conflict of interest and not upon the fact of co-counsel's prior involvement with the creditors' committee in superseded chapter XI proceedings which had been found by the Bankruptcy Court not to conflict with its present role in the bankruptcy proceedings. The prior involvement with that creditors' committee did not appear to trouble the appellate court. As Galgay J. (the bankruptcy judge) said at p. 1253:

> The law firm served as counsel to the Official Creditors' Committee during the REA Chapter XI proceeding but at no point in the REA proceeding did Whitman & Ransom represent any particular railroad or airline. The role of counsel to an official creditors' committee is not adverse to or in conflict with the role of counsel to a bankruptcy trustee if liquidation should subsequently ensue.

25 In *Grant, supra*, decided a month after the release of the appellate decision in *REA*, Galgay J. said at pp. 82-3:

> ... It is also asserted that WGM's role as co-counsel to the Chapter XI Creditors' Committee constitutes a disqualification factor.
>
> [34] This Court recently had the opportunity to review the factors to be considered in entertaining a motion to disqualify attorneys for a trustee in re REA Holding Corp., 4 Bankr.Ct.Dec. 1249 (S.D.N.Y. 1979). The disqualification of both a trustee and his co-counsel was sought upon alleged conflicts of interest which prevented them from adequately representing the interests of the bankrupt estate. Among the alleged conflicts cited was the fact that the counsel for the trustee had represented the Creditors' Committee during the Chapter XI case that preceded an adjudication in bankruptcy and the retention of such counsel by the trustee. In considering that motion I was guided by the teachings of Emle Industries, Inc. V. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973). Emle admonishes courts to recognize their "responsibility to preserve a balance, delicate though it may be, between an individual's right to his own freely chosen counsel and the need to maintain the highest ethical standards of professional responsibility." 4 Bankr.Ct.Dec. at 1253 (citation omitted). Additionally, I noted the difficulties involved in evaluating the claims asserted in the perspective of the guidelines provided by United States v. Standard Oil Company, 136 F.Supp. 345, 367 (S.D.N.Y. 1955), which states:
>
> When dealing with ethical principles, it is apparent that we cannot paint with broad strokes. The lines are fine and must be so marked. Guideposts can be established when virgin ground is being explored, and the conclusion in a particular case can be reached only after painstaking analysis of the facts of precise application of precedent.
>
> I concluded and reaffirm that "(t)he role of counsel to an official creditors' committee is not adverse to or in conflict with the role of counsel to a bankruptcy trustee if liquidation should subsequently ensue." 4 Bankr.Ct.Dec. at 1253.

In the appeal decision of *Re W.T. Grant Co. 1*, 699 F.2d 599 (2d. Cir. N.Y. 1983) Friendly J. in dismissing the appeal said at p. 613:

> We see no reason to disagree with Judge Galgay's reaffirmation, 4 B.R. at 83, of his conclusion in *In re REA Holding Corp.*, 4 Bankr.Ct.Dec. 1249, 1253 (Bankr.S.D.N.Y. 1979), vacated and remanded on other grounds, 2 B.R. 733 (S.D.N.Y. 1980), that "[t]he role of counsel to an official creditors' committee is not adverse to or in conflict with the role of counsel to a bankruptcy trustee if liqui dation should subsequently ensue." WGM's previous representation of one or more of the banks or their subsidiaries in unrelated matters is scarcely a ground for disqualification. There is no contention that WGM regularly served any of the banks in bankruptcy cases, and their having done so in one or more unrelated cases would not prevent a vigorous assertion of the claims of the subordinated debentureholders against the banks. On an issue of this sort particular weight should be given to the conclusion of the Bankruptcy Judge, who had abundant opportunities to observe the activities of WGM over many months and concluded "that the Trustee's attorneys have served him and the creditors of the bankrupt estate with vigor, objectivity and independence."

26 I think it appropriate to take a look at the fact situations in *Micro-Time* and *Envirodyne, supra.* In both there would appear to be a problem with ongoing relationships of significance with creditors who may be adverse in interest to the bankrupt estate. In *Envirodyne* at pp. 1018-9 Schwartz C.J. said:

> ... Judge Schmetterer based the American Printers decision, in part, on the reasoning in re Amdura Corp., 121 B.R. 862 (Bankr.D.Colo. 1990). In Amdura, a firm seeking to be employed as debtor's counsel represented the debtor's primary secured lender on an ongoing basis in matters unrelated to the bankruptcy case. The debtor commenced the bankruptcy case as result of its inability to reach an accommodation with the lender. A partner of the firm testified that other counsel would have to be employed to investigate and prosecute a potential suit against the lender because the firm would not "bite the hand that feeds it." In re Amdura, 121 B.R. at 867. During the February 10 hearing, Mr. Millstein argued that the facts in this case do not justify disqualifying Cleary, Gottlieb because, unlike the creditor in Amdura, Salomon is not the primary secured creditor in this case. Mr. Millstein apparently believes that the relative size of the creditor's claim vis-a-vis the estate's total debt is necessarily relevant to whether Debtors' counsel may continue to maintain a relationship with that creditor without violating the tests of Sec. 327(a).
>
> Counsel's argument is not persuasive. The key issue is whether the firm's interest in maintaining the client relationship with Salomon, a substantial party-in-interest, could impair the firm's ability to act with impartiality, even unconscious impartiality. The Amdura opinion correctly focuses on the law firm's ability to act impartially as the debtor's representative in all matters. The court in Amdura does not consider the relative size of the creditor's claim in a vacuum, but in conjunction with the creditor's status as a major client of the firm. Amdura, 121. B.R. at 869.
>
> The court must remain cognizant of the fact that Salomon is an insider, a 64% owner, and a substantial creditor of the Debtor Envirodyne. The negotiation of a plan of reorganization likely will necessitate negotiation with Salomon, a "substantial client" of Cleary, Gottlieb. Given these facts in this case, the Debtors' interests and the interests of the creditor body as a whole are not best represented at a negotiation table by a lawyer who faces a substantial client on the other side. (FN14)

27 In *Micro-Time* Rhodes J. stated at pp. 607-8:

> [4] The facts in this case are essentially the same as those in re Gray, 64 B.R. 505 (Bankr.E.D.Mich.1986). Although the trustee and the accountants for the trustee are not prepetition creditors of the estate, Bohl's work for Comerica does present a potential, if not an actual, conflict of interest. Comerica was a major creditor of Micro-Time. The amount of its debt was very strongly disputed and there had been an adverse relationship between the principal of the debtor (Kirkland) and Comerica. When the trustee was appointed, it was clear that a successful resolution of Micro-Time's dispute with Comerica would be a necessary prerequisite to any successful chapter 11 reorganization of Micro-Time. Any hint of any prior or ongoing relationship between Comerica and Bohl would create at least the

> appearance of impropriety. This is sufficient under the case law and section 101(13) to disqualify John C. Bohl, Jr. as trustee and Parker, Bohl & Associates as accountants for the trustee.
>
> Like the accounting firm in Gray, Bohl did not disclose his potentially disqualifying relationship with Comerica in either the trustee's declaration of disinterest or in the affidavit he submitted when he applied for approval to appoint Parker, Bohl & Associates as accountants for the trustee. Instead, Bohl swore in his affidavit that "To the best of my knowledge neither our firm nor any member thereof ... holds any interest adverse to the matters upon which we are to be engaged. Neither I nor any member of my firm has any relationship or interest in the above named debtor or any other parties of interest therein." These statements were false; Bohl had an ongoing relationship with Comerica.

Micro-Time and *Envirodyne* illustrate quite different concerns than the situation prevailing here. There is no suggestion of an ongoing relationship with the ALC Committee side which would possibly influence Richter from its neutral, impartial role as trustee, acting in the best interests of the estate.

28 Thus given that Richter is the preference of the petitioning creditor (and of the ALC Committee which appears to represent apparently unchallenged major creditors); it has the advantage of being quite familiar with and knowledgeable of the situation from its prior involvement as forensic investigator; the proprietary claims have been acknowledged as complex and difficult to describe; those advancing proprietary claims have had the advantage of advice from their own forensic investigators; it does not appear on the material before me that Richter has any ongoing relationship with any creditor and particularly not with any creditor or claimant which may have an adverse position to the estate, it would not seem to me appropriate to disqualify Richter as the nominee for trustee in place of Deloitte in the petition by UBS, but rather it would seem that Richter was adequately qualified to act as trustee. This result would avoid the estate taking a significant period of time to catch up with potential slippage exposure if the litigation heats up quickly and a duplication of expense for another firm to come to the same position as Richter now is on the learning curve. On a practical basis, given what is at stake in relation to the funds already expended as to Richter's investigation, I do not see this duplication as a major factor but certainly it is a reasonable factor to consider. To their credit the Rehabilitator and the Liquidator have acknowledged that they in essence expect a fair fight in the proprietary claim situation against a trustee which is adequately and well prepared; they were not opposing Richter on the basis of knocking out a worthy opponent. The Liquidator had no concern about Richter being hired as a consultant by any trustee; I understand the Rehabilitator's attitude to have been the same. They were concerned, I take it, that Richter was beholden to the ALC Committee and the creditors it represented. As discussed, that relationship is at an end and Richter must be indifferent to all creditors, whomsoever they may be. Certainly this aspect of neutrality must be demonstrated throughout the trusteeship, including any s. 163 examinations.

29 In the result I see no impediment to Richter replacing Deloitte as the nominee for trustee in the UBS petition order accordingly.

30 As a postscript I would observe that my secretary and the manager of the Commercial List/Bankruptcy Office were bombarded with calls yesterday and today as to when my decision was going to be released and why it had not been then released. Counsel have advised that they had not done so. It may be that these enquiries were made by persons who were trading in or arbitraging claims. Such behaviour is not only inappropriate, but also counterproductive (looking at their self interest of having the decision as early as possible).

Motion granted.

End of Document

TAB 6

2012 ONCA 404
Ontario Court of Appeal

Crystallex International Corp., Re

2012 CarswellOnt 7329, 2012 ONCA 404, 216 A.C.W.S. (3d) 550, 293 O.A.C. 102, 4 B.L.R. (5th) 1, 91 C.B.R. (5th) 207

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

And In the Matter of a Plan of Compromise or Arrangement of Crystallex International Corporation

D. O'Connor A.C.J.O., R.A. Blair, Alexandra Hoy JJ.A.

Heard: May 11, 2012
Judgment: June 13, 2012 *
Docket: CA C55434, C55435

Proceedings: affirming *Crystallex International Corp., Re* (2012), 2012 ONSC 538, 2012 CarswellOnt 968, 89 C.B.R. (5th) 303 (Ont. S.C.J. [Commercial List]); additional reasons at *Crystallex International Corp., Re* (2012), 2012 CarswellOnt 9479, 2012 ONCA 527 (Ont. C.A.)

Counsel: Richard B. Swan, S. Richard Orzy, Derek J. Bell, Emrys Davis for Appellant, Computershare Trust Company of Canada
Andrew J.F. Kent, Markus Koehnen, Jeffrey Levine for Respondent, Crystallex International Corporation
Barbara L. Grossman for Tenor Capital Management Company, L.P. and Affiliates
Robert Frank for Forbes & Manhattan Inc., Aberdeen International Inc.
David Byers for Monitor Ernst & Young Inc.

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.e Jurisdiction
XIX.1.e.ii Single judge

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.vii Extension of order

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.h Miscellaneous

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by creditors

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.4 Appeals

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency — Companies' Creditors Arrangement Act — General principles — Jurisdiction — Single judge

Section 11.2 of the Companies Creditors Arrangement Act does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Appeals

Corporation moved for approval of DIP financing and management incentive plan against wishes of noteholders — Supervising judge found there could be no meaningful recovery, and therefore no successful restructuring, without financing of arbitration which was corporation's biggest asset — Appeal by noteholders dismissed — Supervising judge was in the best position to balance the interests of all stakeholders — Appellate court should not interfere where question is one of weight to be given to particular factors rather than failure to consider factors or correctness.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by creditors

C Corp. sought court approval for agreement with T LP providing debtor in possession (DIP) financing — Agreement was opposed by C's noteholders who proposed their own DIP financing — Agreement with T LP approved — Appeal by noteholders dismissed — Supervising judge correct in finding agreement was not "plan of arrangement" or "compromise" requiring vote.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous

C Corp. sought court approval for agreement with T LP providing management incentive plan (MIP) — Agreement was opposed by C's noteholders who had own proposed plan — Agreement with T LP approved — Appeal by noteholders dismissed — Supervising judge correctly held that independent committee had applied business judgment.

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Air Canada, Re (2004), 2004 CarswellOnt 469, 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]) — considered

Calpine Canada Energy Ltd., Re (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 415 A.R. 196, 33 B.L.R. (4th) 68 (Alta. Q.B.) — referred to

Calpine Canada Energy Ltd., Re (2007), 35 C.B.R. (5th) 27, 410 W.A.C. 25, 417 A.R. 25, 2007 ABCA 266, 2007 CarswellAlta 1097, 80 Alta. L.R. (4th) 60, 33 B.L.R. (4th) 94 (Alta. C.A. [In Chambers]) — referred to

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) — distinguished

Computershare Trust Co. of Canada v. Crystallex International Corp. (2009), 65 B.L.R. (4th) 281, 2009 CarswellOnt 7997 (Ont. S.C.J. [Commercial List]) — referred to

Computershare Trust Co. of Canada v. Crystallex International Corp. (2010), 70 B.L.R. (4th) 45, (sub nom. *Crystallex International Corp. v. Crystallex Corp.)* 263 O.A.C. 137, 2010 CarswellOnt 3374, 2010 ONCA 364 (Ont. C.A.) — referred to

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Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

Imperial Oil Ltd. v. R. (2006), (sub nom. *Imperial Oil Ltd. v. Minister of National Revenue)* 353 N.R. 201, [2007] 1 C.T.C. 41, 2006 SCC 46, 2006 CarswellNat 3176, 2006 CarswellNat 3177, (sub nom. *Imperial Oil Ltd. v. Canada)* 2006 D.T.C. 6660 (Fr.), (sub nom. *Imperial Oil Ltd. v. Canada)* 2006 D.T.C. 6639 (Eng.), (sub nom. *Inco Ltd. v. Canada)* 273 D.L.R. (4th) 450, (sub nom. *Imperial Oil Ltd. v. Canada)* [2006] 2 S.C.R. 447 (S.C.C.) — considered

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Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

Timminco Ltd., Re (2012), 2012 CarswellOnt 1466, 2012 ONSC 948, 95 C.C.P.B. 222, 86 C.B.R. (5th) 171 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Bankruptcy Code, 11 U.S.C.
Chapter 15 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 6(1) — referred to

s. 11 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4)(a) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4)(d) [en. 2005, c. 47, s. 128] — considered

s. 11.5(1) [en. 1997, c. 12, s. 124] — considered

Interpretation Act, R.S.C. 1985, c. I-21
s. 14 — considered

APPEALS from judgment reported at *Crystallex International Corp., Re* (2012), 2012 ONSC 538, 2012 CarswellOnt 968, 89 C.B.R. (5th) 303 (Ont. S.C.J. [Commercial List]) and *Crystallex International Corp., Re* (2012), 2012 ONSC 2125, 2012 CarswellOnt 4577 (Ont. S.C.J. [Commercial List]), granting orders approving agreement for debtor in possession financing, management incentive plan, extension of stay, and approval of actions of Monitor.

***Alexandra Hoy J.A.*:**

I. Overview

1 The primary issue in these appeals is the scope of financing the supervising judge can or should approve, without the sanction of creditors, while a company is under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

2 The respondent Crystallex International Corporation ("Crystallex") is a Canadian mining company. Its principal asset was the right to develop Las Cristinas in Venezuela, which is one of the largest undeveloped gold deposits in the world. Crystallex obtained this right through a contract with the Corporacion Venezolana de Guayana (the "CVG"), a state-owned Venezuelan corporation. On February 3, 2011, after Crystallex spent over $500 million on developing Las Cristinas, the CVG sent Crystallex a letter to "unilaterally rescind" the contract for reasons of "expediency and convenience". There is no suggestion in these proceedings that the rescission was due to any mismanagement by Crystallex.

3 As a result of the cancellation of the contract, Crystallex was unable to pay its $100 million in senior 9.375 per cent notes due December 23, 2011 (the "Notes"). It sought and, on December 23, 2011 obtained, protection under the CCAA.

4 At present, Crystallex's only asset of significance is an arbitration claim for US $3.4 billion against the government of Venezuela in relation to the cancellation of the contract. The arbitration claim is the "pot of gold" in the CCAA proceeding.

5 The appellant Computershare Trust Company of Canada, in its capacity as Trustee for the holders of the Notes (the "Noteholders"), appeals, with leave, three orders made by the supervising judge in the CCAA proceeding: (i) the January 20, 2012 CCAA Bridge Financing Order (with reasons released January 25, 2012 and reported at 2012 ONSC 538 (Ont. S.C.J. [Commercial List]))) (the "Bridge Financing Reasons")) authorizing Crystallex to obtain bridge financing of $3.125 million (the "Bridge Loan") from the respondent Tenor Special Situations Fund, L.P. ("Tenor L.P."); (ii) the April 16, 2012 CCAA Financing Order authorizing Crystallex to obtain $36 million of what the supervising judge characterized as Debtor in Possession ("DIP") financing from Tenor Special Situation Fund I, LLC ("Tenor") (the "Tenor DIP Loan"); and (iii) the April 16, 2012 Management Incentive Plan Approval Order approving a Management Incentive Plan ("MIP") designed to ensure the retention of key executives until the arbitration is completed. The supervising judge's reasons for the CCAA Financing Order and Management Incentive Plan Approval Order are reported at 2012 ONSC 2125 (Ont. S.C.J. [Commercial List])) (the "DIP Financing Reasons").

6 Among other conditions, the Tenor DIP Loan, due December 31, 2016, entitles Tenor to 35 per cent of the net proceeds of the arbitration in addition to interest, provides governance rights that may continue after Crystallex exits from CCAA protection, and requires Tenor's approval to a range of options that might customarily be offered to unsecured creditors in seeking to negotiate a plan of compromise or arrangement.

7 Substantially all of the creditors opposed the approval of the Bridge Loan, the Tenor DIP Loan and the MIP. Crystallex represents that it hopes to negotiate a plan of arrangement or compromise with the Noteholders and other creditors before the current stay until July 30, 2012 expires.

8 The bulk of the $36 million Tenor DIP Loan comprises financing to pursue the arbitration claim, which may continue after the period of CCAA protection.

II. The Legislative Framework

9 The CCAA was amended effective September 18, 2009 to add the following provisions regarding the grant of a charge to secure financing required by the debtor:

> **Interim financing**
>
> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject

to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

. . .

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any. [1]

Prior to the enactment of these provisions, the court relied on its general authority under the CCAA to approve DIP financing: see Lloyd W. Houlden, Geoffey B. Morawetz & Janis P. Sarra, *The 2012 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2011), at p. 1175.

III. The Background

A. Events Prior to the CCAA Filings

10 Crystallex has filed a Request for Arbitration pursuant to the Canada-Venezuela Bilateral Investment Treaty, claiming $3.4 billion plus interest for the loss of its investment in Las Cristinas. The hearing of the arbitration is scheduled for November 11, 2013.

11 Crystallex's most significant liability is its debt to the Noteholders. In addition to amounts owed to the Noteholders, Crystallex has other liabilities of approximately CAD $1.2 million and approximately US $8 million.

12 The current Noteholders are hedge funds, some of whom purchased Notes after Venezuela announced its intention to expropriate Las Cristinas at prices as low as 25 cents on the dollar.

13 The relationship between Crystallex and the current Noteholders is hostile. Crystallex and the Noteholders have been in litigation since 2008. Prior to the maturity date of the Notes, the Noteholders twice, unsuccessfully, brought court proceedings against Crystallex alleging that an event had occurred which accelerated Crystallex's obligation to pay the Notes. Those proceedings were also heard by the supervising judge: see *Computershare Trust Co. of Canada v. Crystallex International Corp.* (2009), 65 B.L.R. (4th) 281 (Ont. S.C.J. [Commercial List]), aff'd 2010 ONCA 364, 263 O.A.C. 137 (Ont. C.A.); and *Computershare Trust Co. of Canada v. Crystallex International Corp.*, 2011 ONSC 5748 (Ont. S.C.J. [Commercial List]).

B. Commencement of Proceedings under the CCAA and Chapter 15

14 On December 22, 2011, one day prior to the maturity of the Notes, Crystallex and the Noteholders filed competing CCAA applications. The Noteholders' application contemplated that all existing common shares would be cancelled, an equity offering would be undertaken, and if, or to the extent, the equity proceeds were insufficient to pay out the Noteholders, the Notes would be converted to equity.

15 Crystallex sought authority to file a plan of compromise and arrangement, the authority to continue to pursue the arbitration in Venezuela, and the authority to pursue all avenues of interim financing or a refinancing of its business and to conduct an auction to raise financing. In his supporting affidavit sworn December 22, 2011, Robert Fung, Crystallex's Chairman and Chief Executive Officer, indicated that Crystallex wished to have all claims stayed against it until the arbitration settled or Crystallex realized the arbitration award. Crystallex had already received an unsolicited offer of financing from Tenor Capital Management.

16 It was (and is) expected that, if the arbitration is successful and the award is collected, there will be more than enough to pay the creditors and a significant amount will be available to shareholders.

17 On December 23, 2011, the supervising judge made an order granting Crystallex's CCAA application (the "Initial Order"). In his reasons released December 28, 2011, he explained that the Noteholders' proposal was not a fair balancing of the interests of all stakeholders: 2011 ONSC 7701 (Ont. S.C.J. [Commercial List]), at para. 26. The Noteholders did not appeal the Initial Order.

18 Crystallex obtained an order under chapter 15 of the United States Bankruptcy Code from the United States Bankruptcy Court for the District of Delaware, among other things giving effect to the Initial Order in the United States as the main proceeding.

C. Crystallex Develops a DIP Auction Process

19 Paragraph 12 of the Initial Order authorized Crystallex to pursue all avenues of interim financing or a refinancing of its business or property, subject to the requirements of the CCAA and court approval, to permit it to proceed with an orderly restructuring. It further provided:

> Without limiting the foregoing, the Applicant may conduct an auction to raise interim or DIP financing pursuant to procedures approved by the Monitor and using such professional assistance as the Applicant may determine with the consent of the Monitor. If such approved procedures are followed to the satisfaction of the Monitor then the best offer as determined by the Applicant pursuant to the approved procedures shall be afforded the protection of the *Soundair* principles so that it will be too late to make topping offers thereafter and such offers will not be considered by this Court.

20 Crystallex hired an independent financial advisory firm, Skatoff & Company, LLC, and developed a set of procedures to govern the solicitation of bids to provide financing to Crystallex. The Monitor, Ernst & Young Inc., approved the bid procedures. The bid procedures indicated that Crystallex's objective was to obtain financing of not less than $35 million, net of costs, that, on completion of the CCAA and U.S. Chapter 15 reorganization proceedings, would roll into financing maturing not sooner than December 31, 2014. The bid deadline was February 1, 2012.

D. The Bridge Loan

21 On January 20, 2012, the supervising judge considered competing proposals from Tenor L.P. and the Noteholders to provide bridge financing. Tenor L.P. offered $3.125 million with interest at 10 per cent per annum. The Noteholders offered $3 million with interest at 1 per cent per annum.

22 The board of Crystallex, taking into account advice received from Mr. Skatoff, recommended the Tenor L.P. offer. Mr. Skatoff was concerned that the Noteholders' objective may have been to defeat the larger DIP financing process

so that they could ultimately impose financing terms on Crystallex. It was also his view that Crystallex should avoid entering into an important financial relationship with a hostile party.

23 The supervising judge approved Tenor L.P.'s offer.

E. The Noteholders Object to the DIP Auction Process

24 On January 20, 2012, the Noteholders brought a cross-motion to modify the DIP auction process then underway, which they severely criticized. They objected to the amount sought, the term, and the lender back-end entitlement a successful DIP lender could acquire. In their view, Crystallex was inappropriately seeking financing in excess of amounts required until a compromise or plan of arrangement could be arrived at between Crystallex and its creditors. Given their existing position in Crystallex, the Noteholders also objected to being required to sign a non-disclosure agreement containing a standstill provision in order to be a qualified bidder.

25 The supervising judge held that if the Noteholders wished to be considered as a qualified bidder, they would have to sign a non-disclosure agreement: Bridge Financing Reasons, at para. 27. As to their other concerns, he wrote, at para. 29:

> In my view these objections are premature and it is not necessary for me to consider their strength at this stage. The time for filing bids from qualified bidders has not yet expired and what bids will be received is unknown. It is when a successful bidder has been chosen and the DIP facility is before the court for approval that these issues raised by the Noteholders would be more appropriately dealt with. Until then, there is no factual foundation for judgment to be passed on the bid procedures for the DIP facility for which Crystallex will seek approval.

F. Competing DIP Financing Offers: The Tenor DIP Loan and the Noteholders' Offer

26 The bidders who responded to the request for DIP financing included three hedge funds that hold approximately 77 per cent of the Notes and Tenor.

27 Those hedgefund Noteholders proposed a loan of $10 million with a simple interest rate of 1 per cent repayable on October 15, 2012.

28 The supervising judge described Tenor's proposed terms in the DIP Financing Reasons:

> [23] The Tenor DIP facility contains the following material financial terms:
>
> (a) Tenor will advance $36 million to Crystallex due and payable on December 31, 2016. This period for the loan is based on Crystallex's arbitration counsel's assessment of the likely timing of a decision from the arbitral tribunal and collection of the award.
>
> (b) The advances will be in four tranches, being $9 million upon execution of the loan documentation and approval of the facility by court order in Ontario, the second being $12 million upon any appeal of the Ontario court order approving the facility being dismissed and upon a U.S court order approving the facility, the third being $10 million when Crystallex has less than $2.5 million in cash and the fourth being $5 million when Crystallex again has less than $2.5 million in cash.
>
> (c) The loans are to be used to (i) repay an interim bridge loan of $3.25 million advanced by Tenor with court approval of January 20, 2012 and payable on April 16, 2012, (ii) fees and expenses in connection with the facility, (iii) general corporate expenses of Crystallex including expenses of the restructuring proceedings and of the arbitration in accordance with cash flow statements and budgets of Crystallex approved by Tenor from time to time.
>
> (d) Crystallex will pay Tenor a $1 million commitment fee.

(e) $35 million of the loan amount will bear PIK interest (payment in kind, meaning it is capitalized and payable only upon maturity of the loan or upon receipt of the proceeds of the arbitration) at the rate of 10% per annum compounded semiannually.

(f) Tenor will receive additional compensation equal to 35% of the net proceeds of any arbitral award or settlement, conditional upon the second tranche of the loan being advanced. Net proceeds of the award or settlement is defined as the amount remaining after payment of principal and interest on the DIP loan, taxes and proven and allowed unsecured claims against Crystallex, including the noteholders, the latter of which will have a special charge for the unsecured amounts owing. Alternatively, Tenor can convert the right to additional compensation to 35% of the common shares of Crystallex. This conversion right is apparently driven by tax considerations.

[24] The Tenor DIP facility also provides for the governance of Crystallex to be changed to give Tenor a substantial say in the governance of Crystallex. More particularly:

(a) Crystallex shall have a reduced five person board of directors, being two current Crystallex directors, two nominees of Tenor and an independent director selected by agreement of Crystallex and Tenor.

(b) The independent director shall be chair of the board of directors and shall not have a second-casting or tie-breaking vote.

(c) The independent director shall be appointed a special managing director and shall have all the powers of the board of directors to (i) the conduct of the reorganization proceedings in Canada and in the U.S. and the efforts of Crystallex to reorganize the pre-filing claims of the unsecured creditors, (ii) any matters relating to the rights of Crystallex and Tenor as against the other under the facility, (iii) the administration of the MIP to the extent not otherwise delegated to the bonus pool committee under the MIP, and (iv) to retain any advisor in respect of these matters. The special manager shall first consult with a non-board advisory panel, consisting of the three Crystallex directors who will step down from the board, and consider in good faith their recommendations.

(d) With respect to matters that may not at law be delegable to the special managing director, he will be required to obtain board approval. If the Tenor nominees use their votes to block that approval, Tenor will forfeit its 35% additional compensation.

[25] The Tenor DIP facility contains proscribed rights of Tenor in the event of default. Tenor may seize and sell assets other than the arbitration proceeding (i.e. any cash and unsold mining equipment). It may not sell the arbitration claim. If there is a default before any arbitration award, Tenor would have the right to apply to court to have the Monitor or a Canadian receiver and manager appointed to take control of the arbitration proceedings. If such application were not granted, Tenor would be entitled to exercise the rights and remedies of a secured creditor pursuant to an order, the loan documentation or otherwise at law.

29 Mr. Skatoff recommended, and the board of Crystallex agreed, to accept the Tenor DIP Loan. Mr. Skatoff indicated, in an affidavit sworn March 20, 2012, that he had recommended that the board reject the Noteholders' offer of a $10 million loan for 6 months because Crystallex could not be assured that it could borrow the balance of the required funds at the expiry of that period on the same terms as the Tenor DIP Loan.

G. The Noteholders' Further, Competing Offer to Allay Mr. Skatoff's Concerns

30 In his affidavit on behalf of the Noteholders, sworn March 27, 2012, Mr. Mattoni responded to Mr. Skatoff's concern by committing that the Noteholders would be prepared to,

... provide financing to Crystallex on the same terms as the [Tenor DIP Loan], in the event that prior to October 1, 2012, the Court orders that such long-term financing is appropriate and necessary. The Noteholders would reserve

> their complete and unfettered ability as creditors to continue to oppose stay extensions or attempts to secure such long-term financing outside of a Plan of compromise (including, specifically, financing to the extent contemplated by the Proposed Loan), but they will provide it if it is ordered by the Court on the same basis as currently proposed with Tenor...

H. The Noteholders' Proposed Plan

31 Prior to the April 5, 2012 hearing, the Noteholders proposed a plan to indicate a good faith intention to bargain. They did not seek approval of this proposed plan at the April 5, 2012 hearing.

32 The plan's terms included that the Noteholders would provide a $10 million loan on the terms described above; exchange their debt for approximately 58 per cent of the equity; provide $35 million to Crystallex in exchange for 22.9 per cent of the equity; and provide incentives to management at a lesser level than the MIP. Their proposed plan left approximately 14 per cent of the equity for the existing shareholders.

I. The Management Incentive Plan

33 The Noteholders had criticized the independent directors of Crystallex as not being sufficiently independent. As a result, the independent directors of Crystallex comprising the compensation committee retained Jay Swartz, a partner of Davies Phillips Vineberg, to determine, from the perspective of an independent director, what an appropriate MIP would be. He in turn retained an independent national executive compensation consulting firm to provide expert advice. Mr. Swartz opined that the overall compensation proposal for the establishment of the bonus pool for the benefit of Crystallex's management was reasonable in the circumstances. The independent directors of Crystallex comprising the compensation committee approved the MIP.

34 At para. 102 of the DIP Financing Reasons, the supervising judge described the MIP:

> In sum, a pool of money, consisting of up to 10% of the net proceeds of the arbitration up to $700 million and 2% of any further net proceeds, after all costs and charges, including the amounts owing to noteholders, is to be set aside and money in this pool may be paid to the beneficiaries of the MIP, depending on the determination of an independent committee. The amounts to be allocated to participants by the compensation committee are discretionary and could be nil. No one will be entitled to any particular amount. Members of the compensation committee will not be eligible for any payments.

35 The MIP sets out a number of factors to be considered by the compensation committee in exercising its discretion. They include the amount and speed of recovery, the amount of time and energy expended by the individual, and the opportunity cost to the individual in staying with Crystallex.

36 In the view of the Noteholders, the MIP is too generous. They proposed that management receive 5 per cent through an equity participation in any after tax award. They also took issue with the range of persons eligible under the MIP.

J. The April 5, 2012 motion

37 On April 5, 2012, Crystallex sought orders approving, among other things, the Tenor DIP Loan and the MIP. The Noteholders as well as Forbes & Manhattan Inc. and Aberdeen International Inc., creditors owed approximately $2.5 million by Crystallex, opposed both the Tenor DIP Loan and the MIP. The one shareholder who attended opposed the MIP.

38 The supervising judge approved the Tenor DIP Loan and the MIP.[2] He also extended the stay until July 30, 2012.

K. Events since April 5, 2012

39 Tenor made the first, $9 million advance under the Tenor DIP Loan. The Bridge Loan was repaid out of the first advance.

40 At the hearing of this appeal, the Monitor advised that Crystallex would require further funds before the anticipated release of this court's decision. Crystallex accepted Tenor's offer to advance a further $4 million to Crystallex, on the same terms as the first, $9 million tranche of the Tenor DIP Loan. Accordingly, this further advance does not entitle Tenor to participate in any arbitration proceeds, or trigger any change in the governance of Crystallex. If the Noteholders' appeal succeeds, the additional amounts advanced by Tenor are, like the first tranche, to be immediately repaid with interest at the rate of 1 per cent per annum, and the Noteholders shall fund the repayment. No commitment fee is payable in respect of this additional advance.

IV. The Supervising Judge's Reasons

A. The Bridge Loan

41 The supervising judge noted, at para. 5 of the Bridge Financing Reasons, that Tenor L.P.'s bridge financing proposal was "really short-term DIP financing". With respect to the boards' recommendation — based on Mr. Skatoff's advice — that Tenor L.P.'s proposal be approved, he wrote, at para. 12:

> This was a business judgment protected by the business judgment rule so long as it was a considered and informed judgment made honestly and in good faith with a view to the best interests of Crystallex. See *Re Stelco Inc.* (200[5]), 9 C.B.R. (5th) 135 (Ont. C.A.) regarding the rule and its application to CCAA proceedings. I see no grounds for concluding that the decision of Crystallex to prefer the Tenor bridge financing proposal is not protected by the business judgment rule or that I should not give it appropriate deference. [Citation corrected.]

42 The supervising judge noted, at para. 13, that "the Monitor has no basis to say that the business judgment exercised by the Crystallex board of directors was unreasonable". The supervising judge accordingly approved the Bridge Loan.

43 Mr. Skatoff expressed concern that the Noteholders' objective in offering bridge financing on such advantageous terms (interest at the rate of 1 per cent, as opposed to the 10 per cent in the Tenor L.P. offer) was to undermine the DIP auction process. The supervising judge observed, at para. 14:

> Whether Mr. Skatoff is correct in his concerns, it seems to me that the relatively minor extra cost involving the Tenor proposed bridge financing for at most a few months must be weighed against the risk of harm to the longer-term DIP financing auction process, and that for the sake of that process, it is preferable not to run the risks that Mr. Skatoff is concerned about.

B. The Tenor DIP Loan

44 The substance of the supervising judge's reasons for approving the Tenor DIP Loan — as set out in the DIP Financing Reasons — may be summarized as follows.

> i. The exercise of business judgment by the board of directors of Crystallex in approving the Tenor DIP Loan is a factor that can be taken into account by the court in considering whether to make an order under s. 11.2(1) of the CCAA (at para. 35).
>
> ii. The Tenor DIP Loan did not amount to a plan of arrangement or compromise. Notably, it did not take away the rights of the Noteholders as unsecured creditors to apply for a bankruptcy order or to vote on a plan of compromise or arrangement. A vote of the creditors was therefore not required (at para. 50). In coming to this conclusion, the supervising judge relied on *Calpine Canada Energy Ltd., Re*, 2007 ABQB 504, 415 A.R. 196 (Alta. Q.B.), leave to appeal refused, 2007 ABCA 266, 417 A.R. 25 (Alta. C.A. [In Chambers])).

iii. Crystallex intended to negotiate a plan of compromise or arrangement with the Noteholders during the stay extension until July 30, 2012 (paras. 48, 126). The Tenor DIP Loan is therefore distinguishable from the financing rejected by the court in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577 (B.C. C.A.), because in that case the debtor did not have an intention to propose an arrangement or compromise to its creditors.

iv. Because the Tenor DIP Loan involves the grant of a financial interest in part of the assets of Crystallex, it is appropriate to consider the *Soundair* factors in deciding whether to approve it (at para. 59). Crystallex conducted a robust competitive bidding process (at para. 39).

v. Mr. Skatoff's evidence was that the Noteholders' proposed six month facility "would seriously erode the chances of Crystallex obtaining third party financing in October" (at para. 90). Counsel for Computershare had said during argument on the motion that the Noteholders "were not prepared to agree to such a $35 million facility at this time but only at some future time as the $10 million facility they now proposed became due" (at para. 27). While it would have been preferable if the Noteholders had been willing to lend on the basis of the terms of the Tenor DIP facility, "it was made clear during argument that the noteholders were not prepared at this time to do so" (at para. 91).

vi. As to the enumerated factors in s. 11.2(4):

(a) Given that Crystallex intends, if possible, to negotiate an acceptable plan of arrangement or compromise, the length of time during which Crystallex is expected to be subject to the CCAA proceedings is not a determinative factor. The financing will be required to pursue the arbitration (at para. 62) and, as the supervising judge noted, "the only way any of the creditors will receive any substantial cash payment is from the proceeds of the arbitration" (at para. 47);

(b) The management of the business and affairs of Crystallex "are a reasonable compromise between Crystallex and Tenor designed to protect the interests of the stakeholders, including the noteholders" (at para. 73). The fact that Tenor is given substantial governance rights does not in itself mean that the DIP Tenor Loan should not be approved. Tenor does not have the right to conduct the reorganization proceedings or the arbitration proceeding. Moreover, under s. 11.5(1) of the CCAA, the court may remove a director whom it is satisfied is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made. Arguably, a court could remove a Tenor nominee under this section without triggering an event of default under the Tenor DIP Loan (at paras. 63-71);

(c) While the Noteholders expressed "extreme displeasure" at Crystallex's management's delay in commencing arbitration proceedings, they do not oppose management having a continuing role in the arbitration (at para. 72);

(d) The Noteholders' argument that the terms of the Tenor DIP Loan — in particular, the fact that the refusal of the court to grant a stay or a bankruptcy are events of default, the grant of a 35 per cent interest in the arbitration proceeds, and the limits on the type of restructuring that can be concluded without the approval of Tenor — will effectively prevent any plan of arrangement was rejected (at paras. 74-82). While, as the Monitor points out, the introduction of a third party, Tenor, with consent rights to certain actions will add complexity to the negotiation of a CCAA plan (at para. 93), the Tenor DIP Loan would enhance the prospects of a viable compromise or arrangement (at para. 83):

> ... Crystallex requires additional financing to pay its expenses and continue the arbitration. A DIP loan allows the company to have the arbitration financed, which if it were not at this stage would impair the arbitration and perhaps the attitude of Venezuela towards the arbitration claim, and as such enhances the viability of a CCAA plan. I have not accepted the argument of the noteholders that the loan would prevent a plan of arrangement.

(e) The supervising judge noted that Crystallex's principal asset is its US $3.4 billion arbitration claim against Venezuela (at para. 12); and

(f) In considering the Noteholders' complaints of prejudice in the context of what the market is demanding for a DIP loan and in all the circumstances, the creditors have not been materially prejudiced by the Tenor DIP Loan (at para. 84).

C. The Management Incentive Plan

45 The supervising judge considered the Noteholders' objections to the quantum and method for providing an incentive to management, the inclusion of certain persons in the MIP, and the approval of the MIP before the negotiation of a plan.

46 In the DIP Financing Reasons, the supervising judge observed, at para. 109, that whether employee retention provisions should be ordered in a CCAA proceeding was a matter of discretion. He noted that the provisions of the MIP had been approved by an independent committee of the board of directors with impressive qualifications, relying on the opinion of Mr. Swartz. In providing that opinion, Mr. Swartz indicated that the absolute amount of the bonus pool could be very substantial and, in allocating it, the compensation committee "may have to carefully consider the absolute amounts to be paid to each member of the Management Group in order to satisfy its fiduciary duties": see DIP Financing Reasons, at para. 108. The supervising judge also noted that Mr. Swartz had retained an independent national executive compensation consulting firm to provide expert advice.

47 Citing *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) (st]) and *Timminco Ltd., Re*, 2012 ONSC 948 (Ont. S.C.J. [Commercial List])), the supervising judge wrote, at para. 112 of the DIP Financing Reasons, "I see no reason why the business judgment rule is not applicable, particularly when the provisions of the MIP have been approved by an independent committee of the board." He further noted, at para. 115, what appears to be the practice of approving employee retention plans before any plan has been negotiated and, at para.105, that the Tenor DIP Loan was conditional on the approval of a MIP acceptable to Crystallex and Tenor.

48 As to who should be eligible to participate in the MIP, at para. 117, the supervising judge noted that the independent committee had exercised its business judgment on the matter and that the participants were known to Mr. Swartz. Having reviewed the evidence, the supervising judge could not "say that any of the persons included in the MIP should not be there".

V. The Parties' Submissions

A. The Noteholders' Submissions

49 The Noteholders frame their opposition to the Tenor DIP Loan on a number of bases.

50 They argue that s. 11.2, titled "Interim financing", only permits a supervising judge to approve financing to meet the debtor's needs while it is developing a plan to present to its creditors.

51 The Noteholders also argue that the supervising judge's finding that the Tenor DIP Loan would enhance the prospects of a viable compromise or arrangement was unreasonable because it resulted from an error of principle, namely an improper focus on the fact that it provided financing for the arbitration.

52 The Noteholders submit that the supervising judge misapprehended the evidence in finding that the Noteholders were not willing to match the Tenor DIP Loan, and this error affected the outcome of the motion.

53 They argue that the supervising judge erred in deferring to the business judgment of the directors of Crystallex in approving both the Bridge Loan and the Tenor DIP Loan. They argue that directors always make a recommendation

and, if Parliament had thought this was a relevant factor, it would have specifically enumerated it in s. 11.2(4) of the CCAA.

54 They argue that the supervising judge erred in principle in focusing on what was the most expedient way to fund the arbitration (as opposed to Crystallex's needs while negotiating a plan with the Noteholders) and, in doing so, committed the same error as the motion judge in *Cliffs Over Maple Bay*.

55 The Noteholders' position is that the Tenor DIP Loan is effectively an arrangement, in the guise of a financing, and Crystallex is misusing the CCAA to impose a restructuring without the requisite creditor approval.

56 The Noteholders submit that this court should order Crystallex to accept the Noteholders' "matching" DIP loan offer.

57 They also renew their objections to the MIP.

B. Crystallex's Submissions

58 Crystallex argues that the Noteholders' appeal with respect to the Bridge Loan is moot because the loan has been advanced, spent and repaid.

59 As to the Tenor DIP Loan, it argues that approving it was within the discretion of the supervising judge, the supervising judge exercised his discretion on a wide variety of findings of fact, capable of evidentiary support in the record, and there is no basis for this court to intervene. It relies on *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [*Century Services*], which recently addressed the broad discretionary jurisdiction of a supervising judge under the CCAA. Crystallex also points to *Air Canada (Re)* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]), as an instance where exit financing was approved before a plan had been approved by creditors.

C. Tenor's Submissions

60 Tenor argues that "interim financing" in the heading to s. 11.2 of the CCAA does not mean "short term", but rather refers to the interval between two points or events, and s. 11.2 does not contain anything that would fetter the discretion of the supervising judge to select an "end point" beyond the expected conclusion of a plan. It argues that the duration of the Tenor DIP Loan is tailored to Crystallex's unique circumstance: all stakeholders acknowledge that the arbitration must be pursued in order for there to be meaningful recovery. In any event, it argues, marginal notes, such as the heading "interim financing" in s. 11.2, are not part of the statute, and their value is limited when a court must address a serious problem of statutory interpretation, citing the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 14, and *Imperial Oil Ltd. v. R.*, 2006 SCC 46, [2006] 2 S.C.R. 447 (S.C.C.), at para. 57.

61 Moreover, Tenor submits, the supervising judge was in the best position to perform the careful balancing of interests required to facilitate a successful restructuring.

VI. Analysis

A. The Appeal from the Bridge Financing Order

62 The Noteholders did not strongly pursue their appeal of the Bridge Financing Order. The relief sought at the conclusion of the hearing related to the Tenor DIP Loan and not the Bridge Loan. The Bridge Loan was disbursed, spent and repaid. I agree with the respondents that the Noteholders' appeal with respect to the Bridge Loan is moot. I will therefore confine my analysis to the Tenor DIP Loan and the MIP.

B. The Appeal from the Tenor DIP Financing Order

(1) Century Services Inc. v. Canada (Attorney General)

63 The Supreme Court of Canada had occasion to interpret the CCAA for the first time in *Century Services*. It used that opportunity to make clear that the CCAA gives the courts broad discretionary powers. Those powers must, however, be exercised in furtherance of the CCAA's purposes: para. 59. Section 11, in particular, was drafted in broad language which provides that a supervising judge "may, subject to the restrictions set out in this Act ... make any order that it considers appropriate in the circumstances". [3] For the majority in *Century Services*, Deschamps J. wrote:

> [69] The *CCAA* also explicitly provides for certain orders...
>
> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

64 It is with the Supreme Court's interpretation of the scope of judicial discretion under the CCAA in mind that I turn to s. 11.2 and the question of whether it permits a supervising judge to approve financing that may continue for a significant period after CCAA protection ends, without the approval of creditors.

(2) Section 11.2 of the CCAA

65 Section 11.2 is headed "Interim Financing". Headings may be used as an aid in interpreting the meaning of a statute: R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008), at p. 394, "Interim" generally means temporary or provisional: *Canadian Oxford Dictionary*, 2d ed. The weight to be given to a heading depends on the circumstances.

66 I agree with the Noteholders that s. 11.2 contemplates the grant of a charge, the primary purpose of which is to secure financing required by the debtor while it is expected to be subject to proceedings under the CCAA. A further purpose, however, is to enhance the prospects of a plan of compromise or arrangement that will lead to a continuation of the company, albeit in restructured form, after plan approval.

67 Section 11.2(4)(a) directs the court to consider the period during which the debtor is expected to be subject to proceedings under the CCAA. It stops short of confining the financing to the period that the debtor is subject to the CCAA. Section 11.2(4)(d) directs the court to consider if the financing would enhance the prospects of a viable compromise or arrangement.

68 Having regard to the broad remedial purpose of the CCAA and the broad residual authority of a supervising judge described in *Century Services*, in my view section 11.2 does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection. Indeed, although in very different circumstances, financing to be available on the debtor's emergence from CCAA protection (sometimes called "exit financing") was approved before a plan was approved in *Air Canada*. [4] Both *Century Services* and section 11.2, however, in my view, signal that it would be unusual for a court to approve exit financing where opposed by substantially all of the creditors. Exit or post-plan financing is often a key element, or a pre-requisite, of the plan voted on by creditors.

69 The question becomes whether the unique facts of this case permitted the supervising judge to approve "interim financing" that was of such duration and structure that it could well outlast the CCAA protection period. This court

should not substitute its decision for that of the supervising judge. I must ask this question through the lens of the applicable standard of review.

(3) Standard of review

70 Appellate review of a discretionary order under the CCAA is limited. Intervention is justified only for an error in principle or the unreasonable exercise of discretion: *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at para. 71. An appellate court should not interfere with an exercise of discretion "where the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion": *New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338 (B.C. C.A.), at para. 26.

(4) The supervising judge did not err in principle or unreasonably exercise his discretion

71 As detailed below, I conclude that there is no basis for interfering with the supervising judge's exercise of discretion in approving the Tenor DIP Loan.

72 Most significantly, in this case, the supervising judge found there could be no meaningful recovery, and therefore no successful restructuring, without the financing of the arbitration. Although the Noteholders characterized the Tenor DIP Loan as "exit financing", it furthered the remedial purpose of the CCAA. To that extent, it is appropriate in the first sense used by Deschamps J. in *Century Services*, even though it may well outlast the period of CCAA protection. The supervising judge's focus on the fact that the Tenor DIP Loan provided financing for the arbitration was not, in the circumstances, an error of principle.

73 In my view, the Noteholders' real argument is that the *means* by which the Tenor DIP Loan was approved were not appropriate. Ideally, a CCAA supervising judge is able to assist creditors and debtors in coming to a compromise. The creditors and Crystallex have not "achieved common ground" on a very significant matter. Effectively, the Noteholders argue that the creditors have not been treated as advantageously and fairly as the circumstances permit. They are the senior creditors and their offer to provide DIP financing on terms they argue matched those of the Tenor DIP Loan was not accepted. With sufficient financing in place to fund the arbitration, their leverage in negotiating a share of the arbitration proceeds has been reduced. Moreover, the Noteholders argue, the supervising judge erred in applying the business judgment rule, and, contrary to *Cliffs Over Maple Bay*, involuntarily stayed their rights during what they characterize as a restructuring. I consider each of these arguments below.

a. The Noteholders' competing DIP loan offer

74 The Noteholders point to their affidavit on the April motion indicating they would submit to an order to advance funds on the same terms as the Tenor DIP Loan "in the event that prior to October 1, 2012, the Court orders that such longterm financing is appropriate and necessary". The supervising judge wrote that it would have been a preferable outcome if the Noteholders had been prepared to lend at the time of the April motion on the terms of the Tenor DIP facility: DIP Financing Reasons, at para. 91. The Noteholders argue that: they were prepared to advance funds on the terms of the Tenor DIP Loan, if so ordered; the supervising judge misapprehended the evidence; and, given the supervising judge's comment that it would have been preferable if the Noteholders had been prepared to lend, that misapprehension affected the outcome of the motion.

75 The supervising judge's comment at para. 91 of the DIP Financing Reasons makes his real concern clear. There, he stated that "at this time" the Noteholders were not prepared to lend on the terms of the Tenor DIP Loan. The Noteholders' view as of April 5, 2012 was that such long-term financing was not necessary, as the $10 million they offered to advance at that time met Crystallex's then cash requirements. The Noteholders reserved their rights to continue to oppose the approval of long term financing before they had come to an agreement with Crystallex about their entitlement, as creditors. Further hearings, and further arguments, were required. The supervising judge found, at para. 83 of the DIP Financing Reasons, that not putting sufficient financing in place to finance the arbitration "at this stage" would

impair the arbitration. There was no suggestion from counsel for the Noteholders that on April 5, 2012 the Noteholders were prepared to waive the condition permitting them to continue to oppose the approval of long term financing. I am not satisfied that the supervising judge clearly misapprehended the evidence.

b. Loss of leverage

76 In Crystallex's view, a reduction of the Noteholders' leverage was desirable. It points to the Noteholders' competing CCAA application, seeking to cancel all of the shareholders' equity, which the supervising judge rejected as not fairly balancing the interests of all stakeholders. The Noteholders' plan, subsequently proposed, would entitle them to 46 per cent of the equity in return for giving up their Notes, which Crystallex also views as excessive. [5]

77 Crystallex argues that the Noteholders are not contractually entitled to convert their Notes to equity, and should therefore not be entitled to do so. Moreover, they argue, in the event of bankruptcy, the Noteholders would only be entitled to recover their principal and interest at the statutory rate of 5 per cent under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and, if the arbitration is realized, they will be entitled to the higher rate of interest they are contractually entitled to under the Notes. As Deschamps J. noted at para. 77 of *Century Services*, participants in a reorganization "measure the impact of a reorganization against the position they would enjoy in liquidation".

78 The Noteholders counter that, contractually, they were entitled to be repaid on December 23, 2011 and, since they were not, and Crystallex proposes to defer repayment for several years and repay the Notes only if the arbitration is successful, the long delay entitles them to some equity participation. Moreover, contractually, Crystallex is restricted from incurring the Tenor DIP Loan, which will be senior to the Notes.

79 Crystallex points to the terms of the Initial Order, affording the "best offer" the protection of the *Soundair* principles, and providing that "topping offers" would not be considered by the court. Crystallex points out that the Noteholders did not appeal the Initial Order and argues that accepting the Noteholders' matching offer would offend the *Soundair* principles. In Crystallex's view, the Noteholders were treated fairly.

80 In turn, the Noteholders argue that the Initial Order authorized Crystallex to conduct an auction to raise *interim or DIP financing* pursuant to procedures approved by the Monitor. Since the outset, the Noteholders maintained their objection that the auction process sought more than interim or true DIP financing. The supervising judge deferred consideration of their objections until the DIP facility was before the court for approval.

81 The Noteholders are sophisticated parties. They pursued a strategy. It ultimately proved less successful than hoped. It appears that the supervising judge would have been prepared to approve the advance of funds to Crystallex by the Noteholders, on the terms of the Tenor DIP Loan, notwithstanding the *Soundair* principles, had the Noteholders agreed to do so, without condition, on April 5, 2012.

82 The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.

c. The business judgment rule

83 The supervising judge held that in addition to the factors in s. 11.2(4) of the CCAA, he could take into account the exercise or lack thereof of business judgment by the board of directors of a debtor corporation in considering DIP financing: DIP Financing Reasons, at paras. 32-35. He cited *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), as authority for this proposition. [6]

84 The fact that a debtor's board of directors recommends interim financing is not a determinative factor, and in some cases may not be a material factor, in considering whether to make an order under s. 11.2. It would be unusual if the board did not recommend the financing for which the debtor seeks approval.

85 *Stelco* should not be read as authority for the principle that the recommendation of the directors of a debtor under CCAA protection is entitled to deference in evaluating whether financing should be approved under s. 11.2 of the CCAA where the factors outlined in s. 11.2(4) have not been complied with. In *Stelco*, the debtor did not seek court approval of a recommendation of the board. In the case of interim financing, the court must make an independent determination, and arrive at an appropriate order, having regard to the factors in s. 11.2(4). It may consider, but not defer to, and is not fettered by, the recommendation of the board.

86 The weight given by the supervising judge to the business judgment of the board of directors of Crystallex in recommending the Tenor DIP Loan is not, however, a basis for this court to interfere with his decision: *New Skeena Forest Products Inc., Re*, at para. 26.

d. Cliffs Over Maple Bay is distinguishable

87 In *Cliffs Over Maple Bay*, the debtor was the developer of a 300 acre site intended to include residential units, a golf course and a hotel. The debtor obtained protection under the CCAA and sought approval of financing that would permit it to complete material parts of the development. It believed that the proceeds generated from the sale of units thus completed would be sufficient to fund the remaining portions of the development and that, if the development were completed, there would be sufficient sale proceeds to satisfy all of the debtor's obligations.

88 The motion judge approved the financing; the mortgagees of the development appealed. The British Columbia Court of Appeal noted, at para. 35, that it was not suggested that the debtor intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. The court allowed the appeal, writing:

> [37] ... DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors ...
>
> [38] ... What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The CCAA was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

89 I agree with the supervising judge that this case can be distinguished from *Cliffs Over Maple Bay*, which turned on the court's finding that the debtor did not intend to negotiate a plan with its creditors.

90 While Mr. Fung initially indicated that Crystallex's plan was to stay creditors' claims until the arbitration was settled or realized, his more recent evidence was that approval of the Tenor DIP Loan does not preclude further discussions about a plan with the creditors. In submissions before the supervising judge, and again before this court, counsel for Crystallex reiterated that Crystallex intended to exit from CCAA protection as soon as a plan was negotiated with the creditors and approved, and that Crystallex intended to negotiate a plan by the expiry of the stay on July 30, 2012. The supervising judge found that Crystallex intended to negotiate a plan with its creditors. There is some basis in the record for such a conclusion.

(5) The Tenor DIP Loan is not an arrangement

91 An arrangement or compromise cannot be imposed on creditors unless it has been approved by a majority in number representing two thirds in value of the creditors: see s. 6(1) of the CCAA.

92 The supervising judge rejected the argument that the Tenor DIP Loan was a plan of arrangement or compromise and therefore required the approval of the creditors. He held, at para. 50 of the DIP Financing Reasons:

> A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

93 I agree. While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. In this case it was within the discretion of the supervising judge to approve the Tenor DIP Loan.

C. The Appeal from the Management Incentive Plan Approval Order

94 In my view, the supervising judge did not err in principle or unreasonably exercise his discretion in approving the MIP. I see no basis for this court to intervene.

95 As the supervising judge noted, employee retention provisions are frequently authorized before a plan is negotiated. The supervising judge was alive to the exceptionally large amounts that might be paid to beneficiaries of the MIP (including Mr. Fung) in this case. The supervising judge took specific note of the issues that the Noteholders had raised in the past regarding the extent to which the independent committee of the board that recommended the MIP was truly independent, and the steps taken by that committee to address those concerns.

96 The recommendation of an independent committee of the board that has obtained expert advice is entitled to more weight in the consideration of a MIP than is the recommendation of the board in the consideration of whether financing should be approved under s. 11.2 of the CCAA. The CCAA does not list specific factors to be considered by the court in the case of a MIP. Moreover, the board would have the best sense of which employees were essential to the success of its restructuring efforts.

97 In addition to considering the recommendation of the independent committee of the board and Mr. Swartz, the supervising judge also reviewed the evidence to consider whether any persons had been included in the MIP who should not have been. He did not rely solely on the board's recommendation.

VII. Disposition

98 Accordingly, I would dismiss the appeals of the CCAA Bridge Financing Order, the CCAA Financing Order, and the Management Incentive Plan Approval Order.

VIII. Costs

99 If the parties cannot agree, I would order that Crystallex and Tenor provide their submissions on the issue of costs within 14 days, and that the Noteholders, if so advised, provide their submissions in response within 10 days thereafter. No reply submissions are to be provided without leave.

D. O'Connor A.C.J.O.:

I agree

R.A. Blair J.A.:

I agree

Appeals dismissed.

Footnotes

* Additional reasons at *Crystallex International Corp., Re* (2012), 2012 CarswellOnt 9479, 2012 ONCA 527 (Ont. C.A.).

1 Paragraph 23(1)(b) provides that the monitor shall "review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings".

2 The MIP was approved subject to an amendment (agreed to by Crystallex) to provide that the value of any stock options ultimately realized by participants of the MIP would be deducted from the amount of any bonus awarded under the MIP on a tax neutral basis.

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

4 In *Air Canada*, Farley J. approved a "global restructuring agreement" which included a commitment of an existing creditor to provide exit financing of approximately US $585 million on the company's emergence from CCAA. DIP financing was in place; the financing at issue was clearly recognized as exit financing. The restructuring agreement was not opposed by substantially all of the creditors. Nor was it argued that it adversely affected the ability of the creditors and the debtor to negotiate a compromise or arrangement.

5 The Noteholders proposed that they receive 22.9 per cent of the equity for the $36 million needed for the arbitration and 58 per cent of the equity in return for giving up their Notes, for a total of approximately 81 per cent of the equity. Assuming that the Noteholders sought a maximum total entitlement of 81 per cent, if they advanced the $36 million on the terms of the Tenor DIP Loan, as they now seek to do, the amount of equity on conversion of their notes would be 46 per cent. See the DIP Financing Reasons, at para. 77.

6 An incorrect citation for *Stelco* was given in the DIP Financing Reasons, at para. 33.

End of Document

TAB 7

2007 CarswellOnt 2571
Ontario Superior Court of Justice

Disera v. Liberty Developments Inc.

2007 CarswellOnt 2571, 157 A.C.W.S. (3d) 86

FIORE DISERA, DAVID RAFFAELE DISERA, FREDERICK BRYON DISERA, and DISERA MOTELS LIMITED (Plaintiffs) and LIBERTY DEVELOPMENTS INC. (Defendant)

Hoilett J.

Heard: February 1, 2007; April 18, 2007
Judgment: April 26, 2007
Docket: 06-CV-314781PD2

Counsel: Richard E. Anka, Q.C. for Plaintiffs
Colin Stevenson for Defendant

Subject: Civil Practice and Procedure; Property; Contracts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Real property

II Registration of real property
II.5 Certificate of pending litigation (lis pendens)
II.5.d Right to register
II.5.d.i Interest in land

Headnote

Civil practice and procedure --- Summary judgment — Requirement to show no triable issue

Real property --- Registration of real property — Certificate of pending litigation (lis pendens) — Right to register — Interest in land

Real property --- Sale of land — Agreement of purchase and sale — Interpretation of contract — Covenants — Miscellaneous

Table of Authorities

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 21 — referred to

R. 22 — referred to

Hoilett J.:

1 This is a motion for summary judgment or other alternative relief particularized below:

> 49. It is respectfully submitted that summary Judgment be granted as against the Defendants at this time for $3,129,000.00 (i.e. $4,186.00 minus $1,057,000), with interest at 4.5% from September 14, 2005, plus the costs of the action and this motion on a substantial indemnity basis to be fixed or assessed. In the alternative, it is submitted that summary Judgment be granted for $2,702,000.00 with interest and costs as above, based upon the admission by Fazel in paragraphs 25 of his October 6, 2006 Affidavit that at least 1,151 units have received final approval.
>
> 50. In the further alternative, it is submitted that the Plaintiffs should be granted one or more of the following:
>
> A. A Certificate of Pending Litigation on the Property;
>
> B. An interim injunction pending trial restraining the Defendants from transferring or encumbering the Property;
>
> C. An Order requiring the Defendants to pay the sum of $4,443,000.100 into Court pending the final disposition of the action (the maximum potential bonus of $5.5 million less the advance payment of $1.057 million paid by the Defendants on August 3, 2006);
>
> (Plaintiff's Factum, paras. 49 and 50)

2 The facts on this motion are not seriously in dispute and, except for attribution; I have reproduced following those facts as they have been summarized in paragraphs 3 to 23, inclusive, of the plaintiff's factum. Arguably, that summary is adulterated by some argument, but I am of the view that such adulteration is patent and does not affect the essentially accurate rendition of the material facts. Indeed the circumstances of this motion begs the question as to why these proceedings were not initiated as a motion under Rule 21 or as a Special Case under Rule 22. The summary of facts follows:

> 3. The Plaintiffs as vendors and Liberty Developments Inc. (a non-existent entity which was subsequently amended to read Liberty Development Corporation ("Liberty")) as purchaser executed the agreement of purchase and sale dated August 19, 2002,which governs the issues in respect of the within motion (the "Agreement").
>
> 4. The purchase price agreed to was $12.5 million for a project comprising 614 residential units, plus a bonus provision if the purchaser brought an application and obtained an increase in density above 614 on the Back Lands.
>
> 5. Section 5.01 of the Agreement reads, in part, as follows:
>
> > **The Purchaser covenants to make an application** (the "Application") to all necessary authorities during the period of two (2) years next following the Closing to re-zone the Motel Lands and Front Lands to residential and concurrently **to apply for an increase in density or coverage** (the "Density Increase") for the easterly portion of the Back Lands...
> >
> > **If** at any time following the Closing of the transaction herein **the City of Vaughan, with the consent of all the relevant governmental authorities, has granted in final form the Density Increase on the initial Application set out above** (the "Decision")...**the Purchaser shall pay additional funds to the vendor within six (6) months of the Decision...of:**

(i) Seven Thousand Dollars ($7,000.00) for each residential unit approved in excess of 614 units on the Back Lands; and

(ii) Seven Thousand Dollars ($7,000.00) for each residential unit approved in excess of One Thousand (1,000) units on the entire Property less funds already paid pursuant to subparagraph 5.01(i) above.

The cumulative bonus payments pursuant to 5.01(i) and 5.01(ii) above shall not exceed Five Million Five Hundred Thousand Dollars ($5,500,000.00) in total.

6. Nothing in section 5.01 makes payment of the bonus contingent on zoning bylaws, approval of site plans, or building permits, nor does it make reference to approval being "obtained in full" nor to "all corollary permissions" as stated in the Fazel Affidavit.

7. Section 5.02 of the Agreement reads, in part, as follows:

> The Purchaser further covenants and agrees not to sell or transfer the Motel Lands and Front Lands...for a period of eight (8) years from the Closing Date...The Vendor will be entitled to register at its own expense and with the cooperation of the Purchaser and in a form acceptable to the Purchaser's solicitor such restriction once the Commercial Lands have been designated as a block on plan of subdivision or a severance has been obtained in accordance with the provisions of the Planning Act.

8. Before the Agreement was entered into, the density level permitted a maximum of 614 units on the Property. The parties intended that a bonus of $7,000.00 per unit over 614 would be payable if the purchaser applied for and obtained a density increase from the City of Vaughan on the Back Lands.

9. Prior to closing, Liberty executed a direction re title which directed the Plaintiffs to convey title of the Property to the Defendant, 1541677 Ontario Inc. ("1541677"). Title to the Property was transferred to 1541677 upon closing.

10. The planning application contemplated by paragraph 5.01 of the Agreement was made. That application was for an increase in density or coverage on the residential Back Lands.

11. On January 24, 2005, the City of Vaughan passed By-Law No. 5-2005, which adopted Amendment No. 621 to the Official Plan of the Vaughan Planning Area ("Amendment No. 621"). Section I of Amendment No. 621 reads in part, as follows:

> The amendment to the Official Plan will permit in addition to the previously approved 614 apartment units, the following: 891 apartment units, 93 townhouse units, a 1.94 ha park [*sic*], and an east/west local road from Bathurst Street to New Westminster Drive. **The total approved and proposed apartment and townhouse unit count is 1,598**, and includes 7 apartment buildings with building heights up to 22 storeys.

12. The Defendants' planning expert, Jim Kirk, concedes that the effect of the above by-law is to increase the density of units for the Property to 1,598 units, that it does not address issues pertaining to zoning, and that an increase in density is different from a rezoning.

13. On January 24, 2005, the City of Vaughan also passed By-Law No. 17-2005 which amended By-Law No. I-88. By-Law No. 17-2005 provides, at paragraph 1(aii), as follows:

> [T]he total combined number of residential units in the RM2 and RA3 Zones shall not exceed a maximum of 1,598 units.

14. On February 14, 2005, the Council of the City of Vaughan adopted Report No. 7 of the Committee of the Whole. Item 29 of that report included the following:

A. Allocation of water and sewage capacity for an additional 984 units (i.e. a total of 1,598 units) and

B. Approval of the traffic impact/phasing report prepared by Cansult Limited in August, 2004.

15. On March 14, 2005, the Regional Municipality of York (the "Region") granted its approval of Amendment No. 621 to the official plan. The bylaw which became enforceable on March 14, 2005 contemplates a total of up to 1,598 residential units on the subject property (the "Property") as a whole. It is common ground that the City of Vaughan approved a density increase to 1,598 units for the Property. The Defendants also admit that "Once we have received the full and final form approvals, definitely we have to pay [the] $4,1886,000 bonus payment". There is no suggestion that either the City of Vaughan or the Region of York may reduce the density in the future.

16. The Defendants' expert, Jim Kirk, in his resumé, refers to his involvement in obtaining approvals in a phased development of 1600 dwelling units.

17. In a letter dated February 14, 2006, Fazel on behalf of Liberty wrote as follows:

> As you may be aware, the subdivision relating to the Lands was registered on December 16, 2005 as registered plan 65M-3872 and permits a total of 1,598 residential units to be built on the entire Property (as defined in the Purchase Agreement). It is our understanding that any additional funds payable under Section 5.01 of the Purchase Agreement are due within six (6) months of such date.

No mention is made in that letter that the bonus set out in section 5.01 is subject to the removal of Holds on all 1,598 units.

18. Fazel wrote and signed that letter, and testified that it represented his state of mind on February 14, 2006. He claims that in July or August of 2006 (after the commencement of this action) he learned that he was mistaken in what he said in the letter, but that he did not communicate that discovery to the Plaintiffs until he swore his Supplementary Affidavit on November 2, 2006, which was after the letter appeared as an exhibit to the Affidavit of Gordon Ullman sworn October 10, 2006. Fazel did not disclose this letter in his October 3, 2006 Affidavit. The letter was also never seen or discussed with the Defendants' planning expert, either before or after he swore his Affidavit.

19. Latif Fazel, the Defendants' representative who swore the Affidavits containing the foregoing admissions, and who signed the February 14, 2006 letter conceding that 1,598 units could be built on the Property, is not a novice or neophyte in the real estate development business, having worked in real estate for 20 years and having been associated with Liberty since 1999. Similarly, his partner, Fred Darvish ("Darvish"), another of Liberty's three principals, has considerable experience in real estate development. Conversely, Fred DiSera (who dealt with the Defendants on behalf of the plaintiffs) has "very little" knowledge of the development process. He is not an expert, not a land use planner, and not a lawyer.

20. The Plaintiff Fred had no less than three meetings with the principals of Liberty, Fazel and Darvish, in or about September, October and November, 2005. At each of those meetings, Fazel and Darvish both acknowledged Liberty's liability to pay the Plaintiffs the sum of $4,186,000.00, and they stated that Liberty had the money set aside to pay that amount in full. Tellingly, during all three meetings with Fazel and Darvish, neither they nor any other Liberty representative ever raised the issue of the removal of the "holds" on current zoning or site plans or any of the other objections to payment of the bonus set out in Fazel's October 3, 2006 Affidavit. There was never any suggestion by them that the bonus was not due and owing, and in fact they both conceded and admitted that it was due and owing. The only issue raised by Liberty was a purported set-off of $675,000.00, which was raised, *inter alia*, in Fazel's letter of February 14, 2006 (namely, $500,000.00 for one acre of the subject land that was used for a park, and $175,000.00 representing 50% of a $350,000.00 donation made to the City of Vaughan by Liberty to upgrade that park), even though the Agreement contains no provision for any deduction or set-off for these or other matters of any kind.

21. At a minimum, 1,151 units have been given final approval, 613 of which had already been sold as at October 3, 2006, with another 231 units under construction.

22. Because they conceded that at least 1,151 units had been given final approval, the Defendants paid the Plaintiffs $1,057,000.00, which the Defendants calculated by multiplying the difference between 1,151 and 1,000 (151) by $7,000.00. In other words, the calculation was made as if clause 5.01(ii), and only 5.01(ii), of the Agreement applied. They did not factor clause 5.01(i) into the calculating (which provides for $7,000.00 for each approved unit in excess of 614). Fazel conceded that the 1,151 units qualified under clause 5.01(ii), but he initially professed in his cross-examination not to know why they would not have qualified under clause 5.01(i). He then testified in his cross-examination that clause 5.01(i) did not apply because there was a "completely different layout for the plan of subdivision to that contemplated at the time [the] agreement was signed." However, he then conceded that there is no plan of subdivision that will show what was contemplated when the Agreement was signed, and that he is not sure whether there is anything in clause 5.01 that says what will happen to the bonus payment provision if there is a plan of subdivision that provides for a different layout than the plan of subdivision that was in place prior to the Agreement being signed.

23. All that is required from the City of Vaughan for the Hold (H) removal for the remaining 447 units (i.e. 1,598 less 1,151) is site plan and traffic impact approval for those remaining units. 'H' removal is not part of, and has nothing to do with, the "initial Application" referenced in the Agreement, and it has nothing to do with density or an increase in density. In short, Liberty has been granted its density rights for 1,598 residential units. Whether Liberty implements or uses the density increase is a totally different issue which, it is submitted, has nothing to do with triggering payment of the bonus under clause 5.01(i) of the Agreement. Liberty cannot utilize these density rights until individual site plans are approved by the City of Vaughan, but those rights are there and remain there indefinitely.

(see Plaintiff's Factum, paras. 3-23)

3 The responding parties frame the following four issues to be addressed:

1) Are the plaintiffs entitled to summary judgment?

2) Should the plaintiff (*sic*) be granted an order to issue and register a certificate of pending litigation?

3) In the alternative, are the plaintiffs entitled to an interim or permanent injunction restraining the defendants from selling, transferring, encumbering or otherwise disposing of the property? and,

4) In the further alternative, are the plaintiffs entitled to an order requiring the defendants to pay the sum of $5,500,000.00 into court as security for the plaintiff's claim?

4 It is my view that the answer to the above questions, which, in a formal sense, frame the issues, turns, ultimately, on the correct interpretation to be placed on the agreement between the parties, and, in particular clauses 5.01 and 5.02 of the agreement:

5.01 The Purchaser covenants to make an application (the "Application") to all necessary authorities during the period of two (2) years next following the Closing to re-zone the Motel Lands and Front Lands to residential and concurrently to apply for an increase in density or coverage (the "Density Increase") for the easterly portion of the Back Lands. The Purchaser shall promptly comply with all requirements for the application, diligently pursue the application and bear the costs associated therewith.

If at any time following the Closing of the transaction herein the City of Vaughan, with the consent of all the relevant governmental authorities, has granted in final form the Density Increase on the initial Application set out above (the "Decision") or any subsequent applications relating to the Property commenced within eight (8) years of Closing

(the "Subsequent Decision"), on reasonably satisfactory terms and conditions, the Purchaser shall pay additional funds to the Vendor within six (6) months of the Decision or Subsequent Decision equal to the sum of:

(i) Seven Thousand Dollars ($7,000.00) for each residential unit approved in excess of 614 units on the Back Lands; and

(ii) Seven Thousand Dollars ($7,000.00) for each residential unit approved in excess of One Thousand (1,000) units on the entire Property less funds already paid pursuant to subparagraph 5.01(i) above.

The cumulative bonus payments pursuant to 5.01(i) and 5.01(ii) above shall not exceed Five Million Five Hundred Thousand Dollars ($5,500,000.00) in total.

(iii) Notwithstanding and in addition to the Purchase Price and bonus payments payable pursuant to subparagraphs 5.01(i) and 5.01(ii) above the Purchaser shall pay to the Vendors a minimum guaranteed bonus of Five Hundred Thousand Dollars ($500,000.00). These funds shall be a credit against the above bonus in the event greater than Five Hundred Thousand Dollars ($500,000.00) is earned. The guaranteed bonus payment shall be due and payable on the fifth anniversary of the Closing. This bonus shall not in any way be subject to adjustments, set-off or abatement.

In the event that the City of Vaughan supports the application and the application is granted but the Decision is referred to the Ontario Municipal Board by third parties, including local ratepayers, the Purchaser shall at its own cost and expense pursue with all due diligence an appeal to the Ontario Municipal Board. In all other events where the application is refused or appealed the Purchaser at its own cost may in its sole and absolute discretion pursue an appeal of such decision to the Ontario Municipal Board.

5.02 The Purchaser further covenants and agrees not to sell or transfer the Motel Lands and Front Lands (the "Commercial Lands") consisting of approximately six (6) acres, as is or for commercial development for a period of eight (8) years from the Closing Date. However residential high rise may be developed on part or all of the Commercial Lands within the said eight (8) years. The Vendor will be entitled to register at its own expense and with the cooperation of the Purchaser and in a form acceptable to the Purchaser's solicitor such restriction once the Commercial Lands have been designated as a block on plan of subdivision or a severance has been obtained in accordance with the provisions of the Planning Act. In the event that the density increase is obtained in full, or in part, such that the Purchaser has paid to the Vendor the entire bonus outlined in 5.01 (i) & (ii) then the aforementioned restrictions shall be removed by the Purchaser or the Vendor.

In the event the application to increase the density or coverage is rejected by the City of Vaughan and the OMB and is not appealed then the Purchaser shall have the right to remove such restriction without the Vendor's consent.

The Purchaser shall have the right after eight (8) years from Closing to remove the restrictions without the Vendor's consent unless there is an ongoing application for rezoning to increase the density.

(see Motion Record, Tab D)

5 Without any diminishment of the moving parties' position, it may be put very simply and briefly. Its essence is that the language of the agreement is unambiguous and unburdened by the many conditions the responding parties have sought to graft onto it. The relevant terms of the agreement have been met and the moving party is entitled to the relief it seeks.

6 At some risk of simplification, the responding parties' position may be briefly, but accurately, summarized. They contend that, given the hoops and hurdles that developers have to cross before they are able to build, the responding parties cannot yet build the residential units on which the moving parties predicate their bonus claims. Accordingly, the granting of the relief sought would represent a commercial absurdity. In particular, it is the contention of responding

parties that the following excerpt from *clause 5.01*, *supra*, should be read to mean that virtually every pre-condition of giving effect to the approved Density Increase had to be met before it could be said to have been "granted in final form":

. . . . .

> If at any time following the Closing of the transaction herein the City of Vaughan, with the consent of all the relevant governmental authorities, has granted in final form the Density Increase on the initial Application set out above (the "Decision") or any subsequent applications relating to the Property commenced within eight (8) years of Closing (the "Subsequent Decision"), on reasonably satisfactory terms and conditions, the Purchaser shall pay additional funds to the Vendor within six (6) months of the Decision or Subsequent Decision equal to the sum of:

. . . . .

7 The responding parties contend that there are presently "holds" in place, pending the release of which the responding parties are unable to give effect to the density approval that has been granted; as such there has not been a "grant in final form". Exemplifying that "hold", the responding parties argue, are the following two paragraphs from "Amendment Number 621, The Official Plan of the Vaughan Planning Area":

. . . . .

> 6. On October 12, 2004, Counsel resolved to reserve water and sewage capacity to 1541677 Ontario Limited for a total of 1598 units (93 townhouses and 1505 apartment units), of which 614 units were previously allocated on April 14, 2003. Accordingly, of the total 1,598 units, new capacity would be reserved for 984 units consisting of the 93 townhouse and 891 apartment units. Final allocation would be granted by Council as part of the draft plan of subdivision or site plan approvals process.
>
> 7. The applicant submitted a Traffic Impact/Phasing Report prepared by Cansult Limited, dated August 2004. In order to facilitate the overall proposal, Cansult recommended that the development be initiated in phases as transportation improvements are undertaken in the area. The City and Region of York are supportive of the recommendations in the Cansult report, and the final report is to be approved through the approval of the draft plan of subdivision. The implementing zoning by-law will include a Holding provision that will be lifted in part as individual site plans are approved in accordance with the phasing plan provided by the Traffic Impact/Phasing Report by Cansult.
>
> (see Motion Record, date-stamped Sept. 14, 2006, Tab 2E, at page 57)

8 The following extract from The City of Vaughan By-Law Number 17-2005 is cited as an example, only, of "hold" which the respondent contends must be lifted before the grant assumes "final form", and the obligation to pay the bonus arises:

. . . . .

> The following provisions shall apply to the subject lands shown in Schedule "E.1275":
>
> > i) The subject lands zoned with the Holding "H" provision shall be used for a use lawfully existing on a property on the date of the passing of the By-law 17.2005 on the 24th day of January, 2005, until such time as the Holding "H" symbol is removed on the lands zoned RM2(H) Zone. The Holding "H" provision shall be lifted in part as individual site plans are approved by Council in accordance with a phasing plan identified in a Traffic/Phasing Report approved by the City.
>
> (see Motion Record, *supra*, Tab F, at page 68)

9 Concerning the alternative forms of relief claimed, and in particular the prayer for a Certificate of Pending Litigation ("C.P.L.") and the injunction, counsel for the responding parties contend that there is no interest in land based on which

the moving party can predicate a claim for a C.P.L. The point being that the bonuses on which they claim rests constitute a debt, independent of the mortgage, and, for that reason, does not create an interest in land.

10 Injunctive relief, the responding party submits, is inappropriate in the present circumstances; the criteria for such a remedy not having been met. In particular, the responding party is a reputable and successful developer, and either a C.P.L. or injunction would have the effect of bringing to a halt the responding party's operations. In other words, the harm to the responding party would be irreparable. On the contrary, the loss, if any, to the moving parties is compensable in damages. Clearly, therefore, the responding party argues, the balance of convenience favours rejecting any claim for a C.P.L. or any form of injunctive relief.

11 It is important to note that there is one important fact not in dispute on this motion and that is the fact that there was a decision granting an increase in density to 1,598 units, up from 614 for which there was prior approval. Among the items of evidence supporting that conclusion are 1) the partial payment of bonuses pursuant to the agreement; 2) the opening paragraph of Latif Fazel's, an officer and director of Liberty, February 14, 2006 letter to Gordon Ullman, the plaintiff's solicitors and 3) the evidence of James Kirk on his December 11, 2006 cross-examination; in particular Questions 78-81. Kirk, it should be noted is a professional planner, associated with the firm of Malone Given Parsons Ltd. The relevant questions and answers were at a time when Kirk had read clauses 5.01 and 5.02, *supra*, and was aware that their interpretation was in issue:

> 78. MR. ANKA: I'd like him to tell me what the effect of this bylaw did, if anything, to the density for this particular piece of property.
>
> THE DEPONENT: Okay. This bylaw adopted an official plan amendment, because it's not a zoning bylaw per se. It's a bylaw to adopt —
>
> 79. Q. BY MR. ANKA: We both know that.
>
> A. Okay. The OPA 621 re-designated lands as explained in the purpose section of this document, and as it states, Permit in addition to the previously approved 614 apartment units the following: 891 units, 93 townhouses, a park, a road, and that the total unit count approved and proposed is 1,598.
>
> 80. Q. Would you agree with me that the effect of this bylaw is to increase the density of units for this particular piece of property?
>
> A. Yes.
>
> 81. Q. And you have told me previously that this bylaw does not address issues pertaining to zoning?
>
> A. Correct.

The reference in Q.81 to what was told "previously" may be found at Questions 56 to 58, inclusive; the general purport of which was to underscore the distinction between a "rezoning" and an "increase in density".

12 Roy Mason, a municipal planner for 29 years, opines in paragraph 7 of his October 11, 2006 affidavit that:

> 8. ..., the granting of the density increase on March 14, 2005 constitutes a decision in final form within the meaning of 5.01 of the Agreement. The post-approval hurdles are simply other, unrelated planning requirements that Liberty, like any other developer, will have to meet. They have nothing to do with, and have no impact on, the density increase that Liberty was granted over a year and a half ago in March of 2005.
>
> (see Plaintiff's "Reply Motion Record", Tab 3)

13 Counsel for the responding party submits that the fact that the moving party has produced an expert opinion makes the point that there is a genuine issue for trial. The responding party, it should be observed, has failed, however, to focus that issue, by leading its own expert opinion.

14 It is my view that, reasonably read, the record invites the reasonable conclusion that there is no ambiguity in the language of the agreement, and the condition triggering the responding party's obligation to pay the sums called for has been met. There is no substance, in my view, to the responding party's contention that the interpretation of the agreement invited by the moving party is a commercial absurdity. In order to meet that test, the impugned agreement has to be incapable of being executed. It is not enough for a party, with the benefit of twenty-twenty hindsight, to conclude that it may have been able to negotiate a more favourable agreement. Were that the case, the courts would be deluged with applications to re-write contracts freely entered into by businessmen and businesswomen. That is not the proper function of the court.

15 The legal principles applicable to summary judgment applications are now trite law. Those principles have been succinctly and elaborately expressed but the essential test remains the same: is there a genuine issue for trial. It is my view, for all the foregoing reasons, that there is no such genuine issue. Accordingly, there will be judgment for the plaintiff for the pecuniary relief sought, together with interest in accordance with the *Courts of Justice Act.* Counsel should have no problem calculating the precise amount of the judgment, given its underlying formulaic character.

16 I see no need, in the circumstances to grant the injunctive relief sought.

17 The moving party shall have its costs of these proceedings. If the parties are unable to agree on reasonable costs, I shall entertain brief written submissions, once exchanged, within thirty (30) days of the date of these reasons. Those reasons shall be addressed to my attention in one joint package.

End of Document

2008 ONCA 34
Ontario Court of Appeal

Disera v. Liberty Developments Inc.

2008 CarswellOnt 194, 2008 ONCA 34, 163 A.C.W.S. (3d) 549, 63 R.P.R. (4th) 197

FIORE DISERA, DAVID RAFFAELE DISERA, FREDERICK BYRON DISERA, AND DISERA MOTELS LIMITED (Plaintiffs / Respondents) and LIBERTY DEVELOPMENT CORPORATION and 1541677 ONTARIO INC (Defendants / Appellants)

J. Simmons, J. MacFarland, P. Rouleau JJ.A.

Heard: October 18, 2007
Judgment: January 21, 2008
Docket: CA C47180

Proceedings: affirming *Disera v. Liberty Developments Inc.* (2007), 2007 CarswellOnt 2571 (Ont. S.C.J.)

Counsel: Colin P. Stevenson for Appellants
Richard E. Anka, Q.C. for Respondents

Subject: Contracts; Property; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

XVIII Summary judgment
XVIII.5 Requirement to show no triable issue

Civil practice and procedure

XXIV Costs
XXIV.8 Scale and quantum of costs
XXIV.8.d Quantum of costs
XXIV.8.d.ii Allowance of increased costs

Real property

II Registration of real property
II.5 Certificate of pending litigation (lis pendens)
II.5.d Right to register
II.5.d.i Interest in land

Real property

III Sale of land
III.1 Agreement of purchase and sale
III.1.b Interpretation of contract
III.1.b.ii Covenants
III.1.b.ii.E Miscellaneous

Headnote

Real property --- Sale of land — Agreement of purchase and sale — Interpretation of contract — Covenants — Miscellaneous

Defendants agreed to purchase from plaintiffs property that allowed for construction of 614 residential units — Defendants covenanted to apply to all necessary authorities to re-zone property to residential and to apply for increase in density — Agreement contained bonus provision if defendants applied for and obtained re-zoning and density increase in "final form" from city — Application was made to re-zone parts of subject property to residential and to increase density coverage for all of property — City passed by-law, which adopted amendment to official plan, and regional municipality approved amendment, thereby increasing density on property to 1,598 units — Plaintiffs claimed payment pursuant to bonus provision, applied for, and were granted summary judgment in sum of $3,129,000 — Appeal by defendants dismissed — Defendants contended there were "holds" in place on 218 units, pending release of which there was no grant in "final form" — Motions judge correctly concluded that matter fell to be determined on interpretation of agreement, language of which was unambiguous — Obligation to pay bonus was triggered when city, with consent of all relevant governmental authorities, granted density increase in final form on reasonably satisfactory terms and conditions — Agreement was silent in respect of any implementation issues — Terms of bonus clause were fulfilled when regional municipality approved official plan amendment as previously adopted by city — It followed that there were no material facts in dispute requiring trial.

Civil practice and procedure --- Summary judgment — Requirement to show no triable issue

Defendants agreed to purchase from plaintiffs property which allowed for construction of 614 residential units — Defendants covenanted to apply to all necessary authorities to re-zone property to residential and to apply for increase in density — Agreement contained bonus provision if defendants applied for and obtained re-zoning and density increase in "final form" from city — Application was made to re-zone parts of subject property to residential and to increase density coverage for all of property — City passed by-law, which adopted amendment to official plan, and regional municipality approved amendment, thereby increasing density on property to 1,598 units — Plaintiffs claimed payment pursuant to bonus provision, applied for and were granted summary judgment in sum of $3,129,000 — Appeal by defendants dismissed — Defendants contended there were "holds" in place on 218 units, pending release of which there was no grant in "final form" — Motions judge correctly concluded that matter fell to be determined on interpretation of agreement, language of which was unambiguous — Obligation to pay bonus was triggered when city, with consent of all relevant governmental authorities, granted density increase in final form on reasonably satisfactory terms and conditions — Agreement was silent in respect of any implementation issues — Terms of bonus clause were fulfilled when regional municipality approved official plan amendment as previously adopted by city — It followed that there were no material facts in dispute requiring trial.

Civil practice and procedure --- Costs — Scale and quantum of costs — Quantum of costs — Allowance of increased costs

Awarding of costs is within motions judge's discretion.

Table of Authorities

Statutes considered:

Planning Act, R.S.O. 1990, c. P.13
s. 36 — referred to

APPEAL by defendants from judgment reported at *Disera v. Liberty Developments Inc.* (2007), 2007 CarswellOnt 2571 (Ont. S.C.J.), granting motion for summary judgment for plaintiff for pecuniary relief; CROSS-APPEAL by plaintiffs from motions judge's disposition of costs.

Per curiam:

1 This is an appeal from the judgment of Hoilett J. dated April 26, 2007 wherein he granted summary judgment in favour of the respondents in the sum of $3,129,000.

2 The appellants agreed, by way of an Agreement of Purchase and Sale dated August 19, 2002 ("Agreement"), to purchase a property which allowed for construction of 614 residential units. However, a recital in the Agreement indicated that the appellants intended "to apply for an Official Plan Amendment and a re-zoning of the Property to allow for high density residential and/or commercial townhouses and/or semi-detached homes and/or single homes on the Property."

3 Clause 5.01 of the Agreement contemplated that a bonus would be paid by the appellants in certain circumstances. The relevant provision in this case provided that a bonus of $7,000 per unit over 1,000 units would be payable if the appellants applied for and obtained rezoning and a density increase in "final form" from the City of Vaughan on the property.

4 Clause 5.01 of the Agreement provides:

> The Purchaser covenants to make an application (the "Application") to all necessary authorities during the period of two (2) years next following the Closing to re-zone the Motel Lands and Front Lands to residential and concurrently to apply for an increase in density or coverage (the "Density Increase") for the easterly portion of the Back Lands....
>
> If at any time following the Closing of the transaction herein the City of Vaughan, with the consent of all the relevant governmental authorities, has granted in final form the Density Increase on the initial Application set out above (the "Decision") or any subsequent applications relating to the Property commenced within eight (8) years of Closing (the "Subsequent Decision"), on reasonably satisfactory terms and conditions, the Purchaser shall pay additional funds to the Vendor within six (6) months of the Decision or Subsequent Decision equal to the sum of:
>
> . . . . .
>
> ii) Seven Thousand Dollars ($7,000.00) for each residential unit approved in excess of One Thousand (1,000) units on the entire Property....

5 An application was made in November 2003 to rezone parts of the subject property to residential and to increase the density coverage for all of the property.

6 On January 24, 2005, the City of Vaughan passed By-law No. 5-2005 which adopted Amendment No. 621 to the Official Plan of the Vaughan Planning Area. Amendment No. 621 re-designates the subject lands High Density Residential and Open Space Park and states that the following policies shall apply to the High Density Residential lands:

> • a maximum density of 1,598 units comprising 93 townhouse units and 1,505 apartment units, or a combination thereof not to exceed 1,598 units, shall be permitted, and the number of apartment buildings shall not exceed 7;
>
> . . . . .
>
> • the overall development of the subject lands shall be in accordance with a master plan approved by Council, and intended to guide future development within the Amendment No. 621 area, together with the submission of the following reports to be approved through consideration of a draft plan of subdivision application: urban design guidelines, landscape/streetscape and open space master plan, shadow study, traffic impact/phasing report, and any other reports considered appropriate by the municipality.

7 In addition, the Amendment states that the Official Plan policies relating to "shall be implemented by way of an amendment to the Vaughan Zoning By-law, and Draft Plan of Subdivision and Site Plan approvals".

8 On the same day the City of Vaughan also passed By-Law No. 17-2005 which amended By-Law No. 1-88 to rezone the lands on terms indicating that some of the high density uses were subject to a Holding (H) provision under s. 36 of the *Planning Act* and that the Holding 'H' provision would be lifted in part as individual site plans are approved by Council in accordance with a phasing plan identified in a Traffic Impact/Phasing Report approved by the City. The By-Law also provided for an adjustment in the number of specific types of units that could be constructed so long as "..the total combined number of residential units in the RA3 and RM2 Zones shall not exceed a maximum of 1,598 units."

9 On February 14, 2005, the Council of the City of Vaughan adopted Report No. 7 of the Committee of the Whole. Item 29 of that report included the following:

> (a) Allocation of water and sewage capacity for an additional 984 units (i.e. a total of 1,598 units) and
>
> (b) Approval of a traffic impact/phasing report prepared by Cansult Limited in August, 2004.

Item 29 also stipulated:

> The final traffic report is to be approved by the Vaughan Engineering Department and the Region of York Transportation and Works Department, as a condition of subdivision approval. The implementing zoning by-law will include a Holding provision that will be lifted in part as individual site plans are approved in accordance with the above-noted phasing plan identified in the Traffic Impact/Phasing report by Cansult.

10 On March 14, 2005, the Regional Municipality of York granted its approval of Official Plan Amendment No. 621, thereby approving the density increase to 1,598 units for the property.

11 The appellants' primary ground of appeal is that the motion judge erred in finding that the density increase was approved in "final form" on March 14, 2005 and that the bonus for the additional units was payable as a result. The appellants submit that the clause is unambiguous but, as set out in their factum, should be interpreted as follows:

> ... while the official plan amendment was adopted on March 14, 2005, thereby establishing a policy of increased coverage, that policy was not implemented concurrently by a zoning by-law as the latter was subject to an "H" or "hold" under s. 36 of the *Planning Act* [R.S.O. 1990, c. P-13]. The proposed density increase was ineffective until the "H" was removed. The "H" was removed on February 26, 2007 in respect of 1,380 units and the vast bulk of the bonus is therefore payable on August 26, 2007.

12 The appellants do not dispute that they must pay the bonus contemplated in clause 5.01 of the Agreement for the 380 units (1,380 minus 1,000) no longer subject to a hold. With respect to those units, the only issue is the timing of payment. The appellants, however, maintain that the bonus for the other 218 units (1,598 less 1,380) will not be triggered until the hold is removed.

13 The appellants further submit that if the clause is ambiguous, the motion judge erred in granting summary judgment where there are conflicts in the evidence of the planning experts called by the parties.

14 The respondents' position, which the motion judge accepted, is that the clause is unambiguous. The density increase to 1,598 had been granted in final form by all relevant governmental authorities on March 14, 2005 and the bonus was payable within six months of that date even though a hold under s. 36 of the *Planning Act* was in place. The respondents submit that it is immaterial that the units subject to the hold could not actually be built until the "H" was removed by the City of Vaughan.

15 In our view, the motion judge correctly concluded that this matter falls to be determined on the interpretation of the Agreement, specifically clause 5.01 of the Agreement. The issue is whether the City of Vaughan granted the density increase in final form on Liberty's initial application at the time the amendments and approvals described above were passed, thereby entitling the respondents to the bonus as set out in clause 5.01.

16 We find no ambiguity in the language of the Agreement and therefore we do not need to look to extrinsic evidence for interpretative aid. It is not the role of judges to create ambiguity where none exists.

17 The obligation to pay the bonus is triggered when the City of Vaughan, with the consent of all relevant governmental authorities, grants the density increase in final form on reasonably satisfactory terms and conditions.

18 The Agreement is silent in respect of any implementation issues. As the respondents stated in their factum:

> "H" removal is not part of, and has nothing to do with, the "initial Application" referenced in the Agreement, and it has nothing to do with density or an increase in density. In short, Liberty has been granted its density rights for 1,598 residential units. Whether Liberty implements or uses the density increase is a totally different issue which has nothing to do with triggering payment of the bonus under clause 5.01(i) of the Agreement. Liberty cannot utilize these density rights until individual site plans are approved by the City of Vaughan, but those rights are there and remain there indefinitely.

19 In our view, the terms of s. 5.01 of the Agreement requiring that "the City of Vaughan, with the consent of all the relevant governmental authorities, has granted ... the Density Increase on the initial Application [in final form]" were fulfilled when the Regional Municipality of York approved Official Plan Amendment No. 621 as previously adopted by the City of Vaughan.

20 Reading the Agreement as a whole, including the recital indicating that the appellants intended to apply for an Official Plan Amendment and a rezoning of the Property, we conclude that the phrase "initial Application" as it appears in s. 5.01 of the Agreement refers to the request for an Official Plan Amendment increasing the maximum permitted number of units for the property. The fact that Amendment No. 621 stipulates that certain conditions must be fulfilled prior to the issuance of any building permits does not detract from the conclusion that approval of the density increase in final form has been granted on reasonably satisfactory terms and conditions.

21 It follows therefore that there are no material facts in dispute requiring a trial.

22 The appeal is dismissed.

Cross-Appeal

23 The respondents cross-appeal the motion judge's disposition of costs and seek an increased amount. They point to no error in principle but suggest a more reasonable figure would be $50,000 plus disbursements and G.S.T. as opposed to the all inclusive sum of $30,000 awarded by the motion judge.

24 The awarding of costs is a matter within the motion judge's discretion and absent error in principle this court will not interfere with the exercise of that discretion.

25 The motion judge considered the offers made by the respondents and clearly expressed reasons for ruling as he did that the costs sought by the respondents were "grossly excessive".

26 The cross-appeal is dismissed.

27 Costs of the appeal to the respondents fixed in the sum of $8,000.00 inclusive of disbursements and G.S.T. Costs of the cross-appeal to the appellants fixed in the sum of $1,500.00 inclusive of disbursements and G.S.T.

Appeal dismissed; cross-appeal dismissed.

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TAB 8

2006 BCCA 66
British Columbia Court of Appeal

Fraser v. Houston

2006 CarswellBC 552, 2006 BCCA 66, [2006] B.C.W.L.D. 3017, [2006] B.C.W.L.D. 3035, [2006] B.C.W.L.D. 3058, [2006] B.C.W.L.D. 3060, [2006] B.C.J. No. 290, 148 A.C.W.S. (3d) 378, 370 W.A.C. 19, 51 B.C.L.R. (4th) 82

Brian Fraser (Respondent / Plaintiff) and James Ralph Houston, Urban Projects Ltd., Urban Projects (Barbados) Ltd., Addwest Minerals, Inc. and Addwest Minerals International, Ltd. (Appellants / Defendants)

Southin, Levine, Lowry JJ.A.

Heard: January 13, 2006
Judgment: February 15, 2006
Docket: Vancouver CA033024

Proceedings: reversing in part *Fraser v. Houston* (2005), 2005 BCSC 715, 2005 CarswellBC 1141 (B.C. S.C.)

Counsel: R. D. Holmes for Appellants
D.J. Barker for Respondent

Subject: Civil Practice and Procedure; Contracts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

III Parties
III.4 Standing

Civil practice and procedure

XVI Disposition without trial
XVI.7 Settlement
XVI.7.c Enforcement of terms

Contracts

VII Construction and interpretation
VII.1 General principles

Contracts

IX Performance or breach
IX.8 Breach
IX.8.a General principles

Headnote

Civil practice and procedure — Disposition without trial — Settlement — Enforcement of terms

Plaintiff claimed he had brought corporate opportunity to defendant that involved acquisition of shares of company — Defendants acquired shares in company — Plaintiff brought action against individual and corporate defendants

— Parties entered into settlement agreement — Agreement required defendants to pay to plaintiff $505,000 on execution of agreement, additional $200,000 by specified date, pay installments of $5,000 U.S. for 48 months and transfer 100,000 shares of company to plaintiff each month for 20 months — Defendants paid $505,000 on execution of agreement but did not pay additional $200,000 — Defendants only paid $5,000 U.S. for nine months and only transferred $800,000 shares to plaintiff — Settlement required defendants to deliver 600,000 shares to plaintiff's solicitor to be held as security and, provided that if plaintiff directed solicitor to sell shares and there was shortfall, only two named companies would remain liable for shortfall and remaining defendants would not be liable — Plaintiff brought action against defendants for unpaid monies and damages for failure to deliver 1,200,000 shares in company — Action allowed — Defendants' argument that sale of shares given as security was plaintiff's sole recourse in event of default was rejected — Settlement was clear and unambiguous — Settlement obliged all defendants to make payments and transfer shares and defendants failed to do so — Agreement did not restrict plaintiff's remedy in event of default to sale of shares — Agreement did not set out security for payment of $505,000 or transfer of 2,000,000 shares — Plaintiff chose not to exercise his option to sell shares and was not obliged to do so — Unless plaintiff exercised that option two companies were not solely liable for shortfall — Settlement did not specify two options that would occur on default but instead established security and stated what would happen if security was called upon — Wording of agreement did not prevent plaintiff from determining not to realize security but to sue defendants when they failed to meet their contractual obligations — Defendants' representatives had notice of default and wrote to plaintiff acknowledging default — Eventually further notice was provided by filing of claim — Defendants did not make up default within five days as required by agreement — Defendants appealed — Appeal allowed in part — Plaintiff did breach right of first refusal clause and defendants were awarded $100.00 in damages for breach — Defendants' argument that unilateral mistake was made held no merit as there was no convincing evidence it was true — Defendants' claim that they had negotiated for different liability which was not in agreement they signed was not basis on which it could be said that they necessarily believed they had obtained when they executed agreement — Liability for payment in executed agreement was compromise between what both parties wanted and it could not be said that plaintiffs received exactly what they wished for — There was no evidence of relevant conversations between solicitors on relevant clauses.

Contracts --- Construction and interpretation — General principles

Plaintiff claimed he had brought corporate opportunity to defendant that involved acquisition of shares of company — Defendants acquired shares in company — Plaintiff brought action against individual and corporate defendants — Parties entered into settlement agreement — Agreement required defendants to pay to plaintiff $505,000 on execution of agreement, additional $200,000 by specified date, pay installments of $5,000 U.S. for 48 months and transfer 100,000 shares of company to plaintiff each month for 20 months — Defendants paid $505,000 on execution of agreement but did not pay additional $200,000 — Defendants only paid $5,000 U.S. for nine months and only transferred $800,000 shares to plaintiff — Settlement required defendants to deliver 600,000 shares to plaintiff's solicitor to be held as security and, provided that if plaintiff directed solicitor to sell shares and there was shortfall, only two named companies would remain liable for shortfall and remaining defendants would not be liable — Plaintiff brought action against defendants for unpaid monies and damages for failure to deliver 1,200,000 shares in company — Action allowed — Defendants' argument that sale of shares given as security was plaintiff's sole recourse in event of default was rejected — Settlement was clear and unambiguous — Settlement obliged all defendants to make payments and transfer shares — Defendants failed to do so — Agreement did not restrict plaintiff's remedy in event of default to sale of shares — Agreement did not set out security for payment of $505,000 or transfer of 2,000,000 shares — Plaintiff chose not to exercise his option to sell shares and was not obliged to do so — Unless plaintiff exercised that option two companies were not solely liable for shortfall — Settlement did not specify two options that would occur on default but instead established security and stated what would happen if security was called upon — Wording of agreement did not prevent plaintiff from determining not to realize security but to sue defendants when they failed to meet their contractual obligations — Contract did not set out express alternatives and limit plaintiff to those alternatives — Defendants' argument that it was not reasonable for responsibility for shortfall to be limited to companies but for responsibility for potentially greater liability remain with defendants was rejected

— Party may well elect to access owed monies by sale of shares already in hands of his solicitor rather than embark upon lawsuit and it was not unreasonable for plaintiff to accept certain limitations should that course be utilized — Defendants appealed — Appeal allowed in part — Plaintiff did breach right of first refusal clause and defendants were awarded $100.00 in damages for breach — Defendants' argument that unilateral mistake was made held no merit as there was no convincing evidence it was true — Defendants' claim that they had negotiated for different liability which was not in agreement they signed was not basis on which it could be said that they necessarily believed they had obtained when they executed agreement — Liability for payment in executed agreement was compromise between what both parties wanted and it could not be said that plaintiffs received exactly what they wished for — There was no evidence of relevant conversations between solicitors on relevant clauses.

Civil practice and procedure — Parties — Standing

Plaintiff claimed he had brought corporate opportunity to defendant that involved acquisition of shares of company — Defendants acquired shares in company — Plaintiff brought action against individual and corporate defendants — Parties entered into settlement agreement — Agreement required defendants to pay to plaintiff $505,000 on execution of agreement, additional $200,000 by specified date, pay installments of $5,000 U.S. for 48 months and transfer 100,000 shares of company to plaintiff each month for 20 months — Defendants paid $505,000 on execution of agreement but did not pay additional $200,000 — Defendants only paid $5,000 U.S. for nine months and only transferred $800,000 shares to plaintiff — Settlement required defendants to deliver 600,000 shares to plaintiff's solicitor to be held as security and, provided that if plaintiff directed solicitor to sell shares and there was shortfall, only two named companies would remain liable for shortfall and remaining defendants would not be liable — Plaintiff brought action against defendants for unpaid monies and damages for failure to deliver 1,200,000 shares in company — Action allowed — Defendants' argument that plaintiff lacked standing to bring action because he had designated company as his designee pursuant to terms of settlement agreement was rejected — Where plaintiff directed funds to go was of no importance to defendants — Agreement also provided that payment was to be made to either plaintiff or his designee collectively termed "Designee" in agreement — Plaintiff was therefore included in agreement's definition of designee — Defendants appealed — Appeal allowed in part — Plaintiff did not lose his right to sue to enforce agreement by merely nominating company to receive payments and benefits — Trial judge made no finding that plaintiff entered into agreement with defendants in order to defraud his creditors and defendants have shown no evidence that would support that finding — Plaintiff did breach right of first refusal clause and defendants were awarded $100.00 in damages for breach.

Contracts — Performance or breach — Breach — General principles

Plaintiff claimed he had brought corporate opportunity to defendant that involved acquisition of shares of company — Defendants acquired shares in company — Plaintiff brought action against individual and corporate defendants — Parties entered into settlement agreement — Agreement required defendants to pay to plaintiff $505,000 on execution of agreement, additional $200,000 by specified date, pay installments of $5,000 U.S. for 48 months and transfer 100,000 shares of company to plaintiff each month for 20 months — Defendants paid $505,000 on execution of agreement but did not pay additional $200,000 — Defendants only paid $5,000 U.S. for nine months and only transferred $800,000 shares to plaintiff — Settlement required defendants to deliver 600,000 shares to plaintiff's solicitor to be held as security and, provided that if plaintiff directed solicitor to sell shares and there was shortfall, only two named companies would remain liable for shortfall and remaining defendants would not be liable — Plaintiff brought action against defendants for unpaid monies and damages for failure to deliver 1,200,000 shares in company — Action allowed — Defendants brought counterclaim against plaintiff for breach of agreement — Counterclaim dismissed — Defendants' argument that sale of shares given as security was plaintiff's sole recourse in event of default was rejected — Settlement was clear and unambiguous — Settlement obliged all defendants to make payments and transfer shares — Defendants failed to do so — Agreement did not restrict plaintiff's remedy in event of default to sale of shares — Agreement did not set out security for payment of $505,000 or transfer of 2,000,000 shares — Plaintiff chose not to exercise his option to sell shares and was not obliged to do so — Unless plaintiff exercised that option two companies were not solely liable for shortfall — Settlement did not specify two options that

would occur on default but instead established security and stated what would happen if security was called upon — Wording of agreement did not prevent plaintiff from determining not to realize security but to sue defendants when they failed to meet their contractual obligations — Agreement provided that parties would not interfere with each other's activities — Defendants' allegation that plaintiff breached that provision of agreement when he sold some of his shares and that had effect of driving down value of shares was rejected — Plaintiff's activity did not have significant impact on share value as his trading was minimal — Plaintiff had given some shares to someone else and did not control her disposition of shares — There was no evidence that defendants would have bought shares — Most significant factor in shares decline in value was declining gold prices — Defendants also contended plaintiff failed to use his best efforts to obtain release from corporation in accordance with agreement — Plaintiff made no effort to obtain release but defendants did not suffer damages as result of his actions as corporation had made no claim against them — If claim arose defendants could rely on indemnification clause contained in settlement agreement — Defendants appealed — Appeal allowed in part — Plaintiff did breach right of first refusal clause and defendants were awarded $100.00 in damages for breach — Defendants' argument that unilateral mistake was made held no merit as there was no convincing evidence it was true — Defendants' claim that they had negotiated for different liability which was not in agreement they signed was not basis on which it could be said that they necessarily believed they had obtained when they executed agreement — Liability for payment in executed agreement was compromise between what both parties wanted and it could not be said that plaintiffs received exactly what they wished for — There was no evidence of relevant conversations between solicitors on relevant clauses.

Table of Authorities

Cases considered by *Lowry J.A.*:

Agip S.p.A v. Navigazione Alberta Italia S.p.A (1983), [1984] 1 Lloyd's Rep. 353 (Eng. C.A.) — considered

Baden v. Société Générale pour Favoriser le Developpement du Commerce & de l'Industrie en France SA (1983), [1983] B.C.L.C. 325, [1992] 4 All E.R. 161, [1993] 1 W.L.R. 509 (Eng. Ch. Div.) — referred to

Bank of Montreal v. Vancouver Professional Soccer Ltd. (1987), 15 B.C.L.R. (2d) 34, 1987 CarswellBC 174 (B.C. C.A.) — considered

Can-Dive Services Ltd. v. Pacific Coast Energy Corp. (2000), 2000 BCCA 105, 2000 CarswellBC 262, 74 B.C.L.R. (3d) 30, 1 C.L.R. (3d) 169, [2000] 5 W.W.R. 683, 134 B.C.A.C. 19, 219 W.A.C. 19 (B.C. C.A.) — considered

Commission for the New Towns v. Cooper (Great Britain) Ltd. (1995), [1995] Ch. 259, [1995] 2 W.L.R. 677, [1995] 2 All E.R. 929 (Eng. C.A.) — considered

Downtown King West Development Corp. v. Massey Ferguson Industries Ltd. (1996), 1 R.P.R. (3d) 1, 133 D.L.R. (4th) 550, 89 O.A.C. 373, 28 O.R. (3d) 327, 1996 CarswellOnt 899 (Ont. C.A.) — referred to

Frederick E. Rose (London) Ltd. v. William H. Pim Junior & Co. (1953), [1953] 2 Q.B. 450, [1953] 2 Lloyd's Rep. 238, 70 R.P.C. 238, 33 Can. Bar Rev. 164, [1953] 2 All E.R. 739, [1953] 3 W.L.R. 497 (Eng. C.A.) — referred to

George Wimpey UK Ltd. v. V.I. Construction Ltd. (February 3, 2005), Doc. A3/2004/1466 (Eng. C.A.) — considered

Hart v. Boutilier (1916), 56 D.L.R. 620, 1916 CarswellNS 43 (S.C.C.) — considered

Hurst Stores and Interiors Ltd. v. ML Europe Property Ltd. (April 1, 2004), Doc. A1/2003/1523 (Eng. C.A.) — considered

Joscelyne v. Nissen (1969), [1970] 2 Q.B. 86, [1970] 1 All E.R. 1213 (Eng. C.A.) — considered

Lovell & Christmas Ltd. v. Wall (1911), 104 L.T. 85 (Eng. C.A.) — considered

"M.F. Whalen" (The) v. Point Anne Quarries Ltd. (1921), 63 S.C.R. 109, 63 D.L.R. 545, 1921 CarswellNat 38 (S.C.C.) — considered

Riverlate Properties Ltd. v. Paul (1974), [1975] Ch. 133, [1974] 2 All E.R. 656, [1974] 3 W.L.R. 564 (Eng. C.A.) — considered

Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd. (2002), 2002 SCC 19, 2002 CarswellAlta 186, 2002 CarswellAlta 187, 20 B.L.R. (3d) 1, 209 D.L.R. (4th) 318, [2002] 5 W.W.R. 193, 98 Alta. L.R. (3d) 1, 283 N.R. 233, 299 A.R. 201, 266 W.A.C. 201, 50 R.P.R. (3d) 212, (sub nom. *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*) [2002] 1 S.C.R. 678 (S.C.C.) — considered

APPEAL of judment reported at *Fraser v. Houston* (2005), 2005 BCSC 715, 2005 CarswellBC 1141 (B.C. S.C.).

***Lowry J.A.*:**

1 On 26 September 1997, Brian Fraser executed an agreement with James Houston and four companies Mr. Houston controlled, to settle litigation Mr. Fraser had instigated arising out of what he claimed was a loss of his right to participate in a business opportunity of which Mr. Houston had taken advantage. The opportunity was to acquire a company that owned some mining properties including an operating gold mine in Arizona and undertake a public offering to raise financing. The agreement provided in part for payments of money and the delivery of shares of the public company to Mr. Fraser over a period of months. In accordance with a provision of the agreement, shares in the public company were also held as security for the payments of money. Mr. Houston and the four companies defaulted both on their covenant to make the payments and on their covenant to deliver shares.

2 On 4 January 2001, Mr. Fraser commenced this action for breach of the settlement agreement. Liability was denied on various grounds and a counterclaim for breaches of the agreement was made against Mr. Fraser. With respect to the payments that had not been made, it was contended in the main that, by virtue of the provisions of the agreement pertaining to the security shares, Mr. Fraser was precluded from taking action against Mr. Houston and the companies in respect of their covenant to make the payments. They maintained that his remedy was confined to selling the security shares and pursuing the restricted recourse for any shortfall against the two companies that were the subject of the opportunity pursuant to the terms upon which the security shares were held under the agreement.

3 The action was tried before Mr. Justice Williamson, who granted judgment to Mr. Fraser in excess of $400,000 to compensate him for the default in respect of the payments and a further $18,000 in respect of the shares that were not delivered. The learned trial judge dismissed the counterclaim. Various grounds of appeal are now advanced, the foremost of which is that the judge erred in the interpretation he gave to the provision of the agreement relating to the security, or that he erred in failing to rectify that provision to accord with what it is said the agreement was to have provided.

The Agreement

4 The agreement was negotiated by Mr. Fraser and David Rennie, who was an accountant and business associate of Mr. Houston. The terms were drawn by solicitors, Howard Shapray and Bradley Cramer of Shapray Cramer &

Associates, instructed by Mr. Fraser, and David Church and Andrew Pearson of Camp Church & Associates, instructed by Mr. Houston.

5 The parties to the agreement were Mr. Fraser, on the one hand, and, on the other, Mr. Houston, his two companies through which he conducted his business (Urban Projects Ltd. and Urban Projects (Barbados) Ltd., together "Urban Projects"), Addwest Minerals, Inc. ("AMI"), the company that gave rise to the opportunity, and Addwest Minerals International, Ltd. ("Addwest International"), the vehicle employed for the public offering. Mr. Houston, Urban Projects, and AMI were the defendants in the action and were defined in the agreement, accordingly, as the "Defendants".

6 In exchange for a complete release in the broadest form of all claims made by Mr. Fraser against the Defendants and Addwest International, the Defendants covenanted as follows:

> 4. The DEFENDANTS shall:
>
> (a) make unconditional payment to FRASER, by a certified cheque, bank draft, or trust cheque from Camp Church & Associates ("Camp") to Shapray Cramer & Associates ("Shapray") in trust, in the amount of $150,000 (CDN), contemporaneous with delivery to Camp of this Release and Settlement Agreement executed by FRASER;
>
> (b) make unconditional payment to FRASER or his designee (collectively, "the DESIGNEE"), by way of delivery to Shapray of a certified cheque, bank draft, or trust cheque from Camp payable to Shapray in trust, in the amount of $350,000 (CDN) contemporaneous with delivery to Camp of this Release and Settlement Agreement executed by FRASER and an unfiled copy of the Consent Dismissal Order in the Action contemplated by this Agreement bearing the original endorsement of counsel for FRASER in the Action; and
>
> (c) make unconditional payment to DESIGNEE, by way of delivery to Shapray of a certified cheque, bank draft, or trust cheque from Camp payable to DESIGNEE, in the amount of $200,000 (CDN) on or before March 17, 1998;
>
> (d) make unconditional payment to DESIGNEE, by way of delivery to Shapray, or to such other person in Vancouver, British Columbia, and for so long as Fraser may nominate by delivery by facsimile to David Rennie at 604-689-7667 at least 5 days prior to the next date for payment, of a certified cheque, bank draft, or trust cheque from Camp, or by delivery by wire transfer to a wire transfer location and number as may be provided from time to time by DESIGNEE by facsimile to Camp at least 10 days prior to the next date for payment ("the Wire Transfer"), payable to DESIGNEE in the amount of $5,000.00 (U.S.) on or before October 15, 1997 with a further $5,000.00 (U.S.) by a certified cheque, bank draft, or trust cheque from Camp payable to DESIGNEE, or by the Wire Transfer, to be delivered on or before the 15th day of each consecutive month thereafter for a period, including the first payment, of 48 months in total.
>
> (e) make unconditional payment to Shapray of the sum of $5,000.00 (CDN) by way of delivery to Shapray of a certified cheque, bank draft, or trust cheque from Camp on account of FRASER's legal fees incurred in connection with this matter contemporaneous with delivery to Camp of this Release and Settlement Agreement executed by FRASER and an unfiled copy of the Consent Dismissal Order in the Action contemplated by this Agreement bearing the original endorsement of counsel for FRASER in the Action.

7 Thus the Defendants were required to pay a total of $505,000 on the execution of the agreement, which they did. They were then to pay $200,000 (the "4(c) amount or payment") six months later and a further $240,000 (the "4(d) amount or payment") over the following 48 months. They paid none of the 4(c) amount and made only nine monthly payments of $5,000 of the 4(d) amount.

8 The Defendants covenanted to post security as follows:

5. On or before October 21, 1997, the DEFENDANTS shall deliver to Shapray 600,000 shares, which shall be free-trading and without restriction or legend in ADDWEST INTERNATIONAL (the "Security"). The Security is to be held by Shapray subject to the following trust conditions:

(a) subject to paragraph 6 [providing for 15 days notice of default], in the event that the DEFENDANTS fail to make the payment referred to in paragraph 4(c) above, Shapray may as and when instructed by DESIGNEE deliver 200,000 of the Escrow Shares ("the 4(c) Shares") to FRASER in satisfaction or partial satisfaction, as the case may be, of the payment obligation set out in paragraph 4(c) above, until such time as the earlier of (i) net proceeds of $200,000.00 CDN has been realized by or for DESIGNEE from the sale of the 4(c) Shares by FRASER using the facilities of any exchange on which the shares of ADDWEST INTERNATIONAL are listed and traded, at which time FRASER shall deliver the unsold balance if any of the 4(c) Shares to Camp, or (ii) all of the 4(c) Shares have been sold by FRASER using the facilities of any exchange on which the shares of ADDWEST INTERNATIONAL are listed and traded and net proceeds of less than $200,000.00 CDN has been realized, in which case Addwest Minerals, Inc. ("AMI") and ADDWEST INTERNATIONAL alone shall each remain jointly and severally liable for the unpaid portion of the payment referred to in paragraph 4(c) above.

(b) in the event that the DEFENDANTS fail to make any of the payments referred to in paragraph 4(d) above, and there has been an event of default pursuant to paragraph 7 below [providing for 5 days notice and the acceleration of payments], Shapray may as and when instructed by DESIGNEE deliver 400,000 shares of the Security ("the 4(d) Shares") to FRASER in satisfaction or partial satisfaction, as the case may be, of any amount due and owing pursuant to paragraph 4(d) above and paragraph 7 below, until such time as the earlier of (i) net proceeds equal to the amount due and owing under paragraph 4(d) and paragraph 7 has been realized by or for DESIGNEE from the sale of the 4(d) Shares by FRASER using the facilities of any exchange on which the shares of ADDWEST INTERNATIONAL are listed and traded, at which time FRASER shall return the balance of the 4(d) Shares to Camp, or (ii) all the 4(d) Shares are sold by Fraser using the facilities of any exchange on which the shares of ADDWEST INTERNATIONAL are listed and traded, and net proceeds less than the amount due and owing under paragraph 4(d) and paragraph 7 have been realized, in which case AMI and ADDWEST INTERNATIONAL alone shall each remain jointly and severally liable for the unpaid portion of any amount due and owing under paragraph 4(d) and paragraph 7.

9 The Defendants covenanted to deliver shares of Addwest International to Mr. Fraser's solicitors and they did so: 200,000 shares to secure the 4(c) payment, and 400,000 shares to secure the 4(d) payment. Of particular significance now, the clauses provided that AMI and Addwest International alone would remain liable if the proceeds of a sale of shares were, in each instance, less than $200,000 and $240,000 respectively.

10 Finally, the Defendants covenanted to deliver shares to Mr. Fraser as follows:

9. The DEFENDANTS shall deliver to DESIGNEE, at an address in Vancouver, British Columbia stipulated by FRASER by written facsimile to David Rennie at 604-689-7667, or at such other facsimile number as David Rennie shall provide in writing to Shapray, two million (2,000,000.00) shares which are free trading and without restriction or legend in ADDWEST INTERNATIONAL. Those shares shall be delivered at a rate of 100,000 shares per month, commencing on October 17, 1997 and continuing on or before the 15th day of every consecutive month thereafter until the full 2,000,000 shares have been delivered.

11 The Defendants delivered only the first 800,000 of the 2,000,000 shares they were required to deliver at 100,000 shares a month for 20 months.

12 It is significant that, at the time the agreement was made, Addwest International shares were trading at $1.50. By June 1998, the price of gold had fallen sufficiently to render the operation of the AMI mine unprofitable. It was closed and the trading price of the shares fell to the point where the shares became essentially worthless.

Interpretation

13 The parties divide over the effect to be given to the wording of clauses 5(a) and 5(b) which provide that, in the event of a shortfall on the sale of the shares held as security, "AMI and ADDWEST INTERNATIONAL alone shall each remain jointly and severally liable for the unpaid portion" of the payments secured. Mr. Fraser maintains that the limited recourse prescribed pertains only to liability for any shortfall in the sale of the shares. The Defendants say that what was prescribed was the sole recourse available to Mr. Fraser in the event of their default under clauses 4(c) and 4(d) whether he elected to sell the shares held as security or not. They actually plead:

> 25. These Defendants say that the Agreement provided that the Defendants were all responsible for making the initial payments totalling $505,000 referred to in paragraphs 4(a), (b) and (e) of the Executed Form of Agreement, but that only the Defendants Addwest Minerals and Addwest International were liable for any payment or share delivery obligations to Fraser or to his designee.

14 The Defendants maintain that, in the event of their default under clause 4(c) or 4(d), Mr. Fraser's only recourse on a sensible interpretation of the agreement was to take delivery of the shares held by his solicitors, sell them, and pursue AMI or Addwest International for any shortfall. They say that Mr. Fraser could not sue them if they defaulted on their covenant to pay, such that Mr. Houston and Urban Projects had no obligation to compensate Mr. Fraser for the default and accordingly no action lay against them. They argue that there would be little point to there being restricted recourse available to Mr. Fraser under clause 5 if he could sue all of the Defendants, including Mr. Houston personally, for the full amount owing when the default occurred.

15 The judge rejected the interpretation for which the Defendants contend. With respect to the rationale for the provisions of the agreement as drawn, he said:

> [28] ... A party may well elect to access owed monies by sale of shares already in the hands of his solicitor rather than embark upon a lawsuit with all of its vicissitudes. It would not be unreasonable in order to have access to that shortcut to accept certain limitations should that course be utilized.

16 I share the judge's view and am able to find no basis on which it could be said that, having covenanted to personally make payments totalling $440,000, Mr. Houston and Urban Projects were effectively insulated, by the covenant they gave in clause 5, from liability for anything other than the value of the shares they put in trust as security.

17 As drawn, clause 5 is a covenant to post security — an obligation; it is not a qualification of the covenant given in clause 4. There is no provision in the agreement affording Mr. Houston or Urban Projects any option in relation to paying the amounts they covenanted to pay, and the agreement cannot be interpreted as if there were. The covenants given in clause 4 are clear and they were not given subject to any limitation or condition. They are actually stated to be "unconditional".

18 It would be an unusual agreement indeed that would afford one party who covenants unconditionally to make payments of money to the other to be free of any liability if the payments are not made for no other reason than because arrangements have been put in place to secure performance. The effect of such an agreement would be to give the payor an option as to whether the covenant was honoured. Such an agreement could certainly be made, but one would expect it to contain a clear provision to give effect to what would be a somewhat unusual bargain. Otherwise, one would expect the payor to remain liable on the covenant given regardless of how it may be secured.

19 This agreement is certainly not unworkable. In the event of default, the Defendants were by operation of law required to compensate Mr. Fraser. Their obligation to do so could have been limited by express provision in the agreement, but that was not done. Had Mr. Fraser elected to take the security, as he may well have done when the shares had good value, his recourse for any shortfall would have been limited to recovering what he could from AMI and Addwest International. But he chose not to take delivery of any of the shares, which, after the gold mine closed, were of little value, and there was no doubt little prospect of recovering anything from AMI or Addwest International.

20 It follows that I would not accede to this ground of appeal.

Rectification

21 The Defendants say that, if the agreement, as executed, is not to be interpreted as they say it should be, then in the alternative it must be rectified to put right a mistake that was made as to what it provided. They plead:

> 26. These Defendants say that, to the extent that the Executed Form of Agreement does not reflect the parties' Agreement and true intentions as pleaded in paragraph 25 herein, it ought to be:
>
> . . . . .
>
> b) Rectified.

22 While the particular wording that the Defendants say is to be added to the agreement in order to rectify it is not pleaded, as I consider it should have been (in the prayer for relief if not otherwise), they said in argument that a sentence must be added to clause 5 so that it would read as follows, with the sentence underlined:

> 5. On or before October 21, 1997, the DEFENDANTS shall deliver to Shapray 600,000 shares, which shall be free-trading and without restriction or legend in ADDWEST INTERNATIONAL (the "Security"). <u>The Security shall be the sole recourse of Fraser and Designee for the payments referenced in paragraphs 4(c) and 4(d).</u> The Security is to be held by Shapray subject to the following trust conditions: ...

23 The judge said he did not consider it was necessary that he address the Defendants' case for rectification and he did not do so. It is not clear to me from his reasons why he held that view, but it is now common ground that if, on the evidence adduced, there was a case for rectification, it had to be addressed.

24 Rectification is an equitable remedy that may be granted where it is shown that because of a mistake, which can be mutual or unilateral, an executed instrument does not give effect to what was intended. While the nature of the evidence and the burden of proof required to make out a case for rectification based on a unilateral mistake may be largely the same as for invoking the remedy in a case of mutual mistake, the elements of the case to be proven in each instance are fundamentally different.

25 On the argument advanced, at least in their factum, the Defendants' case is one of their having made a unilateral mistake about the provisions of the instrument they executed in circumstances where Mr. Fraser or his solicitors knew or ought to have known of their mistake. They do, however, say in the alternative that the evidence adduced at trial would support there having been a mutual mistake, contending that there was an accord with respect to the liability of Mr. Houston and Urban Projects for making the 4(c) and 4(d) payments that was mutually overlooked in the wording of clause 5. Before reviewing the evidence and considering the Defendants' case, it may be advantageous to review the principles that govern the extraordinary remedy of rectification in the context of both mutual and unilateral mistake.

a) Mutual Mistake

26 The intervention of equity to rectify a document that by virtue of the parties' mutual mistake does not evidence their true agreement is a remedy that requires adherence to principles that have been developed in recognition of the importance of preserving confidence in commercial paper. It is a remedy to be employed with caution. This is seen to

be as true today as when the Supreme Court considered the remedy in what are the two cornerstone cases of Canadian law on the subject: *Hart v. Boutilier* (1916), 56 D.L.R. 620 (S.C.C.) [*Hart*], and "*M.F. Whalen*" *(The) v. Point Anne Quarries Ltd.* (1921), 63 S.C.R. 109, 63 D.L.R. 545 (S.C.C.) [*M.F. Whalen*]. In *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19 (S.C.C.) [*Performance Industries*], which was concerned with a unilateral mistake, Binnie J., writing for a unanimous court on the point, observed at para. 31:

> In *Hart*, *supra*, at p. 630, Duff J. (as he then was) stressed that "[t]he power of rectification must be used with great caution". Apart from everything else, a relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts.

27 The law that now governs rectification where there has been a mutual mistake is derived from *Hart* and "*M.F. Whalen*", as informed by the English Court of Appeal's decision in *Joscelyne v. Nissen* (1969), [1970] 1 All E.R. 1213, [1970] 2 Q.B. 86 (Eng. C.A.), where any question of the need to establish the existence of an enforceable agreement prior to the execution of the document that is sought to be rectified was put to rest. What was seen to be required was only the existence of a continuing common intention on the point in issue providing that the intention was outwardly expressed and that it continued until the document was executed.

28 In *Bank of Montreal v. Vancouver Professional Soccer Ltd.* (1987), 15 B.C.L.R. (2d) 34 (B.C. C.A.) at 36-37, after stating that rectification is not concerned with the making of a contract but with defects in recording it, McLachlin J.A. (as she then was) said that before the remedy can be obtained, the applicant must establish first that the instrument does not reflect the agreement of the parties, and then that the parties shared a continuing common intention, up to the time of signing, that the provision at issue stand as agreed and not as reflected in the document. For that proposition, she cited *Joscelyne v. Nissen* and the earlier decision of the Court of Appeal that gave rise to the difficulties addressed in that case, *Frederick E. Rose (London) Ltd. v. William H. Pim Junior & Co.*, [1953] 2 All E.R. 739, [1953] 2 Q.B. 450 (Eng. C.A.).

29 This statement is not, however, to be taken as excluding the requirement that the parties' common intention must have been outwardly expressed. Writing for a unanimous court in *Joscelyne v. Nissen*, Russell L.J. emphasized the requirement at p. 1221, after quoting in particular Buckley L.J. from *Lovell & Christmas Ltd. v. Wall* (1911), 104 L.T. 85 (Eng. C.A.) at 93, at p. 1217 as follows:

> In ordering rectification the court does not rectify contracts, but what it rectifies is the erroneous expression of contracts in documents. For rectification it is not enough to set about to find out what one or even both of the parties to the contract intended. What you have got to find out is what intention was communicated by one side to the other, and with what common intention and common agreement they made their bargain.

30 In keeping with rectification being a form of relief that is to be granted with caution, the party seeking to have the instrument that was executed altered has always borne a heavy onus to prove that what was executed was not the agreement, as well as what the outwardly expressed continuing common intention actually was. As Binnie J. observed in *Performance Industries* at paras. 41-43, the standard of proof was once the criminal standard of "beyond a reasonable doubt" and oral testimony required documentary corroboration. Neither is any longer the case. But now, while it can be accepted that the standard is somewhat lower, it is still higher than the mere "balance of probabilities" customarily employed in a civil case. Binnie J. settled on a standard of "convincing proof" which was the standard recognized by the English Court of Appeal in *Joscelyne v. Nissen*. I consider that to mean that a case for rectification must be compelling.

b) Unilateral Mistake

31 Where rectification of a document is sought because there has been a unilateral mistake made with respect to a particular term of a transaction, it can never be said that there was a common intention with respect to that term that continued until the document was executed. Indeed, the clear effect of rectifying a document where there has been a unilateral mistake is to impose on the non-mistaken party an agreement that, at least at the time the document was executed, that party did not intend to make. Rectification in this context is employed where the parties were, at least at

that time, clearly not *ad idem*. It enables a party to overcome its own mistake by having the court impose on another an agreement the other did not intend to have to perform. The remedy is, for this reason, quite drastic in nature, as recognized most recently by the English Court of Appeal in *George Wimpey UK Ltd. v. V.I. Construction Ltd.*, [2005] EWCA Civ 77 (Eng. C.A.) [*Wimpey*] per Blackburne J. at para. 75.

32 However, the mistake of one party to an agreement cannot, of itself, constitute a basis for equitable relief. The rationale for that was well put by Russell L.J., speaking for the court, in *Riverlate Properties Ltd. v. Paul* (1974), [1975] Ch. 133, [1974] 2 All E.R. 656 (Eng. C.A.) [*Riverlate Properties*], where some nineteenth century cases that appeared to suggest otherwise were explained or overruled. In rejecting the notion that one party was entitled to equitable relief, be it rectification or rescission, on the mere ground of having made a mistake, Russell L.J. said, at p. 141:

> If reference be made to principles of equity, it operates on conscience. If conscience is clear at the time of the transaction, why should equity disrupt the transaction? If a man may be said to have been fortunate in obtaining a property at a bargain price, or on terms that make it a good bargain because the other party unknown to him has made a miscalculation or other mistake, some high-minded men might consider it appropriate that he should agree to a fresh bargain to cure the miscalculation or mistake, abandoning his good fortune. But if equity were to enforce the views of those high-minded men, we have no doubt that it would run counter to the attitudes of much the greater part of ordinary mankind (not least the world of commerce), and would be venturing on the field of moral philosophy in which it would soon be in difficulties.

33 Thus, something more than a mistake on the part of one party is required before equitable relief can be employed.

34 As a result, rectification of a document where there has been a mistake that is not common to both parties must be understood as having a different focus than the relief that can be employed when a mistake has been mutually made. The remedy affords relief against conduct on the part of the non-mistaken party that equity views as sufficiently unconscionable to warrant the remedy. The burden of proof resting on the party seeking relief is the same, but what must be established is quite different. What must be established is conduct on the part of the non-mistaken party that renders it unconscionable to permit that party to benefit from the agreement (such as would warrant rescission if that remedy were sought) and, in addition, that renders it unconscionable to resist the rectification of the written instrument even though the remedy will impose on the non-mistaken party an agreement that it did not intend to make at the time the instrument was executed.

35 It has, in some circumstances, but not always (see for example *Wimpey*), been held that, where one party actually knew that the other party to an agreement did not appreciate that the document being executed differed from what that party intended it should provide, the conduct of the non-mistaken party in not drawing the difference to the attention of the other justified rectification. That was the case in *Performance Industries* where the Supreme Court upheld a decree of rectification based on a unilateral mistake. The parties' discussions had been predicated on one receiving a parcel of land 110 yards wide, which was critical for the use of the land that he planned. The other party knew that the executed agreement provided that the parcel would be 110 *feet* wide which was much to his advantage. He also knew of the plan for the property and that the transaction would not have proceeded if the parcel were not to be 110 yards wide. The non-mistaken party was then held to an obligation that, at the time he executed the written document, he did not expect to ever have to perform.

36 However, what a person actually knew is not always easily proven, particularly were there is a high standard of proof, and the position with respect to constructive knowledge is much less clear. In *Performance Industries*, at para. 31, Binnie J. did say that what is essential to rectification based on a unilateral mistake is that, at the time of execution of the written document, the non-mistaken party "knew or ought to have known" of the error. But he also said that the attempt of the former to take advantage of the error by relying on the written document must amount to "fraud or the equivalent of fraud", being what in the cases is said to be equitable fraud.

37 While, prior to *Performance Industries*, the proposition that constructive knowledge may support a decree of rectification received some recognition in Canadian law (see *Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.* (1996), 28 O.R. (3d) 327, 133 D.L.R. (4th) 550 (Ont. C.A.)), there does not appear to be a case where an appellate court has actually rectified a document on that basis. Indeed, in *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (2000), 74 B.C.L.R. (3d) 30, 2000 BCCA 105 (B.C. C.A.), when considering constructive knowledge in the context of rectification where there was said to have been a unilateral mistake, Southin J.A. discounted the prospect of a finding of equitable fraud being predicated on constructive knowledge when, at para. 142, she said bluntly:

> In my opinion, questions of unconscionability are not matters to be determined on what someone ought to have known, but what he did know.

38 It is significant that *Performance Industries* was a clear case of actual knowledge. Constructive knowledge was not raised and the Supreme Court did not need to undertake any analysis of the circumstances under which what one party ought to have known would lead to rectification. It did not do so. In my view, it remains very much an open question.

39 There is now a line of English appellate authority beginning with *Riverlate Properties*, and continuing to and discussed to some extent in *Wimpey* where it has been recognized that, if rectification is to be ordered based on one party's knowledge of the other's mistake, only actual knowledge will suffice. In *Agip S.p.A v. Navigazione Alberta Italia S.p.A* (1983), [1984] 1 Lloyd's Rep. 353 (Eng. C.A.) at 361 [hereinafter *The "Nai Genova"*], Slade L.J., with whom Oliver and Goff LL.J. agreed, said on reviewing some of these cases:

> In all the various formulations of the relevant principle in the judgments in those cases, none of the members of the respective Courts suggested that rectification can properly be granted on account of unilateral mistake unless the defendant had *actual knowledge* of the existence of the plaintiff's mistake at the time when the contract was signed.

He further said at p. 365:

> ... I might perhaps add that I strongly incline to the view that in the absence of estoppel, fraud, undue influence or fiduciary relationship between the parties, the authorities do not in any circumstances permit the rectification of a contract on the grounds of unilateral mistake, unless the defendant had actual knowledge of the existence of the relevant mistaken belief at the time when the mistaken plaintiff signed the contract.

40 What was said in *The "Nai Genova"* was qualified in *Commission for the New Towns v. Cooper (Great Britain) Ltd.*, [1995] Ch. 259, [1995] 2 All E.R. 929 (Eng. C.A.) [*Cooper*], to the extent that, as a matter of law, wilfully shutting one's eyes to the obvious, as well as wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make, constitute actual knowledge, as is to be drawn from *Baden v. Société Générale pour Favoriser le Developpement du Commerce & de l'Industrie en France SA* (1983), [1993] 1 W.L.R. 509, [1992] 4 All E.R. 161 (Eng. Ch. Div.). *Cooper* was not decided on that basis, but rectification was ordered on the basis of "shut-eye knowledge" by the Court of Appeal in *Hurst Stores and Interiors Ltd. v. ML Europe Property Ltd.*, [2004] EWCA Civ 490 (Eng. C.A.).

41 Stuart-Smith L.J. went somewhat further in *Cooper*. He suggested that a fraudulent misrepresentation which was intended to mislead, and succeeded in doing so, when coupled with suspicion of mistake, would support a decree of rectification. But in *Wimpey*, Selby L.J. observed at para. 54 that where there is conduct amounting to deception and fraud, it is unnecessary to resort to doctrines of mistake to find a remedy.

42 In any event, a person who merely ought to have known that another was making a mistake cannot, without more, be said to have committed an equitable fraud. His position is not comparable to that of a person who has actual knowledge of the mistake being made. At least as a general proposition, commercial certainty must favour holding a party to an agreement it saw fit to execute over imposing on another party obligations it did not intend to assume, or depriving it of rights it did not intend to lose, on the basis that it ought to have known a mistake was being made.

c) The Evidence

43 Following discussions conducted between Mr. Fraser and Mr. Rennie over some period of time into September, the first draft of the Release and Settlement Agreement was prepared by the Defendants' solicitors and sent by Mr. Church to Mr. Cramer. It was dated 17 September 1997. The provisions with respect to the payments to be made pursuant to clauses 4(c) and 4(d) and the shares to be delivered to Mr. Fraser (2,000,000 over 20 months) were substantially the same as in the document that was ultimately executed, but clause 5 was quite different. It provided as follows:

> 5. Forthwith upon execution of this Release and Settlement Agreement, the DEFENDANTS shall deliver to Shapray 200,000 shares in Addwest Minerals International Ltd. ("Addwest"). Those shares (the "Escrow Shares") are to be held by Shapray subject to the following conditions:
>
> (a) in the event that the DEFENDANTS fail to make the payment referred to in paragraph 4(c) above, Shapray shall be at liberty to release the Escrow Shares to the Designatee, in full and final satisfaction of the payment obligation set out in paragraph 4(c) above;
>
> (b) in the event of any default of the payment obligation set out in paragraph 4(c) above, release of the Escrow Shares by Shapray shall be the sole remedy available to FRASER and he shall have no further entitlement to claim payment of any monies; and
>
> (c) in the absence of default of the payment obligation set out in paragraph 4(c) above, Shapray shall return the Escrow Shares to the law firm Camp Church & Associates forthwith upon discharge of that obligation.

44 It will be seen that the word "security" was not employed and that the shares to be delivered to Shapray Cramer (referred to as the "Escrow Shares") were to be only 200,000 as opposed to the 600,000 ultimately agreed upon. The shares were to be held only in respect of the $200,000 payment that was to be made to Mr. Fraser in six months time and not in respect of the Defendants' obligation to pay a further $240,000 at $5,000 a month. Most significantly, clause 5(b) provided that release of the shares to Mr. Fraser would be his sole remedy in the event of default in the payment of the $200,000 amount.

45 Mr. Shapray wrote to Mr. Church on September 19 after reviewing the draft. He identified 13 points that had to be addressed. Most significantly for present purposes, he wrote:

> 4. That the security described in paragraph 5 as "the Escrow Shares" be increased from 200,000 to 1,000,000 Addwest shares and that such escrow shareholding (the "Security") be placed in escrow with Camp Church to be held as security for the performance of any and all of the monetary obligations of the Defendants and/or Addwest under the terms of the settlement. The escrow agreement will provide a mechanism for portions of the Security to be released at the direction of Mr. Fraser to be sold at arms length in the event of any default in order to satisfy any or all of the Agreement's financial commitments, in whole or in part;
>
> 5. With respect to the payment obligation in paragraph 4(c), Mr. Fraser requires the option to accept 200,000 shares of Addwest in lieu of that payment at any time before March 17, 1998. In other words, paragraph 5 will have to be redrafted to make it Mr. Fraser's option to accept the shares rather than the Defendants' option to forfeit the shares in lieu of the payment obligation in paragraph 4(c);
>
> 6. It is necessary that time be of the essence of the agreement and that in the event that there is any default in the satisfaction of any of the financial obligations of the Defendants to Mr. Fraser or his designate that there be an acceleration of all of the other financial obligations under the terms of the agreement. Specifically, if the parties miss a payment due date, the entire balance becomes due, owing and payable forthwith. Mr. Fraser or his designate may then call upon the Security to be released and sold in whole or in part at his option in order to satisfy in whole or in part the other financial obligations;

46 It will be seen that Mr. Shapray focused directly on clause 5 and proposed that it be completely changed. First, he said that the number of shares, which he termed "the Security", was to be increased to 1,000,000 to be held by Camp Church as security for the performance of all of the Defendants' monetary obligations. He said there would have to be a mechanism for the release of the shares, at Mr. Fraser's direction, in the event of default to be sold to satisfy any or all of the financial commitments. He went on to say Mr. Fraser required an option to accept 200,000 of the shares in lieu of payment of the $200,000 amount (the shares trading at the time at $1.50). Finally, he said that time would have to be of the essence such that if a payment date was missed the entire balance of payments to be made would become payable forthwith, and that Mr. Fraser could then call upon the security, in whole or in part at his option, in order to satisfy the Defendants' financial obligations. Mr. Shapray was clearly seeking to put Mr. Fraser in a position to be able to rely on the security to the extent he wished to recover all that the Defendants were agreeing to pay him, as well as being able to exercise an option of taking 200,000 shares in lieu of the $200,000 payment.

47 Mr. Church wrote to Mr. Shapray, in response, on September 22. Somewhat curiously, he began by stating that he understood further settlement discussions had taken place between their clients (presumably meaning Mr. Fraser and Mr. Rennie) and then said he was confirming the resolution of the matter on the basis of the terms set out in the draft he had sent to Mr. Shapray. He proceeded to address each of the 13 points raised by Mr. Shapray, conceding some in favour of Mr. Fraser. With respect to clause 5, he wrote:

> 4. the security described in paragraph 5 of the Settlement Agreement as the "Escrow Shares" will be in the amount of 200,000 and will be as security for payment only of the monetary obligation described in paragraph 4(c);
>
> 5. the wording of paragraph 5 of the Settlement Agreement will remain the same with no option for Mr. Fraser to accept shares rather than payment;

48 Mr. Church concluded his letter by enclosing a computer disc containing his draft of the agreement and asking Mr. Shapray to make any changes he wished to reflect the contents of the letter.

49 Thus, it was clear at this stage that, at least insofar as their solicitors were concerned, the parties were very much at odds about the wording of clause 5. In contrast to what Mr. Shapray sought for Mr. Fraser, the Defendants apparently sought to have 200,000 shares stand as Mr. Fraser's only remedy if they were to default on their obligation to pay $200,000 in six months time. They were, however, prepared to remain fully liable for their default in respect of any other payment. Mr. Church accepted that there should be an acceleration clause which meant the Defendants would be liable to compensate Mr. Fraser fully for $240,000 if they failed to pay one or more of the $5,000 monthly payments.

50 There was a further exchange of letters between the solicitors leading to a draft of the agreement which, on September 25, Mr. Shapray sent to Mr. Pearson (who was then working with Mr. Church on the settlement). The letters exchanged dealt with various points but do not appear to be material now except that they reflect Mr. Cramer (who was then working with Mr. Shapray) informing Mr. Church of Mr. Fraser's willingness to "accept [600,000 shares] as security for the performance of the covenants of the Defendants" and Addwest International (which it had been agreed would be a party to the agreement). Mr. Cramer took the precaution of stating that "[t]here is no deal until *all* of the terms are agreed to and the documents are executed and delivered". Although it is clear from the correspondence that there were continuing discussions in the interval, between Mr. Fraser and Mr. Rennie and their respective solicitors, there appears to be no evidence, at least none to which we have been directed, of what was said about clause 5.

51 On September 25, Mr. Shapray wrote to Mr. Pearson and sent a draft he had prepared, apparently based on his understanding of the state of the negotiations. The changes from Mr. Church's draft were not underlined. He told Mr. Pearson that the draft had not been reviewed with Mr. Fraser and was not a "finished" document, but was being sent to move the settlement along in the expectation of concluding the next day. The draft was, in material respects, the same as the document that was ultimately executed save that clause 5 provided as follows:

5. Forthwith upon execution of this Release and Settlement Agreement, the DEFENDANTS shall deliver to Camp 600,000 shares, free-trading and without restriction or legend, in ADDWEST INTERNATIONAL ("the Security"). The Security is to be held by Camp in trust for DESIGNEE subject to the following trust conditions:

(a) subject to paragraph 6 [notice of default], in the event that the DEFENDANTS fail to make the payment referred to in paragraph 4(c) above, Camp shall as and when instructed from DESIGNEE sell up to 200,000 of the Escrow Shares ("the 4(c) Shares") in satisfaction or partial satisfaction, as the case may be, of the payment obligation set out in paragraph 4(c) above, until such time as the earlier of (i) net proceeds of $200,000.00 has been distributed to DESIGNEE from the sale of the 4(c) Shares, at which time Camp shall be at liberty to deal with the balance of the 4(c) Shares as instructed by the DEFENDANTS, or (ii) all of the 4(c) Shares have been sold, in which case the DEFENDANTS shall each remain jointly and severally liable for the unpaid portion of the payment referred to in paragraph 4(c) above.

(b) subject to paragraph 7 [notice of default and the acceleration of payments], in the event that the DEFENDANTS fail to make any of the payments referred to in paragraph 4(d) above, Camp shall as and when instructed from DESIGNEE begin selling up to 400,000 of the Security ("the 4(d) Shares") in satisfaction or partial satisfaction, as the case may be, of any amount due and owing pursuant to paragraph 4(d) above, until such time as the earlier of (i) net proceeds of the amount due and owing under paragraph 4(d) has been distributed to DESIGNEE, or (ii) all the 4(d) Shares are sold, in which case the DEFENDANTS shall each remain jointly and severally liable for the unpaid portion of any amount due and owing under paragraph 4(d) above; at such time as there are no further payments to be made then or in the future pursuant to paragraph 4(d) above, Camp shall be at liberty to deal with the unsold portion of the 4(d) Shares, if any, as instructed by the Defendants.

52 It will be seen that the provision for security was much different than contended for by either Mr. Church or Mr. Shapray initially. The clause provided security to be held by Camp Church for both the 4(c) and 4(d) payments. It further provided that as and when instructed to do so by Mr. Fraser, Camp Church were to sell such shares as necessary to satisfy the Defendants' indebtedness with all of the Defendants remaining liable for any shortfall.

53 Mr. Pearson marked the provisions for Mr. Fraser's recourse in the event of a shortfall on the sale of the shares on the copy of the draft he received. He faxed a letter to Mr. Cramer the following day. In material respects he said:

... Clauses 5(a) and 5(b) do not reflect the agreement reached by the parties. With respect to clause 5(a) there was to be no guarantee provided by the Defendants or by Addwest International.

With respect to paragraph 5(b), the agreement was that Addwest International would be solely liable for the $5,000 U.S. payments in the event that the shares did not yield a sufficient amount of money, but not the Defendants. Please revise the draft accordingly.

54 Mr. Pearson also informed Mr. Cramer that Camp Church was not prepared to be responsible for the sale of the shares at Mr. Fraser's direction and that a different mechanism would be needed for that.

55 Mr. Cramer and Mr. Pearson then had a conversation. Mr. Pearson says he told Mr. Cramer that the bottom four lines of clause 5(a) had to come out with essentially the same being said about clause 5(b); the shares were to be the recourse. The Defendants attach particular importance to Mr. Pearson's testimony in this regard, but clearly what he said, in the context of discussing the clause that provided for the sale of the shares, can have meant nothing other than if the shares were sold in consequence of a default there was to be no further recourse against any of the Defendants. That would be the only effect of deleting the last four lines of 5(a) and making a similar change to 5(b). Presumably, if that had been done, Mr. Pearson would have been content, but the deletion would have had no effect on Mr. Fraser's remedy for the Defendants' breach of their unconditional covenant to make the payments under 4(c) and 4(d) if Mr. Fraser did not sell the security shares.

56 The upshot was that the two solicitors agreed to speak with their clients to resolve what they saw as an impasse. Mr. Cramer spoke to Mr. Fraser. Mr. Pearson spoke to Mr. Houston and then to Mr. Rennie who was at the time vacationing on the Amalfi coast of Italy. Mr. Rennie was asked to attempt to resolve the matter with Mr. Fraser. Mr. Rennie then spoke with Mr. Fraser. A compromise was reached and it is apparent that Mr. Fraser then spoke to Mr. Cramer.

57 Mr. Fraser, Mr. Houston, Mr. Rennie, and Mr. Pearson all testified about the telephone communication they had on that day in particular. Mr. Cramer was not called, but some evidence he gave when examined for discovery was read in. What is important, of course, is what was said (i.e., what outward expression there was) as between the parties, Mr. Fraser and Mr. Rennie on the one hand, and Mr. Pearson and Mr. Cramer on the other.

58 Mr. Fraser maintains that he never said he would agree to confine his remedies to the provisions of clause 5, but for now it is essential to consider whether a case for rectification could be made out if his testimony were to be put to one side. If it could, a new trial would have to be ordered.

59 With the possible exception of Mr. Rennie, no one testified that there was any discussion with Mr. Fraser or his solicitors about Mr. Fraser having no remedy if he did not have the security shares sold. The only time anything like that appears to have been reflected in written form was in the first draft, dated September 17, prepared by Mr. Church (that was the subject of the subsequent exchange of letters between Mr. Shapray and Mr. Church), and there the provision that Mr. Fraser would have no remedy apart from what were then described as the "Escrow Shares" pertained only to the 4(c) payment. Mr. Pearson acknowledged that the focus on the morning of September 26 was who would be liable for any shortfall on the sale of the security shares and he accepted that he could not say that Mr. Cramer ever acknowledged Mr. Fraser's sole remedy in relation to a default in the 4(c) and 4(d) payments would be the security shares.

60 Mr. Rennie did testify to the effect that he told Mr. Fraser on September 26 that if he did not agree to give up any remedy other than against AMI and Addwest International, Mr. Houston would walk away from the deal and that Mr. Fraser then agreed to his remedy being limited accordingly. Mr. Rennie kept no notes of this conversation and he was testifying almost eight years after it occurred. When he was examined for discovery three years earlier, and asked what was actually said in the conversation, he said something somewhat different. He said his conversations with Mr. Pearson and Mr. Fraser were confined to what he termed the "recourse issue", that is whether the Addwest companies were to be the only parties to be looked to for recourse and that Mr. Fraser concurred with him that it was to be only those two companies. When that was put to him at trial, he accepted that the one issue he spoke about with Mr. Fraser was Mr. Fraser's "recourse if the [sale of] shares did not realize sufficient amount".

61 On no account could it be said that Mr. Rennie's testimony is convincing evidence of his having had any discussion with Mr. Fraser wherein Mr. Fraser accepted that he was to have no remedy other than to sell the security shares. Mr. Rennie's testimony is, in the end, consistent only with an accommodation being reached on September 26 between him and Mr. Fraser to the effect that the Addwest companies (and not Mr. Houston and Urban Properties) would be liable in the event of a shortfall on the sale of the security shares as the agreement provides.

62 Following the conversation between Mr. Fraser and Mr. Rennie, presumably after speaking to Mr. Fraser, Mr. Cramer sent the following fax to Mr. Pearson setting out his understanding of what had been agreed:

> Mr. Rennie and Mr. Fraser spoke after you and I this morning. As I understand it, they've agreed that the covenant to pay $200,000 survives delivery of the 4(c) security shares if the sale of them doesn't fetch $200,000, but that only Addwest Minerals and Addwest International would be responsible for the shortfall. Similarly, on 4(d), only Addwest Minerals and Addwest International are responsible to make the payments, i.e., not Mr. Houston personally. I'm working on a revised draft which I'll try and get to you shortly. Do you have the funds available to close today? Please give me a call if there's anything arising.

63 It is suggested that the wording of the message can be read as a statement that Mr. Fraser had agreed to confine any remedy he might have, if the defendants failed to make the 4(c) or 4(d) payments, to the sale of the security and the pursuit

of the Addwest companies. But given the limited scope of what Mr. Pearson had questioned about Mr. Shapray's draft, which is what prompted the telephone discussions, I do not consider the message could be fairly read as other than Mr. Cramer informing Mr. Pearson that he understood Mr. Fraser and Mr. Rennie had resolved what liability would survive a shortfall in the event of the security shares being sold, and that he would revise his draft. Again, when it is viewed in the context of what Mr. Pearson raised with Mr. Cramer about clause 5 as drawn by Mr. Shapray, nothing can be taken from the message that would render it convincing evidence that Mr. Fraser had made any agreement about the Defendants' liability if, in the event of default, the shares were not sold. Mr. Cramer was not telling Mr. Pearson that Mr. Fraser had agreed to give up any remedy other than clause 5. He was telling him that clause 5 was to be revised, as Mr. Pearson had asked, but in a way that reflected the resolution of the impasse that had arisen out of Mr. Shapray's draft that day.

64 Mr. Cramer then prepared an amended draft that in material respects was the final draft of clause 5. The changes made were underlined. They included Shapray Cramer holding the security. There were apparently subsequent changes, which included the security shares not being delivered until late October instead of at the time the agreement was executed. That was because the shares could not be made available more quickly, but the parties agreed to the provision of alternate security in the interim that was put in place when the agreement was executed. It was executed in the evening at the offices of Shapray Cramer with Mr. Fraser, Mr. Houston, Mr. Shapray, and Mr. Pearson attending.

d) The Defendants' Case

65 The Defendants contend that it was clear throughout, as evidenced by Mr. Church's draft dated September 17, the exchange of letters between him and Mr. Shapray that followed, and the Defendants' reaction to Mr. Shapray's draft of September 25, that the Defendants were not agreeable to being liable in the event of their default in making either the 4(c) or 4(d) payments save for their concession with respect to the liability of the Addwest companies that was made on September 26.

66 The Defendants say that, knowing that to be the case, neither Mr. Fraser nor his solicitors drew attention to the fact that the draft that Mr. Shapray prepared and sent to Mr. Pearson on September 25 provided that Mr. Fraser was effectively reserving a right to sue all of the Defendants on their covenant to make the 4(c) and 4(d) payments. The changes from Mr. Church's draft were not underlined in Mr. Shapray's draft of September 25 and the underlining of the changes in Mr. Cramer's revised draft of September 26, after the round of telephone calls, is said to have diverted the Defendants' attention away from the overall effect of the covenant to make the 4(c) and 4(d) payments and focused it on the concluding lines of paragraphs 5(a) and 5(b). Thus, the Defendants say, Mr. Fraser and his solicitors knew or ought to have known that Mr. Houston was making a mistake when he executed the agreement which did not free him and Urban Projects of liability for any default on their part in making the 4(c) or 4(d) payments.

67 I consider the first obstacle the Defendants face in obtaining a decree of rectification on the basis of a unilateral mistake is the nature of the mistake that they say they made. It is a mistake that would have to have been made by Mr. Houston, who says that he did no more than take a quick look at the agreement before he executed it, or more particularly, by his solicitors who settled the terms of the agreement and presumably represented to Mr. Houston that the agreement was in accordance with his instructions.

68 This is not a case of an altered or omitted provision in an executed instrument that was, to the knowledge of one party, overlooked by the other. The nature of the mistake, if indeed there was a mistake, appears to have been simply an error in judgment as to the legal effect of a negotiated clause. Given that, with limited qualification, parties to an agreement negotiate in self-interest, it must be doubtful that, in the absence of any misrepresentation, there are any equitable considerations that attach to one party not disclosing what is perceived to be a misinterpretation on the part of the other as to the legal effect of the provisions of a written agreement. Certainly solicitors do not as a rule engage in advising each other on the legal effect of terms that are proposed in the course of negotiation. The formation of commercial agreements would be a much different exercise if they were under some obligation to do so.

69 The greater obstacle to a decree of rectification based on a unilateral mistake is, however, that there is no evidence — certainly no convincing evidence — that Mr. Fraser or his solicitors had any reason to consider that a mistake was being made. There is no evidentiary basis on which it could be said that, at the time the agreement was executed, it was clear that the Defendants were determined that Mr. Fraser should abandon any remedy he would have for their default in the payment of more than $440,000 apart from the security and limited recourse in the event of a shortfall as provided in clause 5, and neither Mr. Fraser nor his solicitors had given any indication that they were amenable to Mr. Fraser having no remedy beyond what that clause provided. Mr. Fraser and his solicitors could not then have had any reason to consider that Mr. Houston or his solicitors mistakenly read the agreement as confining Mr. Fraser's remedies as is now contended.

70 The draft of the agreement Mr. Church prepared can in no way be said to have communicated to Mr. Fraser that Mr. Houston and Urban Properties were not prepared to be liable for any of the 4(c) and 4(d) payments in the event of their default when, after further negotiations, they executed the agreement. What a party may seek in the course of negotiations is no basis on which it can be said that is necessarily what he believed he had obtained when he executed an agreement.

71 At best, that first draft showed the Defendants' bargaining position to be that they were seeking to be relieved of liability for the default in payments that were secured. Mr. Shapray's response not only rejected the restriction on Mr. Fraser's recourse that was proposed, but suggested that Mr. Fraser was to have an option to take the shares that were to be held as security instead of the 4(c) payment. Mr. Church then wrote insisting in effect that the Defendants were to retain what would be their option to make the 4(c) payment or leave Mr. Fraser to his recourse against the security. Neither position prevailed in the end.

72 On the face of the executed agreement, the compromise was that neither party obtained the option they wanted. The covenants to make both the 4(c) and 4(d) payments were secured, the security was only available to Mr. Fraser in the event of default, and the Defendants remained liable to compensate Mr. Fraser in the event of default in their covenants to make the payments. It cannot be said that Mr. Fraser and his solicitors had reason to consider that what the Defendants were seeking, as evident in the draft Mr. Church prepared, was what they believed they were obtaining when they executed the agreement.

73 Further, there is nothing in the fact that Mr. Shapray's draft of September 25 did not have the changes from Mr. Church's draft of September 17 underlined. This is not a case of a change having been overlooked on a solicitor's reasonable review of a revised draft. Mr. Pearson certainly did not testify that he did not appreciate that the wording of clause 5 had been substantially altered. He read the clause and actually marked the changes in it that he questioned, and then raised them with Mr. Cramer.

74 There is also nothing in the contention that Mr. Cramer's underlining of his revised draft on September 26 diverted attention from the overall effect of clauses 4(c), 4(d), and 5. That is certainly not what Mr. Pearson said in his testimony. He testified to the effect that he did not turn his mind to whether clause 5 was the only remedy available to Mr. Fraser because, to him, it made no sense to negotiate over whether Mr. Houston and Urban Projects were to be liable for a shortfall on the sale of the security shares if they were to be liable for their default in clauses 4(c) and 4(d) in any event. Attention was focused on the recourse Mr. Fraser was to have if the sale of shares resulted in a shortfall because that was what Mr. Pearson questioned when he received Mr. Shapray's draft. It is obvious that Mr. Cramer underlined the change resulting from the telephone discussions to make certain Mr. Pearson was aware of the extent of the revision and would make no mistake as to what it was.

75 The draft that Mr. Church prepared and the following exchange of correspondence afford no support for the Defendants' case for rectification. Apart from the discussions on September 26, there is no evidence of any discussion about the extent of Mr. Fraser's remedies, and it cannot be said that the discussion on September 26 was about more

than the provisions of clauses 5(a) and 5(b) in Mr. Shapray's draft of September 25 relating to liability for any shortfall in the sale of the security shares that Mr. Pearson questioned.

76 Mr. Shapray's draft appears to have been what he understood reflected the terms Mr. Fraser and Mr. Rennie had reached. The draft was sent to Mr. Pearson to consider. Mr. Pearson informed Mr. Cramer that clauses 5(a) and 5(b) did not accord with his understanding of the terms. It was accepted, after the telephone discussion between Mr. Fraser and Mr. Rennie that followed, that, whatever terms had been reached in the course of their negotiations, Mr. Shapray's draft would be revised. It was then revised in a manner acceptable to the Defendants' solicitors and subsequently executed.

77 The absence of any convincing evidence of a discussion between the parties, much less of an accord being reached, concerning Mr. Fraser having no remedy other than what clause 5 affords, completely defeats the case for rectification based on a unilateral mistake the Defendants seek to make out.

78 Much the same can be said with respect to a case being made out on the basis of a mutual mistake. In the absence of any convincing evidence of an accord in material respects, Mr. Fraser and his solicitors could not be said to have been making any mistake themselves when the agreement was executed.

79 The Defendants' case of an equitable fraud having been committed based on a unilateral mistake has not been made out on the evidence adduced at the trial, there being no basis on which it can be said that it would be unconscionable not to rectify the agreement. The Defendants may have been mistaken about the legal consequences of the agreement they made when they executed the document they now wish to have rectified, but if they were, theirs was a unilateral mistake for which, in the absence of any conduct amounting to equitable fraud on the part of Mr. Fraser and his solicitors, there is no remedy.

80 Further, in the absence of there being proof of a mutual intention, that was outwardly expressed and that continued to the execution of the agreement, that Mr. Fraser's remedies were to be confined to selling the security shares and pursuing the Addwest companies, no mutual mistake that would support the rectification for which the Defendants contend has been made out and there can be no rectification on that basis.

81 The Defendants' case for rectification is far from compelling and I would not accede to this ground of the appeal.

Other Grounds

82 The other grounds of appeal the Defendants raise are, in my view, of little substance.

83 The Defendants first say that Mr. Fraser is without standing to sue them in this action because, in accordance with the agreement, he designated a company to be the recipient of the payments to be made and of the shares to be delivered by the Defendants. That being the case, it is said that only the designated company can bring an action to enforce the Defendants' obligations under the agreement made with Mr. Fraser. No authority is cited to support this proposition. Mr. Fraser did not assign his rights under the agreement; he named a company to which he wished the payments and deliveries to be made. As the trial judge held, that did not preclude Mr. Fraser from enforcing the agreement. Indeed, it appears to me that Mr. Fraser alone could do so.

84 The Defendants next say that Mr. Fraser's entering into an agreement that permitted him to designate what was an offshore company to receive the benefits of the settlement with the Defendants (as he did) was part of a scheme to defraud his creditors that in some way was manifest in his incorporating a second company using a similar name to the offshore company. They say the agreement was then entered into for an illegal purpose and is not enforceable. There is nothing unlawful about designating the recipient of benefits under an agreement. I do not see why it should be said to become unlawful merely because a party who wishes to make a designation is in debt. The judge made no finding that Mr. Fraser entered into the agreement with the Defendants in order to defraud his creditors, and the Defendants have directed us to no evidence that mandates that conclusion in any event.

85 The Defendants finally say that Mr. Fraser repudiated the agreement and they advance a counterclaim for damages. In the main, they say that Mr. Fraser breached a term of the agreement requiring him to give them an offer of first refusal to buy any of the shares of Addwest International he received from them that he wished to trade. He traded a large volume of shares beginning in August 1998, after the gold mine closed, without honouring the right of first refusal. The Defendants say that breach, coupled with Mr. Fraser's breach of a covenant not to interfere with the Defendants' business, which resulted in financing difficulties consequent upon the fall in the price of Addwest International shares, constituted a repudiation of the agreement. The Defendants did not adduce evidence to prove their loss at trial, but say it was very substantial and that this Court can make an assessment from the amounts borrowed to acquire AMI that, together with interest, remain outstanding.

86 The judge disposed of this aspect of the defence and the counterclaim on the basis that Mr. Fraser's conduct caused no loss because it all occurred after the gold mine closed. He found that the largest contributing factor to the fall in the price of Addwest International shares was not attributable to Mr. Fraser's trading activity; rather, it was the fall in the price of gold that led to the closure of the mine. Both of the breaches for which the Defendants contend, occurred after they had defaulted in their obligations and, in my view, the breach of the right of first refusal did not amount to a repudiation of the agreement. On the judge's finding of fact, Mr. Fraser's share trading activity cannot be said to have interfered with the Defendants' business such that no breach occurred in that regard. Further, there is no basis on which this Court should interfere with the judge's factual finding. It was based in part on the expert evidence adduced. It would appear that the Defendants are entitled to an award of nominal damages for Mr. Fraser's breach of the right of first refusal clause even though his breach did not cause any loss. I would award the Defendants nominal damages of $100, but would otherwise not accede to this ground of appeal.

Disposition

87 I would allow the appeal only to the limited extent of awarding the Defendants nominal damages of $100.00 for breach of the right of first refusal clause asserted in their counterclaim.

***Southin J.A.*:**

I agree.

***Levine J.A.*:**

I agree.

Appeal allowed in part.

End of Document

2006 CarswellBC 2228
Supreme Court of Canada

Fraser v. Houston

2006 CarswellBC 2228, 2006 CarswellBC 2229, [2006] S.C.C.A. No. 133,
239 B.C.A.C. 332 (note), 358 N.R. 398 (note), 396 W.A.C. 322 (note)

James Ralph Houston, Urban Projects Ltd., Urban Projects (Barbados) Ltd., Addwest Minerals, Inc. and Addwest Minerals International, Ltd. v. Brian Fraser

Bastarache J., Fish J., LeBel J.

Judgment: September 7, 2006
Docket: 31405

Proceedings: Leave to appeal refused, 2006 BCCA 66, 2006 CarswellBC 552, [2006] B.C.W.L.D. 3017, [2006] B.C.W.L.D. 3058, [2006] B.C.W.L.D. 3035, [2006] B.C.W.L.D. 3060, 51 B.C.L.R. (4th) 82 (B.C. C.A.); Reversed (in part), [2005] B.C.W.L.D. 4789, [2005] B.C.W.L.D. 4803, [2005] B.C.W.L.D. 4796, [2005] B.C.W.L.D. 4806, 2005 BCSC 715, 2005 CarswellBC 1141 (B.C. S.C.)

Counsel: None given

Subject: Contracts; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

III Parties
III.4 Standing

Civil practice and procedure

XVI Disposition without trial
XVI.7 Settlement
XVI.7.c Enforcement of terms

Contracts

VII Construction and interpretation
VII.1 General principles

Contracts

IX Performance or breach
IX.8 Breach
IX.8.a General principles

Headnote
Contracts

Civil practice and procedure

Per Curiam:

1 The application for leave to appeal from the judgment of the Court of Appeal for British Columbia (Vancouver), Number CA033024, 2006 BCCA 66, dated February 15, 2006, is dismissed with costs.

End of Document

TAB 9

Guarantee Company of North America *Appellant*

v.

Gordon Capital Corporation *Respondent*

and

Chubb Insurance Company of Canada and Laurentian General Insurance Company Inc. *Respondents*

INDEXED AS: GUARANTEE CO. OF NORTH AMERICA *v.* GORDON CAPITAL CORP.

File No.: 26654.

1999: June 17; 1999: October 15.

Present: L'Heureux-Dubé, Gonthier, Iacobucci, Major and Bastarache JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Civil procedure — Summary judgment — Test for summary judgment — Motions judge determining that record sufficient to deal with motion for summary judgment — No genuine issue requiring trial — Whether Court of Appeal erred in interfering with motions judge's determination.

Contracts — Insurance — Misrepresentation — Rescission — Repudiation — Distinction between rescission and repudiation.

Contracts — Insurance — Contractual limitation periods — Wrongful rescission — Construction approach to fundamental breach — Whether contractual limitation period in bond survived wrongful rescission of bond.

The respondent investment dealer and brokerage firm entered into a fidelity insurance contract with the appellant. During the period of time covered by the bond, one of its employees engaged in fraudulent and dishonest activities which led to his enrichment and significant losses to the respondent. The respondent notified the appellant of a potential fidelity bond claim. Its sworn proof of loss indicated that the loss was discovered on June 26, 1991. The appellant advised the respondent

Guarantee Company of North America *Appelante*

c.

Gordon Capital Corporation *Intimée*

et

Chubb Insurance Company of Canada et Laurentian General Insurance Company Inc. *Intimées*

RÉPERTORIÉ: GUARANTEE CO. OF NORTH AMERICA *c.* GORDON CAPITAL CORP.

N° du greffe: 26654.

1999: 17 juin; 1999: 15 octobre.

Présents: Les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major et Bastarache.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Procédure civile — Jugements sommaires — Critère applicable aux jugements sommaires — Décision du juge des requêtes que le dossier est suffisant pour trancher une motion visant à obtenir un jugement sommaire — Absence de véritable question requérant la tenue d'un procès — La Cour d'appel a-t-elle commis une erreur en modifiant la décision du juge des requêtes?

Contrats — Assurance — Déclaration inexacte — Résiliation — Répudiation — Distinction entre résiliation et répudiation.

Contrats — Assurance — Délais de prescription contractuels — Résiliation injustifiée — Façon d'aborder l'inexécution fondamentale sous l'angle de l'interprétation — Le délai de prescription prévu dans la police a-t-il continué de s'appliquer après la résiliation injustifiée de cette dernière?

La maison de courtage de valeurs mobilières intimée a conclu avec l'appelante une police d'assurance contre les détournements. Pendant la période visée par la police, un des employés de l'intimée s'est livré à des activités frauduleuses et malhonnêtes qui lui ont permis de s'enrichir et qui ont entraîné des pertes importantes pour l'intimée. L'intimée a informé l'appelante de la possibilité qu'une réclamation fondée sur une assurance contre les détournements soit présentée. Sa preuve de

that, pursuant to a provision in the bond, it was rescinding the bond on the basis that the respondent had made misrepresentations in its application for the bond. The respondent denied the validity of the rescission and refused to accept the return of the premiums, and on July 15, 1993 commenced an action against the appellant in Quebec. The appellant then commenced an action in Ontario claiming that the bond was rescinded and that the respondent had failed to commence legal proceedings for the recovery of the loss within 24 months from the discovery of such loss as required by the bond. Eventually, the proceedings instituted in Quebec were stayed pending the outcome of the Ontario action. The appellant brought a motion for summary judgment on the basis that the respondent had failed to commence legal proceedings within the time period prescribed by the bond. The motions judge granted summary judgment in favour of the appellant. The Court of Appeal allowed the respondent's appeal. At issue here is whether the Court of Appeal should have interfered with the motions judge's determination that the record was sufficient to deal with the appellant's summary judgment motion and whether the Court of Appeal erred in finding that the limitation period in the bond did not survive the appellant's affirmation that the bond was rescinded.

Held: The appeal should be allowed.

The proper test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial. Once the moving party has made this showing, the respondent must then establish his claim as being one with a real chance of success. This case is an appropriate one for summary judgment as there was no genuine issue for trial. Under section 3 of the bond, all that was required for discovery of loss were sufficient facts to cause a reasonable person to assume that a loss of a type covered by the bond would be incurred. The undisputed facts in the present case lend strong support to the inference that it could be reasonably assumed that a loss of the type covered by the policy had been or would be incurred. No credibility issue sufficient to require trial was raised in the present case. A self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence. On a proper reading of the bond, a loss of the type covered is simply a loss resulting from employee dishonesty with the presumption that the manifest intent of such behaviour was personal gain. The test for dis-

sinistre attestée sous serment indiquait que le sinistre avait été découvert le 26 juin 1991. L'appelante a informé l'intimée que, conformément à une disposition de la police, elle résiliait cette police pour le motif que l'intimée avait fait des déclarations inexactes dans sa demande de police. L'intimée a nié la validité de la résiliation, refusé le remboursement des primes et intenté une action contre l'appelante au Québec, le 15 juillet 1993. L'appelante a alors intenté une action en Ontario dans laquelle elle alléguait que la police était résiliée et que l'intimée avait omis d'engager des procédures d'indemnisation du sinistre dans les 24 mois suivant sa découverte, comme l'exigeait la police. En fin de compte, l'action intentée au Québec a été suspendue jusqu'à ce qu'une décision soit rendue sur l'action intentée en Ontario. L'appelante a présenté une motion visant à obtenir un jugement sommaire pour le motif que l'intimée avait omis d'engager des procédures judiciaires dans le délai prescrit par la police. Le juge des requêtes a rendu un jugement sommaire en faveur de l'appelante. La Cour d'appel a accueilli l'appel de l'intimée. Il s'agit en l'espèce de savoir si la Cour d'appel a eu raison de modifier la décision du juge des requêtes que le dossier était suffisant pour trancher la motion de l'appelante visant à obtenir un jugement sommaire, et si la Cour d'appel a commis une erreur en concluant que le délai de prescription prévu dans la police avait cessé de s'appliquer dès que l'appelante avait confirmé que la police était résiliée.

Arrêt: Le pourvoi est accueilli.

Le critère qu'il convient d'appliquer à une motion visant à obtenir un jugement sommaire est respecté lorsque le requérant démontre qu'il n'y a aucune véritable question de fait importante qui requiert la tenue d'un procès. Une fois que l'auteur de la motion a fait cette démonstration, il incombe ensuite à la partie intimée d'établir que son action a vraiment des chances de réussir. La présente affaire se prête à un jugement sommaire vu l'absence de véritable question requérant la tenue d'un procès. Suivant l'article 3 de la police, la découverte d'un sinistre requiert seulement l'existence de faits suffisants pour inciter une personne raisonnable à supposer qu'un sinistre du genre visé par la police surviendra. Les faits non contestés en l'espèce étayent fortement la déduction que l'on pouvait raisonnablement supposer qu'un sinistre du genre visé par la police était survenu ou surviendrait. Aucune question de crédibilité suffisante pour nécessiter la tenue d'un procès n'a été soulevée dans la présente affaire. En l'absence d'un exposé détaillé des faits et d'éléments de preuve à l'appui, un affidavit intéressé n'est pas suffisant en soi pour donner naissance à une question susceptible de faire

covery of loss under the bond was an objective one that did not require a definitive finding of loss, but merely an assumption. There was no legal issue to be resolved at trial.

Problems have arisen from misuse of the word "rescission" to describe an accepted repudiation. To use these terms synonymously can only lead to confusion and should be avoided. Rescission is a remedy available to the representee, *inter alia*, when the other party has made a false or misleading representation. Repudiation, by contrast, occurs by words or conduct evincing an intention not to be bound by the contract. Contrary to rescission, which allows the rescinding party to treat the contract as if it were void *ab initio*, the effect of repudiation depends on the election made by the non-repudiating party. If the non-repudiating party accepts the repudiation, the contract is terminated, and the parties are discharged from future obligations, although rights and obligations that have already matured are not extinguished. If the repudiation is not accepted, the contract remains in being for the future and each party has the right to sue for damages for past or future breaches. Courts must be sensitive to the potential for misuse of the term rescission and must analyse the entire context of the contract and give effect, where possible, to the parties' intent. Where, as in this case, the misrepresentation becomes a term of the contract, rescission will be available if the misrepresentation is "substantial", "material" or "goes to the root of the contract". Here the bond specifically provided that misrepresentations of "material fact" would be grounds for rescission. As the parties are sophisticated, it is appropriate to give effect to their intent as expressed in the plain words of the contract. The appellant's attempt to effect a restitution of the premiums paid by the respondent confirms that "rescission" is appropriately used in the bond.

Proceeding upon the assumption that the appellant wrongfully rescinded the bond, the appellant was not precluded from relying on the 24-month contractual limitation period contained in the bond. Substantial failure of contractual performance, often described in other contexts as a fundamental breach, may relieve the non-breaching party from future executory contractual

l'objet d'un débat judiciaire. Selon une juste interprétation de la police, un sinistre du genre visé correspond simplement au sinistre résultant de la malhonnêteté d'un employé qui, présume-t-on, avait manifestement l'intention de réaliser un gain personnel. Suivant la police, le critère applicable à la découverte d'un sinistre était un critère objectif qui requérait non pas une constatation définitive de sinistre, mais simplement une supposition. Il n'y avait aucune question de droit à trancher au procès.

Des problèmes découlent de l'emploi abusif du mot «résiliation» pour décrire une répudiation acceptée. L'emploi de ces mots comme synonymes ne peut qu'engendrer de la confusion et devrait être évité. Une partie peut résilier un contrat notamment dans le cas où l'autre partie lui a fait une déclaration fausse ou trompeuse. Par contre, la répudiation se fait par des mots ou une conduite traduisant l'intention de ne pas être lié par le contrat. Contrairement à la résiliation qui permet à la partie qui résilie le contrat de le considérer comme étant nul au départ, l'effet de la répudiation dépend du choix que fait la partie autre que celle qui répudie le contrat. Si la partie autre que celle qui répudie le contrat accepte la répudiation, le contrat prend fin et les parties sont libérées de leurs obligations futures, quoique les droits et obligations qui sont déjà arrivés à échéance ne soient pas éteints. Si la répudiation n'est pas acceptée, le contrat reste en vigueur à l'avenir et chacune des parties a le droit d'intenter une action en dommages-intérêts pour toute rupture passée ou future. Les tribunaux doivent être conscients du risque d'emploi abusif du terme «résiliation» et ils doivent analyser le contexte intégral du contrat et, si possible, mettre à exécution l'intention des parties. Lorsque, comme en l'espèce, la déclaration inexacte devient une clause du contrat, la résiliation sera possible si la déclaration inexacte est «substantielle», «importante» ou «touche à l'essence même du contrat». Dans la présente affaire, la police prévoyait expressément que toute déclaration inexacte d'un «fait important» constituerait un motif de résiliation. Comme les parties sont avisées, il convient de mettre à exécution l'intention qu'elles ont clairement exprimée dans le contrat. La tentative par l'appelante d'effectuer une restitution des primes versées par l'intimée confirme que le mot «résiliation» est utilisé à juste titre dans la police.

En supposant qu'elle a résilié la police de façon injustifiée, l'appelante n'était pas empêchée d'invoquer le délai de prescription de 24 mois prévu dans la police. L'inexécution substantielle d'un contrat par une partie, souvent appelée «inexécution fondamentale» dans d'autres contextes, peut libérer l'autre partie de l'exécution future des obligations qui lui incombent en vertu du

obligations. Here, as a matter of contractual interpretation, the parties intended that the contractual limitation period survive a wrongful rescission on the part of the appellant. Commercial reality is often the best indicator of contractual intention in cases such as this. Absent some explanation to the contrary, if a given construction of the contract would lead to an absurd result, the assumption is that this result could not have been intended by rational commercial actors in making their bargain. In this case, to deny the application of the time limitation clause would lead to an absurd result. The appellant, when faced with a potential misrepresentation concerning the degree of risk it has agreed to underwrite, would be placed in the untenable position of subjecting itself to a longer statutory limitation period than would otherwise apply in circumstances where coverage has been denied for other reasons. Upon a true construction of the contract, and taking into account the stated purpose of a contractual limitation period as a device whereby the insurer can both quantify and limit risk, the intention of the parties was that the clause setting out the 24-month limitation period was to apply to the process of bringing a claim against the appellant where the appellant has breached the contract by wrongfully rescinding, whether the breach is characterized as fundamental or otherwise. The parties to this appeal were sophisticated commercial actors who were represented by counsel. In these circumstances, it would not be unconscionable, unfair, unreasonable or otherwise contrary to public policy to uphold the intentions of the parties concerning the operation of the contractual limitation period.

Cases Cited

Applied: *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426; **distinguished:** *Mills v. S.I.M.U. Mutual Insurance Association*, [1970] N.Z.L.R. 602; **referred to:** *Ross v. Scottish Union and National Insurance Co.* (1918), 58 S.C.R. 169; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545; *Rogers Cable TV Ltd. v. 373041 Ontario Ltd.* (1994), 22 O.R. (3d) 25; *Confederation Trust Co. v. Alizadeh*, [1998] O.J. No. 408 (QL); *Abram Steamship Co. v. Westville Shipping Co.*, [1923] A.C. 773; *Keneric Tractor Sales Ltd. v. Langille*, [1987] 2 S.C.R. 440; *Sail Labrador Ltd. v. Challenge One (The)*, [1999] 1 S.C.R. 265; *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827; *B.G. Linton Construction Ltd. v. Canadian National Railway Co.*,

contrat. En l'espèce, sur le plan de l'interprétation du contrat, les parties ont voulu que le délai de prescription prévu dans le contrat continue de s'appliquer après sa résiliation injustifiée par l'appelante. La réalité commerciale est souvent le meilleur indice de l'intention des parties contractantes dans des cas comme celui-ci. Si une interprétation donnée du contrat menait à un résultat absurde, on supposerait qu'en l'absence d'explication contraire des acteurs commerciaux rationnels ne peuvent pas avoir voulu un tel résultat en concluant leur contrat. En l'espèce, un refus d'appliquer la clause du délai de prescription mènerait à un résultat absurde. L'appelante, face à une éventuelle déclaration inexacte concernant l'ampleur du risque qu'elle a accepté d'assurer, se retrouverait dans la situation intenable où elle s'imposerait un délai de prescription légal plus long que celui qui s'appliquerait par ailleurs dans le cas où l'indemnisation est refusée pour d'autres motifs. Selon une interprétation exacte du contrat et compte tenu de l'objet explicite d'un délai de prescription contractuel en tant que mécanisme permettant à l'assureur de quantifier et de limiter le risque, les parties ont voulu que la clause, qui établit le délai de prescription de 24 mois, s'applique à l'engagement d'une action contre l'appelante dans le cas où celle-ci romprait le contrat en le résiliant de façon injustifiée, peu importe que cette rupture soit qualifiée de fondamentale ou autre. Les parties au présent pourvoi étaient des acteurs commerciaux avisés représentés par des avocats. Dans ces circonstances, il ne serait pas inique, injuste, déraisonnable ou par ailleurs contraire à l'ordre public de respecter l'intention des parties concernant l'application du délai de prescription contractuel.

Jurisprudence

Arrêt appliqué: *Hunter Engineering Co. c. Syncrude Canada Ltée*, [1989] 1 R.C.S. 426; **distinction d'avec l'arrêt:** *Mills c. S.I.M.U. Mutual Insurance Association*, [1970] N.Z.L.R. 602; **arrêts mentionnés:** *Ross c. Scottish Union and National Insurance Co.* (1918), 58 R.C.S. 169; *Hercules Managements Ltd. c. Ernst & Young*, [1997] 2 R.C.S. 165; *Dawson c. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257; *Irving Ungerman Ltd. c. Galanis* (1991), 4 O.R. (3d) 545; *Rogers Cable TV Ltd. c. 373041 Ontario Ltd.* (1994), 22 O.R. (3d) 25; *Confederation Trust Co. c. Alizadeh*, [1998] O.J. No. 408 (QL); *Abram Steamship Co. c. Westville Shipping Co.*, [1923] A.C. 773; *Keneric Tractor Sales Ltd. c. Langille*, [1987] 2 R.C.S. 440; *Sail Labrador Ltd. c. Challenge One (Le)*, [1999] 1 R.C.S. 265; *Photo Production Ltd. c. Securicor Transport Ltd.*, [1980] A.C. 827; *B.G. Linton Construc-*

A breach that is "substantial" or "goes to the root of" the contract is often also described as a material breach; see, for example, Fridman, *supra*, at p. 293: "A misrepresentation is a misstatement of some fact which is material to the making or inducement of a contract". The misrepresentation in this case was in the application, and was thereby incorporated into the Bond. Specifically, the misrepresentation complained of was, as stated in Guarantee's August 5, 1992 letter to Gordon that

> in respect of customer accounts a partner, officer or other designated responsible employee who has no other duties in connection with the account [would review] each account monthly checking for excessive or improper activity. The proof of loss discloses that no one other than Rachar was charged with reviewing the accounts in question.

The question, in light of the law as stated in Waddams, *supra*, and Fridman, *supra*, is whether the misrepresentation is "substantial", "material", or "goes to the root of" the contract. This brings us back to the issue of the parties' intent, for whether the rescission is warranted is at least in part a question of intent.

Whether the misrepresentation is material is a complicated question on which there is an extensive body of case law. However, these precedents are not entirely apposite, as they generally do not involve contracts, like this one, that use the term "rescission" to define the remedy for a misrepresentation in the application. The rescission clause in this appeal reads as follows:

> The insured represents that the information furnished in the application for this bond is complete, true and correct. Such application constitutes part of this bond.
>
> Any misrepresentation, omission, concealment or incorrect statement of a material fact, in the application or otherwise, shall be grounds for the rescission of this bond. [Emphasis added.]

L'inexécution qui est «substantielle» ou qui «touche à l'essence même» du contrat est souvent qualifiée d'importante; voir, par exemple, Fridman, *op. cit.*, à la p. 293: [TRADUCTION] «Une déclaration inexacte est un exposé erroné d'un fait important pour conclure ou pour inciter à conclure un contrat». La déclaration inexacte en l'espèce figurait dans la demande et a donc été incorporée dans la police. Plus précisément, la déclaration inexacte reprochée, selon la lettre du 5 août 1992 que Guarantee a fait parvenir à Gordon, était la suivante:

> [TRADUCTION] en ce qui a trait aux comptes clients, un associé, un dirigeant ou un autre employé désigné n'ayant aucune autre responsabilité relativement au compte en question [procéderait] à un examen mensuel de chacun de ces comptes en vue de vérifier s'ils ont fait l'objet d'une activité abusive ou irrégulière. La preuve de sinistre révèle que seul Rachar était chargé d'examiner les comptes en question.

La question qui se pose, compte tenu de l'état du droit exposé par Waddams, *op. cit.*, et Fridman, *op. cit.*, est de savoir si la déclaration inexacte est «substantielle», «importante» ou «touche à l'essence même» du contrat. Cela nous ramène à la question de l'intention des parties car la question de savoir si la résiliation est justifiée est tout au moins en partie une question d'intention.

45 La question de savoir si la déclaration inexacte est importante est complexe et fait l'objet d'une jurisprudence abondante. Toutefois, cette jurisprudence n'est pas tout à fait pertinente puisqu'en général il n'y est pas question de contrats, comme celui dont il est question en l'espèce, où le mot «résiliation» est utilisé pour définir le recours applicable à une déclaration inexacte dans la demande. La clause de résiliation dont il est question en l'espèce se lit ainsi:

> [TRADUCTION] L'assuré déclare que les renseignements fournis dans la demande de police sont complets et exacts. La demande fait partie de la police.
>
> Toute déclaration inexacte, omission, dissimulation ou description erronée d'un fait important, dans la présente demande ou ailleurs, constitue un motif de résiliation de la présente police. [Nous soulignons.]

By stating that a misrepresentation in the application would be grounds for rescission, the parties effectively stated their intent that such a misrepresentation is "substantial" and "goes to the root of" the contract. The reference to misrepresentations of "material fact" suggests the same conclusion. These are sophisticated parties that can be expected to know the meaning of fundamental legal terms such as "rescission", and it is appropriate to give effect to their intent as expressed in the plain words of the contract. As stated by Wilson J. in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, at p. 505, "parties of equal bargaining power should be allowed to make their own bargains". See similarly, at p. 458, *per* Dickson C.J. This point is discussed more fully *infra*, at paras. 54-56.

En précisant qu'une déclaration inexacte dans la demande justifierait la résiliation, les parties ont effectivement indiqué leur intention qu'une telle déclaration inexacte soit «substantielle» et «touche à l'essence même» du contrat. La mention de la description erronée d'un «fait important» inspire la même conclusion. Les parties sont avisées et on peut donc s'attendre à ce qu'elles connaissent le sens de termes juridiques fondamentaux comme la «résiliation»; il convient de mettre à exécution l'intention qu'elles ont clairement exprimée dans le contrat. Comme l'a dit le juge Wilson dans l'arrêt *Hunter Engineering Co. c. Syncrude Canada Ltée*, [1989] 1 R.C.S. 426, à la p. 505, «il devrait être permis à des parties qui ont négocié à armes égales de conclure leur propre contrat». Voir, dans le même ordre d'idées, à la p. 458, le juge en chef Dickson. Cette question est approfondie plus loin, aux par. 54 à 56.

46 Aside from our general reluctance to disturb the choice of terms by sophisticated commercial parties, we note in passing that the appellant not only rescinded the contract, but also tendered return of the insurance premiums. Their letter of August 5, 1992 stated their intention to rescind the policy, and they enclosed a cheque for $106,000, representing the premiums paid by Gordon under the policy. This distinguishes this case from *Mills*, *supra*, and demonstrates Guarantee's attempt to effect a restitution and restore the parties to the *status quo ante*, a crucial aspect of rescission. See Waddams, *supra*, at para. 424. While obviously not conclusive evidence of their contractual intentions, this evidence confirms the earlier conclusion that "rescission", as used in this contract, did indeed mean just that.

Outre notre réticence générale à modifier les termes choisis par des parties commerciales avisées, nous soulignons en passant que l'appelante a non seulement résilié le contrat, mais qu'elle a aussi offert de rembourser les primes d'assurance. Dans sa lettre du 5 août 1992, elle a exprimé son intention de résilier la police et a joint un chèque de 106 000 $ représentant le montant des primes versées par Gordon en vertu de la police. Cela distingue la présente affaire de l'arrêt *Mills*, précité, et démontre que Guarantee a tenté d'effectuer une restitution et de remettre les parties dans la situation où elles se trouvaient antérieurement, un aspect crucial de la résiliation. Voir Waddams, *op. cit.*, au par. 424. Bien qu'elle ne soit manifestement pas concluante quant aux intentions des parties contractantes, cette preuve confirme la conclusion précédente que le mot «résiliation», utilisé dans le présent contrat, signifiait précisément cela.

47 In summary, a misrepresentation, even one that was incorporated into the contract, gives the innocent party the option of rescinding the contract, i.e. to have it declared void *ab initio*. The misrepresentation must be "material", "substantial" or "g[o] to the root of" the contract. We express no opinion on the availability of damages in such cases. Repudiation, by contrast, occurs when one party indicates

En résumé, une déclaration inexacte, même si elle a été incorporée dans le contrat, donne à la partie innocente la possibilité de résilier le contrat, c'est-à-dire de le faire déclarer nul au départ. La déclaration inexacte doit être «importante», «substantielle» ou «touche[r] à l'essence même» du contrat. Nous ne nous prononçons pas sur la possibilité d'obtenir des dommages-intérêts en

TAB 10

2016 ONSC 133
Ontario Superior Court of Justice

Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of)

2016 CarswellOnt 21, 2016 ONSC 133, 262 A.C.W.S. (3d) 752, 33 C.B.R. (6th) 80

Doyle Salewski Inc., in its capacity as court-appointed interim receiver of Impact Tool & Mould Inc. and in its personal capacity, Plaintiff/Respondent and BDO Canada Limited, Formerly BDO Dunwoody Limited in its capacity as Trustee in Bankruptcy of Impact Tool & Mould Inc., Defendant/Moving Party

M.A. Garson J.

Heard: November 30, 2015
Judgment: January 4, 2016 *
Docket: 150/2010

Counsel: Justin R. Fogarty, Pavle Masic, for Plaintiff / Respondent
Gerard Chouest, Julia Lefebvre, for Defendant / Moving party

Subject: Civil Practice and Procedure; Estates and Trusts; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XVII Practice and procedure in courts
XVII.9 Miscellaneous

Civil practice and procedure

XXII Judgments and orders
XXII.23 Res judicata and issue estoppel
XXII.23.b Issue estoppel
XXII.23.b.iii Miscellaneous

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous

Debtor was competitor of creditor and owed creditor $600,000 judgment debt — Creditor retained B Ltd. in January 2003 to examine likelihood of recovery — D Inc. was appointed interim receiver of debtor in March 2003 pursuant to s. 47 of Bankruptcy and Insolvency Act — Receiver assigned debtor into bankruptcy in May 2003 at creditor's request — B Ltd. was appointed trustee in bankruptcy — Receiver commenced action against trustee in January 2010 for damages for deceit and breach of fiduciary duty — Trustee brought motion for summary judgment dismissing action as statute-barred — Motion dismissed — Action was not statute-barred, and there were genuine issues to be examined at trial — History of proceedings was multi-faceted and complex and would require findings of fact that could not be made on current evidence — While receiver became aware by November 2006 that it began incurring unnecessary expenses that could only be recovered from trustee personally, it was not appropriate for receiver to pursue legal proceedings at that point — It was not until receiver had copy of particular report in 2008 or

2009 that receiver learned of low value of debtor's assets and that trustee already had copy of this report — Trustees in bankruptcy were officers of court and had to represent all creditors impartially and even-handedly.

Civil practice and procedure — Judgments and orders — Res judicata and issue estoppel — Issue estoppel — Miscellaneous

Debtor was competitor of creditor and owed creditor $600,000 judgment debt — Creditor retained B Ltd. in January 2003 to examine likelihood of recovery — D Inc. was appointed interim receiver of debtor in March 2003 pursuant to s. 47 of Bankruptcy and Insolvency Act — Receiver assigned debtor into bankruptcy in May 2003 at creditor's request — B Ltd. was appointed trustee in bankruptcy — Receiver commenced action against trustee in January 2010 for damages for deceit and breach of fiduciary duty — Motion dismissed — Relief sought by receiver did not constitute abuse of process — Issue of fees claimed in present action had not been decided in prior costs decisions and were not within scope of issue estoppel — Present action was not about seeking costs that should have been recovered in bankruptcy proceeding — Broader issue was related to trustee's behaviour and whether trustee breached any fiduciary duty owed to receiver.

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s. 37 — considered

s. 47 — considered

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R. 21.02 — considered

R. 57.01 — considered

MOTION by trustee for summary judgment for dismissal of interim receiver's action for damages for deceit and breach of fiduciary duty as statute-barred, or for striking out of portions of claim based on issue estoppel.

M.A. Garson J.:

Introduction

1 BDO brings a Rule 20 motion for summary judgment to dismiss this action on the basis that it is statute barred by the *Limitations Act*, 2002, S.O. c. 24.

2 In the alternative, BDO brings a Rule 21 motion to strike out portions of the claim on the basis of issue estoppel.

3 For the reasons that follow, I am satisfied that there are genuine issues to be examined at trial and that the relief sought by DSI in this action does not constitute an abuse of the court process.

Background and Facts

4 This dispute has a long and harrowed history that need not be fully recited for the purposes of this motion. I will restrict my recital of the facts to those relating to the issues before me. I note at the outset that the parties are litigating over recovery of monies from a bankrupt estate that has no assets left.

5 On March 7, 2003, Doyle Salewski Inc. ("DSI") was appointed interim receiver of Impact Tool and Mould ("Impact"), pursuant to s. 47 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 "*BIA*". As of today, DSI has not been discharged of its powers and duties as an interim receiver under the terms of the appointment order.

6 Unique and Impact were competitors in the automotive mould making and tool manufacturing market in Windsor.

7 BDO was retained by Unique Tool and Gauge ("Unique") on January 29, 2003 to examine the likelihood of recovery of a $600,000 judgment debt owing to Unique by Impact.

8 Kevin O'Brien, a non-party in these proceedings but a named party in a related Windsor application, is a chartered accountant and was appointed an Inspector of the bankrupt estate ("the Estate").

9 As part of its role as interim receiver, DSI drafted a series of reports (six in total) between April 7, 2003 and May 30, 2007.

10 At the request of Unique, DSI assigned Impact into bankruptcy on May 20, 2003 and BDO was appointed Trustee in Bankruptcy of the Estate.

11 DSI was indemnified for its fees as interim receiver by three of the former shareholders of Impact. DSI did not have a concern with assigning Impact into bankruptcy, provided Unique indemnify the fees of BDO.

12 It did not take long for friction to develop between DSI and BDO. In July 2003 BDO brought a motion for access to the books and records of Impact. Deputy Registrar Stevens granted this order on October 10, 2003, subject to a restriction on sharing such documents with the Inspectors of the Estate.

13 BDO appealed this decision and the Court of Appeal ultimately allowed BDO's appeal and permitted BDO to share information with the Inspectors of the Estate.

14 On July 14, 2006, counsel for DSI sent a letter to counsel for BDO offering to convene a meeting to discuss issues and in an effort to understand each other's concerns and address those concerns without further litigation.

15 A further motion for production was brought by BDO. Andrea Orr, a partner with BDO, swore an affidavit in support of the motion on October 11, 2006.

16 Shortly thereafter, on October 27, and November 21, 2006, DSI issued its Third Report and Supplementary Report to the Third Report respectively, and took issue with many of the statements in Ms. Orr's affidavit, referring to them as "patently false or in error".

17 On February 5, 2007, counsel for DSI wrote to counsel for BDO, reiterating the willingness of DSI to meet with BDO to discuss the matter and reminding BDO once again, on the need to include DSI on the service list for any matters relating to the bankruptcy and/or receivership.

18 Prior to the hearing of BDO's motion, DSI issued its Fourth Report dated May 30, 2007 seeking approval of DSI's fees and expenses and an award of costs on a substantial indemnity basis payable personally by the Trustee. This report continued to raise numerous concerns about the alleged improper conduct of BDO for failing to act impartially and causing the interim receiver (DSI) to be put to considerable and unnecessary time and expense.

19 On June 26, 2007, Brockenshire J. denied BDO leave to examine DSI. DSI claimed costs of $192,580.24 and on January 16, 2008, were awarded $4000 in costs, payable personally by BDO. Brockenshire J. stated in his ruling that it was "...completely obvious from the beginning that there was absolutely no hope of unsecured creditors receiving anything." In fixing this award for costs, Brockenshire J. determined that the issue of fees between 2003-2007 were not properly before him.

20 Not surprisingly, BDO appealed this decision unsuccessfully to the Court of Appeal and was ordered to pay an additional $15000 in costs personally to DSI because this was a "no-asset bankruptcy". BDO was also unsuccessful in seeking leave to appeal this decision to the Supreme Court of Canada.

21 On March 4, 2009, counsel for DSI wrote to counsel for BDO seeking costs of $153,250.24 and indicating its desire to canvass options to resolve the matter through settlement or further litigation.

22 DSI issued a Notice of Action on January 18, 2010, claiming damages of $200,000 for the tort of deceit, alleging that BDO made false statements, deliberately omitted relevant facts and failed to correct its errors.

23 DSI was required, pursuant to section 215 of the *BIA*, to seek leave prior to commencing its action. Leave was obtained before Deputy Registrar Stevens on May 5, 2010.

24 The statement of claim filed by DSI alleges breach of fiduciary duty (not deceit) by BDO between 2003 and 2007 and particularizes the wrongful conduct to include:

i. making false statements in affidavits filed in support of court proceedings and deliberately omitting relevant facts in the affidavits;

ii. pursuing courses of action that were not commercially reasonable;

iii. making unfounded serious allegations against the Receiver;

iv. failing to act in good faith and impartially amongst the stakeholders;

v. pursuing a course of action for the benefit of the Indemnifying Creditor rather than for the general benefit of the stakeholders of Impact; and

vi. initiating frivolous and vexatious court proceedings.

25 The root of the London action speaks to the alleged failure of BDO to act in the best interests of DSI and of the failure of BDO to carry out its role as a court-appointed officer with good faith and integrity.

26 The issue of whether DSI is a creditor of the Estate (which would make BDO a fiduciary to DSI) is the subject of a related proceeding commenced by way of application issued pursuant to s. 37 of the *BIA* in Windsor on December 13, 2010.

27 The root of the Windsor application is the alleged misconduct of BDO, the funds improperly paid to Inspector O'Brien, and a reduction of the fees of BDO. DSI seeks that such excess fees be returned to the Estate for distribution to the creditors.

28 Cross-examinations on all of the affidavits filed in the Windsor application have been completed.

29 DSI filed an amended proof of claim on October 14, 2014, claiming $368,744.93 on an unsecured basis and $96,561.74 on a secured basis, for time spent, legal fees and disbursements that were disallowed by BDO.

30 The amended proof of claim was filed after BDO filed its motion to dismiss the Windsor application and BDO disallowed the amended proof of claim just five days before the motion was to be heard.

31 On January 22, 2013, Morissette J. made an order permitting BDO to amend its statement of defence to plead, for the first time, the issue that this action is statute barred by the *Limitations Act*. In her order at para. 4, Morissette J. further stated that the parties in this action can rely upon information received through the discovery process in the Windsor application.

32 Throughout the Windsor application, BDO has refused requests by DSI for documents or access to relevant information which required DSI to bring several procedural motions to compel answers to undertakings, cross-examine former solicitors and to produce certain documents.

33 One such motion was heard by Gates J. on March 13, 2013. In his endorsement dated May 9, 2013, Gates J. made the following observations at p. 3, paras. 19 to 22.

> It is perhaps trite to say that the Trustee is an officer of the court whose obligation of fairness and impartiality to all creditors. This does not, in my view, change because one of the creditors, for its own commercial or business reasons, provides funds to the Trustee to bankroll this litigation.
>
> In doing so, the respondents O'Brien and Unique become the surrogates of the Trustee and as such are bound by the same obligation as BDO. They can be in no higher position or enjoy no greater freedom.
>
> What is at stake here is fairness and consistency flowing from the Trustee's statutory obligations relating to the production and protection of the remaining records. These principles trump the notion of privilege.
>
> To deny the production to the applicant would, in my view, permit O'Brien and Unique to circumvent what the Trustee would be obliged to carry out; namely, in a dispassionate and impartial manner, deal with all of the creditors and, wherever required by the *BIA* or the bankruptcy rules, secure the approval of the Inspectors and the Court to carry out its obligation of fiduciary fairness. Fairness must not only be done, it must appear to be done.

34 Later at para. 25 and 28, Gates J. commented as follows:

Approval from the Inspectors is more than merely a routine process; they are not figure-heads to be ignored. Their responsibilities include the approval of lawyers' fees and disbursements to the bankrupt estate. A Trustee's conduct and ineffective management of its responsibilities can lead to its disentitlement to all or a substantial portion of any fees claimed (see *Sally Creek Environs Corporation (Re)* (2008), C.B.R. (5th) 90).

In my view, it appears that the respondents, in unilaterally denying the creditor status of DSI have, in effect, departed from the well-known obligations of a trustee to all creditors and have hidden it behind a wall of asserted privilege, the net effect of which is to offend or breach the underlying fairness obligation of the Trustee. This is made all the more significant by the fact that O'Brien and Unique are financing the Trustee's solicitor's legal work.

[Emphasis added].

35 BDO unsuccessfully appealed the ruling of Gates J. in November 2013.

36 During cross-examination of Brian Doyle, president of DSI, on October 21, 2015, on his affidavit sworn September 28, 2015, he acknowledged that DSI was aware of the following by the end of 2007:

i. Ms. Orr had made false statements and had deliberately omitted information in her affidavit of October 11, 2006 [Doyle Transcript, pp. 58-60, Q. 242-245, 248-250];

ii. BDO pursued a course of action throughout 2007 that was not commercially reasonable [Doyle Transcript, pp. 60-61, Q. 253-256]

iii. BDO had made serious allegations against DSI in its conduct of the receivership [Doyle Transcript, pp. 61-62, Q. 257-262];

iv. BDO had allowed itself to be used by Unique in pursuit of a compromised debt, which was a failure to act in good faith and impartially [Doyle Transcript, p. 62-63, Q. 263-266; p. 37, Q. 162];

v. BDO had failed in its conduct under the Bankruptcy and Insolvency Act to protect the interest of all creditors [Doyle Transcript, p. 31, Q. 134]; and

vi. BDO had initiated frivolous and vexatious court proceedings [Doyle Transcript, p. 75, Q. 307].

37 In or around 2008 or 2009, DSI received an un-redacted version of a report prepared by Carson Jackson Inc. (the "Jackson report") showing low liquidation valuations for the assets of Impact. BDO had possession of this report for some time prior to DSI receiving a copy. DSI had no knowledge of this report or the low liquidation valuation of the assets prior to receiving and reviewing this report.

38 In December 2009, DSI was provided with BDO's final Statement of Receipts and Disbursements (SRD's) which disclosed $54,548.21 fees paid to Inspector O'Brien for special services and the $39,058.60 in fees paid to BDO for the administration of the Estate. There was also information that the legal fees of the Estate totalling $50,920.76 were paid through the Trustee and from August 30, 2006, the solicitor for the Estate was paid directly ($216,548.21) by Unique under its guarantee.

39 In cross-examination, Ms. Orr admitted that prior to the receipt of the final SRD's, DSI would not have access to any of the information contained in that document: *see Examination at pp.22-24, questions 81-94.*

40 DSI has also launched an ethics complaint with the Office of the Superintendent of Bankruptcy ("OSB") against BDO. In response, the OSB sent a letter to DSI on August 22, 2011 concluding it found no "impropriety, deficiency, or breach of fiduciary duty in the Trustee's administration of the estate".

Issues

41 The primary issue for determination on this motion is whether the claim by DSI was commenced outside the limitation period and is barred by statute.

42 The alternative issue is whether the claim should be dismissed as an abuse of process on the basis that it is subject to the doctrine of issue estoppel.

Positions of the Parties

43 BDO submits that DSI knew or ought to have known the material facts at the time they occurred between 2003 and 2007, and in any event, before January 18, 2008.

44 Alternatively, BDO argues that the issue of costs has already been addressed by earlier courts and that any action by DSI to seek to further recover such costs amounts to an abuse of process.

45 DSI states that while it may have been suspicious of the conduct of BDO as early as May 2007, it was only after receipt of the Jackson report, and the Final SRD's from BDO in late December 2009, that its earlier suspicion that information previously unknown came to light, was confirmed. More specifically, DSI had become aware that Unique had taken over the administration of the Estate.

46 DSI further argues that BDO should have raised the limitations argument at the time of the s. 215 *BIA* leave motion in 2010 or in its original statement of defence filed in 2011. BDO only raised the limitations issue in an Amended Statement of Defence in January 2013.

Preliminary Matter

47 At para. 49 of the affidavit of Brian Doyle, sworn September 28, 2015, The affiant states:

> The Windsor Application has not yet been heard, nor has BDO's four (4) year old motion to dismiss the application and the issue of whether DSI is a creditor of the Estate. I believe that the court's finding on whether DSI is a creditor of the Estate in the Windsor Application will be dispositive on the issues raised in these proceedings regarding whether BDO breached its fiduciary duties. As such and given the relative importance of the outstanding issues in the Windsor Application, I believe that this motion is premature

48 I invited submissions from counsel as to whether this motion should be heard in advance of the Windsor application since the issue of whether DSI is a creditor is likely dispositive of the issues in this proceeding.

49 For reasons that made little sense to me, the parties confirmed that no dates have been set to hear either the Windsor application or the motion to dismiss this application. Given the history of these proceedings, I find the absence of firm return dates to be concerning.

50 Equally concerning is that this matter is now more than five years down the road and no discoveries have occurred. Once again, I am sceptical as to the reasons for the delay in moving this matter along.

51 BDO asks that for the purposes of this hearing, I assume that DSI was successful in establishing that they are a creditor to the Estate of Impact and, as such, BDO owes a fiduciary duty towards them.

52 Despite my concerns that this motion, and more particularly, the timing of this motion, represent yet another strategic and tactical manoeuvre in this never ending struggle, I am nonetheless satisfied that I am able to deal with the issues on this motion at this time.

53 My concerns are shared by the Court of Appeal, who in dismissing DSI's earlier appeal of the decision of Quinn J. where he upheld a decision by BDO to disallow a proof of claim filed by DSI for fees and disbursements, made the following comments at paras. 14 and 15 per Feldman J.A.:

> However, the subtext of this proceeding is the impending s. 37 application and the issue of whether DSI is a "creditor" within the meaning of the *BIA* for the purpose of that application. What appears to have occurred here is that DSI filed an amended proof of claim after BDO gave notice of its motion to dismiss the s. 37 application, which motion was brought on the argument that DSI was not a creditor of the bankrupt estate. BDO then took the step of disallowing DSI's proof of claim just five days before the motion to dismiss the s. 37 application was scheduled to be heard. It appears that the purpose of DSI's filing of its proof of claim was to establish its status as a creditor of the bankrupt estate; the purpose of BDO's subsequent disallowance was to refute that status, resulting in DSI's appeal of the disallowance. The effect was to have the "creditor" issue decided in the context of the appeal from the disallowance of the proof of claim rather than in the context of the s. 37 application.
>
> This was the next move in what appears to be a strategic game that was not fully explained to the court, despite numerous questions posed during oral argument. There was no need for the appeal of the disallowance of the proof of claim to be heard and decided before the previously scheduled motion in the s. 37 application, where the "creditor" issue was to be argued. However, that is what occurred. [Emphasis added].

54 I am mindful of the extensive time the parties have occupied on this matter at several levels of court. The spirit and intent of the *Rules of Civil Procedure* require that I attempt to ensure the most just, expeditious and least expensive determination of every matter on its merits.

55 Accordingly, I am prepared to deal with this matter in advance of the Windsor application or the motion to dismiss the Windsor application.

Is the action statute barred?

56 A proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered: see s. 4 of the *Limitations Act*.

57 Section 5 of the *Limitations Act* codifies the discoverability principle and states:

> (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

58 The determination of when the clock begins to run is a factual determination made on a case by case basis.

59 The fact that the potential claimant fails to appreciate the legal significance or consequences of the facts does not postpone the commencement of the limitations period: see *Holley v. Northern Trust Co., Canada*, 2014 ONSC 889 (Ont. S.C.J.) at paras. 155-156.

60 The claimant need only be aware of *prima facie* grounds giving rise to a claim and need not possess knowledge that the claim is likely to succeed: see *Kowal v. Shyiak*, 2012 ONCA 512 (Ont. C.A.) at para. 18.

61 Knowledge of liability on the part of the claimant is not part of discoverability for the purposes of the commencement of the limitation period: see *Lochner v. Toronto Police Services Board*, 2015 ONCA 626 (Ont. C.A.) at para. 7.

62 Similarly, the discovery of new facts which create a more robust claim do not reset or restart the limitation clock: see *Tender Choice Foods Inc. v. Versacold Logistics Canada Inc.*, 2013 ONSC 80 (Ont. S.C.J.) at para. 59.

63 The analysis of whether DSI's claim was discoverable is not as simple as BDO suggests. Despite numerous questions posed during oral argument, I was unable to clearly understand the interplay between the Windsor application and the London action. Although BDO would suggest the Windsor application is utterly irrelevant to this action, I am mindful of the order of Morissette J. specifically linking the two proceedings and allowing the parties to rely on information received through discoveries in the Windsor application.

64 In my view, the history of these proceedings is multi-faceted and complex and will require findings of fact that I am unable to make on the evidence before me.

65 BDO suggests that the claim was discoverable at the time of DSI's Third Report on November 21, 2006. I do not agree. Although I accept that DSI was aware that it began to incur expenses that it could only recover from BDO personally and that such expenses were the result of apparent alleged improprieties by BDO, I do not agree that it was appropriate for DSI to seek to remedy the potential loss by way of legal proceedings.

66 More specifically, on the evidence before me, it is clear that:

(i) DSI had requested an earlier copy of the Jackson report but was denied its production by BDO. It was not until its receipt of an unredacted copy of this report that DSI learned of the actual low value of Impact's assets and that BDO had a copy of this report.

(ii) The final SRD's confirmed that Inspector O'Brien was receiving substantial fees for his services which exceeded fees paid to BDO for administration of the Estate. There was also confirmation that legal fees incurred since August 2006 were paid directly by Unique and legal fees paid on behalf of the Estate were not taxed by the court.

67 In my view, although DSI was suspicious at an earlier time, the material facts contained in the Jackson report and the evidence contained in the SRD's were evidence that Unique had, in some manner, taken over the administration of the Estate from BDO. An earlier request by DSI for a copy of the Jackson report was denied by BDO.

68 As best I can tell, the misconduct of BDO contained in the reports of DSI go to the root of the Windsor application. This application deals with the role of BDO as both an officer of the court and a fiduciary.

Role of Trustee as Officer of the Court

69 A Trustee is an officer of the court and must represent all creditors impartially and even-handedly.

70 The breach of a duty of care owed by a court officer is not a matter that should be advanced without sufficient facts and knowledge.

71 The following is taken from Morawetz & Houlden, *Bankruptcy and Insolvency Law of Canada* at pages 1-62/3:

A trustee in bankruptcy is an officer of the court. This flows from s.16(4) which provides that the trustee shall in relation to and for the purpose of acquiring possession of the property of the bankrupt be in the same position as

if he or she were a receiver of the property of the debtor appointed by the court. A court-appointed receiver is an officer of the court.... [1]

72 Morowetz & Houlden further state that:

The trustee has an obligation to be neutral and even-handed in its dealings with all classes or creditors and with the bankrupt. The court must ensure that the trustee has been transparent and even-handed in meeting these obligations. [2]

73 In *Confederation Treasury Services Ltd., Re*, [1995] O.J. No. 3993, 59 A.C.W.S. (3d) 1058 (Ont. Bktcy.) at p. 13 Farley J. of this court further noted:

...No one should take too lightly the burdens and responsibility of securing such an appointment. The appointment is not a franchise to make money (although a trustee should be rewarded for its efforts on behalf of the estate) nor to favour one party or one side. The trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate.

[Emphasis added].

74 Citing *Prince Edward Island v. Bank of Nova Scotia* (1988), 70 C.B.R. (N.S.) 209, 72 Nfld. & P.E.I.R. 191 (P.E.I. T.D.) at paras. 41 and 44 with approval, Farley J. adopted McQuaid J.'s words:

It is the duty of the trustee, who *is an officer of the court*, to represent impartially the interest of all creditors; he is obligated to hold an even hand as between competing class of creditors; he must act for the benefit of the general body of creditors; he is not an agent of the creditors, but an administrative official required by law to gather in and realize on the assets of the bankrupt and to divide the proceeds in accordance with the scheme of the *Bankruptcy Act* among those entitled. And perhaps most importantly, he must conduct himself in such a manner as to avoid any conflict, real or perceived, between his interest and his duty.

...the trustee, who is in actuality *an officer of the court*, rather than single creditor's nominee, must represent all creditors, and ensure that conflicting interests are resolved equitably. He must not only act without interest or bias, but must be clearly perceived to be acting without interest or bias.

[Emphasis added].

Role of Trustee as a Fiduciary

75 In *Chaban, Re*, [1998] S.J. No. 181, 165 Sask. R. 177 (Sask. Q.B.) Smith J. of the Saskatchewan Court of Queen's Bench noted:

The trustee in bankruptcy is in a fiduciary position and this court will treat seriously any departure from the standards of impartiality and freedom from conflict between interest and duty that flow from that.

76 The following is taken from Morawetz & Houlden, at pages 1-62/3:

It is essential that the trustee have no interest which will conflict with his administration of the bankrupt estate; he must be wholly impartial...

A trustee must conduct himself in such a manner as to avoid a conflict of interest and duty, and he must not profit from the trust assets at the expense of the creditors of the bankrupt estate...

> A trustee in bankruptcy does not function as an agent of the creditors in the ordinary sense, but as an administrative official required by law to gather in and realize on the assets of the bankrupt, and then to divide the proceeds among those entitled thereto in accordance with the scheme set out in the *Bankruptcy Act*...

Effect of Behavior of Trustee on Commencement of Limitation Clock

77 In my view, it is inappropriate to start the limitations clock while good faith efforts are ongoing to achieve a remedy.

78 Officers of the court should be discouraged from immediately commencing litigation and encouraged to discuss and negotiate differences.

79 As Duncan Grace (as he then was) states in a letter to counsel for BDO on July 14, 2006, in response to a request by BDO to examine representatives of DSI under oath:

> The Interim Receiver will, of course, comply with its obligations as set forth in the *Bankruptcy and Insolvency Act*, and Bankruptcy and Insolvency General Rules as well as the provisions of the Order appointing the Interim Receiver. The trustee in bankruptcy will be given notice of the Interim Receiver's application to the Court for taxation of its accounts and its discharge and the trustee can, of course, object if so advised.
>
> With respect, our clients are both officers of the Court and we do not understand why it is necessary for either of them to take adversarial proceedings against the other. If the trustee has questions or concerns with respect to the interim receivership process then we would be pleased to cooperate in arranging for and convening a meeting involving our respective clients with counsel to discuss those issues on a without prejudice basis.
>
> [Emphasis added].

80 The obstacles and delays erected by BDO throughout these proceedings have impeded the exercise of reasonable diligence on the part of DSI to discover the cause of action in this matter. These obstacles are also sufficient to impact the start of the limitations clock.

81 In the Fourth Report of DSI, dated May 30, 2007, DSI seeks its costs for its fees and disbursements to be paid personally by BDO. In support of this request, DSI sets out at p.14 of this report its concern that Unique is indemnifying BDO and the only inspector of the Estate is Mr. O'Brien who is not a neutral party. DSI suggests that BDO is not acting impartially by allowing a disgruntled creditor to pursue a compromised debt.

82 In written submissions dated November 1, 2007, to Brockenshire J. after he dismissed BDO's motion to examine DSI, counsel for DSI clearly articulates its concern that BDO is acting for the sole benefit of Unique and that Unique has used the position of BDO as Trustee to shelter its exposure to costs and manipulate the process for its own agenda.

83 By November 1, 2007, it appears that DSI held the belief that the frivolous actions of BDO had caused DSI to incur substantial and unnecessary fees.

84 Brian Doyle fairly concedes in his cross-examination that he had suspicions. However, in the context of a bankruptcy proceeding and disagreements and arguments between a trustee and a receiver, this court does not expect, nor wish to encourage, parties to engage in formal adversarial proceedings based on suspicion alone.

85 I am wholly unimpressed by the fact that BDO did not raise the limitations issue before Deputy Registrar Stevens during the s. 215 *BIA* leave hearing in 2010.

86 Although I agree with BDO that the leave test under s. 215 of the *BIA* does not determine the merits of a claim and is designed to protect the trustee against frivolous or vexatious claims, I do not accept the position advanced by BDO

that these types of arguments (i.e. limitations defence) are rarely advanced at the s. 215 *BIA* leave stage. At a minimum, the s. 215 leave is some evidence of a factual basis for the claims made by DSI.

87 I am equally baffled as to why this limitations argument was not pled in the initial statement of defence and appeared for the first time in 2013 and is now argued for the first time in late 2015.

88 The evidence before me suggests that as early as May 2007 DSI decided that the blame may lie at the feet of BDO for its deficiencies (Doyle Transcript, pp. 37-38, Q. 162-167). Turning to the test for discoverability in s. 5 of the *Limitations Act*, DSI knew or ought to have known:

i. that the injury loss or damage occurred before January 18, 2008; and,

ii. that such losses were caused by or contributed to by an act or omission of BDO.

89 However, the evidence does not support the third requirement for the test for discoverability, namely that a legal proceeding would have been an appropriate means to seek to remedy the loss prior to January 18, 2008.

90 It is necessary that all of the requirements set out in s. 5(1) of the *Limitations Act* be met before the limitations clock starts to run.

91 It would be both unfair and improper for DSI to have been required to commence a legal action any earlier than 2009. Both parties are officers of the court and should be discouraged from pursuing adversarial proceedings against each other until reasonable efforts to resolve the matter have been addressed.

92 To determine otherwise on the facts before me would send the wrong message regarding the duties of a trustee to act fairly and impartially to all creditors, even those opposing its SRD's. BDO should not benefit from their prior misconduct.

93 This court has and will continue to expect the highest standard of conduct on the part of trustees in the discharge of their duties to the court and the Estate: see *Sally Creek Environs Corp., Re* [2010 CarswellOnt 2634 (Ont. C.A.)], *supra*, at paras. 139, 151 and 155.

94 In my view, the legally appropriate date upon which DSI knew or ought to have known, by the exercise of reasonable diligence, that a cause of action arose against BDO, was after January 18, 2008.

95 It would be fundamentally unfair to DSI to have been required to commence an action in these circumstances before January 18, 2008.

96 BDO's behavior in withholding or not distributing pertinent and relevant information to DSI prevented DSI from discovering the material facts upon which this claim is based.

97 Although DSI was suspicious in 2006 and 2007 that BDO had (i) made false statements and omitted relevant facts in an affidavit; (ii) was pursuing a commercially unreasonable course of action; (iii) had made serious allegations about the behavior of DSI, and (iv) was being influenced by Unique, these suspicions were unsupported by material facts.

Summary Judgment

98 On a motion for summary judgment, the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.), requires that I first determine whether there is a genuine issue requiring trial based only on the evidence before me.

99 On the facts before me, I am satisfied that the discoverability of the action is a genuine issue that requires a trial.

100 I also agree with DSI that there is evidence to suggest that BDO acted in a manner that was not consistent with the best interests of DSI, a creditor to the Estate. This finding also establishes a further genuine issue for trial.

101 Having reached these findings, I next turn to the enhanced powers under r. 20.04(2.1) and (2.2) which include:

(a) weighing the evidence

(b) evaluating the credibility of a deponent, and

(c) drawing any reasonable inference from the evidence.

102 I then consider whether the use of these expanded powers will allow me to reach a fair and just result that is timely, affordable and proportionate to the action as a whole.

103 When deciding whether it is in the interests of justice to rely on the enhanced fact-finding powers, I am mindful of and consider the consequences of this motion in the context of the outstanding Windsor application.

104 I am satisfied on the record before me that DSI had suspicion in 2007 and 2008 but not actual knowledge of the material facts regarding the alleged breach of fiduciary duties owing by BDO. There is little doubt that by March 4, 2009 DSI had sufficient factual information and had exhausted reasonable efforts to attempt to address earlier suspicion. This is confirmed by the letter of counsel for DSI threatening litigation.

105 DSI made reasonable efforts to acquire this knowledge that would support its suspicion but was stonewalled by BDO in attempts to have meetings or exchange documents. By all accounts, this behaviour continues today.

106 I am satisfied that DSI exercised reasonable diligence in attempting to verify its suspicions and that it was appropriate as an officer of the court dealing with another officer of the court in the context of a bankruptcy proceeding, to not rush off and commence litigation at the entry point of suspicion.

107 DSI did not have knowledge of sufficient facts prior to January 18, 2008 to properly allege a claim for breach of fiduciary obligations against BDO.

108 I am satisfied that DSI has demonstrated that it behaved in a reasonable manner and exercised reasonable diligence in its efforts to discover the facts in issue and has met the onus to rebut the limitations claim asserted by BDO.

Conclusion

109 For the above reasons, I am satisfied that a genuine issue exists for trial and I cannot reach a fair and just resolution of all of the issues in this action.

110 The motion for summary judgment is therefore dismissed.

111 However, I am satisfied that there is sufficient information available to me to conclusively deal with the discoverability of this action by DSI. More specifically, I make a binding determination that the limitations clock did not commence until after January 18, 2008 and that the action is not statute barred.

Issue Estoppel

112 In the alternative, BDO seeks to strike DSI's claim pursuant to R. 21.01 on the basis that it is subject to the doctrine of issue estoppel and should be dismissed as an abuse of process. More specifically, BDO seeks to strike out paras. 1(a), (b) and (c) of the statement of claim and paras. 29, 30, 33 and 36 of the plaintiff's reply. [3]

113 BDO relies on R. 21.01(3)(d) which allows this court to dismiss a claim that is an abuse of the process of the court.

114 In *Salasel v. Cuthbertson*, 2015 ONCA 115 (Ont. C.A.), at para. 11, the Court of Appeal establishes three conditions that must be met to invoke issue estoppel:

(i) the issue in the proceeding must be the same as the one decided in the prior decision;

(ii) the prior judicial decision must have been final; and

(iii) the parties to both proceedings must be the same.

115 DSI argues that the earlier costs awards were not appealed and are therefore final. Claims for costs awards must be made in the proceeding in which they were incurred.

116 However, Brockenshire J., on January 16, 2008, awarded DSI only $4,000 in costs payable personally by BDO, notwithstanding that DSI claimed $192,580.24. In his endorsement, Brockenshire J. determined that the issue of fees between 2003 and 2007 were not properly before him.

117 In my view, the issue of fees between 2003 and 2007 were not decided in the prior costs decisions and are not within the scope of issue estoppel. Deputy Registrar Stevens reasons for granting s. 215 leave under the *BIA*, at para. 4, support the finding that costs, fees and disbursements for the preparation of receiver reports by DSI between 2003 and 2007 were not dealt with by Brockenshire J.

118 I do not agree with BDO that DSI sought and recovered its costs in the bankruptcy proceeding nor do I accept that the within action simply seeks additional costs that were not granted in the bankruptcy proceeding.

119 I also disagree that the issue in this action is DSI's entitlement to its costs. The broader issue relates to the behavior of BDO and whether it owed a duty, and subsequently breached its duty, as a fiduciary to DSI to act in the best interests of DSI. This issue has yet to be decided in a prior decision.

120 It would send the wrong message if the misconduct of an officer of the court and a fiduciary which came to light after proceedings had concluded could not be addressed by a subsequent court. Quite frankly, that proposition would be both unfair and unjust and represent an abuse of the court's process. The integrity of the insolvency system demands no less.

121 The case law is clear that improper conduct on the part of a Trustee may lead to disentitlement of fees claimed: see *Sally Creek Environs Corporation*, *supra.*

122 Rule 21.02 provides that a Rule 21.01 motion shall be made promptly and a failure to do so may be taken into account in awarding costs.

123 Courts have interpreted this rule so as to allow for a dismissal of a Rule 21.01 motion for delay in bringing the motion: see *Fleet Street Financial Corp. v. Levinson* (2003), 31 C.P.C. (5th) 145 (Ont. S.C.J.) and *Colonna v. Bell Canada* (1993), 15 C.P.C. (3d) 65 (Ont. Gen. Div.).

124 These issues could have been raised many years ago. There is no explanation provided for the delay in raising them now. Much of the costs claims asserted in this action are interwoven with the evidence obtained through cross-examinations on the Windsor application.

125 In light of my earlier comments, I am not prepared to grant the relief sought as it relates to costs incurred between 2008 and 2010 on the basis of the unexplained and extensive delay.

126 In any event, I am unable to determine on the record before me which costs awards in this timeframe are the subject of the within action.

Costs

127 BDO seeks an award of costs of $57,154.12 on a partial-indemnity scale, inclusive of disbursements and HST.

128 The defendants argue that this was a complex proceeding, requiring substantial time and legal effort, and that as the motion may be dispositive of the action, it is of significant importance to the parties.

129 DSI seeks $40,432.75 on a partial-indemnity scale; inclusive of disbursements and HST and $65,391.06 on a substantial indemnity basis, inclusive of disbursement and HST.

130 The overall goal of a costs award is to award an amount that is fair and reasonable for the unsuccessful party to pay in the circumstances; see: *Boucher v. Public Accountants Council (Ontario)*, [2004] O.J. No. 2634 (Ont. C.A.) at para. 26.

131 I have considered the Bill of Costs submitted by DSI and the factors enumerated in r. 57.01.

132 As earlier stated, in my view, this motion should not have been argued in advance of the Windsor motion to dismiss the Windsor application.

133 I also deem relevant the harrowed history of the proceedings and the suspicious nature of many events regarding tactical maneuvers.

134 Having regard to all of the circumstances in this case, I believe that a fair, balanced and reasonable award of costs is an award on a partial-indemnity basis, payable by BDO to DSI, in the amount of $30,000.00, inclusive of HST and disbursements, to be paid within 30 days.

Final Comments

135 One of the counsel referred to these proceedings as "the low watermark" of court appointed officers' behaviour. I agree.

136 Court appointed officers are supposed to act fairly and reasonably. They owe a duty to the court.

137 I urge both parties to take a second sober look at the prudence of continuing with this very public and somewhat unflattering dispute. It is time to put the adversarial swords aside and bring to the forefront common sense, fairness, integrity and decency.

Next Steps

138 DSI has not advanced this action past the document discovery stage. No examinations for discovery have been held and none are scheduled.

139 In my view, the motion to dismiss the Windsor application and the Windsor application should proceed in advance of the London application.

140 The parties shall have 60 days to set a timetable for this action and to remit this timetable to the court no later than March 30, 2016.

141 In the event that my schedule permits, I may be made available to deal with further hearings in this matter, should such be necessary.

Motion dismissed.

Footnotes

* Corrigenda issued by the court on January 8, 2016 and January 11, 2016 have been incorporated herein.

1 *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3.

2 *Engels v. Richard Killen & Associates Ltd.* (2002), 60 O.R. (3d) 572, [2002] O.J. No. 2877 (Ont. S.C.J.).

3 1. The plaintiff claims:
a) damages for breach of fiduciary duty, in the amount of $200,000, plus such further and additional amounts as may be proven at trial of this action;

b) an accounting of all monies received by the Trustee on account of its fees and disbursements pursuant to the indemnity which it holds or otherwise;

c) a declaration that the conduct of the Trustee is in breach of the OSB code and CAIRP rules (as both terms are defined herein).

29. In response to paragraphs 19 and 20, the primary indemnity obligation to DSI is the Estate in accordance with the terms of the order of Justice Patterson dated March 7, 2003. It is the conduct of the Defendants (and Mr. O'Brien) that has caused the Plaintiff damages and for that, the Defendants remain liable.

30. In response to paragraph 24, DSI states that the Defendants abrogated their responsibilities as administrator of the Estate of Impact Tool to Mr. O'Brien and Unique, an angry judgment creditor. By abrogating its responsibilities to Mr. O'Brien, the Defendant allowed Mr. O'Brien to administer and alter the Estate with his biased investigations and conclusions and commence legal proceedings against the "target" (the Plaintiffs).

33. In response to 27, it was the responsibility of the Defendant in its capacity as Trustee and as an officer of the court to monitor the integrity of the administration of the estate of Impact Tool, remain impartial and neutral, as well as the independence of its Inspectors and in this case, BDO failed or neglected to do so causing damages to the Plaintiff for which the Defendants are liable.

36. Following the release of the decision of the Honourable Justice Brockenshire on June 26, 2007 [2007 CarswellOnt 9136 (Ont. S.C.J.)], the Defendant sought its discharge but due to the efforts of Mr. O'Brien and Unique to keep them secure and comfortable, BDO remained involved in the prosecution of the Plaintiffs in name only, which ultimately caused the Plaintiff damages.

End of Document

TAB 11

2005 CarswellOnt 2516
Ontario Court of Appeal

Ivorylane Corp. v. Country Style Realty Ltd.

2005 CarswellOnt 2516, [2005] O.J. No. 2535, 11 C.B.R. (5th) 230, 140 A.C.W.S. (3d) 16, 199 O.A.C. 1, 256 D.L.R. (4th) 38, 7 B.L.R. (4th) 15

Ivorylane Corporation (Plaintiff / Respondent) and Country Style Realty Limited (Defendant / Appellant)

Borins, Blair, LaForme JJ.A.

Heard: May 4, 2005
Judgment: June 21, 2005 *
Docket: CA C42138

Proceedings: affirming *Ivorylane Corp. v. Country Style Realty Ltd.* (2004), 2004 CarswellOnt 2567 (Ont. S.C.J. [Commercial List])

Counsel: Arnold Zweig for Appellant
Alistair Riswick for Respondent

Subject: Insolvency; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.e Miscellaneous

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Tenant leased premises from landlord — Tenant paid fixed monthly rent but not additional variable charges for insurance, taxes and maintenance — Tenant obtained protection order under Companies' Creditors Arrangement Act — Tenant elected not to repudiate lease with landlord — Claims procedure order was issued, but tenant did not send notice to landlord as required by it — Sanction order was issued after creditors approved plan of compromise — Landlord commenced action for unpaid arrears — Tenant's motion to determine if landlord's claim was barred by plan was resolved in favour of landlord — Motion judge found that landlord should not be penalized for not filing proof of claim in time required by plan, as tenant was in breach of obligation to notify landlord — Motion judge concluded landlord's claim was unaffected obligation and not barred by plan, which prevented only claims by affected creditors — Tenant appealed — Appeal dismissed — Motion judge was correct that provisions of plan and sanction order did not bar landlord's claim — Motion judge's finding that landlord should have been given notice as known creditor was well supported by record — Plan made it clear that lease that was not repudiated and had no written agreement to allow claim was unaffected obligation — Plan expressly compromised only affected claims and sanction order was clear that it was binding only on affected creditors — Landlord was entitled to bring claim.

Table of Authorities

Cases considered by *Blair J.A.*:

Blue Range Resource Corp., Re (2000), 2000 ABCA 285, 2000 CarswellAlta 1145, (sub nom. *Enron Canada Corp. v. National-Oilwell Canada Ltd.*) 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352 (Alta. C.A.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 20 — referred to

R. 21 — referred to

APPEAL by tenant from judgment reported at *Ivorylane Corp. v. Country Style Realty Ltd.* (2004), 2004 CarswellOnt 2567 (Ont. S.C.J. [Commercial List]), finding landlord's claim against tenant was not barred by *Companies' Creditors Arrangement Act*.

***Blair J.A.*:**

Outline

1 The primary issue on this appeal is whether, on the facts of this case, a pre-CCAA claim for arrears of rent under a lease may be asserted in full against the re-organized CCAA company after the CCAA proceedings have been completed, where the lease in question was not repudiated as part of those proceedings.

2 On December 13, 2001, Country Style Realty Limited sought and obtained court protection pursuant to the *Companies' Creditors Arrangement Act* R.S.C. 1985, Chapter 36, as amended (the "CCAA"). As a result, all pending and potential proceedings against it were stayed pending negotiation and approval of a plan of compromise or arrangement between the company and its creditors. At the time, Country Style was in arrears in the payment of the portion of its rent pertaining to adjusted taxes, maintenance and insurance ("TMI") respecting a fast-food retail outlet leased from Ivorylane Corporation and located near Shanty Bay, Ontario. The arrears amount to $146,892.12.

3 Country Style elected not to repudiate the Ivorylane lease, as it was entitled to do under the Initial CCAA Order. All amounts owing for rent since the effective date of the CCAA proceedings, including the TMI portion of the rent, have been paid.

4 Although there had been intermittent negotiations about the arrears of TMI in 1999, Ivorylane had taken no steps to enforce its claim before the CCAA proceedings were commenced. There is currently no dispute about the amount of the claim, however.

5 For reasons that are unclear on the record, Ivorylane's claim for rental arrears was not documented in Country Style's books. As a result, no direct notice was given to it of the CCAA proceeding and it did not see the notice that was published in the Globe and Mail on January 9 and 10, 2002, in accordance with a Claims Procedure Order (the

"CPO") granted by Lax J. on January 7. In fact, Ivorylane did not become aware of the CCAA proceedings until March 6, 2002, when it received from Country Style a faxed response to a February 26 summary of TMI arrears that Ivorylane's counsel had forwarded. The March 6 letter advised Ivorylane that Country Style, and related companies, had commenced proceedings under the CCAA.

6 On March 7, 2002, Spence J. sanctioned and approved the Plan of Compromise that Country Style had negotiated with its creditors (the "Sanction Order"), and Country Style emerged from CCAA protection.

7 On October 4, 2002, Ivorylane commenced this action, seeking to recover $146,892.12, being the full amount of the TMI arrears up to December 31, 2001. Country Style defended on the grounds that the claim was barred by the terms of the Plan of Compromise and the Sanction Order in the CCAA proceedings. On a Rule 21 motion for the determination of a question of law, Cumming J. declared that the claim was not barred. [1] Country Style appeals that decision.

8 For the reasons that follow, I would dismiss the appeal.

The CCAA Proceedings

9 Under the Initial Order granted by Colin Campbell J. on December 13, 2001 (paragraph 8(f)), Country Style was entitled, but not required, to,

> . . . repudiate any lease . . . relating to any leased premises . . . on such terms as may be agreed upon between the Applicant and such Landlord, or failing such agreement, to deal with the consequences thereof in the Plan.

10 The effect of the CCAA stay of proceedings was to require a landlord to continue to honour the terms of a lease that was not repudiated, provided Country Style complied with its obligations under the lease on a going-forward basis. After consultation with the Monitor appointed under the Initial Order, Country Style decided not to repudiate the lease.

11 On February 7, 2002, Lax J. granted the Claims Procedure Order which required, amongst other things, that notice of the CPO be given by facsimile transmission, personal delivery, courier or pre-paid mail to each known existing creditor, and that the creditor be provided with a Proof of Claim and Instruction Letter. In addition, a Notice to Creditors was to be placed in the national edition of the Globe and Mail newspaper for two days, commencing January 9, 2002. As I have indicated, no such notice was sent to Ivorylane, and Ivorylane did not see the notice in the Globe and Mail.

12 The CPO established a claims bar date (ultimately set as February 11, 2002). Any creditor not submitting a Proof of Claim by that date was to be forever barred from asserting the claim and the claim would be extinguished. Unaware of the CCAA proceedings, Ivorylane submitted no such Proof of Claim.

13 After the usual series of negotiations and meetings of creditors, the Plan of Compromise proposed by Country Style was approved by the requisite vote of creditors. Spence J. granted the Sanction Order on March 7, 2002.

Analysis

14 The motion judge concluded that Ivorylane's pre-CCAA claim for arrears of rent was an Unaffected Obligation and not an Affected Unsecured Claim under the Plan of Compromise. Therefore, it was not compromised, released, extinguished or barred by the Plan or the Sanction Order and Ivorylane was entitled to bring this action. The motion judge also held that the Claims Bar Date in the Claims Procedure Order was not effective to preclude Ivorylane's claim because Ivorylane had not been give the requisite notice. In any event, even if the Claims Bar Date were operative against Ivorylane, the motion judge would have granted relief against the bar "in the exceptional circumstances, as [he found] to be present in the instant situation" (reasons, para. 47), based on the principles enunciated by the Alberta Court of Appeal in *Blue Range Resource Corp., Re*, 2000 ABCA 285 (Alta. C.A.) at para. 41.

15 As the motion judge noted, there are some seeming anomalies in this result. First, Ivorylane appears to be better off as a result of his Order than it would have been had it received notice and filed its Proof of Claim (as it says it would

have done). This is because, in the claims process, Ivorylane would have received only the eight or nine cents on the dollar that all Affected Unsecured Creditors received from the Plan. Secondly — and perhaps more notably — the effect of the Order is to place a landlord, with an ordinary unsecured claim for pre-CCAA arrears of rent, but whose lease has not been repudiated, in a superior position to other landlords with exactly the same kind of claim but whose lease was repudiated, and, as well, to place the landlord in a superior position to all other creditors with similar unsecured claims. This contravenes the basic insolvency principle that creditors are to be treated equally and rateably in accordance with their class.

16 It would take compelling and clear language in the Plan and Sanction Order to mandate such a result. However, the fate of a creditor's claim in a CCAA proceeding is governed by the provisions of the Plan negotiated and approved by the creditors, and by the Court Order sanctioning the arrangement and permitting the insolvent company to reemerge as a viable economic entity. Therein lies the explanation for the apparent anomalies, in the circumstances of this case. The motion judge was correct in holding that the provisions of this Plan and this Sanction Order did not compromise or bar Ivorylane's claim for pre-CCAA arrears of rent.

17 A review of the pertinent provisions of the Sanction Order and the Plan bear out this conclusion.

The Sanction Order

18 Paragraph 6 of the Sanction Order sanctions and approves the Plan pursuant to the CCAA. In other provisions the Order stipulates that,

> a) the Plan becomes effective and binds the Applicants and *the Affected Creditors* upon the Effective Date (para. 8); and,
>
> b) subject to the provisions of the Plan, "all obligations or agreements to which the Applicants are party as of the Effective Date *shall be and remain in full force and effect, unamended*" and the parties are obliged to perform, and prohibited from repudiating, their obligations thereunder by reasons (amongst other things) of the fact that the Applicants sought and obtained relief under the CCAA or that a reorganization has been implemented (para. 15)
>
> [emphasis added].

The Plan

19 What the Motions Judge referred to as "the chain of definitions in s. 1.1 of the Plan", and certain other provisions of the Plan, are also important for the disposition of the appeal. The following definitions are pertinent:

> "Affected Claim" means an Affected Unsecured Claim or an Affected Secured Claim . . .
>
> "Affected Creditor" means a holder of an Affected Claim.
>
> "Affected Unsecured Claim" means a Claim for which a Proof of Claim has been delivered, including the Claims of those Persons listed on Schedule "A" [2]
>
> "Affected Unsecured Creditor" means a holder of an Affected Unsecured Claim including, without limitation, a holder of a Landlord Claim
>
> "Claim" includes any right of a Person against one or more of the Applicants in connection with any indebtedness, liability or obligation of any kind whatsoever of one or more of the Applicants . . . whether liquidated, unliquidated, reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown . . . including without limitation, any claim arising from or caused by the repudiation by an Applicant of any contract, Lease or other agreement . . . For greater certainty, a "Claim"

includes a Landlord Claim but does not include any right to payments of any creditor for the provision of goods and/or services to an Applicant on or after the Date of Filing. [3]

"Landlord Claim" means an Affected Unsecured Claim arising in respect of (i) a Landlord Repudiation Claim or (ii) a Lease or written agreement relating to a Lease in respect of which the Applicants have agreed that a Claim may be made in consideration of an amendment or variation of the terms of such Lease or agreement.

"Landlord Creditors" means Affected Unsecured Creditors holding Landlord Claims.

"Landlord Repudiation Claim" means the actual or prospective repudiation of a Lease where notice of repudiation of such Lease was given by an Applicant in accordance with the Initial Order and the Claim Procedure Order which shall be calculated, in the case of a repudiation, as the Rent payable by an Applicant to such Landlord for the 12 months following the delivery of the notice of repudiation (but not beyond the termination date under the relevant Lease), less any amounts paid or payable by any other Person to such Landlord under any lease entered into by such Landlord for such premises after receipt by the Landlord of such notice of repudiation.

"Unaffected Obligations" means those Claims listed on Schedule "B".

20 Schedule "B" to the Plan, entitled "Unaffected Obligations" includes, in subparagraph (f) the following:

Equipment, personal property and *real property leases* and other contracts *which have not been repudiated* or terminated as at the Subsequent Claims Bar Date *and in respect of which there has been no written agreement to allow a Claim*

[emphasis added]

21 Other provisions in the Plan that are relevant include:

Section 2.2 Persons Affected

This Plan provides for a coordinated restructuring and compromising of Affected Claims. This Plan will become effective on the Effective Date and shall be binding on and enure to the benefit of the Applicants and the Affected Creditors . . .

Section 2.3 Persons Not Affected

This Plan does not affect holders of Unaffected Obligations. . . [emphasis added]

Section 7.1 Contracts and Leases

Except as otherwise provided in the Plan, or in any contract, instrument, release, indenture or other agreement or document entered into in connection with the Plan, as of the Effective Date each *Applicant shall be deemed to have ratified each* executory contract and *unexpired lease to which it is a party, unless such contract or lease (a) was previously repudiated* or terminated by such Applicant, or (b) previously expired or terminated pursuant to its own terms. [emphasis added]

Lack of Notice and the Effect of the Claims Procedure Order

22 The motion judge found that Ivorylane should have been given formal notice of the claims procedure process because it was, or should have been, a "known existing creditor". This finding is well supported by the record, and I agree with it. However, on the wording of this Plan and Sanction Order, it does not follow that Ivorylane's claim should be treated as if it were an Affected Claim compromised by the Plan. This conclusion flows from the following analysis.

23 Ivorylane's claim for pre-CCAA arrears of rent is clearly a "Claim" as that term is defined in the Plan. The Claims Procedure Order requires that any person with an existing claim must file a Proof of Claim and provides that the claims of those who fail to do so are barred forever. An Accepted Unsecured Claim is a claim with respect to which a Proof of Claim is filed, and such Claims are compromised by the Plan and the Sanction Order. On a non-contextual application of the CPO alone, then, it would appear that if Ivorylane had filed a Proof of Claim — as it says it would have done, had it received notice — the claim for pre-CCAA arrears would have become an Accepted Claim. The CPO cannot override the terms of the Plan and the Sanction Order, however, and in my opinion, the effect of the provisions of the Plan respecting Unaffected Obligations is to divest Ivorylane's claim of its apparent quality as an Accepted Claim because of the provisions of the Plan respecting Unaffected Obligations.

24 I note, parenthetically, that at best, if Ivorylane's Claim were an Affected Claim, Ivorylane would be entitled to recover no more than the same compromised amount of eight or nine cents on the dollar as were other unsecured creditors of its class. However, for the reasons explained below, the wording of this particular Plan of Compromise takes Ivorylane's claim for such arrears out of the Affected Claim category for the simple reason that Country Style's obligation to pay those arrears is an obligation under a non-repudiated lease and is, accordingly, an Unaffected Obligation not affected by or compromised by the Plan.

The Plan and Sanction Order

25 The fact that the negotiators and authors of the Plan felt compelled to specify that a "landlord claim" was included in an "affected unsecured claim" and that "landlord creditors" means "affected unsecured creditors holding Landlord Claims", lends support to the notion that other claims by landlords — such as claims for pre-CCAA arrears of rent — are not included as affected unsecured claims. This conclusion is bolstered, in my opinion, by other provisions in the Plan. First, the definition section and Schedule "B", to the Plan make it plain that a real property lease that has not been repudiated or terminated, and in respect of which there has been no written agreement to allow a claim, is an "Unaffected Obligation". The Plan by its express terms only compromises Affected Claims and only binds Affected Creditors (s. 2.2). The Plan does not affect holders of Unaffected Obligations (s. 2.3).

26 Moreover, except as otherwise provided in the Plan — and I cannot find anywhere in the Plan where it is "otherwise provided" — Country Style is "deemed to have ratified each . . . unexpired lease to which it is a party, unless such . . . lease (a) was previously repudiated or terminated . . . or, (b) previously expired or terminated pursuant to its own terms (s. 7.1). The Ivorylane lease does not fall within either of these exceptions. There is nothing in the Plan or the Sanction Order to suggest that Country Style is only deemed to have ratified that part of the lease that relates to Country Style's post-CCAA obligations.

27 Finally, as noted earlier in these reasons, the Sanction Order makes it clear that the Plan only binds Affected Creditors and that any agreement to which Country Style is a party as at the Effective Date — which would include the unrepudiated Ivorylane lease — "shall be and remain in full force and effect *unamended*" and that Country Style, as a party to that agreement, is obliged to perform it and prohibited from repudiating its obligations under the lease by reason of the fact that Country Style sought and obtained CCAA relief or that a reorganization has been implemented (Sanction Order, para. 15).

Disposition

28 Accordingly, I agree with the motion judge, on the particular facts of this case, that Ivorylane's pre-CCAA claim for arrears of rent is not compromised or barred by the Plan and Sanction Order. Ivorylane is entitled to bring the within action.

29 The appeal is therefore dismissed.

30 In accordance with the agreement of counsel, costs of the appeal are fixed in the amount of $6,500 all inclusive, payable to the respondent as the successful party.

***Borins J.A.*:**

I agree.

***LaForme J.A.*:**

I agree.

Appeal dismissed.

Footnotes

* A corrigendum issued by the court on June 21, 2005 has been incorporated herein.

1 A Rule 20 motion for summary judgment, that was brought at the same time, was dismissed.

2 Schedule "A" is a list of all the existing known affected unsecured creditors. Ivorylane is not on that list.

3 "Claim" is even more compendiously defined than quoted here. I have excerpted only the portions of the definition that appear to relate to the issues on the appeal.

TAB 12

2015 BCSC 42
British Columbia Supreme Court

League Assets Corp., Re

2015 CarswellBC 61, 2015 BCSC 42, [2015] B.C.W.L.D. 1410, [2015] B.C.W.L.D. 1411, [2015] B.C.W.L.D. 1465, 22 C.B.R. (6th) 20, 249 A.C.W.S. (3d) 795, 3 P.P.S.A.C. (4th) 133

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

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57, As Amended

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, As Amended

In the Matter of a Plan of Compromise and Arrangement of League Assets Corp. and Those Parties Listed on Schedule "A", Petitioners

Fitzpatrick J.

Heard: November 20, 2014
Judgment: January 14, 2015
Docket: Vancouver S137743

Counsel: Christopher J. Ramsay, Katie G. Mak for Petitioners
Jordan Schultz for Ad Hoc Group of LOF Noteholders
Vicki Tickle for Investors
Tracy Sandler for Pricewaterhouse Coopers Inc.
Dennis K. Fitzpatrick for RoyNat Inc.
Heather Ferris for Export Development Canada and Meckelborg Financial Group Ltd.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.a Purpose

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Equity

III Equitable doctrines
III.12 Miscellaneous

Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Purpose

Group of noteholders lent money to debtor LOF which, together with related corporate entities, was subject of proceedings under Companies' Creditors Arrangement Act (CCAA) — Noteholders alleged that they advanced funds to LOF on basis that if LOF used those funds to advance monies to other related entities then those entities would provide loan agreements and security to LOF — Other entities received funds from LOF but no loan documentation or security was obtained — Noteholders brought application for declaration that other entities were indebted to LOF in respect of funds advanced by LOF and for charge over assets of other entities — Application dismissed — It is fundamental objective of Canadian insolvency regime that all claimants be treated fairly in distribution of whatever assets remain, within bounds of applicable statutory regime — Noteholders failed to establish on balance of probabilities that any loan agreement existed between LOF as lender and other entitites as borrowers, with respect to any amounts received by those entities — There was no common intention as between LOF and other entities upon which equitable charge could be granted — Granting security in favour of noteholders would not be appropriate and would not advance policy objectives under CCAA — All factors pointed to need to stay course and treat like creditors equally in terms of their recovery, otherwise orderly liquidation of assets would descend into chaos as creditors attempted to obtain bigger piece of pie.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Group of noteholders lent money to debtor LOF which, together with related corporate entities, was subject of proceedings under Companies' Creditors Arrangement Act (CCAA) — Noteholders alleged that they advanced funds to LOF on basis that if LOF used those funds to advance monies to other related entities then those entities would provide loan agreements and security to LOF — Other entities received funds from LOF but no loan documentation or security was obtained — Noteholders brought application for declaration that other entities were indebted to LOF in respect of funds advanced by LOF and for charge over assets of other entities — Application dismissed — It is fundamental objective of Canadian insolvency regime that all claimants be treated fairly in distribution of whatever assets remain, within bounds of applicable statutory regime — Noteholders failed to establish on balance of probabilities that any loan agreement existed between LOF as lender and other entitites as borrowers, with respect to any amounts received by those entities — There was no common intention as between LOF and other entities upon which equitable charge could be granted — Granting security in favour of noteholders would not be appropriate and would not advance policy objectives under CCAA — All factors pointed to need to stay course and treat like creditors equally in terms of their recovery, otherwise orderly liquidation of assets would descend into chaos as creditors attempted to obtain bigger piece of pie.

Equity — Equitable doctrines — Miscellaneous

Equitable charge — In order for court to grant equitable charge there must be common intention between parties to make property in question security for debt.

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s. 11 — considered

s. 23(1)(c) — considered

Personal Property Security Act, R.S.B.C. 1996, c. 359
Generally — referred to

s. 12 — referred to

s. 19 — referred to

APPLICATION by group of creditors for declaration of indebtednesss and for charge over assets.

***Fitzpatrick J.*:**

Introduction

1 It usually goes without saying that in any insolvency proceeding, there is a sea of broken promises and dashed expectations. Some of those rise to the level of a claim that can be advanced in the proceeding. Many claimants look back in hindsight and consider, often with regret, what should have happened in terms of protecting their position.

2 Even so, matters are crystallized by the filing of proceedings. Further, it is a fundamental objective of the Canadian insolvency regime — whether under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") or the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") — that all claimants be treated fairly in the distribution of whatever assets remain, within the bounds of that statutory regime.

3 In this proceeding, there are no shortage of claimants who have realized, quite belatedly, that what was promised will never be delivered or that they should have taken further steps to preserve their recovery from the petitioners within the League Assets group. One such disappointed group of creditors includes certain note holders who lent money to the petitioner, League Opportunity Fund Ltd. ("LOF"). This application is brought by an ad-hoc group that represents the majority of those note holders (collectively, the "Noteholders").

4 The Noteholders allege that they advanced funds to LOF on specific terms by which they were to obtain security from LOF. Further, they say that they advanced those funds on the basis that if LOF used those funds to advance monies to other League Assets entities, then those entities would similarly provide loan agreements and security to LOF. No loan documentation or security was obtained from any of these other League Assets entities who later received funds from LOF.

5 The Noteholders now seek an order that these other League Assets entities are indebted to LOF in respect of all the funds advanced by LOF. Further, the Noteholders seek a charge over the assets of these other League Assets entities.

6 If they succeed on all fronts, the Noteholders stand to gain further recoveries of approximately $1.8 million, principally arising in two asset pools (IGW REIT LP and Gatineau — as defined below). In the event they succeed only on the debt issue, this is reduced to approximately $1.3 million. Needless to say, the cost of this success will be borne by other stakeholders, including secured and unsecured creditors and equity participants within the League Assets group as a whole.

Background Facts

7 This proceeding had a rocky start but began with a stated objective of achieving a restructuring. Much of the background of this matter is set out in my earlier reasons for judgment delivered on October 25, 2013, just after the filing of these proceedings on October 17, 2013: *League Assets Corp., Re*, 2013 BCSC 2043 (B.C. S.C.). At that time, I approved interim financing in the face of substantial opposition from various secured creditors. I also appointed representative counsel to represent the substantial investor group (some 3,500 individuals) who had not retained counsel.

8 In those reasons, I described the complex organizational structure of the petitioners. As will become evident, the complexity of that structure is very relevant on this application.

9 In its first report to the court dated October 23, 2013, the court appointed monitor, PricewaterhouseCoopers Inc. (the "Monitor"), addressed the complex corporate structure and the complex holdings of the various entities within the League Assets group. In particular, the Monitor stated at paragraph 4.3 that:

> Based on the Monitor's limited review of League's financial affairs, it is apparent that monies were frequently loaned from one entity to another within the group of entities.

10 After the issuance of my reasons, considerable efforts were undertaken by the various stakeholders towards negotiating and reaching a settlement (essentially, a 'détente') by which the operations were stabilized. Time limits were put in place to allow sale efforts to continue, by reason of which values of the underlying real estate projects were preserved or enhanced. This settlement resulted in the granting of the amended and restated initial order on October 25, 2013 (the "ARIO") and the later process order which was granted on November 22, 2013 (the "Process Order"). Both laid the foundation for all actions taken in the proceedings since that time. By reason of the ARIO and the Process Order:

> a) the Monitor was given enhanced powers to conduct a sales process of certain properties. Some secured creditors were exempted and allowed to commence or continue realization proceedings. Those secured creditors subject to the stay were held off until June 2014 when either the properties were released to them or the Monitor continued with the sales effort with their consent. Substantial sales have been completed and many others are still being pursued; and
>
> b) each distinct property was essentially "ring fenced" in order to trap operational and sale proceeds and costs and also to allow payment of particular obligations arising within the entities holding those assets. In addition, the proceeds of the interim financing were subject to a specific allocation as against particular assets and general costs (such as overhead and professional costs) being essentially allocated on a *pro rata* basis depending on recoveries.

11 In late 2013, it quickly became apparent that it would be a difficult exercise to attempt to estimate the potential realizations for the assets, let alone what the stakeholders might recover. Specifically, as mentioned above, there had been a substantial flow of monies to and from the various League Assets entities as a result of which there were numerous inter-company balances which, if respected, had the potential to affect recoveries within the group depending on the flow of monies. In January 2014, a claims process was initiated to get some certainty as to what claims existed.

12 By the summer of 2014, all hopes of a restructuring had been dashed and the stakeholders were resigned to a complete liquidation process, again within the constructs of the ARIO and the Process Order.

13 The Monitor was asked to prepare a report to the stakeholders pursuant to the *CCAA*, s. 23(1)(c). On June 23, 2014, the Monitor served its nineteenth report to the court. Attached to that report is the Monitor's report to the stakeholders dated June 23, 2014, which includes its analysis of potential recoveries. This further report is called, quite aptly, the "Waterfall Analysis".

14 As the Monitor notes, the Waterfall Analysis is a fluid document and any changes within the complex analysis will have a cascading effect on other aspects. The Waterfall Analysis respects the various inter-company balances mentioned above and also allocates wind-up costs (estimated at $28.5 million) according to the ARIO and Process Order.

15 As matters stand, the Waterfall Analysis projects a very bleak outlook for the equity claimants. The claimants appear to have invested over $294 million but are estimated to recover only 5%, or just over $13 million. This is a very generalized statement since many investors will recover nothing.

16 The Noteholders filed their application on November 19, 2013 but, at the request of the Monitor, they did not proceed to have it heard immediately. This was noted by the Monitor in its report with the further indication that the Waterfall Analysis "may change materially depending on the result of the LOF Noteholders' application", amongst other issues.

17 The Noteholders renewed their efforts to have their application heard in October 2014. The application was adjourned at the request of the Noteholders who wanted more time to clarify the relief they were seeking. That clarification has now been received and the application proceeded on that basis.

The Issues

18 The Noteholders seek:

> a) a declaration that certain League Assets entities are indebted to LOF, in an amount equal to the amount of the "Note Proceeds" received by those entities; and
>
> b) assuming that a debtor/creditor relationship exists with LOF, a charge on the assets of those League Assets entities in favour of LOF, in an amount equal to the amount of the "Note Proceeds" received by those entities.

Are the Other League Entities Indebted to LOF?

(a) The Facts

19 The evidence in support of this application is found in the affidavit of Adam Abramson, who is the Chief Compliance Officer of investment companies who manage the accounts of various Noteholders.

20 In 2012, LOF issued an offering of convertible promissory notes (the "Notes") to a maximum of $25 million (the "Subscription Agreement"). Exhibit 4 to the Subscription Agreement contains the "Terms" upon which the offering is made. Those "Terms" indicate:

> a) the "Objective" of the offering was to provide bridge capital to fund the acquisition of and investment into strategic corporate and real estate assets;
>
> b) "Use Of Proceeds" referred to the net proceeds of the Notes being used for: start-up costs for LOF; to make acquisitions of real estate and other assets; to make "new acquisitions" consistent with League's growth strategy (League Assets was starting to negotiate with certain "Targets" in various sectors); and working capital and general corporate purposes; and
>
> c) under "Security", the obligations of LOF to repay the Notes were to be secured by a general security agreement granted in favour of the Noteholders (the "LOF GSA") ranking in first priority over all assets of LOF. In addition, the obligations of LOF under the Notes were to be guaranteed by the petitioners, League Assets Corp. ("LAC") and IGW REIT Limited Partnership ("IGW REIT LP") with the express acknowledgement in the guarantees that LAC and IGW REIT LP would "indirectly benefit from credit extended to [LOF]".

21 Mr. Abramson refers to what the Noteholders describe as the most critical "Term" of the Subscription Agreement which reads:

SECURITY IN INVESTEE COMPANIES	[LOF] will enter into loan agreements with all investee companies, with any loans advanced by [LOF] secured by security agreements over the assets of the investee companies.

22 There is no further detail concerning what is meant by "assets" in the above "Term". The Noteholders seek a charge on all assets, whether real or personal, in the "investee companies" although all arguments centered on the security being general security agreements, not mortgages. In any event, the Monitor has approached this application and its analysis on the basis that any equitable charge would be restricted to personal property.

23 As a result of this offering, the Noteholders subscribed for approximately $13.5 million in Notes. In accordance with the "Terms", on October 31, 2012, LOF executed the LOF GSA. It is in what I would describe as fairly standard terms, with security over all LOF's personal property to secure amounts owing "from time to time" from LOF to the Noteholders. Further, on December 24, 2012, guarantees of the LOF indebtedness were executed by LAC and IGW REIT LP in favour of the Noteholders.

24 For reasons that are not apparent, the Noteholders failed to take steps to protect their interests until very late in the day. The LOF GSA was not properly registered until November 2013, about one year after the execution of the LOF GSA, and after these proceedings were commenced. At no time prior to the *CCAA* filing did the Noteholders or their representatives enquire, consistent with their present position, as to whether LOF had loaned any of the proceeds of the Notes to any other League Assets entities which would have led presumably to the further enquiry about documentation, including loan and security agreements, from these other entities.

25 Counsel for the League Assets group produced various spreadsheets detailing transfers from LOF in the period from November 1, 2012 to January 11, 2013. In addition to various amounts for working capital, commissions, legal and filing fees and transfers to non-*CCAA* entities, the spreadsheets refer to the following "disbursements" from LOF:

a) $9,988,312 in total to LAC, with individual entries being described as "cash transfer", "working capital" or "proceeds"; and

b) $550,000 to League Capital Markets Ltd. ("LCM"), with the entry being described as a "loan from [LOF]".

26 On November 19, 2012, LOF and LAC entered into a loan agreement (the "LAC Loan Agreement") in relation to LOF's agreement to loan LAC monies from time to time. The transfers to LAC had begun on November 16, 2012. It was a term of the LAC Loan Agreement that these loans would be secured by a general security agreement. However, it is unknown whether such a security agreement was ever executed as none has been produced. If any such agreement was executed, no financing statement was registered in either the Ontario or British Columbia personal property registries.

27 Of the approximately $10 million that LAC received from LOF, the spreadsheets from League Assets group's counsel indicate that these funds were used by LAC or transferred from LAC to other League Assets entities. Other than $4,232,000 which was used by LAC for working capital, the spreadsheets refer to the following later transfers (approximate amounts only) from the remaining $5.7 million:

a) $975,000 was transferred to IGW REIT LP;

b) $2.769 million was transferred to Colwood City Centre Limited Partnership and Colwood City Centre GP Inc. (collectively, "Colwood");

c) $1.5 million was transferred to Gatineau Centre Development Limited Partnership, Gatineau Centre Development GP Inc. and Gatineau Centre Real Estate Development Corporation (collectively, "Gatineau");

d) $42,000 was transferred to IGW Residential Capital Limited Partnership and IGW Residential Capital General Partner Inc.;

e) $4,000 was transferred to Residences at Quadra Village Limited Partnership and Residences at Quadra Village GP Inc.;

f) $60,000 was transferred to Fort St. John Retail Limited Partnership and Fort St. John Retail GP Inc.;

g) $36,000 was transferred to North Vernon Properties Limited Partnership and North Vernon Properties Inc.; and

h) $18,000 was transferred to Cowichan District Financial Centre Limited Partnership and Cowichan District Financial Centre GP Inc.

(All of the above entities are referred to as the "Tier 2 Entities").

28 In addition to LAC and LCM not having provided any security to LOF, it does not appear that any Tier 2 Entities provided any loan or security documentation to LOF. Certainly, there were no financing statements registered against the Tier 2 Entities in favour of LOF.

(b) The Debt Issue

29 At present, the Noteholders have a secured position as against the assets of LOF in respect of amounts owing under the Notes in accordance with the LOF GSA. The Noteholders also hold the LAC and IGW REIT LP guarantees although they hold no security in respect of that indebtedness.

30 LAC is indebted to LOF under the LAC Loan Agreement.

31 The Noteholders would substantially improve their position by the relief sought here by establishing a debtor/creditor relationship between LOF, as lender, and LCM and the Tier 2 Entities, as borrowers, with corresponding security in favour of LOF in respect of that debt.

32 If this relief is granted, it would represent a substantial shift in value to LOF and would directly benefit the Noteholders who hold security against LOF's assets. It would also have the effect of decreasing the value of the assets held in LAC, LCM and the Tier 2 Entities and would directly and negatively affect the stakeholders who would otherwise recover at those corporate levels.

(c) Discussion

33 The Noteholders contend that there are separate, binding agreements between LOF, as lender, and each of LCM and the Tier 2 Entities, as borrowers, by which each agreed to borrow, and repay to LOF, the portion of the proceeds of the Notes that each of them received as "loans".

34 The Noteholders argue that such agreements exist between LOF and LCM and the Tier 2 Entities based on two allegations:

a) that LCM and the Tier 2 Entities had knowledge that the proceeds from the Notes were being offered to LOF on the "Terms"; and

b) that by accepting certain proceeds from the Notes, LCM and the Tier 2 Entities accepted the "Terms" and received consideration.

35 In the first instance, there is little or no evidence that the monies transferred by LOF to LCM and the Tier 2 Entities were "loans" in accordance with the Subscription Agreement. Mr. Abramson readily acknowledges that his source of evidence on this application is limited; namely, what was actually obtained by the Noteholders from LOF during the marketing of the Notes; what was filed in this proceeding; and finally, certain communications from League Assets group's lawyers some time ago. It is apparent that the Noteholders have not engaged in any real analysis or investigation of League Assets' financial affairs or the flow of funds between LOF and the other entities. No forensic analysis has been completed.

36 It is significant that there is no further information on why such funds were transferred, since both the spreadsheets and Mr. Abramson refer to these funds as being "used" by LAC. This is consistent with the overall lack of clarity regarding all transfers of funds, as Mr. Abramson refers to LOF as having:

> ... loaned/funded/transferred such proceeds to various League and non-League entities pursuant to several loan, funding or other arrangements.

37 As such, I agree that while Mr. Abramson calls these further transfers from LOF "loans", that categorization is entirely speculative.

38 In addition to the Subscription Agreement "Terms", as set out above, Mr. Abramson points to other communications to the investment firms, including Trapeze Capital Corp. ("Trapeze") and others, regarding how the investment in LOF would be secured.

39 Firstly, on December 13, 2012, Gregory Harris, counsel for LOF, emailed Trapeze and certain officers and directors of LOF, attaching a form of promissory note and general security agreement. Mr. Harris said these documents:

> ... will be used for the loans to IGW REIT LP, as well as to [LAC] or any other League entity borrowing funds from [LOF].

Both the promissory note and the security agreement were in the name of IGW REIT LP in favour of LOF and dated for December 2012. Both were unsigned.

40 Secondly, Mr. Abramson points to an undated League Assets PowerPoint presentation where the "Security" for the offering was stated to be "Guaranteed by LEAGUE and over $400 M in Assets". Mr. Abramson's analysis of this statement has led him to the belief that the "$400 M in Assets" referred to the assets of the entire League Assets group, not just IGW REIT LP and LAC.

41 In a similar vein, Mr. Abramson refers to an email dated November 14, 2012 from George Wogiatzis of another League Assets entity, League Investment Services Inc., to certain investors stating "[t]he investment is into a note that is in a very secure position, with the investment having a coverage ratio [ ] of unencumbered assets of 9 times."

42 These circumstances are not compelling evidence that LCM and the Tier 2 Entities either received the monies as "loans" or that they agreed to enter into loan agreements to repay amounts to LOF which had been received either directly from LOF (in the case of LCM) or indirectly from LOF (in the case of the Tier 2 Entities). In particular, Mr. Harris' comment that security would be obtained from entities borrowing money "from LOF" still begs the question as whether such monies were agreed to be advanced as a loan.

43 The Noteholders also contend that LOF, LAC, IGW REIT LP and Gatineau were all under common control. The directors of LOF were Emanuel Arruda ("Arruda") and Adam Gant ("Gant"), and its officers included Arruda, Gant, John Kelly and Patrick Miniutti ("Miniutti"). The directors of LAC were Arruda and Gant, and its officers included Arruda, Gant and Miniutti. The directors and officers of IGW REIT LP were Arruda and Gant. The directors of Gatineau were Arruda and Gant.

44 Gant and Arruda were also in control of other League Assets entities, including the remaining Tier 2 Entities. This control was exercised by various corporate entities and included direct or indirect ownership into those Tier 2 Entities or by way of the provision of management services to them.

45 Even accepting that the various entities within the League Assets group were under common control, it can hardly be determinative that the amounts transferred were "loans" and that the recipient company agreed to be bound by a loan agreement to repay these loans by that fact.

46 This is even more tenuous in respect of the Tier 2 Entities which did not even receive the monies directly from LOF.

47 The Monitor points out that LAC was an operating entity and it received funds from sources other than LOF. Who is to say that any amounts transferred or loaned by LAC to the Tier 2 Entities even arose from the proceeds from the

LOF Notes rather than some other source? Again, there is no evidence (apart from the vague reference in the spreadsheet regarding LCM) that the transfer from LAC to LCM and the Tier 2 Entities were even loans, as opposed to other types of transfers (such as repayment of debt).

48 Further, the critical "Term" quoted above refers to "loans advanced *by [LOF]*". It does not refer to loans advanced by LOF and then on-lent to other League Assets entities, such as the Tier 2 Entities. It is not correct to say that LOF "loaned" any monies to any of the Tier 2 Entities. There is no evidence that LAC, before receiving any funds from LOF, was obliged to use them for any particular purpose or was even obliged to obtain security from any other recipient of these monies (to the extent that LAC could say that any particular monies came from LOF).

49 The Noteholders rely on *AGT Financial Corp. v. Ellake Services Ltd.*, 2011 BCSC 578 (B.C. S.C.). In that case, Mr. Thompson was the director of two companies, BYG Natural Resources Inc. ("BYG") and, his own company, AGT Financial Corporation ("AGT"). AGT took security over certain shares owned by BYG and the issue arose as to whether, by reason of his position in BYG, AGT was to be imputed with knowledge of a prior security interest that had been granted by BYG in those shares. In accordance with the provisions of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 (the "*PPSA*"), Mr. Thompson, and hence AGT, were found to have knowledge of the prior security interest: paras. 44-65.

50 The reasoning in *AGT Financial* does little to assist in the analysis in this case where the Noteholders must prove not only that LCM and the Tier 2 Entities knew of the Terms, but that they agreed to accept the monies were being "loaned" to them by LOF.

51 The basic principles of contract require that a contracting party have knowledge or notice of the offer and that the party accepted that offer either by express agreement or by implied conduct: *Century 21 Canada Ltd. Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196 (B.C. S.C.) at paras. 72-73.

52 Firstly, there is no evidence from anyone within the League Assets group of companies on this issue as to knowledge of the "Terms" or even the general intention in the transfers of these funds. Neither Arruda nor Gant or any other director or officer were examined on the issue.

53 Secondly, even assuming that Arruda or Gant were aware of the "Terms", I have difficulty in seeing that Arruda and Gant's knowledge of the "Terms" of the LOF offering to Noteholders can be seen as notice to all other League Assets entities that if they, either directly or indirectly, received some of these monies that it was being offered only as a "loan". There is no documentary evidence to support such a suggestion beyond a vague reference in one spreadsheet that the amount advanced to LCM was a "loan from [LOF]". While the documentation, including the "Terms" of the offering do support that LOF may have been looking to advance these monies as loans, there is no persuasive evidence to indicate that, in the case of the transfers to LCM and the Tier 2 Entities, it did so.

54 There is also no indication that LCM and the Tier 2 Entities expressly agreed to accept such transfers as a loan from LOF. There is no contemporaneous documentation or any other evidence at the time of the transfers that would support that LCM did so. Similarly, there is no evidence that the Tier 2 Entities intended to receive loans from LAC and repay them on such terms. There is nothing signed by these companies.

55 In *Terrien Bros. Construction Ltd. v. Delaurier*, 2006 BCSC 1645 (B.C. S.C. [In Chambers]), aff'd 2007 BCCA 623 (B.C. C.A.), Madam Justice Russell discussed what constitutes "acceptance by conduct":

> [36] ... [A] party can accept a contract by conduct even without delivery of an acceptance. As reviewed by Cohen J. in ***Cranewood Financial Corp. v. Norisawa*** (2001), 107 A.C.W.S. (3d) 405, 2001 BCSC 1126 at paras. 339-340:
>
> > In discussing what constitutes acceptance, Fridman [G.H.L. Fridman, *The Law of Contract*, 4th ed. (Toronto: Carswell, 1999)] said, as follows, at pp. 56-57:

> It is clear that, as Wilson J. stated in *Sloan v. Union Oil Co.*, [1955] 4 D.L.R. 664, "an offer may be accepted by conduct as well as words." As is the case where acceptance is intended to be, or is appropriately indicated by some statement by the offeree, whether oral or in writing, the nature of acceptance by conduct depends upon the requirements, if any, stipulated by the offeror. In the absence of any special act or conduct prescribed by the offeror, acceptance may be inferred from the offeror's conduct. Yet such conduct must indicate: (a) that the act in question was performed with a view to acceptance of the offer, and not from some other motive or some other reason; and (b) that it was intended to be acceptance of the offer in question. In such cases the question is whether a reasonable man would interpret the offeree's conduct as an acceptance of the offer. [Footnotes omitted]

[37] Thus, the question which arises is how a reasonable person, in the position of an objective bystander, would describe the effect of what he had seen or heard in the circumstances of this case.

[Emphasis added].

56 The Noteholders contend that the actions of LCM and the Tier 2 Entities in simply receiving these monies are sufficient evidence of acceptance of such monies being a loan from LOF. They argue that, given the "Terms" in the Subscription Agreement and the representations made by LOF to the Noteholders, the reasonable interpretation of the transfers from LOF to LCM and also from LOF to LAC and then to the Tier 2 Entities is that such transfers were made in accordance with those "Terms" and that these "Terms" were accepted by LCM and the Tier 2 Entities.

57 As the Monitor notes in the Waterfall Analysis, there was a significant transfer of assets and monies between the various League Assets entities. In many respects, the books and records of the League Assets group are lacking, yet, in many instances, both secured and unsecured loans were recorded. The Noteholders have decided, presumably for valid reasons, not to undertake any investigation into the corporate affairs of League Assets beyond the cursory one I have noted above.

58 In my view, there may be any number of interpretations as to the basis upon which LCM and the Tier 2 Entities accepted the transfer of these monies. With respect to LCM, there is no evidence that any "loan" from LOF was recorded in its books and records as such. With respect to the Tier 2 Entities, it is equally possible that it was LAC that "loaned" the amounts to them, not LOF. Similarly, no documents were produced from the books and records of the Tier 2 Entities to indicate how the amounts transferred were described and recorded.

59 I conclude that the Noteholders have failed to establish, on a balance of probabilities, that any agreement exists between LOF, as lender, and LCM and the Tier 2 Entities, as borrowers, in respect of any amounts received by those entities being loans.

Should an Equitable Charge be Granted?

60 My conclusion above is sufficient to dispose of the matter with respect to LCM and the Tier 2 Entities. However, as all counsel argued the issue relating to the proposed equitable charge, I will address it also, on the basis that LCM and the Tier 2 Entities agreed to repay the amounts as loans to LOF.

61 This issue as to the equitable charge also arises with respect to LAC, where there is the LAC Loan Agreement, but no security appears to have been signed by LAC in favour of LOF.

62 Again, the Noteholders would substantially improve their position by being granted:

> a) security over LAC's assets in respect of amounts owing under the LAC Loan Agreement. They seek a charge in the amount of $4,232,217, being the amount transferred to LAC from LOF and used for working capital; and

b) if a debtor/creditor relationship had been established, security in favour of LOF as against the assets of LCM (limited to $550,000); and

c) if a debtor/creditor relationship had been established, security in favour of LOF as against the assets of the Tier 2 Entities (limited to the specific amounts received by them, as noted above). (This relief does not include Colwood as that property has since been disposed of by the League Assets group).

63 The Noteholders originally sought to obtain a declaration of security from the time when this application was first brought in November 2012, a position that was extremely contentious given the other registered security interests that already existed as against the various assets. However, it was later clarified that the Noteholders now only seek to be granted priority from the date of the hearing, being November 20, 2014. In addition, the proposed security was to be subordinated to various court ordered charges as set out in the ARIO.

(a) Is There a Common Intention?

64 Under its equitable jurisdiction, the court may grant an equitable charge where there was an agreement between two parties to grant a security interest, but a valid security interest was not effectively conveyed.

65 The court in *Vancouver (City) v. Smith* (1985), 63 B.C.L.R. 180 (B.C. C.A.), at 183 adopted the statements of Madam Justice Boland in *Sikorski, Re* (1978), 89 D.L.R. (3d) 411 (Ont. H.C.) that the "important feature of an equitable mortgage is the common intention of the parties to the mortgage contract to make the property in question security for the debt due."

66 The Noteholders also cite *O'Brien v. Royal Bank*, [2008] O.J. No. 653 (Ont. S.C.J.) at para. 25, (2008), 68 R.P.R. (4th) 261 (Ont. S.C.J.) and *Elias Markets Ltd., Re* (2006), 25 C.B.R. (5th) 50 (Ont. C.A.) as to the appropriate test. At 65 in *Elias Markets*, the court stated:

> In essence, the concept of an equitable charge seeks to enforce a common intention of the mortgagor and mortgagee to secure property for either a past debt or future advances, where that common intention is unenforceable under the strict demands of the common law.

67 Accordingly, an equitable mortgage may be granted where there is informality in the granting of a security interest that prevents it from being a legal interest: *Vancouver (City) v. Smith* at 182-183.

68 In *Production Enhancement Group Inc., Re*, 2011 ABQB 350 (Alta. Q.B.), the court addressed the validity of a general security agreement that was found to be defective. Following the bankruptcy of the company, the trustee in bankruptcy received an opinion that the security was not valid and enforceable due to the lack of certain charging language in the documentation. Madam Justice Kent found that an equitable charge existed based on the clear intention found in the documentation and that the charge was validly registered.

69 The reasoning of the court in *Production Enhancement Group* is distinguishable from this case. As with the previous issue, there is a lack of evidence as to what the true intention of the parties was in relation to any security to be granted. There is no documentation, such as a defective general security agreement, that was signed by either LAC, LCM or the Tier 2 Entities. In addition, no draft documentation was prepared that might have indicated an intention to provide such security. The evidence found in Mr. Harris' email is not determinative of any such intention.

70 At best, the LAC Loan Agreement refers to LAC providing security in the form of a general security agreement but there could have been any number of reasons why that did not occur.

71 Even if LOF and the Noteholders agreed that LOF would obtain such security from amounts that might be loaned by it to others in the League Assets group, that circumstance does not mean that the other entities similarly agreed to give that security. It might simply mean that LOF failed in its obligations to the Noteholders to obtain such security.

72 In any event, I have some doubt as to correctness of the result in *Production Enhancement Group* arising from the recent decision of the British Columbia Court of Appeal in *KBA Canada Inc. v. 3S Printers Inc. (sub nom KBA Canada, Inc. v. Supreme Graphics Limited)* 2014 BCCA 117 (B.C. C.A.). At para. 32, the court held that equitable principles may not override the specific statutory provisions found in the *PPSA*.

73 The *PPSA* provides for the enforceability of security interests. Under s. 10(1)(d), a security agreement is only enforceable against third parties if it is signed by the debtor. In order for the security interest to attach, it must be enforceable: s. 12. A security interest is only perfected after, among other things, it attaches: s. 19. Generally speaking, an unperfected security interest will be subordinate to any perfected security interests and also to a trustee in bankruptcy who might be appointed.

74 These *PPSA* concepts were discussed in *674921 B.C. Ltd. v. Advanced Wing Technologies Corp. (sub nom 674921 B.C. Ltd. v. Advanced Wing Technologies Corp.)* 2006 BCCA 49 (B.C. C.A.) in the context of an agreement by a party that it "will provide its assets as collateral for the loan": para. 6. The court agreed that these words did not result in the granting of a security interest. As submitted by the representative counsel, the words of the court are apposite as to the effect, if such words are found to have been stated, of any agreement to provide security in the future:

> [28] ... Although it is correct that no particular wording needs to be used to create a security interest, a covenant by a debtor that it "will provide" security seems to me to mean just what it says — that it will provide security, at a future date.
>
> [Emphasis in original].

75 Here, there is no signed security agreement. While the LAC Loan Agreement refers to a general security agreement, none can be found. The parties, and hence the court, have no idea what this security agreement may have provided. There is no certainty or sufficient certainty as to the terms and extent of the security that LAC agreed to give: *Vancouver (City) v. Smith* at 183.

76 Nor is there any general security agreement or mortgage signed by LCM or the Tier 2 Entities.

77 While the Noteholders' position regarding the priority of its proposed security interest avoids a consideration of most issues raised by the *PPSA*, it does inform the court in terms of whether the relief sought is appropriate in accordance with the *CCAA*, s. 11.

78 The Noteholders correctly point out that it appears "for whatever reason" that general security agreements were never completed or registered. Those reasons might be that LCM and the Tier 2 Entities refused to provide them. In all the circumstances, there is no evidence upon which the court can conclude that a common intention existed to provide such security or, with respect to LAC, what those terms might have been.

79 I conclude that the Noteholders have not met the onus of proving a common intention between LOF, as lender, and LAC, LCM and the Tier 2 Entities, as borrowers, to provide security over their assets to LOF for amounts transferred to them on the terms sought.

(b) Other Considerations

80 A further difficulty with the Noteholders' position is that they seek relief on the basis of monies transferred directly or indirectly from LOF without any regard for the actual state of accounts between those entities. In short, the Noteholders seek to disregard the actual state of the intercompany accounts at the time of filing. The form of the proposed security agreement (whether the LOF GSA or the draft from Mr. Harris) provides that the "Obligations" which are to be secured means the "indebtedness, liabilities and obligations of the Borrower to the Lender existing *from time to time* ..." Accordingly, even if LAC had granted a general security agreement in favour of LOF, only the balance outstanding would be secured.

81 This is amplified by the situation with the Tier 2 Entities. The Noteholders are seeking a charge in the amount of $975,000 in respect of IGW REIT LP but, in fact, IGW REIT LP is owed $645,000 from LAC, rather than owing monies to LAC arising from the initial transfers. Further, the amount owing by Gatineau to LAC is not $1.5 million, but rather $500,978.

82 The proposed order sought by the Noteholders is predicted by the Monitor to have a profound impact on many fronts. Those most affected, being Export Development Canada ("EDC"), Meckelborg Financial Group Ltd. ("MFG"), RoyNat Inc. ("RoyNat") and representative counsel on behalf of the many individual investors, oppose the relief sought.

83 Firstly, there would be an effect, albeit in some instances an indirect one, on the existing secured priorities in place on certain assets. EDC is a creditor of LAC and it holds security against the assets of LAC which is supported in part by a guarantee of IWG REIT LP. Amounts were advanced to LAC in May 2013 and they remain outstanding at this time.

84 Similarly, RoyNat holds security against the assets of LAC in respect of loans outstanding. In addition, RoyNat is a secured creditor of League Assets Limited Partnership ("LALP") and LALP owns LCM which in turn owns valuable assets. Accordingly, RoyNat intends to rely on the value in LCM flowing to LALP in terms of its recovery. At present, RoyNat expects a shortfall in its recoveries under these loans.

85 As such, any imposition of security against LAC or LCM will directly and negatively affect recoveries to both EDC and RoyNat.

86 EDC and RoyNat also argue that, even if security was ordered by the court, there is evidence that any such security would have been, in any event, subordinate to various secured and unsecured amounts owing by the various entities. The LOF GSA provides:

> 2.1 *Grant of Security Interest.* ...[T]he Borrower hereby grants to the Lenders a security interest (the "Security Interest") in the Collateral which shall be subordinate to acquisition financing facilities, traditional operating credit facilities, term facilities and all financing arranged to fund acquisitions of businesses by the Borrower by way of share or asset purchases.
>
> . . .
>
> 2.8 *Lender Subordination.* The Lenders acknowledge and agree to subordinate the security interest granted in this agreement to any security interest granted by the Borrower to any lender pursuant to operating, term or financing credit facilities, to allow the Borrower to acquire additional businesses by way of share or asset purchases[.]

87 The unsigned general security agreement prepared by Mr. Harris also provided the same section 2.1. It is difficult to assess the true import of such provisions if they were to apply in respect of any security to be granted by LAC, LCM and the Tier 2 Entities. If nothing else, it speaks to the uncertainty regarding imposing a security interest in these circumstances without concrete evidence about what the terms of that security would have been.

88 Secondly, the granting of the order sought would result in the existing unsecured creditors being primed in respect of their position which would result in substantially reduced recoveries at the various corporate levels. For example, if the charge were to be imposed on the assets of IGW REIT LP, the recovery of unsecured creditors would be reduced by approximately $1 million.

89 Thirdly, an imposition of a charge in favour of the Noteholders may jeopardize the recovery of a major asset. MFG is a large equity investor in Gatineau. At present, the intention is to realize upon this investment which would result in a carve out of these assets, similar to what was achieved with another asset group (Stoney Range). The anticipated realization would be a transition fee of $2.5 million which will assist in the payment of the substantial overhead charges. If a charge was granted in favour of the Noteholders, the chances of obtaining that fee would likely evaporate, resulting in other stakeholders bearing a larger share of the overhead burden. In addition, the Monitor advises that a charge

would likely jeopardize recovery of the existing debt against that asset. If less recovery is obtained from this asset, those stakeholders would look to other avenues of recovery within the League Assets group, reducing recoveries to others as a result.

90 The Monitor also raises the point that the relief sought would represent a substantial shift in the allocation of costs within a complex corporate structure, which allocation arose as a result of a heavily negotiated agreement between the various stakeholders. This allocation is used in the Waterfall Analysis and no stakeholder has objected to it.

91 Simply put, if the Noteholders were to succeed in establishing security against LAC, LCM and the Tier 2 Entities, it is not hard to imagine that many other stakeholders will have similar arguments to advance. As I alluded to at the outset of these reasons, there are other stakeholders who were promised certain protections that were not in place at the time of the *CCAA* filing. For example, many investors were told that certain obligations were secured or were further secured by other League Assets entities but they were not.

92 Representative counsel refers to the equitable maxim *aequitas est aequalitas*, meaning "equality is equity". As discussed in John McGhee, ed, *Snell's Equity*, 32d ed. (London: Sweet & Maxwell, 2010) at 119:

> This maxim standing alone is, again, literally false. The wisdom of Solomon does not require the baby to be divided in half. And although equity is said to "delight in equality" the maxim means little more than that those who are entitled to property should have the certainty and fairness of equal division in the absence of reasons for any other division.
>
> [Footnotes omitted].

93 Representative counsel argues that the Noteholders are in no different position than many other investors who have now realized that many of the promises of Arruda, Gant and the League Assets entities are not in place.

94 I have already found that there is no common intention as between LOF and the various other League Assets entities upon which an equitable charge may be granted. That does provide a sufficient basis upon which to dispose of this argument. However, I do agree that, even in light of the overall circumstances, there is no principled or equitable basis upon which the Noteholders should be allowed to leapfrog over other stakeholders who are similarly situated and similarly prejudiced by the course of League Assets group's business and financial affairs.

95 Allowing this application would put the entire Waterfall Analysis into jeopardy in the sense that it would likely engender others to attempt to reorder the priorities that have been tentatively set out in that analysis.

96 As Madam Justice Deschamps stated for the majority in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) [hereinafter Century Services] at para.15, the purpose of the *CCAA* is to avoid the social and economic costs of liquidating a company's assets where possible. We are beyond that idea in this proceeding since all parties now see that the assets must be liquidated in order to satisfy creditor claims. However, there remains utility in maintaining this proceeding in its current state rather than moving to a proceeding under the *BIA* or a receivership, which would involve further cost and would be more restrictive in terms of dealing with the complex asset structure. The flexibility of proceeding under the *CCAA* is a key aspect here and has served the stakeholders well to this time in terms of maximizing value for them. There is no reason to think that will not continue.

97 All factors here point to the need to stay the course and treat like creditors equally in terms of their recovery as contemplated in the Waterfall Analysis. Otherwise, it is likely that what has become an orderly liquidation of the assets will descend into chaos as creditors, such as the Noteholders, attempt to jockey for a better and bigger piece of the pie. That scenario is anything but in the best interests of the stakeholders, including the Noteholders.

98 All of these considerations lead me to conclude that granting security in favour of the Noteholders would not be appropriate and would not advance the policy objectives under the *CCAA*: see *Century Services* at para. 70. Aside

from my conclusions on the main legal issues, as discussed above, I would not exercise the court's statutory or equitable jurisdiction to provide relief to the Noteholders here.

Conclusion

99 The application of the Noteholders is dismissed. If any party wishes to speak to the matter of costs, they may do so at the next scheduled court hearing after giving notice to all interested parties of the relief they seek.

Application dismissed.

End of Document

TAB 13

2010 ABCA 403
Alberta Court of Appeal

SemCanada Crude Co., Re

2010 CarswellAlta 2459, 2010 ABCA 403, [2011] A.W.L.D. 390, [2011] A.W.L.D. 481, 100 C.P.C. (6th) 221, 196 A.C.W.S. (3d) 1003, 48 Alta. L.R. (5th) 58, 510 A.R. 101, 527 W.A.C. 101, 76 C.B.R. (5th) 1

Celtic Exploration Ltd., Applicant (Appellant) and SemCAMS ULC, Respondent (Respondent) and SemCanada Crude Company, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 3191278 Nova Scotia Company and 1380331 Alberta ULC, Not a Party to the Appeal (Not a Party to the Application)

Patricia Rowbotham J.A.

Heard: December 7, 2010
Judgment: December 17, 2010
Docket: Calgary Appeal 1001-0244-AC

Proceedings: refusing leave to appeal *SemCanada Crude Co., Re* (2010), 2010 ABQB 531, 2010 CarswellAlta 1702 (Alta. Q.B.)

Counsel: A.J. Jordan, Q.C., C.S. Narvey, for Applicant, for Leave
A.R. Anderson, Q.C., C.J. Hunter, for Respondent

Subject: Natural Resources; Property; Insolvency; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.e Proceedings subject to stay
XIX.2.e.ii Contractual rights

Natural resources

III Oil and gas
III.5 Oil and gas leases
III.5.c Interpretation

Headnote

Natural resources --- Oil and gas — Oil and gas leases — Interpretation

Parties were operator of natural gas facility and natural gas producer who used facility — Operator entered protection under Companies' Creditors Arrangement Act, and plan was later implemented — Operator owed producer $30,578,976.80 for purchase of gas, and additional amount reflecting end-of-year adjustment — Operator claimed that after stay, processing was performed for producer at market rates, while producer claimed that it agreed to take payment in processed gas, and to pay processing fee — Operator brought successful application for order that agreement between parties was suspended as of date of stay, and for related relief — As no agreement was in existence after stay, chambers judge found that respondent producer was not entitled to set off to debts for end-of-

year adjustment against money owing for processing — Correspondence showed that agreement between parties was suspended by their consent — Suspension occurred under producer's right to do so, and so therefore lack of notice to monitor was minor breach only — Chambers judge also found that equitable set off was not available — There was no evidence that producer was to be charged as third party producer; however, standard charges and terms charged to third party operators were appropriate measure of quantum meruit — Chambers judge found that record was sufficient to determine issue of nature of payment — Producer brought application for leave to appeal — Application dismissed — Ground of appeal did not raise sufficient merit, nor, with one exception, did they raise issues of significance to practice.

Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Contractual rights

Parties were operator of natural gas facility and natural gas producer who used facility — Operator entered protection under Companies' Creditors Arrangement Act, and plan was later implemented — Operator owed producer $30,578,976.80 for purchase of gas, and additional amount reflecting end-of-year adjustment — Operator claimed that after stay, processing was performed for producer at market rates, while producer claimed that it agreed to take payment in processed gas, and to pay processing fee — Operator brought successful application for order that agreement between parties was suspended as of date of stay, and for related relief — As no agreement was in existence after stay, chambers judge found that respondent producer was not entitled to set off to debts for end-of-year adjustment against money owing for processing — Adjustment constituted stayed payable under initial order, as it reflected price adjustment to amounts before stay — Chambers judge also found that producer was not joint owner and could not participate in adjustment pool in same manner as joint owners — Producer did not have trust agreement over end-of-year adjustment — Chambers judge noted that parties were sophisticated negotiators who did not intend to create trust or agency relationship — Chambers judge concluded that evidence was proper to determine nature of agreement on summary judgment — Producer brought application for leave to appeal — Application dismissed — Ground of appeal did not raise sufficient merit, nor, with one exception, did they raise issues of significance to practice.

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Cases considered by *Patricia Rowbotham J.A.*:

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Hurricane Hydrocarbons Ltd. v. Komarnicki (2007), 2007 CarswellAlta 1521, 2007 ABCA 361, 37 C.B.R. (5th) 1, *(*sub nom. *Komarnicki v. Hurricane Hydrocarbons Ltd.)* 425 A.R. 182, *(*sub nom. *Komarnicki v. Hurricane Hydrocarbons Ltd.)* 418 W.A.C. 182 (Alta. C.A.) — referred to

Liberty Oil & Gas Ltd., Re (2003), 2003 ABCA 158, 2003 CarswellAlta 684, 44 C.B.R. (4th) 96 (Alta. C.A.) — followed

Multitech Warehouse Direct Inc., Re (1995), 32 Alta. L.R. (3d) 62, 1995 CarswellAlta 331 (Alta. C.A.) — followed

SemCanada Crude Co., Re (2009), 479 A.R. 299, 2009 ABQB 397 (Alta. Q.B.) — considered

Smoky River Coal Ltd., Re (1999), 1999 CarswellAlta 128, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.*) 237 A.R. 83, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.*) 197 W.A.C. 83, 1999 ABCA 62 (Alta. C.A.) — followed

Telford v. Holt (1987), 1987 CarswellAlta 188, 1987 CarswellAlta 583, 21 C.P.C. (2d) 1, [1987] 2 S.C.R. 193, 41 D.L.R. (4th) 385, 78 N.R. 321, (sub nom. *Holt v. Telford*) [1987] 6 W.W.R. 385, 54 Alta. L.R. (2d) 193, 81 A.R. 385, 37 B.L.R. 241, 46 R.P.R. 234 (S.C.C.) — considered

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Winnipeg Motor Express Inc., Re (2008), 2008 MBCA 133, 2008 CarswellMan 564, 48 C.B.R. (5th) 202, 448 W.A.C. 3, 236 Man. R. (2d) 3, [2009] 7 W.W.R. 104, 15 P.P.S.A.C. (3d) 1 (Man. C.A. [In Chambers]) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 11(1) — referred to

APPLICATION by respondent for leave to appeal judgment reported at *SemCanada Crude Co., Re* (2010), 2010 ABQB 531, 2010 CarswellAlta 1702 (Alta. Q.B.).

***Patricia Rowbotham J.A.*:**

I. Introduction

1 Celtic Exploration Ltd. (Celtic) seeks leave to appeal the decision of the chambers judge in which she found that: the parties' KA Plant Inlet Gas Purchase Agreement (IGPA) was suspended effective July 22, 2008, and Celtic could not set off amounts owed to SemCAMS ULC (SemCAMS) after July 22, 2008 against indebtedness arising under the IGPA.

II. Background

2 The facts are thoroughly described in the reasons for judgment: *SemCanada Crude Co., Re*, 2010 ABQB 531 (Alta. Q.B.) at paras 3 to 53. They can be briefly summarized as follows.

3 SemCAMS is the operator (Operator) and joint owner of natural gas processing plants and related gas gathering systems and pipelines in Alberta, including the facilities at the KA Plant.

4 The KA Plant operates pursuant to a construction, ownership and operation agreement entered into among the joint owners of the plant and SemCAMS as the Operator (CO&O Agreement). Under the CO&O Agreement, each joint owner is entitled to use a share of the through-put capacity in the plant in proportion to its ownership interest. Any excess capacity is allocated first to joint owners and then used to process natural gas owned by third parties for a fee under Gas Processing Agreements. Joint owners have the highest priority for processing. Thus, if joint owners use all their capacity in a given month, third party users can be shut out.

5 Under Gas Processing Agreements third party users deliver raw natural gas to the plant for processing. When processing is complete, the third party user either takes or sells the processed gas (Sales Gas) and products. Throughout this entire process, third party users retain title to their raw gas, Sales Gas and products.

6 Both joint owners and third party users make monthly payments to the Operator (SemCAMS) based on projected use of the plant. At the end of a calendar year, there is a "thirteenth month adjustment" that reconciles projected throughput to actual throughput (Thirteenth Month Adjustment).

7 Celtic is a natural gas producer that originally processed its gas at the KA Plant as a third party user under a Gas Processing Agreement. In 2006, Celtic and SemCAMS entered into the IGPA and the previous Gas Processing Agreement was terminated.

8 Under the IGPA, Celtic sold its raw natural gas to SemCAMS for benchmark prices plus a premium, less the costs associated with the subsequent processing of the gas. Title to the gas would transfer to SemCAMS at the KA Plant. SemCAMS could then process the natural gas using its capacity and priority rights by virtue of its joint ownership interest in the KA Plant.

9 On July 22, 2008, SemCAMS was granted an Initial Order pursuant to section 11(1) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (CCAA). A series of communications between management of Celtic and SemCAMS ensued. These communications, which will be analyzed in greater depth below, left SemCAMS with the impression that the IGPA had been suspended as of July 22, 2008. This was eventually denied by Celtic [1].

10 On July 22, 2008, SemCAMS owed Celtic approximately $32 million. This included approximately $1.4 million owed pursuant to the Thirteenth Month Adjustment provision under the IGPA (Pre-Filing Price Adjustment). On October 9, 2009, Celtic purported to set off the Pre-Filing Price Adjustment against amounts owed by Celtic to SemCAMS, acting in its Operator capacity, for post-filing gas processing at the KA Plant (set off).

11 SemCAMS applied to the chambers judge for an order declaring that the IGPA was suspended effective July 22, 2008, and for relief flowing from this declaration. SemCAMS also applied for a declaration that Celtic was not entitled to the set off.

12 As outlined in para 9 of the chambers judge's reasons, Sem CAMS' position was that, effective July 22, 2008:

(a) the parties expressly agreed to suspend the IGPA;

(b) SemCAMS ceased purchasing raw natural gas from Celtic at the KA Plant inlets;

(c) Celtic continued to deliver raw natural gas for processing to the KA Plant inlets;

(d) SemCAMS in its capacity as Operator of the KA Plant commenced accepting deliveries of Celtic's raw natural gas at the KA Plant inlets on the understanding that the processing of Celtic's gas would be done pursuant to standard third party processing terms and rates; and

(e) Celtic commenced marketing its processed gas and related products at the KA Plant outlets.

13 Celtic's position was that the IGPA was not suspended, but amended or changed such that SemCAMS continued to purchase Celtic's raw natural gas but ended its sale of processed gas and related products. Thus, the IGPA was modified such that Celtic was paid for raw natural gas by "taking in kind" processed gas and products at the KA Plant outlets. A further change was that Celtic would pay SemCAMS as a processing fee a monthly amount economically consistent with the processing fee formula set out in the IGPA: see para 10 of the chambers judge's reasons.

14 The chambers judge agreed with SemCAMS. She concluded that: (1) the IGPA was suspended; (2) Celtic was not entitled to the set off and; (3) Celtic should pay for gas processing after July 22, 2008, on a *quantum meruit* basis in accordance with standard charges and terms of processing imposed by SemCAMS as Operator to third party gas processors.

III. Proposed Grounds of Appeal

15 Celtic's proposed grounds of appeal are that: (1) the CCAA court did not have jurisdiction to deal with the declarations sought by SemCAMS; (2) the chambers judge erred in determining in a summary manner that the IGPA was suspended; (3) Celtic was entitled to the set off; and (4) a trial was required to decide the *quantum meruit* issue.

IV. Test for Leave

16 The power of an appellate court to grant leave should be used sparingly given the unique role of the supervising chambers judge.

17 Citing *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158, 44 C.B.R. (4th) 96 (Alta. C.A.) at paras 15-16; *Canadian Airlines Corp., Re*, 2000 ABCA 149, 261 A.R. 120 (Alta. C.A. [In Chambers]) at paras 6-7 (*Resurgence #1*); *Smoky River Coal Ltd., Re*, 1999 ABCA 62, 237 A.R. 83 (Alta. C.A.); *Canadian Airlines Corp., Re*, 2000 ABCA 238, 266 A.R. 131 (Alta. C.A. [In Chambers]) at para 19 (*Resurgence #2*) and *Multitech Warehouse Direct Inc., Re*, [1995] A.J. No. 663 (Alta. C.A.) at para 3, (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.)), Paperny J.A. outlined the relevant test for leave to appeal at para 9 of *Trilogy Energy LP v. SemCAMS ULC*, 2009 ABCA 275, 460 A.R. 269 (Alta. C.A.) (*Trilogy ABCA*) (refusing leave to appeal *SemCanada Crude Co., Re*, 2009 ABQB 397 (Alta. Q.B.) (*Trilogy ABQB*)):

> The test for leave to appeal in the CCAA context involves a single criterion subsuming four factors: there must be serious and arguable grounds that are of real and significant interest to the parties. The factors used to assess whether this criterion is present are: (1) whether the point on appeal is of significance to the practice; (2) whether the point raised is of significance to the action itself; (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and (4) whether the appeal will unduly hinder the progress of the action.

18 "The threshold issue to be determined on an application for leave to appeal under the CCAA is whether the proposed appeal is *prima facie* meritorious": *Trilogy ABCA* at para 13, citing *Resurgence #1* at para 35. To be reviewable by this court, Celtic must show that there is an error on a question of law, a palpable and overriding error in the findings of fact, or an error in the chambers judge's exercise of discretion: see *Trilogy ABCA* at para 13, *Resurgence #2* at para 42; *Resurgence #1* at paras 28-29.

V. Analysis

19 It is acknowledged that the points raised are of significance to the action. There are very large sums of money at stake. I propose to address the merits of the grounds first, and in the course of that discussion, comment upon their significance to the practice.

A. Jurisdiction of the CCAA Court

20 SemCAMS' claim related, in part, to its ability to carry on business after the filing date. It asked the court to suspend an existing agreement and determine how business would be conducted going forward in its role as a creditor.

Celtic contends that this issue was beyond the scope of the court's jurisdiction in CCAA proceedings, particularly when combined with the summary procedure adopted by the chambers judge.

21 Section 11 of the CCAA provides:

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

22 The chambers judge found that she had jurisdiction because the issue of whether or not an agreement to suspend the IGPA was reached went to the integrity of the CCAA process, and that it was her role to ensure that aggressive creditors were not given an advantage to the prejudice of other less aggressive creditors: paras 128-29. SemCAMS submits that her decision is reasonable. It points out that the CCAA is not focussed solely on compromising debts, as a restructuring necessarily involves looking at the debtor corporation's assets.

23 The CCAA is designed to be a flexible instrument and section 11 gives the court broad jurisdiction: *Winnipeg Motor Express Inc., Re*, 2008 MBCA 133, 236 Man. R. (2d) 3 (Man. C.A. [In Chambers]), at para 13, citing *Smoky River Coal Ltd., Re*. The issue of whether or not the IGPA was suspended arose directly as a result of the CCAA proceedings. This was acknowledged by Celtic's counsel in a letter of August 6, 2008 (the August 6 Letter), which stated: "The purpose of this letter is twofold. First, it outlines Celtic's new arrangements with respect to the suspension and renomination of the Inlet Gas Purchase Agreement with SemCAMS *arising out of the CCAA proceedings*." (emphasis added)

24 The chambers judge was uniquely positioned to understand the import of this issue in the context of the CCAA proceeding, and in particular in its relationship to the claims of other creditors. While the broader issue of jurisdiction might be of significance to the practice, the applicant has not demonstrated any *prima facie* error in the chambers judge's exercise of her discretion.

B. Suspension of IGPA

25 Celtic submitted to the chambers judge that the evidence of certain witnesses, in particular, William Love (Celtic's Marketing Manager) and David Dachis (SemCAMS' director of marketing) did not support a finding that there was an agreement to suspend the IGPA. For example, Love deposed that (1) he was advised by Dachis that SemCAMS had difficulty selling the processed gas and that it would be necessary for Celtic to take back the Sales Gas and other products and find other buyers; (2) he was asked by Dachis to complete a Notice of Take-in-Kind in order to give proper directions with respect to the destination of the gas and other products; and (3) he was assured by Dachis that the notice was simply a technical formality and that there were no discussions about terminating the IGPA or changing the arrangement.

26 The chambers judge acknowledged at paras 80 and 81 that there was conflicting evidence as regards the subjective intentions of some of the witnesses. However, she reasoned that a distinction must be made between negotiations and final agreements: para 105. She determined that there was objectively discernable evidence that both parties agreed to the suspension of the IGPA: paras 103-05. In so concluding, she relied on two pieces of evidence. The first item was an Email sent by Dachis to Love on July 31, 2008, (July 31 Email) which stated:

> **Further to your request,** I have spoken with Brent Molesky of our legal group and SemCAMS hereby **confirms acceptance of the suspension of Celtic's gas deliveries under our inlet purchase arrangement as of July 22nd** (your nomination change was effective as of 20:00 hours).

Brent also advised that he is in the process of seeking direction from Ernst and Young (the Court appointed Monitor) as well as our outside legal counsel; Brent is hoping to have formal letters regarding all SemCAMS inlet purchase arrangements sent out by the end of next week.

(emphasis added)

27 The second key piece of evidence was the August 6 Letter written by Celtic's counsel to SemCAMS' internal counsel which included the following:

Re: SemCAMS ULC Reorganization Pursuant to CCAA Suspension of Celtic Exploration Ltd.'s Inlet Gas Purchase Agreement and its Proprietary Interest in Sales Proceeds Received by SemCAMS ULC from Third Parties

. . .

The purpose of this letter is twofold. **First, it outlines Celtic's new arrangements with respect to the suspension and renomination of the Inlet Gas Purchase Agreement with SemCAMS arising out of the CCAA proceedings.** In addition, this letter requests that SemCAMS issue directions to pay to third party purchasers ("Purchasers") to ensure that sales proceeds arising from gas, condensate, NGL and sulphur (the "Products"), all attributable to raw natural gas supplied by Celtic ("Celtic Gas") are paid to Celtic from July 22, 2008 forward.

. . .

Suspension of the Inlet Gas Purchase Agreement

Effective as of July 22, 2008, SemCAMS accepted the suspension of the Inlet Gas Purchase Agreement (the "IGPA") dated October 24, 2007 and renewed by SemCAMS on April 29, 2008. From July 22, 2008 forward, all sales proceeds from Products derived from Celtic Gas are to be paid directly to Celtic and SemCAMS will invoice Celtic for fees related to processing and other services. As a result of the foregoing, Celtic requests that SemCAMS agree and provide confirmation in writing that Celtic shall take in kind all Products derived from Celtic Gas for the period July 22, 2008 forward and that SemCAMS provide directions to pay to any Purchasers of Products derived from Celtic Gas for the period commencing July 22, 2008 to present, to ensure that any payments made by the Purchasers in respect of Products derived from Celtic Gas from July 22, 2008 forward are paid directly to Celtic.

(emphasis added)

28 The chambers judge found that these written documents confirmed that the parties had reached an agreement to suspend the IGPA.

29 Celtic argues that the chambers judge erred in dismissing the evidence of Love and Dachis without a trial and that she made a patent error in relying on the July 31 Email and August 6 Letter. It points to "conflicting" evidence in other correspondence.

30 Much of the alleged "conflicting" evidence outlined by Celtic relates to the parties' subjective intentions. The chambers judge reviewed that evidence and concluded that much of it dealt with the negotiations that led to the July 31 Email and the August 6 Letter. She was satisfied that the contractual intent of the parties was best determined here by reference to the words used in drafting documents, in this case, the July 31 Email and August 6 Letter: see *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.) at para 54, and that a trial was unnecessary to determine that an agreement to suspend the IGPA was reached between SemCAMS and Celtic. The applicant has not demonstrated any *prima facie* error of law, or palpable or overriding error in her findings of fact. Moreover, this issue involved the interpretation of letters, Emails and evidence of Love and Dachis, all of which are unique to this transaction. Accordingly, it does not raise an issue of significance to the practice.

C. Quantum Meruit

31 A corollary of the chambers judge's finding that the IGPA had been suspended was that after July 22, 2008, Celtic's natural gas was not purchased by SemCAMS (ownership was not transferred to SemCAMS) and thus the gas was not processed by SemCAMS as a joint owner. Given that Celtic was not a joint owner at the KA Plant, and did not have a third party gas handling and processing agreement, the chambers judge found that Celtic should be charged for the processing of its raw natural gas on a *quantum meruit* basis for amounts equivalent to what third parties would pay.

32 Celtic submits that the chambers judge should have directed a trial on this issue to determine the actual cost to SemCAMS to process the gas.

33 I am not persuaded that this ground is *prima facie* meritorious. The chambers judge's conclusion is a natural consequence of her finding that the IGPA was suspended. The only logical remaining alternative, given that Celtic was not a joint owner of the KA Plant, was that SemCAMS was processing the raw natural gas for Celtic as a third party processor, and accordingly that Celtic should be required to pay the rates charged to third parties. Again this issue is unique to this transaction and not of significance to the practice.

D. Set Off

1. Contractual

34 SemCAMS' submitted to the chambers judge that the Thirteenth Month Adjustment was a stayed payable under the Initial Order granted in the CCAA proceedings as it simply represented a price adjustment to amounts owing to Celtic from the period of January 1, 2007 - July 22, 2008 under the IGPA. SemCAMS submitted that the set off was invalid because this amount was properly dealt with pursuant to the claims process order.

35 Celtic submits that the IGPA was not suspended, resulting in Celtic continuing to deliver gas under that agreement, and as such, it is entitled to a contractual set off. Given my decision to deny leave to appeal on the issue of the suspension of the IGPA, it follows that leave is also denied on this ground of appeal.

2. Equitable

36 Celtic also suggested that even if the chambers judge found that SemCAMS processed Celtic's raw gas as the Operator of the KA Plant after July 22, 2008, equitable set off should still have been available because the identity of the parties remained the same and the obligations arose out of substantially the same relationship. SemCAMS argued that this issue was decided in *Trilogy ABQB*.

37 The chambers judge agreed. Applying the test for equitable set off set out in *Telford v. Holt*, [1987] 2 S.C.R. 193 (S.C.C.), at 204, *Telford v. Holt* (1987), 41 D.L.R. (4th) 385 (S.C.C.) which requires mutual cross-obligations between the same parties and in the same right, the chambers judge concluded that Celtic had not met the burden of establishing a close connection between the cross-claims; nor had it established that it would not be manifestly unjust to disallow equitable set off. In her analysis, the chambers judge relied on her earlier decision in *Trilogy ABQB*. She concluded that: "allowing equitable set off to Celtic in this CCAA proceeding after denying it to Trilogy and other producers in similar circumstances would raise further issues of inequity." (at para 121)

38 Celtic submits that she erred in so doing because *Trilogy ABQB* is distinguishable. The applicant has not persuaded me that this ground of appeal is *prima facie* meritorious. The decision in *Trilogy ABQB* involved virtually identical circumstances to this case. In *Trilogy ABQB*, one creditor, Trilogy, sought to set off amounts owed to it by SemCAMS under an inlet gas purchase agreement against amounts owed to SemCAMS as Operator of various plants under CO&O Agreements and under third party Gas Processing Agreements. Similarly, Celtic sought to set off the Thirteenth Month Adjustment owed to it by SemCAMS against amounts owed to SemCAMS as Operator. The applicant

has not demonstrated that the chambers judge erred when she concluded (at para 116) that the factual background is the same as one of the situations dealt with in *Trilogy ABQB*.

39 Further, as was concluded in *Trilogy ABQB*, and reiterated by the chambers judge at para 78, the Thirteenth Month Adjustment is not a claim that Celtic had against SemCAMS as Operator of the KA Plant, but part of its unsecured claim for the unpaid portion of what SemCAMS as purchaser under the IGPA owed for the raw gas it purchased from Celtic prior to the CCAA filing. If the equitable set off for the Thirteenth Month Adjustment was allowed, Celtic would arguably be able to set off the rest of the pre-filing debt owed and this would significantly impact the parties as well as the CCAA proceedings.

E. Effect on the CCAA proceedings

40 While it is true that the CCAA proceedings were concluded when the Plan of Arrangement was implemented by the creditors and the court on November 30, 2009, and this case would not delay or have any effect upon the restructuring of SemCAMS, there is a further concern. There are other similarly situated creditors and if leave were granted, SemCAMS might be left with unresolved financial obligations to multiple parties although all such obligations were intended to be dealt with in its Plan. SemCAMS submits that the Plan may have to be re-opened to address similarly situated creditors, such as Trilogy.

41 If the merits of the grounds of appeal were strong, this court would be faced with a difficult balance between these two competing factors. An appeal could lead to SemCAMS having to re-open the Plan, creating uncertainty and delay which could defeat the purpose and intention of the CCAA: see *Hurricane Hydrocarbons Ltd. v. Komarnicki*, 2007 ABCA 361, 425 A.R. 182 (Alta. C.A.) at para 14. I have concluded that the grounds of appeal do not raise sufficient merit, nor, with one exception, do they raise issues of significance to the practice. In this case this final factor also favours the denial of leave.

42 In conclusion the application for leave to appeal is dismissed.

Application dismissed.

Footnotes

1 On September 22, 2008, counsel for Celtic wrote a letter to SemCAMS refusing to execute new agreements and denying that Celtic had agreed to suspend or terminate the IGPA (September 22 Letter). The letter stated that the Notice of Take-in-Kind "appears only to provide that the gas purchased by SemCAMS is being paid for by the delivery of processed gas." And further stated, "Section 14.3 of the Inlet Gas Purchase Agreement provides that waivers must be in writing and section 14.4 provides that amendments must be in writing and executed by both parties. Hence, in the absence of a written agreement signed by both Celtic and SemCAMS, we are at a loss to understand how SemCAMS can allege that the IGPA has been suspended.

TAB 14

Performance Industries Ltd. and Terrance O'Connor *Appellants/Respondents on cross-appeal*

v.

Sylvan Lake Golf & Tennis Club Ltd. *Respondent/Appellant on cross-appeal*

Performance Industries Ltd. et Terrance O'Connor *Appelants/Intimés au pourvoi incident*

c.

Sylvan Lake Golf & Tennis Club Ltd. *Intimée/Appelante au pourvoi incident*

INDEXED AS: PERFORMANCE INDUSTRIES LTD. *v.* SYLVAN LAKE GOLF & TENNIS CLUB LTD.

Neutral citation: 2002 SCC 19.

File No.: 27934.

2000: December 14; 2002: February 22.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Binnie, Arbour and LeBel JJ.

RÉPERTORIÉ : PERFORMANCE INDUSTRIES LTD. *c.* SYLVAN LAKE GOLF & TENNIS CLUB LTD.

Référence neutre : 2002 CSC 19.

N° du greffe : 27934.

2000 : 14 décembre; 2002 : 22 février.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Major, Binnie, Arbour et LeBel.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Contracts — Equitable remedies — Rectification of contract — Written contract not reflecting prior oral agreement — Whether equitable remedy of rectification available — Whether lack of due diligence a bar to rectification.

Damages — Punitive damages — Written contract not reflecting prior oral agreement owing to fraud of one of parties — Whether trial judge's award of punitive damages should be restored.

The respondent operated an 18-hole golf course. The appellant O entered into negotiations with B, the respondent's principal, for a joint venture. The trial judge found that B and O made an oral agreement, which included an option on the 18th fairway for a specific residential development to be undertaken by B. During the negotiations, B discussed with O photographs and plans of a double row of houses clustered around a *cul-de-sac* along the length of the 18th fairway. When O's lawyer reduced the terms of the oral agreement to writing, the option clause accurately specified the 480-yard length of the proposed development, but instead of sufficient width to permit a double row of houses (approximately 110 yards), the clause as written allowed only enough land for a single row of houses (110 feet).

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Contrats — Réparations fondées sur l'equity — Rectification du contrat — Contrat écrit ne reflétant pas l'entente verbale antérieure — Y a-t-il ouverture à la réparation en equity que constitue la rectification? — Le défaut de faire montre de diligence raisonnable fait-il obstacle à la rectification?

Dommages-intérêts — Dommages-intérêts punitifs — Contrat écrit ne reflétant pas l'entente verbale antérieure en raison de la fraude commise par l'une des parties — La décision du juge du procès accordant des dommages-intérêts punitifs doit-elle être rétablie?

L'intimée exploitait un terrain de golf comptant 18 trous. L'appelant O a entamé des négociations en vue d'établir une coentreprise avec B, le propriétaire de l'intimée. Le juge de première instance a estimé que B et O avaient conclu une entente verbale, qui comportait une option visant la construction d'un complexe domiciliaire particulier par B au 18e trou. Durant les négociations, B a examiné avec O des photographies et des plans du type de complexe qu'il envisageait, à savoir une double rangée de maisons regroupées autour d'un cul-de-sac le long du 18e trou. Après que l'avocat de O a couché par écrit les termes de l'entente verbale, la clause établissant l'option mentionnait de façon précise la longueur de 480 verges du complexe proposé, mais, telle qu'elle avait été rédigée, au lieu

When B sought to exercise the option, O insisted on the written terms, despite knowing that these terms did not accurately reflect the prior oral option agreement. The respondent commenced the present action against the appellants for rectification of the agreement or damages in lieu thereof, punitive damages and solicitor-client costs. The trial judge held that the respondent was entitled to rectification of the option clause, awarding damages in lieu assessed on the basis of the loss of profit on a fully built residential development. Punitive damages were assessed at $200,000. The Court of Appeal set aside the punitive damages award. In all other respects, the appeal was dismissed.

Held: The appeal and cross-appeal should be dismissed.

Per McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Binnie and Arbour JJ.: The necessary preconditions to obtaining the equitable remedy of rectification of the contract are met in this case. First, the respondent has shown the existence and content of the prior oral agreement. There was a definite project in a definite location to which O and B had given their definite assent. Although the parties did not discuss a metes and bounds description, they were working on a defined development proposal. O's numbers (110 x 480) can be accepted, while rejecting the error created by his apparently duplicitous substitution of feet for yards in the write-up of the option clause. Second, it was found that O had fraudulently misrepresented the written document as accurately reflecting the terms of the prior oral contract. Third, the precise terms of rectification are readily ascertained, namely to change the word "feet" in the phrase "one hundred ten (110) feet in width" to "yards". Fourth, there is convincing proof of B's unilateral mistake and O's knowledge of that mistake. B's version of the oral agreement was sufficiently corroborated on significant points by other witnesses and documents. While as an experienced businessman, B ought to have examined the text of the option clause before signing the document, due diligence on the part of the plaintiff is not a (fifth) condition precedent to rectification. Lack of due diligence may be taken into account in the exercise of a discretion to refuse the remedy, but here lack of due

de prévoir une largeur suffisante pour permettre la construction d'une double rangée de maisons (environ 110 verges), elle ne faisait état que d'une largeur suffisante pour une seule rangée de maisons (110 pieds). Lorsque B a voulu lever l'option, O a insisté sur l'application de la convention écrite même s'il savait qu'elle ne reflétait pas fidèlement l'entente verbale antérieure concernant l'option. L'intimée a entamé contre les appelants la présente action, dans laquelle elle sollicitait soit la rectification de la Convention soit des dommages-intérêts en tenant lieu, des dommages-intérêts punitifs et les dépens sur la base procureur-client. Le juge du procès a conclu que l'intimée avait droit à la rectification de la clause relative à l'option, et il a accordé des dommages-intérêts tenant lieu de rectification, établis sur la base de la perte des profits qui auraient été réalisés par la construction complète du complexe domiciliaire. Les dommages-intérêts punitifs ont été fixés à 200 000 $. La Cour d'appel a annulé la décision accordant les dommages-intérêts punitifs, mais elle a toutefois rejeté l'appel sur tous les autres points.

Arrêt : Le pourvoi principal et le pourvoi incident sont rejetés.

Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Major, Binnie et Arbour : Les préalables nécessaires pour donner ouverture à la réparation en equity que constitue la rectification sont réunis en l'espèce. Premièrement, l'intimée a établi l'existence et la teneur de l'entente verbale antérieure. Il existait un projet défini et devant être réalisé à un endroit déterminé, dont O et B avaient convenu précisément. Bien que les parties n'aient pas discuté de la description technique des lieux, elles travaillaient à un projet d'aménagement défini. Il est possible d'accepter les chiffres inscrits par O (110 x 480), tout en écartant l'erreur créée par sa substitution apparemment frauduleuse, relativement à une des dimensions, d'une mesure en pieds à une mesure en verges dans la rédaction de la clause relative à l'option. Deuxièmement, il a été jugé que O avait fait une assertion inexacte et frauduleuse en laissant croire que l'écrit reflétait fidèlement les conditions prévues par l'entente verbale antérieure. Troisièmement, la façon précise par laquelle l'écrit doit être rectifié est facile à déterminer : Il s'agit de remplacer le mot « pieds » par le mot « verges » dans la phrase « cent dix (110) pieds de largeur ». Quatrièmement, il existe une preuve convaincante de l'erreur unilatérale de B et de la connaissance par O de cette erreur. La version donnée par B de l'entente verbale était suffisamment corroborée sur des aspects importants par d'autres témoins ainsi que par des documents. Bell, en tant qu'homme d'affaires expérimenté, aurait dû examiner le texte de la clause

diligence was offset by the finding of fraud against O, and rectification was therefore properly granted.

In the absence of an error of principle, or a factual record that supports the appellants' criticisms, the findings in the courts below on the amount of compensatory damages must stand. Damages for breach of the contract, as rectified, include losses flowing from the special circumstances known to the parties at the time they made their contract.

The award of punitive damages in this case should not be restored as it does not serve a rational purpose. Only in exceptional cases does tort attract punitive damages. An award of punitive damages is rational "if, but only if" compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation. In this case, neither the making of a punitive damages award nor the $200,000 assessment meets the test of rationality.

Per LeBel J.: Subject to the comments on punitive damages in *Whiten*, the majority reasons were agreed with. Rectification of the contract was properly ordered, but punitive damages would fulfill no rational purpose in this case.

Cases Cited

By Binnie J.

Applied: *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18; **referred to:** *Hart v. Boutilier* (1916), 56 D.L.R. 620; *Ship M. F. Whalen v. Pointe Anne Quarries Ltd.* (1921), 63 S.C.R. 109; *Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.* (1996), 133 D.L.R. (4th) 550; *Lamb v. Kincaid* (1907), 38 S.C.R. 516; *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29; *McMaster University v. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9; *Montreal Trust Co. v. Maley* (1992), 99 D.L.R. (4th) 257; *Alampi v. Swartz* (1964), 43 D.L.R. (2d) 11; *Stepps Investments Ltd. v. Security Capital Corp.* (1976), 73 D.L.R. (3d) 351; *Augdome Corp. v. Gray*, [1975] 2 S.C.R. 354; *I.C.R.V. Holdings*

relative à l'option avant de signer le document, mais la diligence raisonnable de la part du demandeur n'est pas un (cinquième) préalable au prononcé d'une ordonnance de rectification. L'absence de diligence raisonnable peut être prise en compte dans l'exercice du pouvoir discrétionnaire de refuser la réparation en question, mais en l'espèce cette omission est contre balancée par la conclusion de fraude prononcée contre O, et la rectification a donc été accordée à bon droit.

En l'absence d'erreur de principe ou d'éléments factuels qui appuieraient les critiques formulées par les appelants, les conclusions des juridictions inférieures sur le montant des dommages-intérêts compensatoires doivent être confirmées. Les dommages-intérêts accordés pour la rupture du contrat rectifié doivent par conséquent inclure les pertes découlant des circonstances particulières connues des parties au moment où elles ont conclu le contrat.

La décision d'accorder des dommages-intérêts punitifs en l'espèce ne doit pas être rétablie puisqu'elle ne sert aucun objectif rationnel. Ce n'est que dans des circonstances exceptionnelles qu'un délit civil commande des dommages-intérêts punitifs. Une décision accordant des dommages-intérêts punitifs n'est rationnelle que « si, mais seulement si » les dommages-intérêts compensatoires ne permettent pas de donner effet adéquatement aux objectifs de châtiment, de dissuasion et de dénonciation. En l'espèce, ni la décision accordant des dommages-intérêts punitifs ni la somme de 200 000 $ accordée à ce titre ne satisfont au critère de la rationalité.

Le juge LeBel : Sous réserve des commentaires exposés sur la question des dommages-intérêts punitifs dans l'arrêt *Whiten*, il y a accord avec les motifs de la majorité. C'est à juste titre que la rectification du contrat a été ordonnée, mais des dommages-intérêts punitifs ne serviraient aucune fin rationnelle dans la présente affaire.

Jurisprudence

Citée par le juge Binnie

Arrêt appliqué : *Whiten c. Pilot Insurance Co.*, [2002] 1 R.C.S. 595, 2002 CSC 18; **arrêts mentionnés :** *Hart c. Boutilier* (1916), 56 D.L.R. 620; *Ship M. F. Whalen c. Pointe Anne Quarries Ltd.* (1921), 63 R.C.S. 109; *Downtown King West Development Corp. c. Massey Ferguson Industries Ltd.* (1996), 133 D.L.R. (4th) 550; *Lamb c. Kincaid* (1907), 38 R.C.S. 516; *First City Capital Ltd. c. British Columbia Building Corp.* (1989), 43 B.L.R. 29; *McMaster University c. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9; *Montreal Trust Co. c. Maley* (1992), 99 D.L.R. (4th) 257; *Alampi c. Swartz* (1964), 43 D.L.R. (2d) 11; *Stepps Investments Ltd. c. Security Capital Corp.* (1976), 73 D.L.R. (3d) 351; *Augdome Corp. c. Gray*, [1975] 2 R.C.S. 354;

The first of the traditional hurdles is that Sylvan (Bell) must show the existence and content of the inconsistent prior oral agreement. Rectification is "[t]he most venerable breach in the parol evidence rule" (Waddams, *supra*, at para. 336). The requirement of a prior oral agreement closes the "floodgate" to unhappy contract makers who simply failed to read the contractual documents, or who now have misgivings about the merits of what they have signed.

37 Selon le premier des obstacles traditionnels, il incombe à Sylvan (Bell) d'établir l'existence et la teneur de l'entente verbale antérieure incompatible. La rectification est [TRADUCTION] « [l']entorse la plus consacrée à la règle de l'exclusion de la preuve extrinsèque » (Waddams, *op. cit.*, par. 336). La condition exigeant une entente verbale antérieure prévient « l'avalanche de poursuites » de la part de contractants insatisfaits qui ont tout simplement omis de lire les documents contractuels, ou qui éprouvent maintenant des réserves sur le bien-fondé de ce qu'ils ont signé.

The second hurdle is that not only must Sylvan (Bell) show that the written document does not correspond with the prior oral agreement, but that O'Connor either knew or ought to have known of the mistake in reducing the oral terms to writing. It is only where permitting O'Connor to take advantage of the error would amount to "fraud or the equivalent of fraud" that rectification is available. This requirement closes the "floodgate" to unhappy contract makers who simply made a mistake. Equity acts on the conscience of a defendant who seeks to take advantage of an error which he or she either knew or ought reasonably to have known about at the time the document was signed. Mere unilateral mistake alone is not sufficient to support rectification but if permitting the non-mistaken party to take advantage of the document would be fraud or equivalent to fraud, rectification may be available: *Hart*, *supra*, at p. 630; *Ship M. F. Whalen*, *supra*, at pp. 126-27.

38 Pour franchir le deuxième obstacle, Sylvan (Bell) doit démontrer non seulement que l'écrit ne correspond pas à l'entente verbale antérieure, mais également qu'O'Connor connaissait ou aurait dû connaître l'existence de l'erreur lorsque les conditions convenues verbalement ont été couchées par écrit. Ce n'est que lorsque le fait de permettre à O'Connor de tirer profit de l'erreur constituerait « une fraude ou l'équivalent d'une fraude » qu'il y a ouverture à rectification. Cette exigence prévient l'avalanche de poursuites de la part de contractants insatisfaits qui ont simplement fait une erreur. L'equity agit sur la conscience du défendeur qui cherche à tirer profit d'une erreur dont il connaissait ou aurait raisonnablement dû connaître l'existence au moment où le document a été signé. À elle seule, une erreur unilatérale ne peut justifier la rectification d'un document, mais il peut y avoir ouverture à cette réparation si le fait de permettre à la partie qui n'était pas dans l'erreur de tirer profit du document constitue une fraude ou l'équivalent d'une fraude : *Hart*, précité, p. 630; *Ship M. F. Whalen*, précité, p. 126-127.

What amounts to "fraud or the equivalent of fraud" is, of course, a crucial question. In *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29 (B.C.S.C.), McLachlin C.J.S.C. (as she then was) observed that "in this context 'fraud or the equivalent of fraud' refers not to the tort of deceit or strict fraud in the legal sense, but rather to the broader category of equitable fraud or constructive fraud. . . . Fraud in this wider sense refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself

39 Déterminer ce qui constitue « une fraude ou l'équivalent d'une fraude » constitue, bien sûr, une question cruciale. Dans *First City Capital Ltd. c. British Columbia Building Corp.* (1989), 43 B.L.R. 29, madame le juge en chef McLachlin de la Cour suprême de la Colombie-Britannique (maintenant Juge en chef du Canada) a souligné que, [TRADUCTION] « dans ce contexte, "une fraude ou l'équivalent d'une fraude" ne s'entend pas du délit que constituent le dol ou la fraude stricte au sens juridique du terme, mais plutôt à la catégorie plus vaste des fraudes par implication ou fraudes

of the advantage obtained" (p. 37). Fraud in the "wider sense" of a ground for equitable relief "is so infinite in its varieties that the Courts have not attempted to define it", but "all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken": *McMaster University v. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9 (Ont. H.C.), at p. 19. See also *Montreal Trust Co. v. Maley* (1992), 99 D.L.R. (4th) 257 (Sask. C.A.), *per* Wakeling J.A.; *Alampi v. Swartz* (1964), 43 D.L.R. (2d) 11 (Ont. C.A.); *Stepps Investments Ltd. v. Security Capital Corp.* (1976), 73 D.L.R. (3d) 351 (Ont. H.C.), *per* Grange J. (as he then was), at pp. 362-63; and Waddams, *supra*, at para. 342.

40 The third hurdle is that Sylvan (Bell) must show "the precise form" in which the written instrument can be made to express the prior intention (*Hart*, *supra*, *per* Duff J., at p. 630). This requirement closes the "floodgates" to those who would invite the court to speculate about the parties' unexpressed intentions, or impose what in hindsight seems to be a sensible arrangement that the parties might have made but did not. The court's equitable jurisdiction is limited to putting into words that — and only that — which the parties had already orally agreed to.

41 The fourth hurdle is that all of the foregoing must be established by proof which this Court has variously described as "beyond reasonable doubt" (*Ship M. F. Whalen*, *supra*, at p. 127), or "evidence which leaves no 'fair and reasonable doubt'" (*Hart*, *supra*, at p. 630), or "convincing proof" or "more than sufficient evidence" (*Augdome Corp. v. Gray*, [1975] 2 S.C.R. 354, at pp. 371-72). The modern approach, I think, is captured by the expression "convincing proof", i.e., proof that may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and

reconnues en equity [. . .] Dans ce sens plus large, la fraude s'entend également d'opérations qui ne sont pas dolosives, mais à l'égard desquelles le tribunal estime qu'il serait abusif de laisser une personne profiter de l'avantage obtenu » (p. 37). Au « sens plus large » de fraude donnant ouverture à une réparation en equity, la fraude se présente sous [TRADUCTION] « un nombre tellement infini de formes que les tribunaux n'ont pas tenté de la définir », mais « elle vise toutes sortes de manœuvres déloyales et de conduites abusives en matière contractuelle » : *McMaster University c. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9 (H.C. Ont.), p. 19. Voir également *Montreal Trust Co. c. Maley* (1992), 99 D.L.R. (4th) 257 (C.A. Sask.), le juge Wakeling; *Alampi c. Swartz* (1964), 43 D.L.R. (2d) 11 (C.A. Ont.); *Stepps Investments Ltd. c. Security Capital Corp.* (1976), 73 D.L.R. (3d) 351 (H.C. Ont.), le juge Grange (plus tard juge à la Cour d'appel), p. 362-363, et Waddams, *op. cit.*, par. 342.

Suivant le troisième obstacle, Sylvan (Bell) doit démontrer [TRADUCTION] « de façon précise » comment l'écrit peut être formulé pour exprimer l'intention antérieure (*Hart*, précité, le juge Duff, p. 630). Cette exigence prévient « l'avalanche de poursuites » de la part de ceux qui inviteraient les tribunaux à spéculer sur les intentions inexprimées des parties ou à imposer ce qui, a posteriori, semble être un arrangement judicieux, qu'auraient pu conclure les parties mais qu'elles n'ont par ailleurs pas choisi. La compétence des tribunaux en equity se limite à exprimer en mots ce sur quoi — et uniquement ce sur quoi — les parties s'étaient déjà entendues verbalement.

Le quatrième obstacle oblige à établir tous les éléments susmentionnés en apportant, conformément aux diverses façons dont notre Cour l'a décrite, une preuve [TRADUCTION] « au-delà de tout doute raisonnable » (*Ship M. F. Whalen*, précité, p. 127), une preuve [TRADUCTION] « qui ne laisse aucun "doute juste et raisonnable" » (*Hart*, précité, p. 630), une « preuve convaincante » ou une « preuve [. . .] plus que suffisante » (*Augdome Corp. c. Gray*, [1975] 2 R.C.S. 354, p. 371-372). Selon moi, l'approche moderne est bien décrite par l'expression « preuve convaincante », c.-à-d. une preuve qui peut être bien

TAB 15

Tercon Contractors Ltd. *Appellant*

v.

Her Majesty The Queen in Right of the Province of British Columbia, by her Ministry of Transportation and Highways *Respondent*

and

Attorney General of Ontario *Intervener*

INDEXED AS: TERCON CONTRACTORS LTD. *v.* BRITISH COLUMBIA (TRANSPORTATION AND HIGHWAYS)

2010 SCC 4

File No.: 32460.

2009: March 23; 2010: February 12.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts — Breach of terms — Tender — Ineligible bidder — Exclusion of liability clause — Doctrine of fundamental breach — Province issuing tender call for construction of highway — Request for proposals restricting qualified bidders to six proponents — Province accepting bid from ineligible bidder — Exclusion clause protecting Province from liability arising from participation in tendering process — Whether Province breached terms of tendering contract in entertaining bid from ineligible bidder — If so, whether Province's conduct fell within terms of exclusion clause — If so, whether court should nevertheless refuse to enforce the exclusion clause because of unconscionability or some other contravention of public policy.

The Province of British Columbia issued a request for expressions of interest ("RFEI") for the design and construction of a highway. Six teams responded with submissions including Tercon and Brentwood. A few months later, the Province informed the six proponents

Tercon Contractors Ltd. *Appelante*

c.

Sa Majesté la Reine du chef de la Colombie-Britannique, représentée par le ministère des Transports et de la Voirie *Intimée*

et

Procureur général de l'Ontario *Intervenant*

RÉPERTORIÉ : TERCON CONTRACTORS LTD. *c.* COLOMBIE-BRITANNIQUE (TRANSPORTS ET VOIRIE)

2010 CSC 4

N° du greffe : 32460.

2009 : 23 mars; 2010 : 12 février.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Contrats — Inexécution — Appel d'offres — Soumissionnaire inadmissible — Clause de non-responsabilité — Principe d'inexécution fondamentale — Appel d'offres lancé par la province pour la construction d'une route — Demande de propositions tenant seulement six entreprises pour admissibles — Acceptation par la province de la proposition d'un soumissionnaire inadmissible — Clause de non-recours protégeant la province contre toute responsabilité découlant de la participation à l'appel d'offres — La province s'est-elle rendue coupable d'inexécution du contrat issu de l'appel d'offres en considérant la proposition d'un soumissionnaire inadmissible? — Dans l'affirmative, son comportement tombait-il sous le coup de la clause de non-recours? — Dans l'affirmative, un tribunal devrait-il néanmoins refuser de faire respecter la clause en raison de son iniquité ou pour quelque autre atteinte à l'ordre public?

La province de la Colombie-Britannique a lancé une demande d'expression d'intérêt (« DEI ») pour la conception et la construction d'une route. Elle a reçu six soumissions, dont celles de Tercon et de Brentwood. Quelques mois plus tard, la province a fait savoir aux

that it now intended to design the highway itself and issued a request for proposals ("RFP") for its construction. The RFP set out a specifically defined project and contemplated that proposals would be evaluated according to specific criteria. Under its terms, only the six original proponents were eligible to submit a proposal; those received from any other party would not be considered. The RFP also included an exclusion of liability clause which provided: "Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim." As it lacked expertise in drilling and blasting, Brentwood entered into a pre-bidding agreement with another construction company ("EAC"), which was not a qualified bidder, to undertake the work as a joint venture. This arrangement allowed Brentwood to prepare a more competitive proposal. Ultimately, Brentwood submitted a bid in its own name with EAC listed as a "major member" of the team. Brentwood and Tercon were the two short-listed proponents and the Province selected Brentwood for the project. Tercon successfully brought an action in damages against the Province. The trial judge found that the Brentwood bid was, in fact, submitted by a joint venture of Brentwood and EAC and that the Province, which was aware of the situation, breached the express provisions of the tendering contract with Tercon by considering a bid from an ineligible bidder and by awarding it the work. She also held that, as a matter of construction, the exclusion clause did not bar recovery for the breaches she had found. The clause was ambiguous and she resolved this ambiguity in Tercon's favour. She held that the Province's breach was fundamental and that it was not fair or reasonable to enforce the exclusion clause in light of the Province's breach. The Court of Appeal set aside the decision, holding that the exclusion clause was clear and unambiguous and barred compensation for all defaults.

Held (McLachlin C.J. and Binnie, Abella and Rothstein JJ. dissenting): The appeal should be allowed. The Court agreed on the appropriate framework of analysis but divided on the applicability of the exclusion clause to the facts.

The Court: With respect to the appropriate framework of analysis the doctrine of fundamental breach

six entreprises intéressées qu'elle entendait désormais concevoir elle-même la route et demander des propositions pour sa construction. La demande de propositions (« DP ») décrivait un projet précis et indiquait que les propositions seraient considérées au regard de certains critères. Elle stipulait que seules les six entreprises intéressées initialement étaient admises à soumissionner et que les propositions présentées par d'autres personnes ne seraient pas examinées. La DP renfermait également une clause de non-recours, dont le texte était le suivant : « Sauf ce que prévoient expressément les présentes instructions, un proposant ne peut exercer aucun recours en indemnisation pour sa participation à la DP, ce qu'il est réputé accepter lorsqu'il présente une soumission. » Comme elle n'avait pas d'expertise dans le forage et le dynamitage, Brentwood a conclu avec une autre entreprise de construction (« EAC ») — qui n'était pas admise à soumissionner — une entente préalable à la soumission prévoyant qu'elles réaliseraient les travaux en coentreprise. De la sorte, elle pouvait présenter une proposition plus concurrentielle. Elle a finalement soumissionné en son nom, présentant EAC comme un « membre important » de son équipe. La liste des adjudicataires possibles a été ramenée à deux entreprises — Brentwood et Tercon —, puis le ministère a finalement opté pour la première. Tercon a intenté une action en dommages-intérêts contre la province et elle a eu gain de cause. La juge de première instance a conclu que la soumission de Brentwood était en fait celle de la coentreprise formée avec EAC, et que la province, qui le savait, avait contrevenu aux stipulations expresses du contrat intervenu avec Tercon en acceptant la soumission d'une autre entreprise qui n'était pas admissible, puis en confiant les travaux à cette même entreprise. Elle a aussi statué que le libellé de la clause de non-recours ne faisait pas obstacle à l'indemnisation pour les inexécutions relevées. La clause était équivoque et elle l'a interprétée en faveur de Tercon. Elle a estimé que l'inexécution reprochée à la province était fondamentale et qu'il n'était ni juste ni raisonnable de faire respecter la clause de non-recours étant donné la nature de l'inexécution. La Cour d'appel a annulé sa décision, statuant que la clause de non-recours était claire et non équivoque et qu'elle faisait obstacle à l'indemnisation pour toute inexécution.

Arrêt (la juge en chef McLachlin et les juges Binnie, Abella et Rothstein sont dissidents) : Le pourvoi est accueilli. Les juges de la Cour conviennent du cadre de l'analyse qui s'impose, mais ils sont partagés sur l'applicabilité de la clause de non-recours aux faits de l'espèce.

La Cour : Pour ce qui concerne le cadre d'analyse approprié, il convient de donner le « coup de grâce » au

should be "laid to rest". The following analysis should be applied when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed. The first issue is whether, as a matter of interpretation, the exclusion clause even applies to the circumstances established in evidence. This will depend on the court's interpretation of the intention of the parties as expressed in the contract. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable and thus invalid at the time the contract was made. If the exclusion clause is held to be valid at the time of contract formation and applicable to the facts of the case, a third enquiry may be raised as to whether the court should nevertheless refuse to enforce the exclusion clause because of an overriding public policy. The burden of persuasion lies on the party seeking to avoid enforcement of the clause to demonstrate an abuse of the freedom of contract that outweighs the very strong public interest in their enforcement. Conduct approaching serious criminality or egregious fraud are but examples of well-accepted considerations of public policy that are substantially incontestable and may override the public policy of freedom to contract and disable the defendant from relying upon the exclusion clause. Despite agreement on the appropriate framework of analysis, the court divided on the applicability of the exclusion clause to the facts of this case as set out below.

Per LeBel, Deschamps, Fish, Charron and Cromwell JJ.: The Province breached the express provisions of the tendering contract with Tercon by accepting a bid from a party who should not even have been permitted to participate in the tender process and by ultimately awarding the work to that ineligible bidder. This egregious conduct by the Province also breached the implied duty of fairness to bidders. The exclusion clause, which barred claims for compensation "as a result of participating" in the tendering process, did not, when properly interpreted, exclude Tercon's claim for damages. By considering a bid from an ineligible bidder, the Province not only acted in a way that breached the express and implied terms of the contract, it did so in a manner that was an affront to the integrity and business efficacy of the tendering process.

Submitting a compliant bid in response to a tender call may give rise to "Contract A" between the bidder and the owner. Whether a Contract A arises and what its terms are depends on the express and implied terms and conditions of the tender call and the legal consequences of the parties' actual dealings in each case.

principe de l'inexécution fondamentale. L'analyse qui suit vaut lorsque le demandeur tente de se soustraire à l'application d'une clause d'exonération ou d'une autre stipulation contractuelle dont il a précédemment convenu. Il faut d'abord déterminer, par voie d'interprétation, si la clause de non-recours s'applique aux faits mis en preuve, ce qui dépend de l'intention des parties qui se dégage du contrat. Lorsque la clause s'applique, il faut en deuxième lieu se demander si elle était inique et de ce fait invalide au moment de la formation du contrat. Lorsqu'elle est jugée valide au moment de la formation du contrat et applicable aux faits de l'espèce, le tribunal peut se demander dans un troisième temps s'il devrait tout de même refuser de la faire respecter en raison d'une considération d'ordre public prépondérante. Il incombe à la partie qui tente de se soustraire à l'application de la clause de prouver un abus de la liberté contractuelle qui l'emporte sur le très grand intérêt public lié au respect des contrats. Le comportement qui se rapproche de l'acte criminel grave ou de la fraude monumentale n'est qu'un exemple de considération d'ordre public bien établie et « foncièrement incontestable » pouvant primer la liberté contractuelle, elle aussi d'ordre public, et empêcher le défendeur de se retrancher derrière la clause de non-recours. Même si les juges de la Cour conviennent du cadre de l'analyse qui s'impose, ils sont partagés sur l'applicabilité de la clause de non-recours aux faits de l'espèce, comme il appert ci-après.

Les juges LeBel, Deschamps, Fish, Charron et Cromwell : La province a contrevenu aux stipulations expresses du contrat issu de l'appel d'offres et intervenu avec Tercon en acceptant la proposition d'une entreprise qui n'était pas admise à prendre part au processus d'appel d'offres, puis en confiant les travaux à cette même entreprise inadmissible. Par ce comportement inacceptable, la province a également manqué à son obligation tacite d'équité envers les soumissionnaires. Correctement interprétée, la clause de non-recours, qui écartait toute demande d'indemnisation « pour [l]a participation » à l'appel d'offres, ne faisait pas obstacle au recours en dommages-intérêts de Tercon. En considérant l'offre d'un soumissionnaire inadmissible, la province a non seulement manqué à ses obligations contractuelles expresses et tacites, mais elle l'a fait d'une manière qui portait outrageusement atteinte à l'intégrité et à l'efficacité commerciale du processus d'appel d'offres.

Le dépôt d'une soumission conforme en réponse à un appel d'offres peut faire naître un « contrat A » entre le soumissionnaire et le propriétaire. L'existence d'un tel contrat et sa teneur dépendent des conditions expresses et tacites de l'appel d'offres ainsi que des conséquences juridiques des échanges intervenus entre les parties.

Here, there is no basis to interfere with the trial judge's findings that there was an intent to create contractual obligations upon submission of a compliant bid and that only the six original proponents that qualified through the RFEI process were eligible to submit a response to the RFP. The tender documents and the required ministerial approval of the process stated expressly that the Province was contractually bound to accept bids only from eligible bidders. Contract A therefore could not arise by the submission of a bid from any other party. The trial judge found that the joint venture of Brentwood and EAC was not eligible to bid as they had not simply changed the composition of their team but, in effect, had created a new bidder. The Province fully understood this and would not consider a bid from or award the work to that joint venture. The trial judge did not err in finding that in fact, if not in form, Brentwood's bid was on behalf of a joint venture between itself and EAC. The joint venture provided Brentwood with a competitive advantage in the bidding process and was a material consideration in favour of the Brentwood bid during the Province's evaluation process. Moreover, the Province took active steps to obfuscate the reality of the true nature of the Brentwood bid. The bid by the joint venture constituted "material non-compliance" with the tendering contract and breached both the express eligibility provisions of the tender documents, and the implied duty to act fairly towards all bidders.

En l'espèce, il n'y a pas lieu de modifier la conclusion de la juge de première instance selon laquelle la présentation d'une soumission conforme était censée faire naître des obligations contractuelles et seules les six entreprises intéressées initialement, devenues admissibles à l'issue de la DEI, pouvaient donner suite à la DP. L'obligation de la province de considérer seulement les propositions de soumissionnaires admissibles figurait expressément dans le dossier d'appel d'offres et dans l'approbation ministérielle requise du processus. Un contrat A ne pouvait donc pas naître de la présentation d'une soumission par une autre personne. La juge de première instance a conclu que la coentreprise formée de Brentwood et d'EAC n'était pas un soumissionnaire admissible, car la composition de l'équipe n'était pas simplement modifiée, mais un nouveau soumissionnaire voyait en fait le jour. La province le savait bien et elle estimait qu'elle ne pouvait ni considérer la proposition de cette coentreprise ni adjuger le contrat à celle-ci. La juge de première instance n'a pas eu tort de conclure qu'en dépit des apparences, la soumission de Brentwood était en fait présentée par la coentreprise formée avec EAC. L'existence de la coentreprise a fait bénéficier Brentwood d'un avantage concurrentiel dans le processus d'appel d'offres, et la province l'a considérée comme un élément favorable à Brentwood lors de son processus d'évaluation. De plus, la province a pris des mesures pour masquer la véritable nature de la soumission de Brentwood. La présentation d'une proposition par une coentreprise constituait une « inexécution importante » du contrat issu de l'appel d'offres ainsi qu'une inobservation des conditions expresses d'admissibilité et de l'obligation tacite d'agir équitablement vis-à-vis de tous les soumissionnaires.

When the exclusion clause is interpreted in harmony with the rest of the RFP and in light of the commercial context of the tendering process, it did not exclude a damages claim resulting from the Province unfairly permitting an ineligible bidder to participate in the tendering process. The closed list of bidders was the foundation of this RFP and the parties should, at the very least, be confident that their initial bids will not be skewed by some underlying advantage in the drafting of the call for tenders conferred only upon one potential bidder. The requirement that only compliant bids be considered and the implied obligation to treat bidders fairly are factors that contribute to the integrity and business efficacy of the tendering process. The parties did not intend, through the words found in this exclusion clause, to waive compensation for conduct, like that of the Province in this case, that strikes at the heart of the tendering process. Clear language would be necessary to exclude liability for breach of the implied obligation, particularly in the case of public procurement where

Interprétée en harmonie avec les autres conditions de la DP et eu égard au contexte commercial de l'appel d'offres, la clause de non-recours n'écartait pas le recours en dommages-intérêts intenté au motif que la province avait inéquitablement permis à une entreprise inadmissible de prendre part au processus. La limitation du nombre de soumissionnaires admissibles constituait l'assise de la DP, et un soumissionnaire devait à tout le moins être assuré que l'évaluation de sa soumission initiale ne serait pas biaisée par quelque avantage sous-entendu dans le dossier d'appel d'offres et dont ne bénéficiait qu'un seul soumissionnaire éventuel. L'exigence que seules soient examinées des soumissions conformes et l'obligation tacite de traiter tous les soumissionnaires équitablement sont généralement considérées comme des éléments contribuant à l'intégrité et à l'efficacité commerciale du processus d'appel d'offres. Les parties n'ont pas voulu, en employant le libellé de la clause de non-recours, écarter toute indemnisation pour un comportement comme celui reproché à la province

transparency is essential. Furthermore, the restriction on eligibility of bidders was a key element of the alternative process approved by the Minister. When the statutory provisions which governed the tendering process in this case are considered, it seems unlikely that the parties intended through this exclusion clause to effectively gut a key aspect of the approved process. The text of the exclusion clause in the RFP addresses claims that result from "participating in this RFP". Central to "participating in this RFP" was participating in a contest among those eligible to participate. A process involving other bidders — the process followed by the Province — is not the process called for by "this RFP" and being part of that other process is not in any meaningful sense "participating in this RFP".

Per McLachlin C.J. and Binnie, Abella and Rothstein JJ. (dissenting): The Ministry's conduct, while in breach of its contractual obligations, fell within the terms of the exclusion compensation clause. The clause is clear and unambiguous and no legal ground or rule of law permits a court to override the freedom of the parties to contract with respect to this particular term, or to relieve Tercon against its operation in this case. A court has no discretion to refuse to enforce a valid and applicable contractual term unless the plaintiff can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contact and defeat what would otherwise be the contractual rights of the parties. The public interest in the transparency and integrity of the government tendering process, while important, did not render unenforceable the terms of the contract Tercon agreed to.

Brentwood was a legitimate competitor in the RFP process and all bidders knew that the road contract would not be performed by the proponent alone and required a large "team" of different trades and personnel to perform. The issue was whether EAC would be on the job as a major sub-contractor or identified with Brentwood as a joint venture "proponent" with EAC. Tercon has legitimate reason to complain about the Ministry's conduct, but its misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

en l'espèce, un comportement qui porte directement atteinte à l'intégrité de l'appel d'offres. Seul un libellé clair peut écarter la responsabilité consécutive au non-respect de l'obligation tacite, spécialement dans le cas de la passation de marchés publics, où la transparence est de rigueur. Qui plus est, l'admissibilité restreinte constituait un élément essentiel de l'autre processus approuvé par le ministre. Au regard du cadre législatif régissant l'appel d'offres en l'espèce, il est peu probable que les parties aient vraiment voulu, en stipulant la clause de non-recours, supprimer un aspect essentiel de ce processus. Le texte de la clause de non-recours de la DP vise les demandes d'indemnisation d'un préjudice découlant de la « participation à la DP ». La participation à un concours ouvert aux seules personnes admises à y prendre part était donc au cœur de la « participation à la DP ». Un processus ouvert à d'autres entreprises — ce qui était le cas du processus suivi par la province — ne saurait s'entendre de « la DP », et le fait d'y prendre part ne saurait véritablement être considéré comme une « participation à la DP ».

La juge en chef McLachlin et les juges Binnie, Abella et Rothstein (dissidents) : Même s'il n'a pas respecté ses obligations contractuelles, le ministère bénéficie de la clause de non-recours en indemnisation. La clause est claire et non équivoque, et aucune règle de droit ou autre fondement juridique ne permet aux tribunaux de passer outre à la liberté des parties de convenir de cette condition ni de soustraire Tercon à son application en l'espèce. Le tribunal n'a pas le pouvoir discrétionnaire de refuser de faire respecter une clause contractuelle valide et applicable, sauf lorsque le demandeur fait valoir une considération d'ordre public prépondérante qui l'emporte sur l'intérêt public lié à la liberté de contracter et qui fait obstacle à ce qui, autrement, constitueraient les droits contractuels des parties. L'intérêt public lié à la transparence et à l'intégrité du processus gouvernemental d'appel d'offres, même s'il est important, n'a pas rendu inapplicables les clauses du contrat auxquelles Tercon avait consenti.

Brentwood était un concurrent légitime dans le processus de DP. Tous les soumissionnaires savaient que le contrat de construction routière ne serait pas exécuté seulement par le proposant retenu, mais bien par une grande « équipe » pluridisciplinaire. La question était celle de savoir si EAC serait sous-traitant principal ou « proposant » dans le cadre de la coentreprise avec Brentwood. Tercon a raison de dénoncer le comportement du ministère, mais celui-ci n'était pas répréhensible au point que l'ordre public justifie le tribunal de refuser au ministère la protection de la clause de non-recours en indemnisation à laquelle Tercon avait librement consenti.

Contract A is based not on some abstract externally imposed rule of law but on the presumed (and occasionally implied) intent of the parties. At issue is the intention of the actual parties not what the court may project in hindsight would have been the intention of reasonable parties. Only in rare circumstances will a court relieve a party from the bargain it has made.

The exclusion clause did not run afoul of the statutory requirements. While the *Ministry of Transportation and Highways Act* favours "the integrity of the tendering process", it nowhere prohibits the parties from negotiating a "no claims" clause as part of their commercial agreement and cannot plausibly be interpreted to have that effect. Tercon — a sophisticated and experienced contractor — chose to bid on the project, including the risk posed by an exclusion of compensation clause, on the terms proposed by the Ministry. That was its prerogative and nothing in the "policy of the Act" barred the parties' agreement on that point.

The trial judge found that Contract A was breached when the RFP process was not conducted by the Ministry with the degree of fairness and transparency that the terms of Contract A entitled Tercon to expect. The Ministry was at fault in its performance of the RFP, but the process did not thereby cease to be the RFP process in which Tercon had elected to participate.

The interpretation of the majority on this point is disagreed with. "[P]articipating in this RFP" began with "submitting a Proposal" for consideration. The RFP process consisted of more than the final selection of the winning bid and Tercon participated in it. Tercon's bid was considered. To deny that such participation occurred on the ground that in the end the Ministry chose a Brentwood joint venture (an ineligible bidder) instead of Brentwood itself (an eligible bidder) would be to give the clause a strained and artificial interpretation in order, indirectly and obliquely, to avoid the impact of what may seem to the majority *ex post facto* to have been an unfair and unreasonable clause.

Moreover, the exclusion clause was not unconscionable. While the Ministry and Tercon do not exercise the same level of power and authority, Tercon is a major contractor and is well able to look after itself in a commercial context so there is no relevant imbalance of bargaining power. Further, the clause is not as draconian as Tercon portrays it. Other remedies for breach of Contract A were available. The parties expected, even if they did not like it, that the "no claims" clause would

L'assise du contrat A demeure l'intention présumée (et parfois inférée) des parties, et non quelque règle de droit abstraite imposée par un tiers. C'est l'intention des parties elles-mêmes qui importe, et non ce qui, à l'issue d'une analyse rétrospective du tribunal, aurait été l'intention de parties raisonnables. Ce n'est qu'en de rares circonstances que le tribunal relève une partie de ses engagements.

La clause de non-recours ne dérogeait pas aux exigences légales. La *Ministry of Transportation and Highways Act* favorise « l'intégrité du processus d'appel d'offres », mais aucune de ses dispositions n'empêche les parties de faire figurer dans leur accord commercial une clause « écartant toute indemnisation » ni ne peut vraisemblablement être interprétée comme ayant cet effet. Tercon — une entreprise avertie et expérimentée — a décidé de participer au processus aux conditions proposées par le ministère malgré le risque posé par la clause de non-recours en indemnisation. C'était sa décision, et la « raison d'être de la Loi » ne faisait aucunement obstacle à la convention des parties sur ce point.

La juge du procès a conclu à l'inexécution du contrat A du fait que, dans sa DP, le ministère n'a pas agi avec l'équité et la transparence auxquelles Tercon était en droit de s'attendre vu le libellé du contrat A. Le ministère a été fautif dans sa mise en œuvre de la DP, mais le processus n'a pas cessé pour autant d'être la DP à laquelle Tercon avait décidé de prendre part.

Les juges dissidents ne souscrivent pas à l'interprétation des juges majoritaires à cet égard. La « participation à la DP » a commencé par la « présent[ation d']une soumission ». Le processus de DP ne se résumait pas au choix final de l'adjudicataire, et Tercon y a participé. La soumission de Tercon a été considérée. Nier cette participation au motif que le ministère a finalement choisi la coentreprise inadmissible dont faisait partie Brentwood, et non Brentwood elle-même (qui était admissible), équivaut à une interprétation forcée et artificielle visant à éviter, par des moyens indirects et détournés, les conséquences de ce qui peut sembler aux juges majoritaires, *ex post facto*, avoir été une clause injuste et déraisonnable.

En outre, la clause de non-recours n'était pas inique. Tercon n'a ni le pouvoir ni l'autorité du ministère, mais c'est une entreprise importante parfaitement en mesure de défendre ses intérêts commerciaux. Il n'y avait donc pas d'inégalité déterminante du pouvoir de négociation. Aussi, la clause de non-recours n'est pas aussi draconienne que le laisse entendre Tercon. L'inexécution du contrat A donnait ouverture à d'autres recours. Les parties s'attendaient, même si cette éventualité ne les

operate even where the eligibility criteria in respect of the bid (including the bidder) were not complied with.

Finally, the Ministry's misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

Cases Cited

By Cromwell J.

Applied: *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860; **considered:** *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426; *Cahill (G.J.) & Co. (1979) Ltd. v. Newfoundland and Labrador (Minister of Municipal and Provincial Affairs)*, 2005 NLTD 129, 250 Nfld. & P.E.I.R. 145; *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423; *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1; **referred to:** *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116; *Hillis Oil and Sales Ltd. v. Wynn's Canada, Ltd.*, [1986] 1 S.C.R. 57.

By Binnie J. (dissenting)

Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426; *The Queen in right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860; *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116; *Tercon Contractors Ltd. v. British Columbia* (1993), 9 C.L.R. (2d) 197, aff'd [1994] B.C.J. No. 2658 (QL); *Karsales (Harrow) Ltd. v. Wallis*, [1956] 1 W.L.R. 936; *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423; *ABB Inc. v. Domtar Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461; *Re Millar Estate*, [1938] S.C.R. 1; *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4th) 650.

Statutes and Regulations Cited

Ministry of Transportation and Highways Act, R.S.B.C. 1996, c. 311, ss. 4, 23.

enchantait guère, à ce que la clause « écartant toute indemnisation » s'applique advenant même le non-respect des critères d'admissibilité de la soumission (et de son auteur).

Enfin, l'inconduite n'était pas répréhensible au point que l'ordre public justifie le tribunal de refuser au ministère la protection de la clause de non-recours en indemnisation à laquelle Tercon a librement consenti.

Jurisprudence

Citée par le juge Cromwell

Arrêts appliqués : *M.J.B. Enterprises Ltd. c. Construction de Défense (1951) Ltée*, [1999] 1 R.C.S. 619; *Martel Building Ltd. c. Canada*, 2000 CSC 60, [2000] 2 R.C.S. 860; **arrêts examinés :** *Hunter Engineering Co. c. Syncrude Canada Ltée*, [1989] 1 R.C.S. 426; *Cahill (G.J.) & Co. (1979) Ltd. c. Newfoundland and Labrador (Minister of Municipal and Provincial Affairs)*, 2005 NLTD 129, 250 Nfld. & P.E.I.R. 145; *Guarantee Co. of North America c. Gordon Capital Corp.*, [1999] 3 R.C.S. 423; *Fraser Jewellers (1982) Ltd. c. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1; **arrêts mentionnés :** *Société hôtelière Canadien Pacifique Ltée c. Banque de Montréal*, [1987] 1 R.C.S. 711; *Double N Earthmovers Ltd. c. Edmonton (Ville)*, 2007 CSC 3, [2007] 1 R.C.S. 116; *Hillis Oil and Sales Ltd. c. Wynn's Canada, Ltd.*, [1986] 1 R.C.S. 57.

Citée par le juge Binnie (dissident)

Hunter Engineering Co. c. Syncrude Canada Ltée, [1989] 1 R.C.S. 426; *La Reine du chef de l'Ontario c. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 R.C.S. 111; *M.J.B. Enterprises Ltd. c. Construction de Défense (1951) Ltée*, [1999] 1 R.C.S. 619; *Naylor Group Inc. c. Ellis-Don Construction Ltd.*, 2001 CSC 58, [2001] 2 R.C.S. 943; *Martel Building Ltd. c. Canada*, 2000 CSC 60, [2000] 2 R.C.S. 860; *Double N Earthmovers Ltd. c. Edmonton (Ville)*, 2007 CSC 3, [2007] 1 R.C.S. 116; *Tercon Contractors Ltd. c. British Columbia* (1993), 9 C.L.R. (2d) 197, conf. par [1994] B.C.J. No. 2658 (QL); *Karsales (Harrow) Ltd. c. Wallis*, [1956] 1 W.L.R. 936; *Guarantee Co. of North America c. Gordon Capital Corp.*, [1999] 3 R.C.S. 423; *ABB Inc. c. Domtar Inc.*, 2007 CSC 50, [2007] 3 R.C.S. 461; *Re Millar Estate*, [1938] R.C.S. 1; *Plas-Tex Canada Ltd. c. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4th) 650.

Lois et règlements cités

Ministry of Transportation and Highways Act, R.S.B.C. 1996, ch. 311, art. 4, 23.

Law", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation, 2007* (2007), 1.

[117] As Duff C.J. recognized, freedom of contract will often, but not always, trump other societal values. The residual power of a court to decline enforcement exists but, in the interest of certainty and stability of contractual relations, it will rarely be exercised. Duff C.J. adopted the view that public policy "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds" (p. 7). While he was referring to public policy considerations pertaining to the nature of the *entire contract*, I accept that there may be well-accepted public policy considerations that relate directly to the nature of the *breach*, and thus trigger the court's narrow jurisdiction to give relief against an exclusion clause.

[118] There are cases where the exercise of what Professor Waddams calls the "ultimate power" to refuse to enforce a contract may be justified, even in the commercial context. Freedom of contract, like any freedom, may be abused. Take the case of the milk supplier who adulterates its baby formula with a toxic compound to increase its profitability at the cost of sick or dead babies. In China, such people were shot. In Canada, should the courts give effect to a contractual clause excluding civil liability in such a situation? I do not think so. Then there are the people, also fortunately resident elsewhere, who recklessly sold toxic cooking oil to unsuspecting consumers, creating a public health crisis of enormous magnitude. Should the courts enforce an exclusion clause to eliminate contractual liability for the resulting losses in such circumstances? The answer is no, but the contract breaker's conduct need not rise to the level of criminality or fraud to justify a finding of abuse.

Contract Law », dans T. L. Archibald et R. S. Echlin, dir., *Annual Review of Civil Litigation, 2007* (2007), 1.

[117] Le juge en chef Duff reconnaît donc que la liberté contractuelle prime souvent les autres valeurs sociétales, mais pas toujours. Le pouvoir résiduel du tribunal d'écarter l'application existe bien, mais la certitude et la stabilité des rapports contractuels commandent de l'exercer rarement. Le juge en chef Duff adopte le point de vue selon lequel l'ordre public [TRADUCTION] « ne doit être invoqué que lorsqu'il est manifeste que le préjudice infligé au public est foncièrement incontestable et ne tient pas seulement aux conclusions bien personnelles de quelques magistrats » (p. 7). Même s'il renvoie à des considérations d'ordre public liées à la nature du *contrat en entier*, je reconnais qu'il peut y avoir des considérations d'ordre public bien établies se rapportant directement à la nature de l'*inexécution* et conférant alors au tribunal le pouvoir limité d'écarter la clause de non-recours.

[118] Il arrive que l'exercice de ce que le professeur Waddams appelle le [TRADUCTION] « pouvoir suprême » de refuser de faire respecter un contrat puisse se justifier, même en contexte commercial. On peut abuser de la liberté contractuelle comme de toute autre liberté. Considérons le cas de fournisseurs de lait qui, pour accroître leur profit, altèrent une formule pour nourrissons en y ajoutant une substance toxique, causant ainsi maladies et décès. En Chine, de tels fournisseurs sont fusillés. Au Canada, les tribunaux devraient-ils en pareil cas faire respecter une clause contractuelle écartant la responsabilité civile? Je ne crois pas. Considérons également le cas de ces gens sans scrupules — résidant heureusement dans un autre pays — qui ont vendu de l'huile de cuisson toxique à des consommateurs qui ne se doutaient de rien, créant ainsi une crise sanitaire publique d'une ampleur considérable. Dans de telles circonstances, nos tribunaux devraient-ils faire respecter une clause de non-recours de façon à écarter la responsabilité contractuelle pour le préjudice ainsi causé? Je ne le crois pas non plus. Cependant, point n'est besoin que l'inexécution contractuelle équivaille à un acte criminel ou à une fraude pour qu'il y ait véritablement abus.

TAB 16

2011 ABQB 399
Alberta Court of Queen's Bench

Winalta Inc., Re

2011 CarswellAlta 2237, 2011 ABQB 399, [2011] A.J. No. 1341, [2012] A.W.L.D. 737, 521 A.R. 1, 84 C.B.R. (5th) 157

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

In the Matter of the Plan of Compromise or Arrangement of Winalta Inc., Winalta Homes Inc., Winalta Carriers Inc., Winalta Oilfield Rentals Inc., Winalta Carlton Homes Inc., Winalta Holdings Inc., Winalta Construction Inc., Baywood Property Management Inc., and 916830 Alberta Ltd.

J.E. Topolniski J.

Heard: March 21, 2011
Judgment: June 24, 2011
Docket: Edmonton 1003-06865

Counsel: Kentigern Rowan for Deloitte & Touche Inc.
Darren Bieganek for Winalta Group

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Fees and conduct of monitor — Monitor acted for debtor in proceedings under Companies' Creditors Arrangement Act — Monitor was appointed at behest of principal creditor and shared certain reports with principal creditor, who provided interim financing — After receiving report, principal creditor ceased to provide interim financing, although this may have been coincidence — Monitor brought application to be paid fees — Monitor found to have acted improperly and given 60 days to make further submissions on fees — No presumption of regularity exists regarding fees — Insolvency monitor generally was appropriate comparator for judging fees, not chartered accounts generally or legal profession — Monitor charged separately for IT staff, administration and secretarial staff — Monitor required to provide more evidence regarding billing practices for IT staff, administration and secretarial staff — Use of subordinate staff did not constitute duplication of work, despite cursory descriptions of some items — CCAA proceedings moved quickly, restructuring involved multiple entities, including publicly traded parent, liabilities far outweighed asset values, intensive sales campaign was initiated to shed redundant asset, and there were numerous claims and disallowances — No evidence that subordinate staff were not thorough and diligent — No evidence, despite extensive questioning, that duplication of services existed among partners — Administrative charge of 6 per cent of total fees in lieu of disbursements was not reasonable, and monitor required to prepare documentation of disbursements — Parties agreed that fees for internal review were not proper — Provisions of s. 23 of Act did not allow monitor to provide principal creditor with report — Initial order gave authority for monitor

to aid in required reports of debtor, but not to deliver them to principal creditor — Monitor was not transparent in actions regarding report, and ignored line between impartial court officer and consultant for principal creditor — No quantifiable loss or evidence of damage to estate was shown, but failure to scrupulously avoid conflict of interest negatively impacted integrity of insolvency system — Appropriate remedy was to reduce fees by amount associated with preparation of report.

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Agristar Inc., Re (2005), 2005 ABQB 431, 2005 CarswellAlta 841, 12 C.B.R. (5th) 1 (Alta. Q.B.) — considered

Bank of Montreal v. Nican Trading Co. (1990), 78 C.B.R. (N.S.) 85, 1990 CarswellBC 397, 43 B.C.L.R. (2d) 315 (B.C. C.A.) — considered

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — followed

Belyea v. Federal Business Development Bank (1983), 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27, 46 C.B.R. (N.S.) 244 (N.B. C.A.) — followed

Columbia Trust Co. v. Coopers & Lybrand Ltd. (1986), 76 A.R. 303, 49 Alta. L.R. (2d) 93, 1986 CarswellAlta 259 (Alta. C.A.) — followed

Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce (2005), 8 C.B.R. (5th) 34, 2005 SKQB 24, 2005 CarswellSask 22 (Sask. Q.B.) — considered

Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce (2005), 11 C.B.R. (5th) 68, 2005 SKQB 252, 2005 CarswellSask 410 (Sask. Q.B.) — referred to

Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd. (2003), 2003 CarswellOnt 1104, 40 C.B.R. (4th) 10 (Ont. S.C.J.) — considered

Confederation Treasury Services Ltd., Re (1995), 1995 CarswellOnt 1169, 37 C.B.R. (3d) 237 (Ont. Bktcy.) — considered

Hess, Re (1977), 23 C.B.R. (N.S.) 215, 1977 CarswellOnt 68 (Ont. S.C.) — followed

Hickman Equipment (1985) Ltd., Re (2002), 2002 CarswellNfld 154, 34 C.B.R. (4th) 203, 214 Nfld. & P.E.I.R. 126, 642 A.P.R. 126 (Nfld. T.D.) — considered

Laidlaw Inc., Re (2002), 2002 CarswellOnt 790, 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2007), 30 C.B.R. (5th) 59, 2007 CarswellOnt 1029 (Ont. S.C.J. [Commercial List]) — considered

Nelson, Re (2006), 2006 CarswellOnt 4198, 24 C.B.R. (5th) 40 (Ont. S.C.J. [Commercial List]) — referred to

Northland Bank v. G.I.C. Industries Ltd. (1986), 1986 CarswellAlta 426, 45 Alta. L.R. (2d) 70, 60 C.B.R. (N.S.) 217, 73 A.R. 372, [1986] 4 W.W.R. 482 (Alta. Master) — considered

Peat Marwick Ltd. v. Farmstart (1983), 1983 CarswellSask 66, [1984] 1 W.W.R. 665, 30 Sask. R. 31, 51 C.B.R. (N.S.) 127 (Sask. Q.B.) — referred to

Prairie Palace Motel Ltd. v. Carlson (1980), 1980 CarswellSask 25, 35 C.B.R. (N.S.) 312 (Sask. Q.B.) — referred to

Sally Creek Environs Corp., Re (2010), (sub nom. *Sally Creek Environs Corp. (Bankrupt), Re)* 261 O.A.C. 199, 2010 CarswellOnt 2634, 2010 ONCA 312, 67 C.B.R. (5th) 161 (Ont. C.A.) — distinguished

Siscoe & Savoie v. Royal Bank (1994), 1994 CarswellNB 14, 29 C.B.R. (3d) 1, 157 N.B.R. (2d) 42, 404 A.P.R. 42 (N.B. C.A.) — referred to

Smoky River Coal Ltd., Re (2001), 2001 ABCA 209, 2001 CarswellAlta 1035, 205 D.L.R. (4th) 94, [2001] 10 W.W.R. 204, 28 C.B.R. (4th) 127, 95 Alta. L.R. (3d) 1, 299 A.R. 125, 266 W.A.C. 125 (Alta. C.A.) — considered

Triton Tubular Components Corp., Re (2006), 2006 CarswellOnt 2120, 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) — considered

Triton Tubular Components Corp., Re (2006), 2006 CarswellOnt 2968 (Ont. S.C.J. [Commercial List]) — referred to

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) — referred to

843504 Alberta Ltd., Re (2003), 30 Alta. L.R. (4th) 91, 4 C.B.R. (5th) 306, 351 A.R. 222, 2003 CarswellAlta 1786, 2003 ABQB 1015 (Alta. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 13.5 [en. 1992, c. 27, s. 9(1)] — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 23 — considered

s. 23(1)(h) — considered

s. 23(1)(i) — considered

s. 25 — considered

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368
R. 34 — considered

R. 35-53 — referred to

R. 39 — considered

R. 44 — considered

Regulations considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Companies' Creditors Arrangement Regulations, SOR/2009-219

s. 7 — referred to

APPLICATION by monitor for approval of fees.

***J.E. Topolniski J.*:**

I. Introduction

> Professional fees in a *CCAA* proceeding hold the potential to be behest with controversy as a result of various factors including lack of transparency, overreaching and conflicts of interest.

(Professor Stephanie Ben-Ishai and Virginia Torres, "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2009* (Toronto: Thomson Carswell, 2008) 142 at p. 169)

1 Deloitte & Touche Inc's. application for approval of its fees as a monitor under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*) is opposed by the debtor companies, whose allegations mimic the concerns expressed by Professor Ben-Ishai and Virginia Torres in the preceding quote.

2 The Winalta companies (Winalta Group) obtained protection from their creditors under the provisions of the *CCAA* on April 26, 2010. At the time, three of nine of the Winalta Group were active. The Winalta Group's assets were worth about $9.5 million, while its liabilities exceeded $73 million.

3 The *CCAA* proceedings moved swiftly at the behest of the primary secured creditor, HSBC Bank Canada (HSBC). It took just six months from the initiation of the proceedings to implementation of the plan.

4 Deloitte & Touche Inc. now wants to be discharged and paid. The Winalta Group takes umbrage at its bill for $1,155,206.05 (Fee) and is asking for a $275,000.00 adjustment for alleged overcharging. It complains about the following:

> (i) charges for support and professional staff other than partners' services/inadequately particularized services (Non-Partner Services);
>
> (ii) duplication;

(iii) a six percent administration fee charged in lieu of disbursements ($50,000.00);

(iv) mathematical errors ($47,979.39); and

(v) charges for internal quality reviews described as something "required to be independent from the engagement" ($10,000.00).

5 The Winalta Group also seeks a $75,000.00 reduction to the Fee as something "akin to punitive damages" for breach of fiduciary duty. It claims that the breach arose when Deloitte & Touche Inc. prepared and delivered a net realization value report to HSBC on September 2, 2010 (September NVR) that prompted HSBC to refuse funding costs to acquire takeout financing.

6 Deloitte & Touche Inc. has agreed to deduct its $10,000.00 charge for the internal quality reviews, but rejects the suggestion that the Fee otherwise is unfair or unreasonable. It asserts that it acted within its mandate and in compliance with its fiduciary obligations. It contends there is no evidence to support the suggestion that HSBC withdrew or reduced its support for the restructuring after receiving the September NVR.

II. A Quick Look Back

7 A brief review of the relationship between the Winalta Group, HSBC and Deloitte & Touche Inc. is useful to better appreciate some of the dynamics at play in this application.

8 The Winalta Group's operations and assets are located in Alberta, except for a small holding in Saskatchewan. Its head office is in Edmonton.

9 In November 2009, HSBC entered into a forbearance agreement with the Winalta Group, which owed it in excess of $47 million (the "Forbearance Agreement"). The Winalta Group agreed to Deloitte & Touche Inc. being retained as HSBC's private monitor, commonly called a "look see" consultant. The Winalta group also agreed to give HSBC a consent receivership order that could be filed with no strings attached.

10 The Winalta Group was not a party to the private monitor agreement between HSBC and Deloitte & Touche Inc., although it was responsible for payment of the private monitor's fees pursuant to the security held by HSBC. It was aware that the private monitor agreement provided for a six percent flat "administration fee" that would be charged by Deloitte & Touche Inc. in lieu of "customary disbursements such as postage, telephone, faxes, and routine photocopying." Charges for "reasonable out of pocket expenses" for travel expenses were not included in the "administration fee."

11 Clearly, HSBC was in the position of power. It agreed to support the Winalta Group's restructuring and to fund its operations throughout the *CCAA* process on the following conditions:

(i) the monitor would be Deloitte & Touche Inc. (the Monitor) and a Vancouver partner of that firm, Jervis Rodriquez, would be the "partner in charge" of the file;

(ii) HSBC would be unaffected by the *CCAA* proceedings;

(iii) the initial order presented to the court for consideration would authorize the Monitor to report to HSBC; and

(iv) the Winalta's Group's indebtedness to HSBC would be retired by October 30, 2010.

12 On April 26, 2010, the initial order was granted as the Winalta Group and HSBC had planned (Initial Order).

13 HSBC continued to provide operating and overdraft facilities to the Winalta Group during the *CCAA* process, as outlined in the Initial Order, which also provided that the Monitor could report to HSBC on certain matters, the details of which are discussed in the context of the Winalta Group's allegation that the Monitor breached its fiduciary duties.

14 The Winalta Group did not seek DIP financing. Its quest for takeout financing to meet the October 30, 2010 cutoff imposed by HSBC was frustrated when HSBC refused to fund the costs associated with obtaining replacement financing without a three million dollar guarantee. A stakeholder came to the rescue. The Winalta Group is of the view that HSBC's refusal to pay the costs is directly attributable to the Monitor's actions in connection with the September NVR.

15 There is nothing in the evidence or the submissions made at the hearing of this application that hints at a strained relationship between the Winalta Group and the Monitor before the Winalta Group learned when it examined a Deloitte & Touche Inc. partner in the context of this application that the Monitor had provided HSBC with the September NVR.

16 The Monitor's interim accounts were sent at regular intervals. They described activities typical of a monitor in a *CCAA* restructuring, including intense activity in the early phases tapering off as the process unfolded, with a spike around the time of the claims bar date and creditors' meeting. There is no suggestion that the Winalta Group voiced concern about the Monitor's interim accounts. Up until the present application, it seems to have been squarely focused on the goal of obtaining a positive creditor vote and paying its debt to HSBC by the cutoff date.

17 In its twentieth report to the court, the Monitor stated that its Fee is for services rendered in response to "the required and necessary duties of the Monitor hereunder, and are reasonable in the circumstances."

III. Analysis

A. Proper Charges

1. General Principles

18 There is a scarcity of judicial commentary relating specifically to the fees of court-appointed monitors, which likely is attributable to the limited number of opposed applications for passing of their accounts.

19 In their article "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," the authors discuss their (qualified) survey of insolvency practitioners, stating at p. 168:

> Several answers noted the court's tendency has been to "rubber stamp" professional fees in non-contentious cases. This lack of judicial scrutiny was concerning to some participants, who stated that an increased degree of oversight would be helpful to ensure the legitimacy of the work completed and fees charged.

20 At pp. 146-147, they review certain cases addressing *CCAA* monitors' fees. Most of these cases, rather than focussing on general considerations in determining what constitutes a monitor's "reasonable fee," deal with specific concerns about professional fees, such as:

> (i) approval of Canadian and American counsel fees in a cross-border insolvency (*Muscletech Research & Development Inc., Re* (2007), 30 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]); or
>
> (ii) approval of "special" or "premium fees" for an administrator under a *CCAA* plan of arrangement (*Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.* (2003), 40 C.B.R. (4th) 10 (Ont. S.C.J.)).

21 In *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce*, 2005 SKQB 24 (Sask. Q.B.) at para. 10, (2005), 8 C.B.R. (5th) 34 (Sask. Q.B.), Kyle J. commented in the context of opposed applications to extend a stay

under the CCAA on the significant amount of anticipated professional fees, noting that: "... the court must be on guard against any course of action which would render the process futile."

22 On a different application in the same proceeding (2005 SKQB 252 (Sask. Q.B.)), Kyle J. reiterated a concern about the burgeoning professional fees (at para.5), saying that they might "sink the company's chances of survival." He also was critical (at paras. 11-12) of the monitor's "excellent though useless" report, its practices of recording minimum half-hour blocks of time and billing for discussions with junior staff. The final criticism (para. 15) was that the monitor's fees were offside the local practice.

23 In *Triton Tubular Components Corp., Re* (2006), 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) at para. 83, additional reasons at2006 CarswellOnt 2968 (Ont. S.C.J. [Commercial List]) , Madam Justice Mesbur's criteria in scrutinizing the propriety of a monitor's counsel's fee was that which "...one would expect from a resistant client."

24 Given the paucity of judicial commentary on the fees of *CCAA* monitors generally, guidance often is sought from analogous case law dealing with the fees of receivers and trustees in bankruptcy.

25 One of the cases most often cited is *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.) at paras. 3 and 9, (1983), 44 N.B.R. (2d) 248 (N.B. C.A.), which set out the following principles and considerations that apply in assessing a receiver's fees:

> ...The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous ...
>
> ...The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

26 In *Agristar Inc., Re*, 2005 ABQB 431, 12 C.B.R. (5th) 1 (Alta. Q.B.) , Hart J. applied the factors articulated in *Belyea* in determining the fairness of the fees charged by a *CCAA* monitor which had been replaced part way through the proceedings. In that case, the court had the benefit of the replacement monitor's accounts to use as a direct comparator.

27 Referee Funduk in *Northland Bank v. G.I.C. Industries Ltd.* (1986), 60 C.B.R. (N.S.) 217, 73 A.R. 372 (Alta. Master) refused (at para. 18) to place a receiver's account under a microscope and to engage in a minute examination of its work. He opined (at para. 35) that: "... parties should not expect to get the services of a chartered accountant at a cheap rate," citing *Prairie Palace Motel Ltd. v. Carlson* (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.) and *Peat Marwick Ltd. v. Farmstart* (1983), 51 C.B.R. (N.S.) 127 (Sask. Q.B.) in support.

28 In *Hess, Re* (1977), 23 C.B.R. (N.S.) 215 (Ont. S.C.), Henry J. considered the following factors in taxing a trustee in bankruptcy's accounts:

> (a) allowing the trustee a fair compensation for his services;
>
> (b) preventing unjustifiable payments for fees to the detriment of the estate and the creditors; and
>
> (c) encouraging efficient, conscientious administration of the estate.

29 Similar to the caution given in *Northland Bank*, Henry J. warned consumers (at para. 11) that: "...it should be borne in mind that the labourer is worthy of his hire. The creditors and the public are entitled to the best services from professional trustees and must expect to pay for them."

30 In my view, the appropriate focus on an application to approve a *CCAA* monitor's fees is no different than that in a receivership or bankruptcy. The question is whether the fees are fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the *CCAA* process. As with any inquiry, the evidence proffered will be important in making those determinations.

31 The Monitor in the present case takes the position that the Winalta Group has failed to present cogent evidence to show that the Fee is neither fair nor reasonable. In essence, it asks that the court apply a presumption of regularity.

32 I am not aware of any reported authority supporting the proposition that there is a presumption of regularity that applies to a monitor's fees. This application is no different than any other. The applicant, here the Monitor, bears the onus of making out its case. A bald assertion by the Monitor that the Fee is reasonable does not necessarily make it so. The Monitor must provide the court with cogent evidence on which the court can base its assessment of whether the Fee is fair and reasonable in all of the circumstances.

2. Non-Partner Services

33 The Fee includes charges for eighteen support staff, a number which the Winalta Group wryly notes equals that of its own staff complement. The support staff involved included those in clerical, website maintenance, analysis, managerial and senior management positions, with (discounted) hourly billing rates ranging from $65.89 per hour (clerical services) to $460.79 per hour (senior management services).

34 The Winalta Group urges that the (discounted) hourly rate of $588.00 charged by the two partners, Messrs. Jervis and Keeble, should have included any work performed by support staff, as is the typical billing practice for lawyers.

(a) Clerical, administrative, and IT staff

35 In *Peat, Marwick Ltd.* at para. 9, Vancise J. ruled that the charges for secretarial and clerical staff should properly form part of the firm's overhead and, therefore, should not be included in the account for professional services.

36 Referee Funduk in *Northland Bank* refused to follow that aspect of the *Peat, Marwick Ltd.* decision as it rested on what he referred to as an "erroneous presumption" that chartered accountants necessarily employ the same billing format as lawyers. Referee Funduk found that the receiver in that case had used the standard billing format for chartered accountants, in which support staff were charged separately. He expressed the view (at para. 30) that it is wrong to compare a chartered accountant's hourly charges to those of a lawyer and to conclude that there is enough profit in the accountant's charges so that work undertaken by staff should not be charged separately. He said that the two operations are not the same and the inquiry should focus on the standard billing format and practice of the profession in question.

37 The Alberta Court of Appeal weighed in on the topic in *Columbia Trust Co. v. Coopers & Lybrand Ltd.* (1986), 76 A.R. 303 (Alta. C.A.), Stevenson J.A. stating at para. 8:

> ... the propriety of charges for secretarial and accounting services must be reviewed to determine if they are properly an "overhead" component that should be or was included or absorbed within the hourly fee charged by some of the professionals who rendered services. The Court, moreover, must be satisfied that the services were reasonably necessary having regard to the amounts involved.

38 In the result, the court in *Columbia Trust Company* elected not to make an arbitrary award but rather to return the matter for "the application of proper principles."

39 In *Bank of Montreal v. Nican Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C. C.A.), at 93, (1990), 43 B.C.L.R. (2d) 315 (B.C. C.A.), the British Columbia Court of Appeal found that, having regard to the evidence in that case, it was appropriate for the receiver to have charged separately for the secretarial and support staff. Taggart J.A., for the court,

observed that *Columbia Trust* qualified but did not overrule *Northland Bank* as the Alberta Court of Appeal simply referred the matter back for review to ensure there was no duplication.

40 The law is no different as it concerns a *CCAA* monitor. While the court should avoid microscopic examination of the Monitor's work, the *Columbia Trust* requirements nevertheless apply. To a degree, I concur with Referee Funduk's observation in *Northland Bank* that the appropriate comparator of a monitor's charges is not the legal profession, as the Winalta Group urges. While mindful that insolvency professionals typically have a chartered accountant's designation, I do not agree with Referee Funduk that the standard billing format for chartered accountants is necessarily the correct comparator. The billing practices for chartered accounts engaged in non-insolvency work may, for a host of reasons, be based on different considerations. What matters is the standard billing practice in the Monitor's own specialized profession - that of the insolvency practitioner.

41 In the present case, the Initial Order specified that: "[t]he Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings." I interpret this to mean the Monitor's standard rates and charges applied in its insolvency practice.

42 Concerning the charges for IT staff, the law required the Monitor to maintain a website (*Companies' Creditors Arrangement Regulation*, SOR/2009-219, s. 7). However, that does not derogate from the Monitor's burden to establish that the service should be a permissible separate charge. Practically, the evidence in this regard should say whether the partners' hourly billing rates have been adjusted specifically to address the legislated requirement to maintain a website.

43 The Monitor has not met the evidentiary burden required of it. It must adduce sufficient evidence to show that in its insolvency practice its industry standard is to charge out secretarial, administrative and IT staff separately rather than to include or absorb those charges as part of the hourly fee charged by the professional staff. If that is its standard practice, it must show that the rates charged were its standard (or discounted) rates. It must also establish that the services were reasonably necessary having regard to the amounts involved.

44 The Monitor is to present affidavit evidence within the next 60 days to address the issues discussed, failing which the charges will be disallowed. This material will be prepared at the Monitor's own cost and the costs of any further application will be addressed at the appropriate time.

(b) Professional staff (non-partner)

45 The Winalta Group contends that there was a duplication of work by non-partner professional staff and that inadequate billing information has been provided. It points to certain entries that are terse, non-specific descriptions of services.

46 Like Hall J. in *Hickman Equipment (1985) Ltd., Re* (2002), 34 C.B.R. (4th) 203 (Nfld. T.D.) at para. 20, (2002), 214 Nfld. & P.E.I.R. 126 (Nfld. T.D.), I consider many of the descriptions of services in the Monitor's accounts to be "singularly laconic." The party responsible for paying a monitor's bill is entitled to more. That said, I find the Winalta Group's suggestion of punishing the Monitor for this infraction by reducing the Fee to be unduly harsh.

47 Despite the cursory nature of certain entries, the work of the Monitor's subordinate professional staff appears to have been appropriate and in furtherance of the ultimate goal of restructuring the Winalta Group's affairs. There seems to be nothing blatantly untoward or unusual about the work undertaken by these individuals.

48 Engaging less senior professionals and other subordinate staff to report to and discuss their findings with more senior professionals is not unusual and does not "constitute any type of double teaming of a nature that would be obviously inappropriate" (*Hickman Equipment (1985) Ltd.* at para. 26).

49 Consideration of the factors articulated in *Belyea* supports the finding that it was acceptable for the Monitor to engage less senior professional staff. In my view, it is relevant that the *CCAA* proceedings moved quickly; the restructuring involved multiple entities, including a publically traded parent; liabilities far outweighed asset values; an intensive sales campaign was initiated to shed redundant asset; and there were numerous claims and disallowances (all but one of which was resolved without the need for court intervention).

50 There is no evidence suggesting that the Monitor's non-partner professional staff was anything but knowledgeable, thorough and diligent, or that their services were excessive, duplicative or unnecessary. While there may have been some degree of professional overlap with the partners, given typical reporting structures, that is facially neither unusual nor inappropriate. The result achieved was positive - a 100 percent vote in favour of the plan of arrangement.

51 I am mindful that the Winalta Group was a co-operative debtor.

3. Duplication of work by partners

52 The Winalta Group also contends that there was duplication of work by two of Deloitte & Touche Inc.'s partners, Messrs. Keeble and Rodriquez.

53 HSBC held a figurative Sword of Damocles over the Winalta Group's head before and during the *CCAA* proceedings. Many concessions were made by the Winalta Group, including its agreement to Mr. Rodriguez being the partner "in charge" for the Monitor, despite his residence being in Vancouver while the Winalta Group's assets and operations were located in Alberta and Saskatchewan. Freed from HSBC's control, the Winalta Group belatedly questions Mr. Rodriguez's general involvement.

54 It is undisputed that Mr. Keeble was the Monitor's "hands on" partner. Mr. Rodriquez, who was familiar to HSBC's special credits branch located in Vancouver, doubtless performed many useful tasks, but as the known entity and more experienced partner, his main raison d'être was to liaise with and provide comfort to HSBC.

55 Both Messrs. Rodriquez and Keeble signed (and presumably carefully prepared or, at a minimum, carefully considered) all twenty of the Monitor's reports to the court. Report preparation underwent three stages. The initial drafts were prepared by the Winalta Group (at the Monitor's request). Next, a review was conducted by one or two of the Monitor's managers. Finally, the reports were delivered to Messrs. Rodriquez and Keeble.

56 The Monitor's accounts do not specify what portion of the fees charged for Mr. Rodriquez ($127,000.00) and for Mr. Keeble ($209,992.00) relates solely to report preparation. Similarly, the Monitor's accounts do not aid in determining if there was any other duplication of work by the two partners.

57 The Winalta Group is entitled to know exactly what it is paying for. That said, it thoroughly questioned the Monitor about the respective roles of Messrs. Rodriquez and Keeble. No evidence was presented to show that there was, in fact, any duplication or that any of the work that they undertook was unreasonable. These charges, therefore, are approved.

4. The administration charge

58 The Winalta Group contends that the Monitor's $50,000.00 administration charge (calculated as six percent of all accounts) in lieu of "customary disbursements" is an unfair "upcharge" with no correlation to reality. In response, The Monitor submits that the Winalta Group implicitly agreed to the administration charge. It further argues that the Winalta Group bears the onus of showing that this charge is offside current industry practice.

59 The Monitor did not inform the Winalta Group of its intention to charge on the same basis as it had billed HSBC. It simply picked up as the *CCAA* monitor where it had left off as HSBC's private monitor. The Monitor points to the Forbearance Agreement, which referred to the administration fee in the Monitor's retainer letter with HSBC as some evidence of the Winalta Group's knowledge and implicit agreement to pay any administration charge in the *CCAA*.

60 Under the terms of HSBC's security, the Winalta Group was liable for the charges of the private monitor. However, it was not a party to the agreement between Deloitte & Touche Inc. and HSBC. In any event, there is no basis for imputing any agreement on the part of the Winalta Group to pay the administration charge in the context of Deloitte & Touche Inc.'s work as *CCAA* Monitor. Even if it were otherwise, I am far from satisfied that such charges are fair and reasonable in all of the circumstances.

61 A "disbursement" is defined as "the payment of money from a fund" or "a payment, especially one made by a solicitor to a third party and then claimed back from the client" (*Oxford Dictionaries Online*).

62 The administration charge may be more or less than the Monitor's actual disbursements. While it may be convenient for the Monitor to apply a flat percentage charge rather than keep track of disbursements, that does not mean that it is fair and reasonable. Indeed, even if a *CCAA* debtor expressly agreed to the administration charge, such agreement and the circumstances in which it was made simply are factors that the court should consider in determining whether the administrative charge is fair and reasonable in all of the circumstances.

63 The Monitor has failed to establish that the administration charge is fair and reasonable in all of the circumstances. The Monitor shall issue an account to the Winalta Group for actual disbursements incurred within 60 days. Whether the Winalta Group will be pleasantly surprised or disappointed will then be seen.

64 The disbursement account will be prepared at the Monitor's own cost.

5. Mathematical errors

65 The parties have resolved the alleged mathematical errors.

6. Internal quality reviews

66 At the hearing of this matter, the Monitor quite properly conceded that the $10,000.00 charged for internal quality reviews should be deducted from its Fees.

B. Breach of Fiduciary Duty/Conflict of Interest

67 A monitor appointed under the *CCAA* is an officer of the court who is required to perform the obligations mandated by the court and under the common law. A monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders.

68 Kevin P. McElcheran describes the monitor's role in the following terms in *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005) at p. 236:

> The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

69 The Winalta Group contends that the Monitor breached its fiduciary duty (and implicitly placed itself in a conflict of interest position) by providing HSBC with the September NVR without its knowledge or consent. The onus of establishing the allegation of breach of fiduciary duty lies with the Winalta Group.

70 The September NVR was sent to HSBC via e-mail. It included a summary of the Monitor's analysis and backup spreadsheets for the following two scenarios:

(1) the bank appoints a receiver for all companies on September 7, 2010;

(2) the bank supports the company through the *CCAA* and is paid out on October 31, 2010 through a refinancing of the assets of Oilfield and Carriers.

The author of the e-mail asked the recipient to confirm his availability to discuss the scenarios with Messrs. Rodriquez and Keeble the next day.

71 Mr. Keeble's responses to questioning, filed March 18, 2011, reference three other reports from the Monitor to HSBC dated June 7, August 12, and August 18, 2010, all of which discussed the estimated value of HSBC's security in various scenarios (Other NVRs). The Winalta Group neither complained of nor referred to the Other NVRs in its evidence or submissions. In the absence of any complaint and evidence, the sole focus of this inquiry is on the September NVR.

72 The Winalta Group's complaints concerning the September NVR are that it was prepared and issued without its knowledge and it lead to HSBC's refusal to fund its takeout financing costs. Articulated in the language used to describe a *CCAA* monitor's duties, the Winalta Group is saying that the Monitor favoured HSBC (placing it in an advantageous position over other creditors) and failed to avoid an actual or perceived conflict of interest.

73 Accusations of bias and breach of fiduciary duty can harm the public's confidence in the insolvency system and, if unfounded, the insolvency practitioner's good name. A careful investigation into allegations of misconduct is, therefore, essential. The process should entail the following steps:

1. A review of the monitor's duties and powers as defined by the *CCAA* and court orders relevant to the allegation.

2. An assessment of the monitor's actions in the contextual framework of the relevant provisions of the *CCAA* and court orders.

3. If the monitor failed to discharge its duties or exceeded its powers, the court should then:

(a) determine if damage is attributable to the monitor's conduct, including damage to the integrity of the insolvency system; and

(b) ascertain the appropriate fee reduction (bearing in mind that other bodies are charged with the responsibility of ethical concerns arising from a *CCAA* monitor's conduct).

Step 1: Reviewing the monitor's duties and powers as defined by the CCAA and court orders relevant to the allegation

(a) The monitor's fiduciary and ethical duties

74 Section 25 of the *CCAA* provides that:

25. In exercising any of his or her powers in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the *Code of Ethics* referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.

75 Section 13.5 of the *Bankruptcy and Insolvency Act*, 1985 R.S.C. 1985, c. B-3 ("*BIA*") provides that a trustee shall comply with the prescribed *Code of Ethics*. The *Code of Ethics* is found in Rules 34 to 53 of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 under the *BIA*. These Rules provide in part that:

(a) Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in administration of the Act (Rule 34).

(b) Trustees shall be honest and impartial and shall provide interested parties with full and accurate information as required by the Act with respect to the professional engagements of the trustees (Rule 39).

(c) Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the opinion of an informed person to impair, their professional judgment (Rule 44).

76 In addition, *CCAA* monitors are subject to the ethical standards imposed on them by their governing professional bodies.

77 A recurring theme found in the case law is that the monitor's duty is to ensure that no creditor has an advantage over another (see *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3d) 1 (N.B. C.A.), at 8; *Laidlaw Inc., Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]) at para. 2; *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) at para. 20; and *843504 Alberta Ltd., Re*, 2003 ABQB 1015 (Alta. Q.B.) at para. 19, *843504 Alberta Ltd., Re* (2003), 351 A.R. 222 (Alta. Q.B.)). The following observations made by Farley J. in *Confederation Treasury Services Ltd., Re* (1995), 37 C.B.R. (3d) 237 (Ont. Bktcy.), at 247 about a bankruptcy trustee's duty of impartiality resonate:

> The appointment is not a franchise to make money (although a trustee should be rewarded for its efforts on behalf of the estate) nor to favour one party or one side. The trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate.

78 In his article, *Conflicts of Interest and the Insolvency Practitioner: Keeping up Appearances* (1996) 40 C.B.R. (3d) 56, Eric O. Peterson tackles the issue of conflict of interest in circumstances where an insolvency practitioner wears two hats. At p. 74, he states:

> ... The duties of a *CCAA* monitor are defined by standard terms in the court order, and are typically owed to the court, the creditors and the debtor company. Therefore, a private monitor or receiver would have a potential conflict of interest in accepting an engagement as *CCAA* monitor of the same debtor. The engagements are at cross purposes.

79 Mr. Peterson cautions (at p. 75) that even if an experienced business person consents to the insolvency practitioner wearing two hats, the insolvency practitioner should bear in mind Mr. Justice Benjamin Cardozo's statement that a fiduciary must be held to something stricter than the morals of the marketplace.

80 Not surprisingly, there may be heightened sensitivity about the work of a *CCAA* monitor who has chosen to wear two hats. Unfounded accusations may be made due to an honestly held suspicion about where the monitor's loyalties lie rather than out of spite or malice.

81 Common sense dictates that *CCAA* monitors should conduct their affairs in an open and transparent fashion in all of their dealings with the debtor and the creditors alike. The reason is simple. Transparency promotes public confidence and mitigates against unfounded allegations of bias. Secrecy breeds suspicion.

82 Public confidence in the insolvency system is dependent on it being fair, just and accessible. Bias, whether perceived or actual, undermines the public's faith in the system. In order to safeguard against that risk, a *CCAA* monitor must act with professional neutrality, and scrupulously avoid placing itself in a position of potential or actual conflict of interest.

(b) The Monitor's legislated and court ordered duties

83 One of a monitor's functions is to serve as a conduit of information for the creditors. This did not, however, give the Monitor here *carte blanche* to conduct the analysis in the September NVR and issue it to HSBC. Such authority must be found in the *CCAA* or the court orders made in the proceeding.

84 Subsections 23(h) and (i) of the *CCAA* deal with the monitor's duty to report to the court. Subsection 23(h) requires the monitor to promptly advise the court if it is of the opinion that it would be more beneficial to the creditors if *BIA* proceedings were taken. Section 23(i) requires the monitor to advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the debtor and its creditors. Typically, this report is shared with the creditors just before or at the creditors' meeting to vote on the proposed compromise or arrangement.

85 The provisions in the Initial Order describing the Monitor's reporting functions are central to this inquiry. They must be read contextually.

86 HSBC was an unaffected creditor that continued to provide financing to the Winalta Group by an operating line of credit and overdraft facility. There was no DIP financing as HSBC was, in effect, the interim financier. Clause 22 of the Initial Order speaks to HSBC's role as a financier during the *CCAA* process.

87 Clause 28(d) of the Initial Order reads, in part, as follows:

> 28. The Monitor, in addition to its prescribed rights and obligations under the *CCAA*, is hereby directed and empowered to:
>
> (d) advise the Applicants in their preparation of the Applicant's cash flow statements and reporting required by HSBC or any DIP lender, which information shall be reviewed with the Monitor and delivered to HSBC or any DIP lender and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by HSBC and any DIP lender.
>
> [Emphasis added.]

88 Clause 30 of the Initial Order states:

> The Monitor shall provide HSBC and any other creditor of the Applicants' and any DIP Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by the Court or on such terms as the Monitor and the Applicants may agree. [Emphasis added.]

89 The Monitor's capacity to report to HSBC was limited to the parameters of these provisions.

Step 2: Assessing the Monitor's actions

(a) Principles of interpretation

90 The interpretation of clauses 28(d) and 30 of the Initial Order lies at the heart of this stage of the analysis. Before undertaking that task, it is helpful to review the principles governing interpretation of the *CCAA* and *CCAA* orders.

91 In *Smoky River Coal Ltd., Re*, 2001 ABCA 209, 299 A.R. 125 (Alta. C.A.), the Alberta Court of Appeal cautioned that as *CCAA* orders become the roadmap for the proceedings, they must be drafted with clarity and precision, and the purpose of the legislation must be kept at the forefront in both drafting and interpreting *CCAA* orders (at para. 16).

92 The issue in *Smoky River Coal Ltd.* was the scope of a provision in an order that did not define a post-petition trade creditor's charge. The court stressed (at para. 17) the importance of clearly defining the scope of charges created by the order. Since the parties had failed to do so, the court balanced the parties' interests, presuming that creditors would understand the purpose of the *CCAA* and would expect that the disputed charge would be interpreted to accord with the

commercial reality that the debtor would be operating in its ordinary course. In the circumstances, the court interpreted that requirement on "commercially reasonable terms" (at para. 19).

93 The provision at issue in *Afton Food Group Ltd., Re* (2006), 21 C.B.R. (5th) 102, 18 B.L.R. (4th) 34 (Ont. S.C.J.) was the scope of a director's and officers' indemnification. At para. 23, Spies J. ruled that the *Smoky River Coal Ltd.* considerations (a liberal interpretation, consideration of the purpose of the *CCAA*, the attempt to balance the parties' interests, and a commercially reasonable interpretation) apply only if the provision is ambiguous, or if there is a gap or omission. In all other circumstances, the court should:

> (i) assume that the parties carefully drafted the terms of the order;
>
> (ii) assume that the terms of the order reflect the parties' agreement within the parameters imposed by the court, and that such agreement was codified in the order and approved by the court; and
>
> (iii) interpret a clear and unambiguous provision in accordance with its plain meaning.

94 The different approaches employed by the courts in *Smoky River Coal Ltd.* and *Afton Food Group Ltd.* are easily reconciled given the degree of ambiguity in and the nature of the provisions being interpreted in each case.

95 In my view, the interpretation of *CCAA* orders requires a case-specific and contextual approach. In interpreting *CCAA* orders, the court should consider the objects of the *CCAA*, recognizing that the importance of the objects will vary with the circumstances of the case at bar. Other considerations include the degree of clarity of the provision, its nature, and its consequences for affected parties.

96 I adopt the reasoning in *Afton Food Group Ltd.* that the words of the provision should be given their plain and ordinary meaning, that the court is entitled to assume that the terms of orders [granted as presented] reflect negotiated agreements, and that the terms were crafted carefully. I add to this that the provision being interpreted should be read in the context of the order as a whole, not in isolation.

97 The modern approach to statutory analysis was summarized as follows by Elmer A. Driedger in his text, *The Construction of Statutes*, 2d ed.(Toronto: Butterworths, 1983) at p. 87, as cited in many cases, including *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(b) Interpreting the relevant provisions of the Initial Order and the CCAA

98 The object of the *CCAA* is to enable insolvent companies to carry on business in the ordinary course or to otherwise deal with their assets so that a plan of arrangement or compromise can be prepared, filed and considered by their creditors and the court. While this object does not play as significant a role in interpreting clauses 28(d) and 30 of the Initial Order as it might in other cases, nevertheless it is relevant.

99 Section 23 of the *CCAA* sets out certain reporting requirements for a court- appointed monitor. None of these authorized the Monitor in this case to provide HSBC with the analysis contained in the September NVR, without the knowledge and consent of the Winalta Group or the court.

100 Clause 28(d) of the Initial Order empowers and obliges the Monitor to give advice to the Winalta Group about its preparation of cash flow statements and reports required of it by HSBC or any DIP lender. It is clear from the plain and ordinary language of the provision that it applies to instances where the Winalta Group reports to HSBC. It is the Winalta Group's job to do the reporting. The Monitor's job is to assist the Winalta Group and to review the reports

before they are delivered to the relevant lender. A contrary finding would render the words "and reviewed with the Monitor" nonsensical.

101 If there is any ambiguity in clause 28(d), it is about who is to deliver the reports. The use of the word "and" after the words "shall be reviewed with the Monitor" is open to the interpretation that the Monitor is to deliver the reports. As nothing turns on that point, I need not decide it.

102 I am entitled to and do assume that the parties' affected by clause 28(d) carefully crafted that provision and agreed to its terms. Had they intended the Monitor to undertake the analysis contained in the September NVR and to provide it to HSBC, they would have said so. Whether such a provision would have been granted is another question altogether.

103 This interpretation is supported by contrasting clause 28(d) with the unambiguous language of clause 30, which refers to the Monitor providing information to HSBC (given to the Monitor by the Winalta Group and declared by it to be non-confidential). Unlike clause 28(d), clause 30 absolves the Monitor of responsibility and liability for its acts. Presumably, the parties would have included similar protection in clause 28(d) if it was intended that the Monitor have the authority it claims.

104 Interpreting clause 28(d) as referring to reports by the Winalta Group rather than the Monitor also is supported by reading the Initial Order as a whole. Clause 22 speaks to HSBC continuing to provide operating and overdraft facilities to the Winalta Group. As HSBS, in effect, is an interim lender, it is logical that the Winalta Group is obliged under the Initial Order to provide it (and any DIP lender) with cash flow statements and any other required reports on a weekly basis (after having the information reviewed by the Monitor, presumably for accuracy).

105 Finally, this interpretation is supported by reference to the object of the *CCAA*, which is to have debtors remain in and control their business operations throughout the term of the restructuring. The debtor is the party that reports to its interim lenders.

106 The Monitor's interpretation of clause 28(d) as authorizing it to prepare and deliver the September NVR to HSBC does not withstand scrutiny. That clause neither expressly nor implicitly authorized the Monitor's conduct in that regard. If the Monitor had any hesitation about the scope of its authority under this clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

107 Clause 30 is unambiguous. To a degree, it supports the Monitor's action as its plain and ordinary language permits the Monitor to release to HSBC (or any DIP lender) information provided by the Winalta Group which it did not declare to be confidential. The Monitor's notes to the September NVR refer to estimated asset realizations, closing dates for certain transactions, and accounts receivable. Presumably, the Monitor obtained that information from the Winalta Group.

108 However, the Monitor's estimate of receivership fees, its various calculations, and its analysis stand on a completely different footing. By definition, that is not "information provided by the Winalta Group." Clause 30 does not authorize the Monitor to take information legitimately obtained from the Winalta Group and to use it as the basis for preparing and issuing the type of analysis contained in the September NVR report. Presumably, this provision (which was granted as presented) reflects a negotiated agreement and was carefully crafted.

109 The Monitor says that it would have prepared and given any creditor the type of analysis contained in the September NVR on demand, irrespective of the creditor's stake. That may be so (or not), but it does not mean that it is authorized or appropriate for it to do so, particularly without the knowledge and consent of the Winalta Group.

110 The Monitor's interpretation of clause 30 as authorizing it to prepare and deliver the September NVR to HSBC fails to withstand full scrutiny. Clause 30 did not authorize the Monitor to provide anything over and above the information provided by the Winalta Group. Again, if the Monitor had any hesitation about the scope of its authority under this

clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

111 Read contextually, neither the express language nor the spirit of clauses 28(d) and 30 of the Initial Order authorized the Monitor to issue certain of the information contained in the September NVR. Its authority was limited to relaying non-confidential raw data obtained from the Winalta Group. HSBC could then have interpreted the data (alone or with the assistance of another insolvency practitioner).

112 The Monitor was not transparent in its dealings with HSBC surrounding the September NVR.

113 Regrettably, and despite any well intentioned motivation that might be imputed to the Monitor, I find that theMonitor lost sight of the bright line separating its duties as an impartial court officer and a private consultant to HSBC when it provided HSBC with the analysis in the September NVR, thereby creating a perception of bias.

114 In circumstances where the Monitor ought to have been keenly attuned to heightened sensitivity about perceptions of bias, it should have sought clarification of the reporting provisions in the Initial Order before conducting the analysis in the September NVR and issuing it to HSBC. The Monitor failed to recognize the need to do so. Instead, it elected to rely on an unsustainable interpretation of clauses 28(d) and 30 of the Initial Order.

Step 3

(a) Determining if damage is attributable to the Monitor's conduct, including damage to the integrity of the insolvency system

115 HSBC's refusal to fund the Winalta Group's costs for procuring takeout financing appears to have fallen on the heels of it receiving the September NVR. Whether that was a mere coincidence or not has not been established by the Winalta Group.

116 No authority was cited for the proposition that the court is entitled to reduce a court-appointed monitor's fees on a basis "akin to punitive damages." However, *Sally Creek Environs Corp., Re*, 2010 ONCA 312, 67 C.B.R. (5th) 161 (Ont. C.A.) is informative, although distinguishable on its facts.

117 *Murphy* concerned the reduction of a trustee in bankruptcy's fees for misconduct where the relationship between the trustee and largest unsecured creditor had spoiled. The trustee rationalized acting without the approval of two inspectors he considered to be the "handmaidens" of the largest unsecured creditor. At times, the trustee acted contrary to the inspectors' express wishes. Concluding that the trustee had sided against it, the creditor complained to various regulatory bodies, alleging serious wrongdoing and mismanagement by the trustee.

118 On taxation, the registrar found the trustee guilty of 15 acts of misconduct ranging from multiple breaches of statutory duties to lying to regulatory bodies about the conduct of the estate. The registrar reduced the trustee's fees from $240,000.00 to $1.00 and disallowed or reduced many disbursements. The registrar's decision was appealed to Ontario's Superior Court of Justice and, in turn, to the Ontario Court of Appeal, which directed (at para. 125) that in preventing unjustifiable payments, the court should begin by considering discrete deductions for misconduct that cost the estate quantifiable amounts. The court also directed (at para. 126) that the court should consider the degree and extent of the misconduct, and its effect on the estate, the affected creditors, and the integrity of the bankruptcy process in general.

119 These directives apply equally to a court-appointed *CCAA* monitor.

120 In the present case, there is no quantifiable loss, nor is there evidence of damage to the estate. However, the Monitor's failure to scrupulously avoid a conflict of interest negatively impacts the integrity of the insolvency system.

(b) Ascertaining the appropriate fee reduction

121 There is very little guidance on how the court is to assess an appropriate fee reduction where there is no quantifiable loss (*Nelson, Re* (2006), 24 C.B.R. (5th) 40 (Ont. S.C.J. [Commercial List]) at para. 31 (Ont. S.C.J.)).

122 Reducing a court-appointed officer's fee is not intended to be punitive, but rather is an expression of the court's refusal to endorse the misconduct (*Murphy* at para. 112; *Nelson, Re* at para. 31).

123 Placing a value on the erosion of the public's confidence is an extremely difficult task, particularly given that the object of the exercise is not to punish the offending party. Arbitrarily choosing a figure as a means of refusing to endorse the misconduct is unfair. In the circumstances of this case, I am of the view that the fairer approach is to deprive the Monitor of any charges associated with its misconduct.

124 Accordingly, the Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with its analysis in the September NVR, following which I will determine the appropriate fee reduction. Should the Monitor fail to provide this information, I will have no alternative but to reduce the Fee otherwise.

IV. Conclusions

125 The onus on this application rested with the Monitor to establish that its Fee was fair and reasonable. It has fallen short of doing so in a number of respects.

126 The Monitor exceeded it statutory and court ordered authority by conducting the analysis in the September NVR and providing it to HSBC. The Monitor failed to act with transparency in its dealings with its former client and blurred the bright line dividing its duties as a court-appointed *CCAA* monitor and a private monitor.

127 In the result:

(i) The Monitor will be afforded a further opportunity to provide better evidence concerning the separate charges for clerical, administrative and IT staff, as discussed above, failing which the charges are disallowed.

(ii) The Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with the analysis in the September NVR, failing which I will otherwise reduce the Fee.

(iii) All affidavits will be prepared at the Monitor's own cost, and the costs of any further application will be addressed at the appropriate time.

(iv) The administration charge is disallowed, and the Monitor will issue an account for actual disbursements within 60 days.

• +

(v) The $10,000.00 charged for internal quality reviews is to be deducted from the Fee.

(vii) Subject to reductions for work connected with the analysis in the September NVR, charges for (non-partner and partner) professional services are approved.

(viii) If the parties cannot agree on costs, they may speak to me at the next application or within 120 days, whichever occurs first.

Order accordingly.

End of Document

TAB 17

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Jakub Adamski

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9.1 INTRODUCTION

§9.1 This chapter deals with three related concerns. The first arises from the fact that "necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose on them".[1] This concern finds expression in the recognition of the importance of the parties' expectations, in devices like interpretation *contra proferentem*, in the imposition of duties of good faith, in the concept of unconscionability, in the clumsy tool of "fundamental breach" — now perhaps no longer with us[2] — and in miscellaneous pockets of (originally) equitable concerns like that for penalties and forfeitures.

§9.2 The second concern arises when an agreement, perfectly fair when made, nevertheless permits one of the parties to abuse the power that the agreement conferred on it. Such a power may be controlled by standards of good faith conduct, a doctrine of unconscionability and by the imposition in the contractual context of concepts like natural justice, *i.e.*, the idea that a decision may only be made when standards of procedural fairness have been met.

§9.3 The third is expressed in common law and statutory rules that, for reasons of public (or social) policy, limit the arrangements that contracting parties may make. Included in this category are the imposition in contractual relations of duties similar in some respects to fiduciary duties and the expression of the traditional common law concern for "covenants in restraint of trade". Some of these concerns are reflected in legislation intended principally to protect consumers, but most are common law developments. The third concern also includes the traditional category of minors' contracts and contracts made by persons of unsound mind.

§9.4 Each of these concerns raises fundamental issues of "freedom of contract" and its corollary, "sanctity of contract", and what both those slogans are believed to connote. One of the greatest nineteenth-century equity judges, Sir George Jessel M.R.,[3] said:

> [I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred ...[4]

Another great nineteenth-century judge, Lindley M.R., said much the same thing:

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1 Lord Nottingham in *Vernon v. Bethell* (1762), 2 Eden. 110, at 113, 28 E.R. 838, at 839 (Ch.).

2 This fact may be the result of the decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, 315 D.L.R. (4th) 385, [2010] S.C.J. No. 4 (S.C.C.).

3 For a profile of Jessel M.R., see A.L. Goodhart, *Five Jewish Lawyers of the Common Law* (London: Oxford University Press, 1949).

4 *Printing and Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462, at 465.

> If there is one thing more than another which is essential to the trade and commerce of this country it is the inviolability of contracts deliberately entered into; and to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, *prima facie* at all events, contrary to the interests of any and every country.[5]

§9.5 Even in 1875 or 1899, when belief in the desirability of "freedom of contract" and "sanctity of contract" may have been at its apogee, neither Jessel M.R.'s nor Lindley M.R.'s statements could have been taken as support for an argument that there should be no controls on the contracts that would be enforced by the courts. Both the common law and equity limited the sanctity of contract (and necessarily freedom to contract), even when the parties were "men of full age and competent understanding". There were three situations where the common law would intervene. The first was the common law limitation on covenants in restraint of trade; until recently, such covenants were *prima facie* void and unenforceable.[6] The second class was the equitable limit on the enforceability of penalties and forfeitures.[7] The venerable limitation on the power of creditors in the development of the mortgagor's equity of redemption is in the same category. The third class consisted of those common law rules that prevented those pursuing "common callings", innkeepers and common carriers principally, from improperly discriminating against potential customers.[8] These situations all provided examples where the parties' power to enforce the contracts that they had made (or a party's freedom to refuse to contract with someone it did not like) would be limited to serve other ends.

§9.6 Nevertheless, what Jessel M.R. and Lindley M.R. had in mind was that the contracts made in the conditions that they described were to be enforced by the courts without considering whether the bargain was now good for both parties and, perhaps especially, without conferring anything like a dispensing power — as would now be found in the doctrine of unconscionability — on the courts. Moreover, implicit in the attitude of people like Jessel M.R. and Lindley M.R. to the enforcement of contracts was the idea that any state control of contracts would be a restriction of the freedom of the parties to make such deals as seem good to them and that much later such control could impair market efficiency. In this sense, freedom of contract entailed sanctity of contract.

§9.7 Since the enforcement of a contract always entails the exercise of state power — a court being as much an expression of such power as a legislature —

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5 *E. Underwood & Son Ltd. v. Barker*, [1899] 1 Ch. 300, at 305 (C.A.).

6 See section 9.5 below.

7 See section 9.4.2 below.

8 See, *e.g.*, *Constantine v. Imperial Hotels Ltd.*, [1944] 2 All E.R. 171 (K.B.) where a hotel was held liable (in nominal damages) for denying accommodation to a West Indian cricket player. See also "The Antidiscrimination Principle in the Common Law" (1989) 102 Harv. L. Rev. 1993. In return, of course, the innkeeper or carrier could assert a common law lien against the goods of the customer.

TAB 18

THE LAW OF CONTRACT IN CANADA

by

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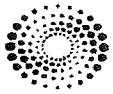

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reference has been made. By doing so, the courts were able to decide whether the parties had objectively agreed upon the substance and identity of the subject-matter of a contract, even though they were under different misapprehensions as to some characteristic or quality of that subject-matter.

Whether the kind of mistake that is involved is described as "mutual" or as "common", it is suggested that, in the final analysis, the rationale for invalidating the alleged contract at common law is the same: was there any error as to the intention to contract, or, putting this slightly differently, did the contracting party seeking to avoid the contract for mistake obtain the consideration for which he had bargained?[67] The answers to these questions involve examination of the nature of "fundamental" mistake, and its application to the facts in issue.

(ii) *Unilateral mistake*

Little, if any, theoretical or practical effect may flow from the differentiation of common and mutual mistake. However, it is important to distinguish these various kinds of bilateral mistake from unilateral mistake, where only one party is in error.[68] Here it may be vital to the final result whether the party not in error is aware or unaware of the other party's mistake.[69] If the party not in error knows or ought to know of the other's mistake, any purported agreement between them may not be enforceable in equity (whatever its effects may be at common law), on the ground that equity will not permit a party to take advantage of the error in offering or accepting by the other party.[70] The rationale of such cases is that equity penalizes

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67 There must be reasonable grounds for the mistaken belief: *478649 Ontario Ltd. v. Corcoran* (1996), 2 R.P.R. (3d) 187 (Ont. Gen. Div.); affirmed (1997), 14 R.P.R. (3d) 281 (Ont. C.A.); leave to appeal refused (1998), 227 N.R. 397 (note) (S.C.C.).

68 As in *Big Quill Resources Inc. v. Potash Corp. of Saskatchewan Inc.* (2000), 195 Sask. R. 144 (Sask. Q.B.); affirmed in respect of rectification (2001), 203 Sask. R. 298 (Sask. C.A.). Contrast *Farm Credit Corp. v. Slater* (2000), 194 Sask. R. 315 (Sask. Q.B.); *Cozart v. Cozart* (2007), 296 Sask. R. 183 (Sask. Q.B.). See McCamus, "Mistaken Bids and Unilateral Mistaken Assumptions: A New Solution for an old Problem?" (2008) 87 Can. Bar Rev. 1.

69 Hence, there was no unilateral mistake as to the number of games in the schedule for 1974 in *Re Gabriel v. Hamilton Tiger-Cat Football Club Ltd.* (1975), 57 D.L.R. (3d) 669 (Ont. H.C.), since the manager of the club did not know that the player was mistaken as alleged; compare *Sign-O-Lite Signs Ltd. v. Windsor Plywood (Kelowna) Ltd.* (1988), 61 Alta. L.R. (2d) 21 (Alta. Q.B.). This passage was referred to in *Commercial Credit Corp. v. Newall Agencies Ltd.* (1981), 126 D.L.R. (3d) 728 at 733 (B.C.S.C.) *per* Hyde L.J.S.C. The entire paragraph is quoted by Kiteley J. in *Toronto Transit Commission v. Gottardo Construction Ltd.* (2003), 68 O.R. (3d) 356 at 373 (Ont. S.C.J.); reversed on appeal (2005), 257 D.L.R. (4th) 539 (Ont. C.A.); leave to appeal refused, 223 O.A.C. 398 (note) (S.C.C.).

70 Equity will set aside the contract: *First City Capital Ltd. v. B.C. Building Corp.* (1989), 43 B.L.R. 29 (B.C.S.C.); *256593 B.C. Ltd. v. 456795 B.C. Ltd.* (1999), 171 D.L.R. (4th) 470 (B.C.C.A.); *Moss v. Chin* (1994), 120 D.L.R. (4th) 406 (B.C.S.C.); rescission of settlement of action for personal injury made after injured person died (which ended her claim). Or will dismiss a claim for specific performance of an alleged contract to sell land where the vendor was mistaken as the purchaser knew: *Santini v. Catenacci* (1991), 21 R.P.R. (2d) 111 (Ont. Gen. Div.); compare *Glasner v. Royal LePage Real Estate Services Ltd.* (1992), 28 R.P.R. (2d) 72 (B.C.S.C.). Or will force a party to pay for items not included in contract in error, *Pressure Pipe Steel Fabrication Ltd. v. W&J Construction Ltd.* (2001), 197 Nfld. & P.E.I.R. 280 (Nfld. T.D.). This sentence was quoted by Williams J. in *Canadian Imperial Bank of Commerce v. Wilson* (1997), 35 B.L.R. (2d) 273 at 281-282 (Ont. Gen.

unconscionable conduct, whether it actually constitutes fraud or involves something amounting to fraud in the view of equity.[71] It must be unfair, unjust or unconscionable to enforce or uphold the contract.[72]

It is not necessary for the party seeking to avoid the contract on the ground of mistake to prove that the other party caused or induced the mistake (although if such causation is established it might lead to rescission for fraud, or for innocent misrepresentation[73]). As long as the unmistaken party knows of the mistake, without having caused it, that party cannot resist a suit for rectification on the grounds of mistake.[74] The same will apply if the other party had good reason to know of the mistake and to know what was intended.[75] The converse of the proposition as to knowledge of

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Div.).

If no advantage was taken there will be no operative mistake; the contract will be upheld: *Brasso Nissan Ltd. v. Misfeldt* (2001), 291 A.R. 351 (Alta. Q.B.).

71 *Ibid.*; *BCE Dev. Corp. v. Cascade Invts. Ltd.* (1987), 55 Alta. L.R. (2d) 22 (Alta. Q.B.); affirmed (1987), 56 Alta. L.R. (2d) 349 (Alta. C.A.); leave to appeal refused (1988), 58 Alta. L.R. (2d) xlix (note). See *Goodger v. Goodger* (1997), 33 R.F.L. (4th) 397 (B.C.S.C.); *Apex Corp. v. Ceco Developments Ltd.* (2005), 387 A.R. 211 (Alta. Q.B.); varied (2008), 429 A.R. 110 (Alta. C.A.). This paragraph was quoted by Power J. in *Marthaller v. Lansdowne Equity Venture Ltd.* (1996), 40 Alta. L.R. (3d) 111 at 121 (Alta. Q.B.); reversed (1997), 200 A.R. 226 (Alta. Q.B.).

72 *Craig Estate v. Higgins* (1993), [1994] 2 W.W.R. 595 at 601 (B.C.S.C.) *per* Boler J. See *Blackburn v. Eager* (2001), 190 N.S.R. (2d) 347 (N.S.S.C.); affirmed 2002 CarswellNS 123 (N.S.C.A.) where the contract was set aside for unconscionability, not mistake. For the grounds on which unilateral mistake will support a claim for rescission, see *Toronto Transit Commission v. Gottardo Construction Ltd.* (2005), 77 O.R. (3d) 269 (Ont. C.A.).

73 *Kerr v. PanCanadian Petroleum Ltd.* (2004), 253 Sask. R. 262 (Sask. Q.B.), above, note 7. In *Walton v. Landstock Invts. Ltd.* (1976), 72 D.L.R. (3d) 195 at 199 (Ont. C.A.) Houlden J.A. suggested that even though there was a valid contract, if a term was added to a contract by an innocent misrepresentation, the party responsible for the misrepresentation was not entitled to rely upon *that* term.

74 *Nfld. Liquor Corp. v. N.A.P.E.* (1980), 22 Nfld. & P.E.I.R. 62 (Nfld. T.D.), where a party to a collective agreement failed to point out to the other party a clause granting benefits to employees to which the employer had not agreed in the negotiations; the employer was entitled to rectification. Compare *Beverley Motel (1972) Ltd. v. Klyne Properties* (1981), 126 D.L.R. (3d) 757 (B.C.S.C.), reconveyance ordered of property sold by vendor who made a mistake as to scope of offer, known to purchaser. Compare *Hayes v. Butler* (1982), 40 Nfld. & P.E.I.R. 43 (Nfld. Dist. Ct.), signature to contract void because of mistake by party signing, therefore the other party to contract obtained no title to land which was the subject of the contract and was a trespasser. But see *Avco Financial Services Realty Ltd. v. Tracey* (1979), 59 N.S.R. (2d) 333 (N.S.T.D.). Sometimes the court will apply the doctrine of estoppel to prevent the unmistaken party from taking advantage of the mistake: *Becker Milk Co. v. Goldy* (1977), 82 D.L.R. (3d) 598 (Ont. H.C.); affirmed (1978), 87 D.L.R. (3d) 608n (Ont. C.A.). The first two sentences of this paragraph were quoted in *Montreal Trust Co. v. Maley* (1992), 99 D.L.R. (4th) 257 at 262 (Sask. C.A.); leave to appeal refused (1992), 102 D.L.R. (4th) vii (note) (S.C.C.), in which rectification was granted of a contract to buy land from the plaintiff when, by mistake, as known to the defendant, oil leases were not reserved from this sale, although it was the plaintiff's general policy to do so. From "As long as the unmistaken party" to "nor rectification will be possible" was quoted by Rouleau J.A. in *Toronto Transit Commission v. Gottardo Construction Ltd.* (2005), 257 D.L.R. (4th) 539 at 547 (Ont. C.A.); leave to appeal refused 2006 CarswellOnt 2544 (S.C.C.).

75 *Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.* (1996), 28 O.R. (3d) 327 at 336-338 (Ont. C.A.); leave to appeal refused (1996), 138 D.L.R. (4th) vii (note) (S.C.C.) *per* Robins J.A. where the circumstances did not justify rectification of the contract. Compare *Saskatchewan Wheat Pool v. Grain Services Union* (2003), 237 Sask. R. 250 (Sask. Q.B.), employer did not know nor ought he to have known that union misunderstood significance of contract;

the other party's mistake is that if the unmistaken party is ignorant of the other's mistake the contract will be valid and neither rescission nor rectification will be possible.[76] Such was the case in *Commercial Credit Corporation v. Newall Agencies Ltd.*[77] The lessor of an automobile, at the lessee's request, indicated the price at which the lessee could purchase the vehicle. The price was erroneously understated. That fact was unknown to the lessee, who paid the stipulated amount and took a transfer of title to the vehicle. It was held that the lessor who sold the vehicle was not entitled to rely on the doctrine of mistake and claim the difference between the sale price and the correct price.[78]

The same result can be found to have been reached in what have been called the "tender" cases.[79] If the party calling for tenders knew of the tenderer's mistake at the time the tender was accepted, the purported acceptance did not produce a valid binding contract. The only situation of this kind where this result was not reached was the *Ron Engineering* case,[80] where the property owner did not know of the tenderer's mistake at the time of acceptance, and where, moreover, the Supreme Court held that the tender was a valid acceptance, albeit founded on mistake, of the property owner's offer contained in the tender advertisement.

Ignorance of the other party's mistake will not protect the non-mistaken party from the possibility of equitable interference, if the non-mistaken party ought to have been aware of the mistaken party's belief, *i.e.*, where the non-mistaken party has constructive notice of the other party's error.[81]

Garrett v. Cameco Corp. (2001), 214 Sask. R. 161 (Sask. Q.B.), employer was aware of alleged mistake; *Bogue v. Bogue* (1999), 126 O.A.C. 236 at 242 (Ont. C.A.) *per* Rosenberg J.A.

76 See *Works v. Works* (2002), 206 N.S.R. (2d) 292 (N.S.S.C.) settlement between husband and wife enforced although husband mistaken, by reason of legal advice, because wife did not know of husband's error. The passage from the beginning of the paragraph to here was quoted by Power J. in *Marthaller v. Landsdowne Equity Venture Ltd.* (1996), 40 Alta. L.R. (3d) 111 at 120 (Alta. Q.B.); reversed (1997), 52 Alta. L.R. (3d) 329 (Alta. C.A.). From "if the unmistaken party" to the end of the sentence was quoted by Laing J. in *Garrett v. Cameco Corp.* (2001), 214 Sask. R. 161 at 178 (Sask. Q.B.).

77 (1981), 126 D.L.R. (3d) 728 (B.C.S.C.).

78 *NRS Block Brothers Realty Ltd. v. Co-operators Development Corp.*, [1994] 9 W.W.R. 404 (Sask. Q.B.); varied (1996), [1997] 2 W.W.R. 131 (Sask. C.A.) where the mistake was caused by the defendant's own carelessness.

79 Above, pp. 241-242: see *Belle River Community Arena Inc. v. W.J.C. Kaufmann Co.* (1978), 87 D.L.R. (3d) 761 (Ont. C.A.) following *McMaster Univ. v. Wilchar Const. Ltd.*, above, note 64, not following *Imperial Glass Co. v. Consol. Supplies Ltd.* (1960), 22 D.L.R. (2d) 759 (B.C.C.A.). See also *Metro. Toronto v. Poole Const. Ltd.* (1979), 10 M.P.L.R. 157 (Ont. H.C.). Contrast *Nor. Const. Co. v. Gloge Heating & Plumbing Ltd.* (1984), 6 D.L.R. (4th) 450 (Alta. Q.B.); affirmed 67 A.R. 150 (Alta. C.A.) where the offeree had insufficient notice of the mistake, the contract was valid; compare *Calgary v. Northern Const. Co.*, [1986] 2 W.W.R. 426 (Alta. C.A.); affirmed [1987] 2 S.C.R. 757; *Custom Iron & Machinery Ltd. v. Calorific Const. Ltd.* (1990), 39 C.L.R. 276 (Ont. Dist. Ct.); reversed (1994), 48 A.C.W.S. (3d) 544 (Ont. C.A.); *Toronto Transit Commission v. Gottardo Construction Ltd.*, above.

80 (1981), 119 D.L.R. (3d) 267 (S.C.C.); above, pp. 36-40.

81 *BCE Dev. Corp. v. Cascade Invts. Ltd.* (1987), 55 Alta. L.R. (2d) 22 (Alta. Q.B.); affirmed (1987), 56 Alta. L.R. (2d) 349 (Alta. C.A.); leave to appeal refused (1988), 58 Alta. L.R. (2d) xlix (note) (S.C.C.); *First City Capital Ltd. v. B.C. Building Corp.* (1989), 43 B.L.R. 29 (B.C.S.C.); *Bogue v. Bogue* (1999), 126 O.A.C. 236, at 242. There may be a duty to disclose such a mistake: *Amertek Inc. v. Canadian Commercial Corp.* (2003), 229 D.L.R. (4th) 419 at 513-519 (Ont. S.C.J.) *per*

TAB 19

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SECOND EDITION

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the proposed plan or sale is fair to affected parties who were not at the negotiating table.

(b) The Monitor

Every Initial Order under the CCAA must appoint a monitor.[71] The mandatory appointment of a monitor, the result of the 1997 amendments of the CCAA, confirms the practice that had developed through the court's exercise of its discretion under the CCAA in making orders staying creditor remedies. The monitor, once appointed, is an officer of the court and exercises the powers that are delegated to it by the court. The minimum powers of the monitor are listed in section 23 of the CCAA. However, the CCAA clearly delegated to the court a broad jurisdiction to direct a monitor to "carry out any other functions in relation to the company" that the court considers appropriate.[72]

The monitor, as an officer of the court, is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor must not be an advocate for the debtor company or any party in the CCAA process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

The monitor must be a licensed trustee. If the monitor is associated with an accounting firm, the firm may not be the auditor or accountant, nor legal counsel,[73] unless otherwise directed by the court. The court may expand the powers of the monitor to include some management functions, such as the operation of the business of the debtor and the filing of a plan of arrangement on behalf of the debtor.[74]

The minimum powers of the monitor include rights to have access to and to examine the company's property including, among other things, its books, records, data, including electronic data, and other financial documents, to the extent necessary to adequately assess the company's business and financial affairs.[75] The minimum duties of the monitor include publishing a public notice regarding the CCAA filing, contacting creditors, reviewing cash-flow statements, appraising the financial state of affairs of the debtor company, advising the court of material adverse

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71 CCAA, s. 11.7.

72 CCAA, s. 23(1)(k).

73 CCAA, s. 11.7(2).

74 *Re 843504 Alberta Ltd.*, [2003] A.J. No. 1549, 30 Alta. L.R. (4th) 91, 4 C.B.R. (5th) 306 (Alta. Q.B.).

75 CCAA, s. 24.

TAB 20

Industry Canada Industrie Canada

Corporate, Insolvency and Competition Law Policy

Statutory Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*

Canada

Government of Canada | Gouvernement du Canada

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Corporate, Insolvency and Competition Law Policy

Statutory Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*

Discussion Paper

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Table of Contents

Executive Summary

Pursuant to a statutorily-mandated review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*, Industry Canada is conducting public consultations to obtain submissions from interested Canadians regarding Canada's insolvency legislation. The discussion paper, which sets out numerous issues identified from key stakeholder input and an environmental scan of the insolvency marketplace, is intended to provide a framework for the public consultations.

The discussion paper is divided into four sections: first, an introduction; second, consumer insolvency issues; third, commercial insolvency issues; and, finally, administrative and technical issues.

The introduction provides general information regarding Canada's insolvency regime and the policy objectives that underlie it, as well as recent marketplace changes and insolvency trends.

The sections on consumer and commercial issues set out broad themes under which specific issues may be found. For example, the consumer insolvency themes include protection of consumer interests, the "fresh start" principle, consumer exemptions, protecting families, and treatment of student loans in bankruptcy. The commercial insolvency themes include encouraging restructuring, protecting vulnerable creditors and enhancing equity, deterring fraud and abuse, and cross-border insolvencies.

The section on administrative and technical issues sets out a number of discrete matters, including renaming the *Bankruptcy and Insolvency Act*, creating a unified insolvency Act, and marshalling of charges.

Pursuant to the statutory review provisions contained in both Acts, the Minister of Industry is to table a report in Parliament on the "provisions and operations" of the Act by September 2014. The report would then be

referred to a Parliamentary committee for study and report within 12 months of the initial tabling. Any decisions regarding possible legislative or regulatory reforms as part of the statutory review would be taken following consideration of the Parliamentary committee's study and report.

Introduction

The Importance of Insolvency Law

Insolvency laws have a significant impact on the economy. Insolvency rules offer security for investors and lenders in both consumer and commercial borrowing transactions. This, in turn, influences credit market risks, which can affect the cost and availability of credit. In the commercial sphere, the reliability of the insolvency system plays a role in attracting domestic and foreign investment, as well as in promoting entrepreneurship and innovation.

One of the principal considerations in an era of increased globalization and competitiveness is how to make the insolvency process as efficient as possible, while maintaining fairness. By facilitating corporate restructuring and directing assets to productive use, the insolvency system contributes to Canada's economic competitiveness and performance.

Rules governing personal insolvency play an important socio-economic role. They allow honest but unfortunate individuals who experience difficult financial distress to release their debts and obtain a fresh start. The consumer insolvency provisions are aimed at balancing the interests of debtors with the interest of creditors who extended credit in the expectation of repayment.

As such, insolvency laws contribute in a meaningful way to the effective and efficient functioning of the marketplace.

Canada's Insolvency Regime

Legislative Framework

The insolvency regime makes up part of Canada's fundamental marketplace framework laws and relies on two main statutes: the *Bankruptcy and Insolvency Act* (BIA) and the *Companies' Creditors Arrangement Act* (CCAA).

The BIA provides a legislative framework to address both consumer and commercial insolvency situations. In bankruptcy, the Act provides for the liquidation of the bankrupt's assets by a trustee and the distribution of the proceeds in a fair and orderly way among the creditors. Alternatively, the Act provides a mechanism for insolvent consumers or commercial debtors to avoid bankruptcy by negotiating settlements with their creditors to reorganize the debtor's financial affairs.

The CCAA provides a legislative framework for the reorganization of insolvent commercial debtors under the court's supervision. It enables an insolvent business to seek a court order staying its creditors from taking action against it while it negotiates an arrangement with them for the rescheduling or compromise of its debts. The CCAA provides a more flexible, court-driven process than the BIA. Businesses reorganizing under the Act must have more than $5 million in debt.

Administrative Framework

Canada's insolvency regime's administrative framework is supported by three pillars:

- **Office of the Superintendent of Bankruptcy** (OSB): regulator with oversight responsibilities for the insolvency system;
- **Trustees-in-Bankruptcy**: licensed by the Superintendent, they are responsible for administering estates and performing various roles under the BIA and CCAA; and
- **Courts** (including registrars in bankruptcy): supervise CCAA proceedings and adjudicate matters under both the BIA and CCAA.

The OSB has statutory responsibility to supervise the administration of all estates and matters under the BIA. Additionally, the OSB has certain functions under the CCAA, including maintaining a public record of CCAA proceedings and investigating complaints regarding the conduct of monitors. In fulfilling its mandate, the OSB sets standards and provides guidance to stakeholders regarding expected conduct through Directives, notices, position papers and programs.

Trustees-in-bankruptcy are responsible for administering insolvencies and can often be engaged to provide advice to financially distressed individuals and businesses. They work with the debtor to complete necessary steps in a bankruptcy, proposal to creditors or restructuring. This involves filing documents with the OSB and ensuring the debtor fulfills the requirements under the BIA or CCAA. Where the debtor fails to fulfill the requirements, as an officer of the court, the trustee is to bring the issues to the attention of the creditors and the court.

The role of the courts varies depending upon the nature of the proceeding. Most individuals who file for bankruptcy will not be required to go to court. Instead, they will obtain a discharge from bankruptcy after the specified period of time through an automatic process. If a trustee or creditor opts to oppose a bankrupt's discharge, the matter is brought to the courts. In other proceedings, the courts are involved at various stages. For example, the courts may be required to resolve disputes or sanction specific actions proposed by the debtor or creditors. In CCAA proceedings, the court plays a key role. Court approval is required to commence a proceeding and it may make various other orders, including approving interim financing, the process for sale of assets, and the disclaimer of contracts. Courts are also responsible for sanctioning any plan of arrangement or compromise.

Objectives of Insolvency Law

Insolvency laws aim to minimize the impact of a debtor's insolvency on all stakeholders. They do this by pursuing the key objectives of equitable distribution of the debtor's assets, and, where possible, by rehabilitation of the debtor.[1] As noted by the Supreme Court of Canada:

> The very design of insolvency legislation raises difficult policy issues for Parliament. Legislation that establishes an orderly liquidation process for situations in which reorganization is not possible, that averts races to execution and that gives debtors a chance for a new start is generally viewed as a wise policy choice. Such legislation has become part of the legal and economic landscape in modern societies. But it entails a price, and those who might have to pay that price sometimes strive mightily to avoid it. Despite the proven wisdom of the policies underpinning the insolvency legislation, it is understandable that few appreciate the "haircuts" or even outright losses that bankruptcies trigger.[2]

It is generally accepted that the objectives of insolvency law may be achieved through legislation that does the following:

- provides certainty in the market to promote economic stability and growth;
- maximizes value of assets;
- strikes a balance between liquidation and reorganization;
- ensures equitable treatment of similarly situated creditors;
- provides for timely, efficient and impartial resolution of insolvency;
- preserves the insolvency estate to allow equitable distribution to creditors;
- ensures a transparent and predictable insolvency law that contains incentives for gathering and dispensing information; and
- recognizes existing creditor rights and establishes clear rules for ranking of priority claims.[3]

It is in this context that Canada's insolvency laws have been developed by Parliament and have evolved through court decisions.

Marketplace Changes

Since the last public consultations on insolvency laws conducted in 2001-2002, which resulted in the legislative reforms of 2008 and 2009, the characteristics of the Canadian consumer marketplace have changed. The ratio of consumer debt to personal disposable income in Canadian households has increased from approximately 110 percent in 2000 to 160 percent in 2012.[4] The increase can be attributed to higher mortgage debt levels and an increase in home equity extraction, both associated with elevated housing prices.[5] Higher mortgage debt levels are a potential source of risk as Canadians may be more vulnerable to a decline in housing prices or an increase in interest rates.

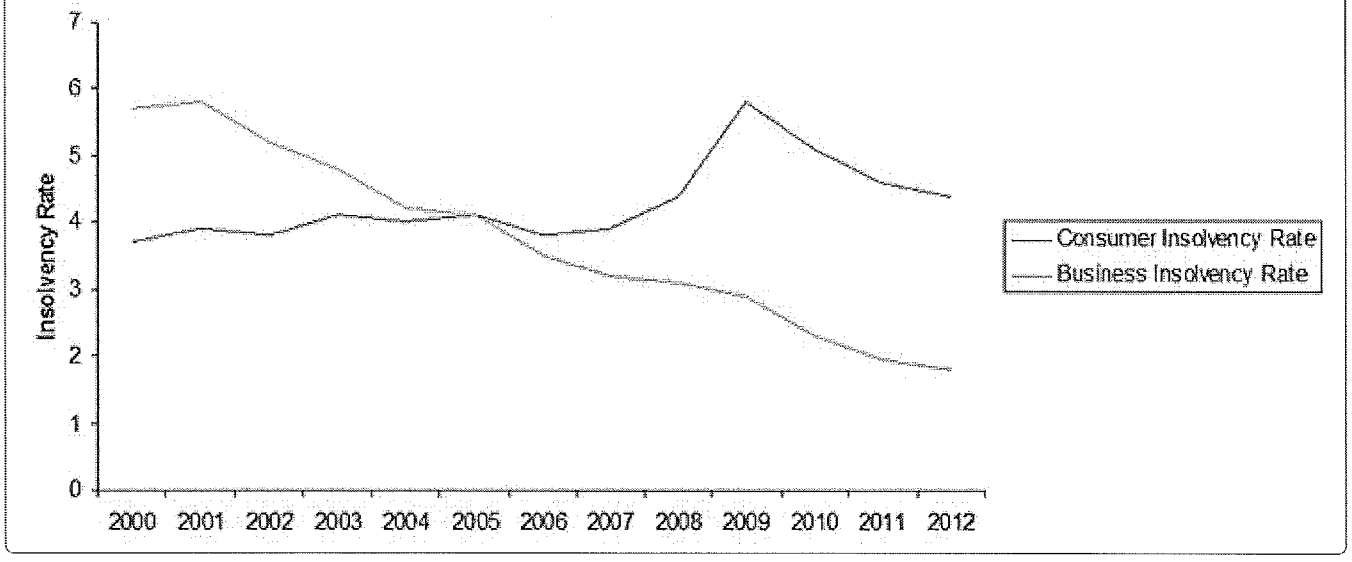
In the commercial context, marketplace changes include the growing importance of intellectual property to Canadian companies, the use of more complex corporate structures, a shift by lenders away from relationship lending, significant growth in the use of derivatives to hedge risk and in the practice of distressed debt trading, and an increasing number of cross-border insolvency proceedings. At the same time, the cost and complexity of restructuring proceedings, particularly under the CCAA, continues to grow, resulting in a shift towards other types of workout arrangements such as private workouts and arrangements under the *Canada Business Corporations Act*.

Insolvency Trends

National Insolvency Rates

Figure 1 illustrates the national consumer and business insolvency rates between 2000 and 2012.[6] An overview of insolvency rates provides a clearer picture of trends than does the total volume alone, because it takes into account changes in population sizes over time. As shown in Figure 1, consumer and business insolvency rates have trended in opposite directions during the past decade. The consumer insolvency rate remained relatively steady from 2002 to 2007 before increasing to 5.8 during the economic downturn in 2009 and declining in subsequent years. In 2000 and 2012, the national consumer insolvency rates were 3.7 and 4.4, respectively. This represents an 18 percent increase in the insolvency rate over this period. On the other hand, other than a small increase during the 2001 economic downturn, business insolvency rates have trended downward throughout the decade. In 2000 and 2012, the national business insolvency rates were 5.7 and 1.8 respectively, representing a 68.4 percent decrease.

Figure 1: Consumer and Business Insolvency Rates



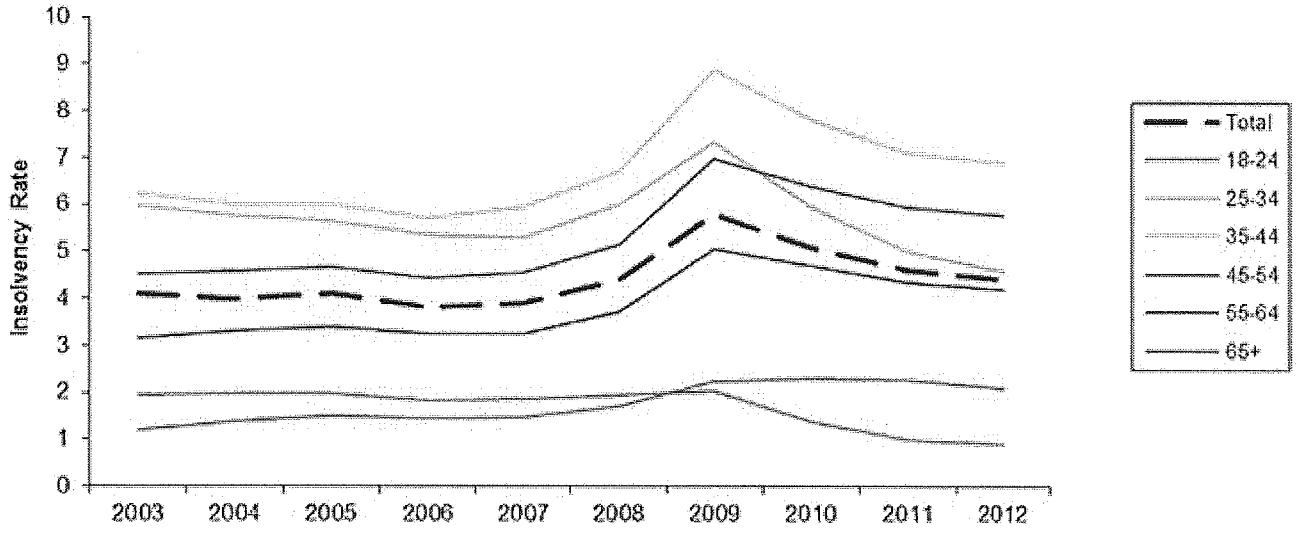
Consumer Insolvency Rate - by Age and Regional Breakdowns

Insolvency does not affect all segments of society equally. Variations in the rates of insolvency by age cohort and by geographic region provide important information regarding insolvency trends in Canada.

Figure 2 shows the national consumer insolvency rate by age cohort. During the past decade, younger Canadians (those between 18 and 34) became significantly less likely to commence insolvency proceedings. On the other hand, Canadians aged 35 and older become more likely to enter insolvency proceedings. This demographic trend is consistent with anecdotal reports that delayed transitions to adulthood among younger Canadians may be placing a greater financial burden on the parents of adult offspring.[7]

It is also important to note that while the insolvency rate of individuals over the age of 65 has increased over the past decade, it still remains well below the national average.

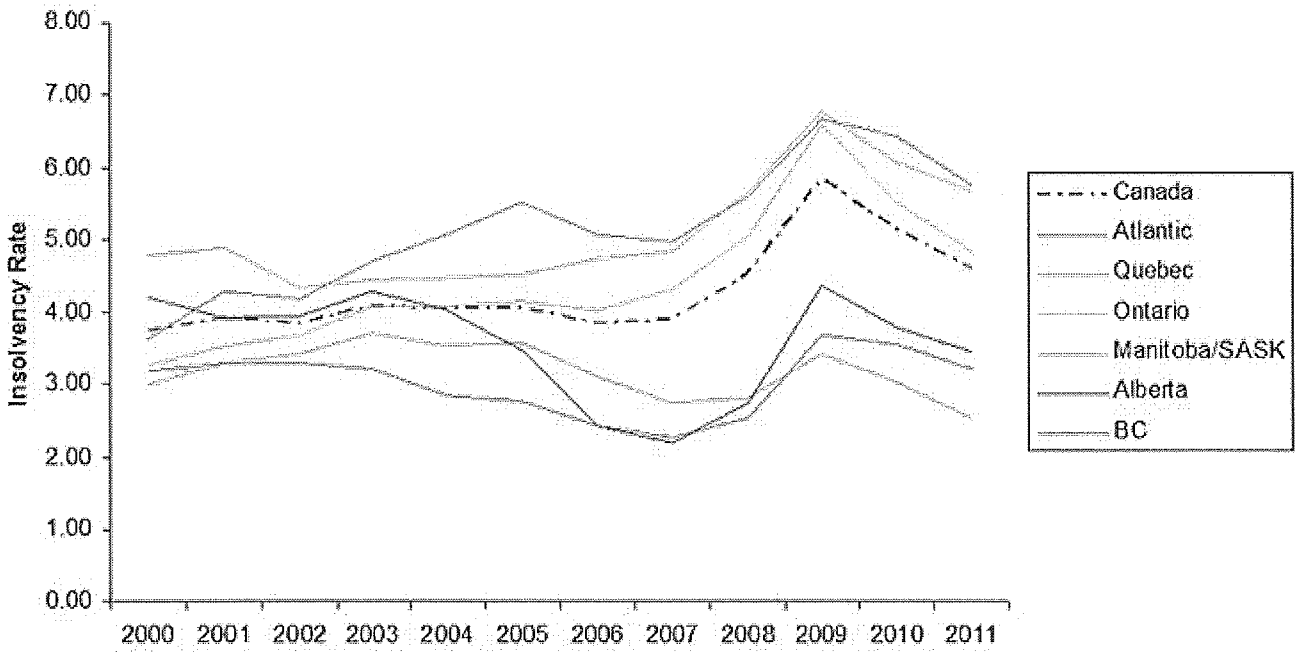
Figure 2: Insolvency Rates by Age Group



There is also significant regional variation in consumer insolvency rates. Between 2000 and 2012, the consumer insolvency rate has increased in Atlantic Canada, Quebec, and Ontario. There has been a better experience in Western Canada as the insolvency rates in Alberta and British Columbia have remained relatively constant while in Saskatchewan and Manitoba they have decreased slightly. Furthermore, the Atlantic Provinces, Quebec, and Ontario continue to have insolvency rates that are higher than the national rate, while the Western provinces and the Prairie provinces have rates that are lower than the national average.

The higher insolvency rates in Atlantic Canada, Quebec, and Ontario may reflect the underlying economic conditions compared to Western Canada. There is empirical support for the hypothesis that unemployment rates and the growth rates are significant in explaining the variation in insolvency filings.[8] For example, in recent years economic growth rates in Alberta, Saskatchewan, and Manitoba have been higher than the national average, while growth rates in Ontario, Quebec, and Atlantic Canada have been lower.[9] Additionally, Western Canada's unemployment rates are lower than the national average, while Atlantic Canada's unemployment rate is higher.[10]

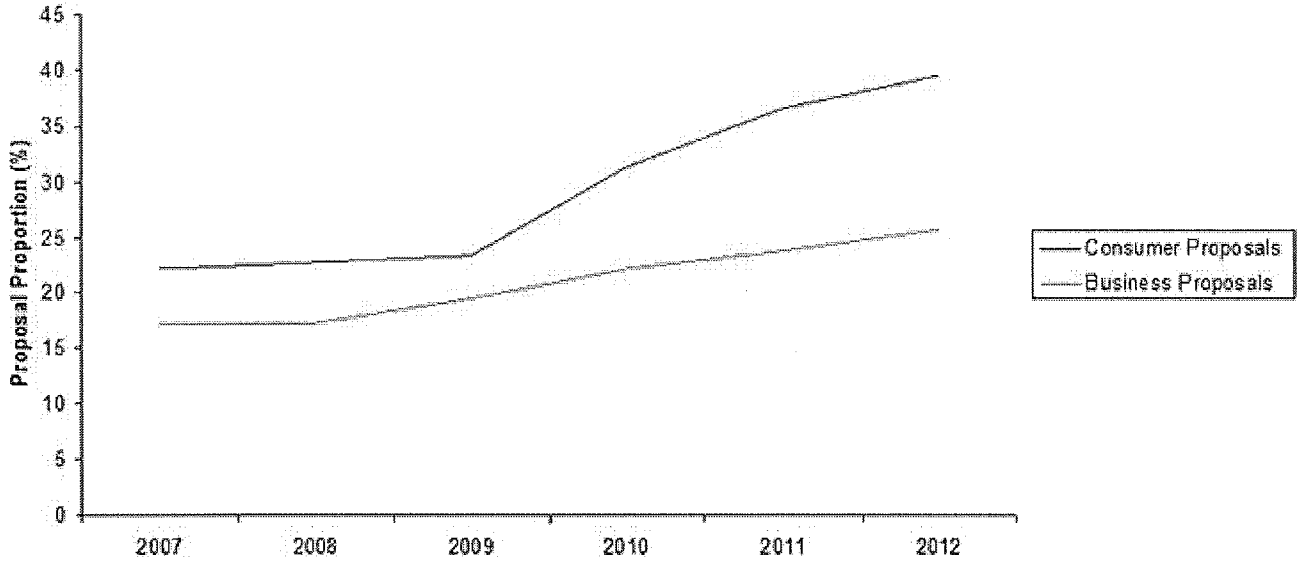
Figure 3: Consumer Insolvency Rates of Insolvency by Region



Growth in Consumer Proposals and Business Proposals

In recognition of the benefits of proposals for insolvent Canadians and their creditors, the 2008-2009 reforms were intended to encourage their use. Figure 4 illustrates the growth in consumer and business proposals under the BIA, as a percentage of total insolvency filings, since 2007. During the same period, the proportion of business proposals as a percentage of total business insolvency filings increased from 17.3% to 25.7%.

Figure 4: Proposal Growth - Consumer and Business Insolvencies



Conclusion

Insolvency laws touch on all aspects of economic life, both for consumers and businesses. They affect the ability of borrowers to access credit, the decisions of investors, and the level of disruption produced by the exit of inefficient firms from the marketplace. They also provide over-indebted consumers with an opportunity to obtain a fresh start and renewed financial health. As a result, it is important to Canada's overall economic performance that its insolvency legislation remains modern, effective and efficient.

In the consumer insolvency context, growing consumer debt levels and changes in demographic insolvency trends – which show that younger Canadians are less likely, and those between the ages of 45 and 54 are more likely, to become insolvent – suggest potential areas for policy focus. Emerging trends in commercial debt markets, including the growth in distressed debt trading and the use of derivatives to hedge economic risk, also suggest areas for policy consideration.

As Canada reviews its insolvency legislation, the overarching objectives of maximizing value, providing a balanced and equitable regime, and ensuring efficient and effective processes will form a base for the policy discussion.

Consumer Issues

Introduction

Individuals who encounter financial distress and are unable to service their debts may resort to insolvency proceedings (*i.e.*, bankruptcies or proposals) under the BIA. The consumer insolvency provisions are aimed at balancing the interests of debtors and their creditors.

In bankruptcy, the debtor's property, subject to certain limitations,[11] is liquidated by a trustee and the proceeds are distributed to his or her creditors. In return, a bankrupt is released from most types of debts.[12] Where the bankrupt has the financial means to contribute a portion of his or her income towards the outstanding debts ("surplus income"), the legislation requires them to do so. First-time bankrupts without surplus income are eligible for discharge from bankruptcy after nine months. The period before being eligible for discharge is longer for those bankrupts with surplus income and for those who have previously been bankrupt.[13]

Alternatively, the BIA provides insolvent debtors with the option of making a proposal to their creditors to repay, over a period of up to five years, all or a portion of what is owed. Proposals have the advantage of allowing the debtor to achieve financial rehabilitation while permitting them to retain assets that would otherwise be liquidated in a bankruptcy. For creditors, successful proposals typically offer a greater recovery than would be available in a bankruptcy.

Protection of Consumer Interests

Consumer Deposits

A retailer may receive payment before providing the contracted goods or services to the consumer. Questions of fairness arise if that retailer then becomes insolvent. The rights of buyers of prepaid goods and services are regulated to some extent by provincial consumer protection legislation, but in the absence of an insurance fund or other compensation, the consumer may become an unsecured creditor in the retailer's bankruptcy.

A consumer lien on the assets of insolvent retailers may protect consumers who have provided deposits or pre-payments. The Senate Committee in 2003 considered the merits of adding consumer liens to the BIA but recommended that the issue should continue to be governed by provincial legislation.[14] In the United States, consumer deposits are treated as preferred claims in bankruptcy for up to approximately US$2,250. The claims rank ahead of unsecured creditors' claims but behind secured claims.

Advocates for consumer liens assert that it is not possible for consumers to determine the financial condition of a retailer before making a deposit and that a consumer lien would provide protection similar to that given to unpaid suppliers. However, a preferred claim may not result in any meaningful recovery for the consumer as

the retailer's assets may be subject to an existing secured charge. If the consumer lien ranked ahead of secured creditors, it would be more effective but lenders would likely react by reducing the availability, or increasing the cost, of credit to retailers to take into account the possibility of such liens ranking ahead of their security.

Stakeholders are invited to make submissions regarding whether, and how, Canada could enhance protection for consumer deposits either through consumer liens or, alternatively, through other mechanisms within the insolvency regime.

Responsible Lending

The BIA provides that debtors' conduct can be subject to scrutiny in order to ensure fairness and integrity of the system. However, creditor behaviour may also contribute to financial difficulty for some Canadians. For example, credit granting practices such as extending credit on onerous terms to individuals who are unable to meet their existing financial obligations can lead to higher rates of insolvency. This may impact on existing creditors, whose recovery would likely be reduced due to the increased claims.

In the wake of the 2008 financial crisis, there have been increased calls for legislative intervention in the United States and other countries for "responsible lending" regimes that would impose certain duties on creditors before they extend credit and restrict the insolvency remedies available to those who did not meet these duties. Possible responses could include empowering the trustee or court to disallow the claim of a creditor where credit was extended improvidently or on unconscionable terms. Additionally, the lender could be required to disgorge payments made on such loans in the period leading up to a bankruptcy or proposal, similar to the treatment of preferences.

Stakeholders are invited to make submissions regarding whether, and how, the BIA could take into account creditors' conduct that has contributed to the financial difficulties or insolvency of a debtor.

The "Fresh Start" Principle

One of the key objectives of the BIA is to enable an honest but unfortunate debtor to obtain a discharge from his or her debts, subject to such conditions as the court may see fit to impose. This is referred to as the "fresh start" principle. Limiting the fresh start principle are specified classes of debt that are not released by an order of discharge.[15] The exceptions are based on overriding public policy concerns[16] because the nature of the debt outweighs the benefit of the bankrupt being relieved of them.

Licence Denial Regimes

Licence denial regimes are used by certain creditors to continue collection efforts even though the debt was stayed and then released through the insolvency process.[17] For example, the regimes may permit a creditor to deny a driver's licence or vehicle registration unless full payment is received. The regimes relate almost exclusively to claims arising from the use of motor vehicles.[18] Creditors that rely on these regimes include insurance companies, provincial insurance regimes, electronic toll-highway operators and rental car companies.

Proponents of these regimes argue that they only encourage voluntary payment since driving is not a right and that debtors may choose to forgo the privilege of driving should they not be able to pay the debt in full. On the other hand, it has been argued that once insolvency proceedings are commenced these special collection tools are replaced with those available through the collective insolvency process. They may no longer be used as they interfere with the insolvency process and frustrate the debtor's 'fresh start'.

There is greater clarity in the United States as the *Bankruptcy Code* expressly bars the use of these special collection tools to collect released debts.[19] In Canada, it has been left up to the courts.[20] In order to ensure consistent national treatment, Industry Canada is interested in the views of Canadians regarding this issue.

Submissions are invited as to whether amendments are required to the BIA to address the apparent conflict between the "fresh start" principle and the objectives of licence denial regimes.

Reaffirmation Agreements

Reaffirmation agreements between a bankrupt and a creditor are those where the bankrupt agrees to pay a debt that was or will be released by a bankruptcy. Courts have recognized that bankrupts may reaffirm an obligation in one of two ways: 1) by conduct, where the bankrupt continues to make payments to a creditor under an agreement, or 2) by express agreement where the bankrupt enters into a written agreement with the creditor to repay an otherwise released debt.

There is no statistical evidence regarding the extent to which reaffirmation is taking place in Canada or whether the practice is being abused. Some commentators have called for greater regulation of reaffirmation on the grounds that it undermines the "fresh start" principle in insolvency. Reaffirmation by conduct (*i.e.*, continued payments) is of particular concern since bankrupts may reaffirm an agreement without realizing he or she is doing so. On the other hand, there may be compelling reasons why a bankrupt may want to voluntarily continue to pay a debt obligation (a common example is a car lease agreement, where the bankrupt requires the use of a car).

Reaffirmation of debts was raised during the last statutory review. The Personal Insolvency Task Force (PITF) in its 2002 report[21] recommended that reaffirmation agreements in respect of unsecured transactions be prohibited because they offend the "fresh start" principle and have the effect of giving one creditor preference over other creditors. However, the PITF recommended that reaffirmation be permitted for secured transactions on the ground that it allows the bankrupt to retain the assets covered by the security agreement and the secured creditor would be in the same position as they would have been if they had to enforce the security. Other stakeholders indicated the need for greater study into the scope and frequency of reaffirmation agreements before making any legislative changes on this issue.

> *Stakeholders are invited to make submissions regarding whether reaffirmation agreements should be regulated under the BIA, either through the mechanisms discussed above or through other mechanisms within the insolvency regime.*

Consumer Exemptions

Registered Savings Products

Successive governments have created initiatives intended to encourage Canadians to create long-term savings for various purposes. For example, Canadians may save for retirement through registered retirement savings plans (RRSPs), for children's post-secondary education expenses through registered education savings plans (RESPs) or for disabled persons' future financial security through registered disability savings plans (RDSPs).

In 2009, RRSPs were exempted from seizure in bankruptcy, subject to a clawback of contributions made in the 12 months before the filing. The goal was to protect retirement savings in a similar way to the protections afforded to registered pension plans, which are exempt from seizure in the event of bankruptcy of the holder of the pension. The exemption of RESPs was also examined in the last review. The Senate Report recommended that the BIA be amended to exempt RESPs from seizure in bankruptcy if: the RESP is locked in; and, RESP contributions in the one-year period prior to bankruptcy are paid to the trustee for distribution to creditors.[22] Largely because these conditions could not be met, which created a significant potential for abuse, RESPs were not exempted from seizure in an insolvency proceeding.

An RDSP is a long-term savings plan intended to assist Canadians with disabilities and their families to save for the future. Eligible parties may contribute any amount per year up to a lifetime contribution limit of $200,000. Government matching grants and bonds are also available to supplement the RDSP, depending on the amount contributed and the family income of the beneficiary.

RDSPs serve the public interest by encouraging savings for the support of people with disabilities. As a result, it has been suggested that they could be exempted from creditor claims in bankruptcy, similar to the protection provided to RRSP funds. Supporters of an exemption for RDSPs note that there are significant differences between RESPs and RDSPs that reduce the potential for abuse in bankruptcy. Unlike an RESP, only individuals who claim the disability tax credit under the *Income Tax Act* qualify for an RDSP and there can only be one account for that person. Furthermore, only a parent, legal guardian or trust institution may open and

contribute to the RDSP and only the beneficiary can access the funds. It is possible, however, that exempting RDSPs could create the potential for abuse that adversely impacts other creditors' interests.

Stakeholders are invited to make submissions regarding the treatment of registered savings products in bankruptcy.

Federal Exemption Lists

Generally, a bankrupt's property is liquidated by a trustee and the proceeds are distributed among the creditors according to the distribution scheme set out in the BIA. Certain property is, however, exempt from distribution to creditors. The exemptions are set by provincial/territorial law.

Stakeholders have questioned whether it would be more appropriate to have a federal exemption list that would apply to all personal bankruptcies regardless of the bankrupt's province of residence or, alternatively, would permit the bankrupt to choose between the federal and provincial exemption list.

In the last statutory review, the Senate Report and the PITF Report recommended that there be a federal exemption list that the debtor can select in preference to the otherwise applicable provincial or territorial exemptions. The issue of whether to develop a federal exemption list was not addressed in the 2008 and 2009 insolvency reforms.

A federal exemption list could create a minimum standard available to all bankrupts. On the other hand, if it varies significantly from existing provincial/territorial exemption lists, it could create uncertainty for creditors who would not know which list a bankrupt would select.

Submissions are invited as to whether the introduction of a federal list of exemptions should be considered.

Protecting Families

Equalization Claims

Marriage breakdown and insolvency are often closely linked as marriage breakdown can often be a trigger for insolvency proceedings.[23] The special nature of some family law debts has been recognized in insolvency law. Under the BIA, a specified portion of unpaid child and spousal support is treated as a preferred claim and is paid ahead of the claims of unsecured creditors.[24] Also, family support obligations are not released by the bankrupt's discharge.[25]

With respect to family assets, most provinces use the "division of property" approach. Divorcing spouses are deemed to have an inchoate claim to half of the family assets which are then divided between the spouses. In the case of exempt assets, bankruptcy has no impact on such divisions as the inchoate claim is not a money claim that would be stayed or released by the bankruptcy.

Ontario, Manitoba and Prince Edward Island use an "equalization" approach under which spouses are entitled to keep property held in their own names but share any increase in the value of marital property that occurred during marriage. Usually this means one spouse must make an equalization payment to the other spouse. Under provincial law, such a payment is considered to be a debt owed by one spouse to the other and is treated as an unsecured claim in an insolvency proceeding.

In *Schreyer*[26], the Supreme Court of Canada found that if the paying spouse becomes bankrupt, an equalization payment may be released in the bankruptcy. As a result, the non-bankrupt spouse was not entitled to payment of the equalization claim while the bankrupt spouse was entitled to keep the exempt property, which was the family farm. The Court noted the apparent injustice and suggested there should be better protection for equalization payments in the event of bankruptcy to avoid such inequitable results.[27]

Submissions are invited as to whether, and how, bankruptcy legislation could be amended so as to improve the status of equalization payments in bankruptcy.

Family Support Claims and the Levy

Bankruptcy provides an efficient collection mechanism for creditors as they may rely on the collective remedies available to the trustee to satisfy their claims. In order to offset the costs of the OSB, the regulator responsible for protecting the integrity of the bankruptcy system, a levy is applied to all payments made by a trustee.[28] The levy is typically five percent of payments.[29]

Subject to certain conditions, family support claims are provable claims under the BIA.[30] This means that a creditor may file a proof of claim and receive a dividend out of the estate. Family support claimants may receive treatment that is preferential to other creditors, to a specified extent, as a portion of their claims may be paid in priority to the claims of other unsecured creditors.[31] The claims also survive the bankruptcy process, meaning that they are not released when the bankrupt receives his or her discharge.[32] The practical impact is that family support claimants can expect to receive greater recovery through the BIA process than other unsecured creditors and they are also entitled to collect the remaining indebtedness post-bankruptcy without competing with creditors whose claims have been released.

As a result of the *Cameron* decision, in which the court held that "the levy is to be shared by all creditors who benefit from the proceedings,"[33] family support creditors must give the bankrupt credit for amounts paid in respect of the levy. Some stakeholders have suggested, however, that not all section 178 creditors credit the bankrupt for the amount of the levy, resulting in an inequitable situation where some section 178 creditors obtain full payment and others do not.

Submissions are invited as to the treatment of section 178 creditors with respect to the Superintendent's levy.

Vesting of Family Property Claims

Upon bankruptcy, all property of the bankrupt at that date and any property that may be acquired by or devolve on the bankrupt before his or her discharge, with certain exceptions, vests in the trustee for distribution among the bankrupt's creditors. Property can include the bankrupt's right to sue a former spouse for an equalization claim or for the division of matrimonial property.

In the last statutory review, the Senate Report recommended that the right to sue the bankrupt's spouse for equalization or division of property under provincial/territorial matrimonial property law be excluded from property vesting in the trustee.[34] The Senate Committee heard that the trustee often settles the claim at a significant discount. As a result, the non-bankrupt spouse retains most of the bankrupt spouse's share of the family assets and the creditors receive very little from the settled claim. Moreover, confidence in the insolvency system may be undermined.[35]

Stakeholders have recommended that the right to sue remain with the former spouse but that any proceeds obtained from the action be considered property to be distributed among the creditors.

Stakeholders are invited to make submissions regarding the treatment of the right to sue a former spouse for an equalization claim or the division of property as property vesting in the trustee.

Joint Debts

Section 142 of the BIA addresses the distribution of property when partners become bankrupt. The section is intended to deal with business situations involving partnerships, not matrimonial situations. Some stakeholders have raised the concern that parties may attempt to apply s.142 in matrimonial situations which could have the effect of distorting the distribution of property that would otherwise take place.

Submissions are invited as to whether s.142 should be amended to restrict its application to business partnerships.

Treatment of Student Loans in Bankruptcy

Discharge of Student Loan Provisions

The federal and provincial governments have implemented student loan programs intended to assist full- and part-time post-secondary students pay for higher education and training. Since these loans are granted on need rather than ability to repay in the event of bankruptcy they are treated differently than other debts under the BIA. In 1997, the BIA was amended to create a two-year waiting period from the time a student ceased to be a full- or part-time student before the loan could be released in bankruptcy. In 1998, the waiting period was increased to 10 years. It has been noted that students typically benefit from the educational opportunities that are facilitated by the government student loans and that the loans are eligible for interest relief, debt forgiveness and other relief under the terms of the student loan program. Accordingly, many stakeholders recognize that the release of student loans in bankruptcy should be subject to special rules, including a waiting period.

The Senate Report recommended a waiting period of five years or, in the case of hardship, a waiting period of less than five years. The Senate heard from stakeholders that the 10-year waiting period created "a period of social atrophy" as the debtor could neither afford to pay the debt, nor to move on from it through the normal means of bankruptcy.[36] In 2009, the BIA was amended to reduce the waiting period from 10 to seven years or, in the case of significant financial hardship, from 10 to five years. Some stakeholders suggest that the seven- and five-year waiting periods still impose too high of a burden.

Stakeholders are invited to make submissions regarding whether the current provisions regarding the release of student loan debts should be amended.

Hardship Discharge

Under the BIA, release of government-funded student loans can be granted on grounds of hardship if the debtor satisfies the court of good faith towards repayment of the loan and that the bankrupt is experiencing and is likely to continue to experience financial difficulty that prevents repayment of the student loan debt. An application for discharge on the basis of hardship may only be made after at least five years have elapsed from when the student ceased to be a full- or part-time student.

In an effort to assist those who demonstrate financial need, however, the Canada Student Loan Program offers several repayment assistance measures. For example, it offers eligible students relief measures such as (a) the Repayment Assistance Plan, (b) the Repayment Assistance Plan for Borrowers with a Permanent Disability, and (c) the Severe Permanent Disability Benefit.[37]

Some stakeholders have suggested that, despite relief measures available under student loan programs, the five-year waiting period in the case of hardship is unwarranted. They argue that obtaining debt relief can be difficult and that, in any event, a hardship discharge is only available if the debtor convinces a court that the hardship is a continuing event that will prevent payment in the future. In their view, this removes the need for a waiting period.

Stakeholders are invited to make submissions regarding the current hardship discharge provisions.

Partial Release of Debts

Under the hardship discharge provision,[38] the courts have found that they do not have the authority to order a release of part of the student loan debt; either all or none of the debt is to be released by court order. Some stakeholders have suggested that it may be appropriate to give the courts more discretion to release a portion of debt where warranted.

Stakeholders are invited to makes submissions regarding possible flexibility for court-ordered partial discharges on hardship grounds, including any factors the court should consider in exercising its discretion.

Commercial Issues

Introduction

In the commercial insolvency context, debtors and creditors have numerous options for dealing with severe financial distress. The BIA provides a rules-based framework for bankruptcy and proposals (e.g. restructuring) by businesses of any size. The CCAA provides a more flexible court-driven framework for reorganizations by companies with at least $5 million in debt. Secured creditors may also opt to put in place a receivership in many circumstances. Corporations have also increasingly been turning to arrangement provisions under corporate legislation, such as the *Canada Business Corporations Act*.

The 2008-2009 reforms were designed to encourage restructurings of viable but financially-distressed firms because the benefits of a successful reorganization include the likelihood of greater returns to creditors than in bankruptcy, preservation of jobs and relationships with suppliers and lenders, and ensuring that assets remain productive to the overall benefit of the Canadian economy.

The Sarra Report

During summer 2011, Dr. Janis Sarra[39] conducted eleven public hearings regarding Canada's commercial insolvency regime. This work was supported by the Canadian Insolvency Foundation. Based on the hearings, Dr. Sarra published a report titled "Examining the Insolvency Toolkit: Report of the Public Meetings on the Canadian Commercial Insolvency Law System"[40] (the "Sarra Report").

Industry Canada greatly appreciates the contribution made to the Canadian public policy debate by Dr. Sarra and all of those who participated in the public hearings.

Encouraging Innovation through Intellectual Property Rights

Creating an economic climate that encourages innovation is considered a vital component of a country's long-term competitiveness. Intellectual property (IP) rights, such as patents and copyrights, play an important role in promoting innovation. IP statutes promote innovation through the incentive of a temporary monopoly and at the same time ensure reasonable access to users, and preserve marketplace integrity (e.g. trade-marks). IP laws focus on the rights of creators and licensees, while insolvency laws focus on the interests of debtors and creditors. However, as economic framework legislation, both IP law and insolvency law can promote innovation and marketplace integrity by mitigating entrepreneurial risks. Insolvency law can provide investors with commercial certainty in the case of default, which facilitates investment in the development of innovative ventures, as well as businesses that rely on the authorized use of IP through licences.

Copyright and Patented Items

There are existing provisions in the BIA regarding rights of holders of patents[41] and copyrights.[42] It has been suggested that these provisions should be modernized, to better reflect the importance of IP rights in the Canadian economy. For example, the provisions related to copyright speak of "manuscripts" that have been "put into type". The archaic language creates difficulties when the copyright in question is software, for example.

Additionally, some stakeholders have called for greater rights for IP producers and creators in insolvency proceedings, enhancing the limited rights that currently exist. For example, it has been suggested that the protection for patentees could be extended to other IP, such as trade-marks. It has also been suggested that the bankruptcy provisions be extended to CCAA restructurings and receiverships.

2009 Amendments – Rights of IP Licensees

Effective licensing rights are essential to a robust IP marketplace, as licensing gives innovators a way to monetize their works and release the innovation into the marketplace during the IP's period of statutory protection. Legislative amendments in 2009 were aimed at reducing the uncertainty faced by IP licencees in an insolvency restructuring. The reforms expressly permit the disclaimer of IP licences, in order to give debtors

and the courts the flexibility to restructure. However, IP licencees may preserve their rights to use the IP as long as they continue to perform their obligations under the licence.

The reforms were viewed as a positive step forward but some commentators have observed that there are outstanding issues regarding IP licences in insolvency. For example, the licencee protection only applies if the licensor restructures but not in bankruptcy or receivership. Others have noted that the new provisions only refer to the licensee's "right to use" the IP in question and do not require the licensor to provide upgrades or maintenance of the technology that may have been included in the IP licencing agreement. It has been noted that, while the amendments protect a licensee against a disclaimer, an insolvent licensor could sell IP free and clear of current licenses. Some commentators have called for additional legislative guidance to assist in this judicial balancing of interests.

Submissions are invited regarding how to improve the existing rules to support the objective of encouraging innovation, while also balancing the competing interests in an insolvency proceeding.

Encouraging Restructuring

Streamlining *Companies' Creditors Arrangement Act* Proceedings

The CCAA sets out a court-driven insolvency proceeding. In order to commence a CCAA proceeding, an initial court order is required. Typically, the order provides for a stay of proceedings against the debtor company, appoints a monitor and sets out the rights and powers of the debtor company during the proceeding, including the ability to carry on business, sell assets and terminate employees. It may also provide for interim financing in order to provide liquidity to fund operations during the proceedings. The debtor company typically returns to the court for approval of various steps in the restructuring process, such as the sale of assets, settling contentious claims or dealing with out-of-the-ordinary-course transactions. Finally, court sanction of a plan of arrangement and distribution of assets to creditors is required.

Concerns have been expressed by stakeholders regarding the complexity and cost of CCAA proceedings. The following issues have been raised as areas of concern in existing practice.

Initial Orders

Some stakeholders have expressed the concern that initial orders can be too broad, which can negatively affect creditors since it may be difficult to successfully challenge decisions that have been acted upon (*e.g.*, where interim financing has been accessed by the debtor). Some stakeholders have suggested that a short automatic stay period (*i.e.*, five to 15 days) followed by an initial court appearance may provide more creditors with the opportunity to appear before the court. The automatic stay could provide limited authority to ensure the debtor company is able to "keep the lights on". Alternatively, the statute could restrict an initial order to what is necessary to allow the debtor to carry on business for a short period until there is a court hearing or notice to creditors.

Stakeholders are invited to make submissions regarding the breadth of initial orders and potential options for streamlining the process.

Claims process

In CCAA restructurings, the time and cost associated with resolving claims can be prohibitive. Some stakeholders have suggested that a default mechanism for determining claims may be appropriate, particularly in smaller CCAA proceedings. The Sarra Report notes that in Alberta the monitor or a court-appointed claims officer determines the amount of claims owing and that amount is accepted unless the creditor objects within a specified period.[43]

Stakeholders are invited to make submissions regarding the existing claims process and whether consideration should be given to a default process.

Court Applications

Significant resources can be dedicated to court applications in many larger CCAA proceedings. The consequence is increased cost for all parties and potentially reduced recovery for creditors. Some stakeholders have suggested that the debtor company could be statutorily authorized to take specified actions or the monitor could be authorized to approve certain actions by the debtor without requiring court sanction. It has also been suggested that the monitor could be granted more authority to mediate or settle disputes.

Stakeholders are invited to make submissions regarding the existing role of court appearances in CCAA proceedings and whether consideration should be given to possible approaches to reduce the number and cost of such court appearances.

Balancing Competing Interests

Role of Unsecured Creditors

Unsecured creditors can be diverse and unorganized, making it difficult for them to have an effective voice in a corporate restructuring. Some stakeholders have suggested that a mandated committee, with professionals paid for by the debtor, could create a more balanced playing field. Other stakeholders, however, have suggested that unsecured creditors' committees would simply create further delays and increase costs (see, for example, Professional Fees in CCAA proceedings below). Some view the existing provisions, which authorize the court to appoint professionals to represent specific creditors, as sufficient.

Stakeholders are invited to make submissions regarding the effectiveness of the existing provisions and other potential mechanisms to ensure an effective voice for unsecured creditors in restructuring proceedings.

Acting in Good Faith

The Sarra Report suggests that since there is no obligation on parties in a CCAA proceeding to act in good faith, creditors may take positions during the bargaining process that they know have little chance of being approved but that will improve their position relative to other creditors. It is suggested that such strategies have the potential to undermine the integrity of the insolvency system and a constructive bargaining process.[44]

Stakeholders are invited to make submissions regarding whether the CCAA should expressly address whether parties to proceedings have a duty to act in good faith.

Eligible Financial Contracts

Under the BIA and CCAA, eligible financial contracts (EFCs) enjoy "safe harbour" provisions that permit them to be terminated, netted and have collateral realized despite the stay of proceedings that may be ordered by the court. These "safe harbours" were implemented in order to ensure a proper functioning derivatives market and to reduce systemic risk. Protections were also put in place in the BIA and CCAA to prevent an insolvent debtor from terminating or assigning an EFC as they could potentially do with other contracts.

The Insolvency Institute of Canada issued a report on derivatives[45] that recommended several actions be taken with respect to EFCs. First, it was recommended that the insolvent party, the trustee, the receiver or the liquidator be permitted to terminate or assign EFCs, subject to certain restrictions. It was also recommended that "walk-away" clauses, which permit a solvent counterparty to refuse to make net termination payments owing to the insolvent party in the event of an insolvency, should be rendered ineffective. The report also recommended that financial collateral securing an EFC be exempted from the existing deemed trusts (e.g. for employee withholdings) and super-priorities (e.g. for unpaid wages, pension contributions). At the same time, the report recommended that financial collateral should be limited to assets that are no longer under the control of the insolvent party, either through assignment or pursuant to a title transfer credit support agreement. The report also recommended that similar rules be applied in receiverships.

On this issue, the Sarra Report suggested EFCs, such as credit default swaps (CDS), may lead to an uncoupling of legal and economic interests and may change creditor behaviour. The Sarra Report also suggests

that consideration be given to new types of derivatives that have emerged in recent years that do not fit within the original intention of the EFC safe harbour provisions.[46] The Sarra Report noted that derivatives could be made subject to the CCAA stay of proceedings, except with leave of the court, and that a process could be put in place to determine whether particular EFCs should be stayed or disclaimed.[47]

Stakeholders are invited to make submissions regarding eligible financial contracts, and their impacts on insolvency and restructuring proceeding, as well as potential policy responses.

Professional Fees in CCAA Proceedings

The issue of professional fees in large corporate insolvencies has received increased attention from stakeholders and insolvency professionals in Canada and elsewhere. Reliable data regarding professional fees in Canadian insolvency proceedings are not currently available. Concerns have been raised that the expense of CCAA proceedings has been growing and may deter businesses use of insolvency proceedings in favour of alternatives that may not properly protect the interests of all creditors and stakeholders. Some stakeholders have also raised concerns that elevated professional fees can harm creditors' recoveries.

Under the CCAA, the court is responsible for reviewing fees charged to the debtor company to ensure they are "fair and reasonable". Parties to the proceeding are entitled to challenge fee applications and the court may reduce or reject fees where warranted. There is no obligation to report professional fees to the OSB or other parties, although they are available in the court record.

Other countries are examining the impact of professional fees on their respective insolvency systems, and the potential role of regulators and professional bodies. For example, in the United States, a guideline regarding attorneys' fees in larger Chapter 11 cases came into force on November 1, 2013.[48] Among other things, legal firms must disclose their non-bankruptcy blended hourly rate, hours and fees per task, and make their billing data available to the court, the U.S. Trustee and major parties to the proceeding. The guideline also sets out approaches for examining fees to ensure they are appropriate. The United Kingdom[49] and Australia[50] are also examining this issue.

Stakeholders are invited to make submissions regarding the impact of professional fees on insolvency proceedings, including the utility of greater disclosure practices.

Enhancing Transparency

Creditor Lists

Currently, the CCAA requires the monitor, within five days after an initial order is made, to prepare a list of creditors and to make it publicly available.[51] The Sarra Report raised the idea of requiring the debtor company to continuously maintain and disclose a creditor list in order to provide more transparency regarding interested parties in the proceeding.[52] Unsecured creditors, such as trade creditors and suppliers, may be able to use the information to better organize. It could also provide information about creditors that can assist in formulating bargaining positions. However, some stakeholders noted that developing and updating a creditor list can be time consuming and expensive, especially if there is active debt trading. This could have the effect of distracting the debtor company from its primary objective of achieving a successful restructuring.

Stakeholders are invited to make submissions regarding imposing an obligation on the debtor company to maintain a creditors' list during a CCAA proceeding.

Empty Voting and Disclosure of Economic Interests

Under the CCAA, creditors have the right to vote on a plan of arrangement or compromise, based on the expectation that they have an economic interest in the success of the restructuring. Stakeholders, however, have raised concerns that as a result of changes in the marketplace, not all creditors may have the same incentives to support a restructuring. In particular, stakeholders have raised concerns regarding the impact of the trading in distressed debt and the potential effects of credit default swaps on creditor incentives and decision making.

Distressed debt trading, in which existing debt is sold at a discount by initial creditors to speculative purchasers, has played an increasingly prominent role in CCAA restructurings. On a positive note, the distressed debt market gives initial creditors an opportunity to fix their losses at an early stage and exit the insolvency proceeding. On the other hand, through purchases of debt at a discount, the purchaser can acquire a more significant voting position than warranted by their economic exposure. At the same time, distressed debt purchasers may hold short-term objectives that run counter to the objective of restructuring the debtor.

Credit derivatives are a form of financial instrument that allow creditors to hedge against credit exposure and that may allow speculators to bet against a particular firm. Credit default swaps (CDS) are a common form of derivative to protect against credit loss, in which a buyer obtains protection from the seller in case of a "credit event", such as default, restructuring or bankruptcy, for a fixed period. Unlike traditional credit insurance, the amount of compensation that can be claimed under a CDS is not limited to the actual loss suffered, there is no automatic right of subrogation and the CDS buyer or seller is not required to hold an actual interest in the hedged debt. It has been suggested that given these characteristics of a CDS, a creditor who holds CDS positions may have disincentives to support a workout or restructuring. Alternatively, a CDS holder may have different incentives in a restructuring proceeding than an unhedged creditor. The lack of transparency with respect to CDS holdings can mean that the restructuring company and unhedged creditors may be unaware of the motives of hedged creditors and their incentives with respect to the outcome of the restructuring process.

It has been suggested that the potential for misalignment of creditors' interests caused by distressed debt trading and credit derivatives, including CDS, may be mitigated by empowering the court to take account of actual economic interests when considering approval of a restructuring plan. Additionally, increased disclosure requirements could provide other creditors with vital information to understand and respond to the incentives of hedged creditors. Others have stated that disclosure and consideration of true economic interests instead of nominal debt holdings could lead to potential negative repercussions in the distressed debt and credit derivative markets.

Stakeholders are invited to provide input on whether courts should be empowered to require greater disclosure of creditors' actual economic interests or to take account of those interests.

Role of the Monitor

Under the CCAA, an insolvency professional is appointed to monitor the business and financial affairs of the debtor (the "monitor").[53] As described in the Sarra Report:[54]

"Monitors are relied on by the courts and the parties to provide information and their views on the financial condition of the debtor, the efficacy and fairness of sales processes or DIP financing arrangements, and their impartial opinion on a host of other issues that arise during the proceeding. Integrity and independence are hallmark attributes of a good monitor."

In 2009, the role of the monitor received statutory clarification, with particular focus on the duty to provide notice to stakeholders and informed guidance to the court.[55] The Superintendent of Bankruptcy also became the regulator for monitor conduct, and a detailed professional conduct regime was added to the CCAA.[56] As noted in the Sarra Report, the role of the monitor is continuing to evolve.[57]

Pre-Filing Reports

A relatively new development is the monitor's "pre-filing report", which is a description of the debtor company's affairs up to the date of a CCAA filing. The report is prepared for the purposes of the initial application and, hence, prior to the monitor's appointment. Pre-filing reports have been found by the courts and insolvency professionals to be beneficial, as they provide timely information to the court. It has been suggested, however, that the monitor's ability to exercise the requisite attribute of independence, prior to receiving a court appointment, is debatable. It has also been suggested that monitors be precluded from introducing evidence in pre-filing reports.

Stakeholders are invited to make submissions regarding whether pre-filing reports should be permitted and, if so, in what circumstances.

Conflict of Interest

The court, creditors, and other stakeholders rely on the monitor to maintain an impartial perspective when providing information on the restructuring process. However, in some CCAA restructurings, the monitor has a pre-existing relationship with the debtor company, for example having acted as the debtor company's financial advisor, which can raise questions as to the monitor's independence.[58] In larger CCAA cases, the debtor company often has separate financial advisors who act independently of the monitor, thereby reducing the potential for real or perceived conflicts of interest. In small- to medium-sized CCAA cases, however, the monitor has often acted as the debtor company's financial advisor pre-filing, raising concerns as to the monitor's impartiality. Some commentators have suggested that such a pre-filing relationship can facilitate a successful restructuring and reduce costs, as the monitor already has knowledge of the debtor company's financial situation. Further, the risks of conflicts are mitigated by the fact that monitors are professionals that are subject to various forms of oversight: they must comply with professional codes of conduct,[59] are subject to appointment restrictions,[60] and are also subject to oversight by the OSB and the court.[61] Others have noted that while a monitor that has acted as a financial advisor to the debtor company may improve the efficiency and reduce the costs of a CCAA restructuring, further measures such as disclosure of the monitor's relationship with the debtor company may be necessary in addition to OSB and court oversight.

Stakeholders are invited to make submissions regarding whether additional measures are necessary to address the potential for conflicts of interest where a monitor has a pre-filing relationship as financial advisor to a debtor company.

Asset Sales

Credit Bidding

Credit bidding refers to the ability of a creditor to use a claim as a form of currency during asset sales in an insolvency proceeding. Canadian legislation is silent regarding credit bidding, but courts have permitted it.[62] The *United States Bankruptcy Code* specifically provides that a lien holder may bid its allowable claim in a sale of the property unless the court orders otherwise.[63]

The Sarra Report notes concerns inherent to credit bidding, particularly with respect to imbalances of power in favour of, and information available to, secured creditors. Such imbalances could reduce the likelihood of competing bids, thereby reducing the potential value of the assets being sold.[64]

Stakeholders are invited to comment on whether credit bidding should be permitted and, if so, what limitations may be appropriate.

Stalking Horse Bids

A stalking horse bid is an initial bid that sets a minimum floor for the eventual sale of assets. While insolvency legislation is silent regarding such bids, Canadian courts permit this type of sales process regularly.

The Sarra Report suggests that stalking horse bids deliver "the message day one to customers, suppliers, employees and other key stakeholders that the business will carry on, and that there is an informed party that has faith in and is committed to the business."[65] It also notes that courts have considered four criteria in assessing a stalking horse bid process: the degree of control exercised over the initial stage to determine the stalking horse bidder; the need for a stalking horse bid as opposed to a traditional sales process; the economic incentives (break fees and other protections) granted to the bidder; and, whether sufficient time is permitted for other bidders to consider topping the credit bid.[66]

Stakeholders are invited to comment on whether stalking horse bids should be expressly permitted under Canadian insolvency legislation and, if so, what limitations may be appropriate.

Applicability of Asset Sale Test

Asset sales are subject to court approval if they are made outside of the ordinary course of business.[67] Some stakeholders have suggested that it is unclear when sales are material enough to become exposed to the court approval process. Because court approval of sales outside the ordinary course of business must take into account how the sale could impact on the payment of wage and pension claims,[68] stakeholders have suggested a materiality test should be created to ensure court approval is sought when appropriate.

Stakeholders are invited to comment on whether a materiality test is required to determine when asset sales will be subject to court approval.

CBCA Arrangements

The *Canada Business Corporations Act* (CBCA) permits a corporation to undertake an "arrangement" in order to effect a corporate change that would not be feasible under any other provision of the Act.[69] Typically, an arrangement is used to conduct a series of changes to a corporation's structure, including mergers, amalgamations and divestitures. In recent years, arrangements have been used to restructure the affairs of insolvent corporations.

The reasons for choosing to restructure under the CBCA rather than insolvency legislation may include the speed and flexibility under which an arrangement can be accomplished; that the debtor's management remains in control of the corporation; that there is no oversight by an independent party such as a monitor; that there are no reporting or other requirements to creditors; and, that it avoids the stigma associated with insolvency.

The CBCA requires that the corporation effecting an arrangement be solvent. Courts have interpreted this to mean that the applicant corporation need be solvent but other affected corporations may be insolvent. As such, some corporations have bypassed the solvency requirement by creating a solvent shell company that is then used as the applicant.[70]

The Director under the CBCA has published a policy statement regarding the use of CBCA arrangement provisions by financially distressed corporations which indicates that corporations must be in compliance with the solvency provisions of the legislation.[71]

Stakeholders have expressed concern with the CBCA arrangement provision because it is skeletal, providing the court broad discretion to make "any interim or final order it thinks fit".[72] As a result, there may be insufficient protections for creditors and a general lack of safeguards compared to insolvency legislation, which strives to balance the competing interests of various affected parties. It has been suggested that insolvency-type protections could be incorporated into the CBCA arrangement provisions. Alternatively, the Sarra Report suggested that it may be appropriate to consider changes to the CCAA in order to respond to the issues that drive parties to use the CBCA.[73]

Stakeholders are invited to provide input regarding the practice of CBCA arrangements involving insolvent companies.

A Streamlined Small Business Proposal Proceeding

The cost of the existing Division I proposal process may be significant and can be prohibitive in the context of small- and medium-sized enterprises (SMEs). It may be appropriate to consider creating a simplified and less expensive proposal process intended to make it easier for SMEs to restructure. Some stakeholders have suggested that certain steps in the process could take place automatically (e.g., 45-day extension of the stay of proceedings), subject to creditors' rights to object.[74]

Stakeholders are invited to make submissions regarding whether a simplified, less expensive proposal process for SMEs would be warranted.

Division I Proposals Extension

A Division I proposal must be filed within six months of the filing of a notice of intention.[75] It has been suggested that the time limit may hinder the debtor's ability to obtain creditor approval, particularly in more complex commercial proceedings.[76] Some stakeholders have suggested permitting the court to extend the time limit in exceptional circumstances where clear criteria exist for granting an extension.[77] On the other hand, other stakeholders have expressed concern that it could lead to abuse of the stay if the length of proceedings is too long.

Stakeholders are invited to provide input on extending the time for filing a Division I proposal following the filing of a notice of intention to file a proposal.

Liquidating CCAA Proceedings

The CCAA was originally envisioned as a restructuring tool. In recent years, courts have noted an increase in the number of liquidating CCAA filings,[78] meaning that the Act is used to sell the assets – typically as a going concern business – and proceeds are distributed among the creditors. Stakeholders have expressed concern with the appropriateness of liquidating CCAAs because there is often no opportunity for creditor approval. Additionally, there can be pressure on the court to approve sales as there is no other going-forward solution. The sales may avoid many of the checks and balances provided by the plan approval process.

Some stakeholders have expressed the view that if liquidating CCAA proceedings are to continue, the CCAA should provide protections and add principles for the court to consider in determining whether to approve the sales processes. Other stakeholders have strongly supported maintaining judicial flexibility to permit the tailoring of appropriate solutions in the particular circumstances of the case.

Stakeholders are invited to provide input on whether the CCAA should be amended to codify protections for stakeholders and principles for the courts to consider in liquidating CCAA proceedings.

Enhancing Equity

Employees' Claims

Notable commercial insolvencies, including Nortel Networks and AbitibiBowater, have raised concerns about debts and obligations owed to employees, former employees and pensioners (together referred to as "employees"). Employees' claims can include unpaid wages, vacation pay, severance and termination pay, long-term disability benefits, pension obligations as well as other employment benefits, such as dental, drug and extended healthcare plans.

Currently, employees benefit from numerous legislative and regulatory protections, as well as government programs, not available to other creditors:

- In bankruptcy and receivership:
    - **Pre-filing unpaid wages and vacation pay** are granted a super-priority over cash, accounts receivable and inventory for up to $2,000 per employee,[79] plus up to $1,000 super-priority for disbursements incurred as part of their employment:[80]
        - To the extent such claims are unfulfilled by the super-priority, they are granted a preferred claim over all of the debtor's remaining property;[81]
    - **Unremitted normal cost pension contributions** are granted a priority over secured creditors without limit;[82]
- In restructuring proceedings, a proposal or plan of arrangement or compromise must provide for the payment of:
    - **Pre-filing unpaid wages and vacation pay** of up to $2,000 per employee;[83]

- **Post-filing wages, vacation pay and disbursements**;[84]
- **Unremitted normal cost pension contributions**;[85]

- The federal Wage Earner Protection Program (WEPP) pays eligible workers up to approximately $3,600 for **unpaid wages, vacation pay, and severance and termination pay**. The WEPP is subrogated to the employees' claim for up to the amount of the super-priority;
- The BIA and the CCAA both respect the **pension fund trust** created under federal or provincial pension legislation, meaning that the amounts held in that pension fund trust are only available to pensioners and are not available to other creditors;
- The federal government announced as part of Budget 2012 that federally-regulated employers that offer **long-term disability plans** will need to do so pursuant to insurance rather than self-funding, meaning that an employer's failure would not affect such benefits.

In recent years, there have been calls to increase protections for employees. For example, it has been suggested that severance and termination could be included in the definition of wages, as they are currently excluded. It has also been suggested that the existing cap of $2,000 on unpaid wages could be increased or removed entirely, permitting employees to obtain priority for the entirety of their claim. With respect to pensions, some stakeholders have suggested that defined benefit pension plan deficits be prioritized, either ahead of secured creditors (i.e. a super-priority) or ahead of unsecured creditors (i.e. a preferred claim). With respect to employee benefit plans, it has been suggested that amounts owed with respect to these plans be prioritized or that the company be barred from terminating such plans without court approval.

International comparisons are imperfect due to differences in employees' claims and how such claims are treated in insolvency proceedings. Industry Canada research[86] found that, of the member countries of the Organisation for Economic Co-operation and Development (OECD) for which information was ascertainable, most – like Canada – provide some form of priority for employees' remuneration in insolvency proceedings. In almost all cases, the insolvency priority is capped either in amount, by a specified time period, or both. Many countries also offer a wage guarantee fund similar to the WEPP. With respect to pensions, many OECD countries with private pension plans provide a preferred claim in insolvency for outstanding contributions. Canada exceeds this by providing a super-priority. Pension deficits are by and large treated as unsecured claims in OECD countries, as is the case in Canada.[87] Finally, with respect to employee benefit plans, the *United States Bankruptcy Code* provides that retiree benefit plans cannot be modified or terminated in a restructuring proceeding without court approval.[88]

Concerns haved been expressed by some stakeholders, however, that any enhancement in the existing super-priority or preferred claims could result in lenders reducing credit available to employers and change behaviour of unsecured creditors, such as suppliers who may impose more restrictive trade credit practices (e.g. shorter payment terms). Industry Canada understands that some manufacturers experienced a reduction in credit availability in 2008, when the $2,000 super-priority was first introduced. Any increase in the amount of the priorities could be anticipated to further negatively impact on credit availability, particularly for small and medium-sized enterprises which have fewer assets against which to apply the super-priority. The House of Commons Standing Committee on Industry, Science and Technology considered Bill C-501 that proposed prioritizing pension claims. The Committee heard from numerous witnesses and decided to oppose the Bill's pension-related provisions due to concerns about their potential negative impact on the Canadian economy.

Stakeholders are invited to make submissions regarding whether, and how, Canada could enhance protection of employee claims in insolvency proceedings.

Employees' Claims in Asset Sales

Under the CCAA, a plan of arrangement or compromise may not be sanctioned by a court unless it provides for the payment of unpaid wages of up to $2,000 per employee and all unremitted normal cost contributions owed to a pension plan.[89] In recent years, however, the Act has been used more often to affect a liquidation of the debtor company (see discussion of "Liquidating CCAAs" above). In these circumstances, there is no plan of arrangement or compromise. In order to ensure that the asset sales that occur in a liquidation scenario do not

defeat the requirement that these claims be paid, the Act provides safeguards.[90] As noted above at "Asset Sales", however, not all sales are conducted under the safeguard provisions, and for those that are it may be difficult to determine if they satisfy the safeguard provisions.

Stakeholders are invited to make submissions regarding whether the existing provisions adequately protect the employees' claims.

Hardship Funds

The BIA permits the payment of interim dividends.[91] The CCAA, on the other hand, is silent on the matter. Courts have exercised their discretion to order interim distributions to vulnerable creditors in certain CCAA cases, however, it is done on a case-by-case basis.

Stakeholders are invited to make submissions regarding whether express authorization for interim dividends in certain circumstances is required and, if so, any potential limitations on the courts' discretion.

Third Party Releases

A "third party release" refers to the discharge of a claim or claims against someone other than the debtor, or a director of a debtor, as part of an insolvency proceeding. The Acts are silent regarding such releases but courts have exercised their discretion "to compel the implementation of a release of the claims against third parties as part of the compromise."[92]

According to the Sarra Report, the criteria for permitting a third party release include: (1) there are special circumstances warranting the release; (2) the release is reasonably connected to the restructuring; (3) the third parties are essential to the restructuring; (4) the arrangement cannot succeed without the releases; (5) the third parties are offering a tangible, realistic contribution to the arrangement; (6) creditors generally must benefit from the arrangement; (7) creditors approve of the plan knowing the nature and effect of the releases; and, (8) the releases are fair and reasonable (*i.e.* not overly broad or offensive to public policy).[93]

Stakeholders are invited to make submissions regarding whether third party releases are appropriate and, if so, whether the identified criteria are sufficient to prevent potential abuse.

Key Employee Retention Bonuses

The CCAA is silent regarding the payment of employee retention bonuses during insolvency proceedings but courts have exercised their discretion to approve bonuses on a case-by-case basis.

The payment of bonuses may be merited in some circumstances, for example, where the employees' contributions during the course of the insolvency proceedings serve to produce beneficial results for stakeholders such as encouraging restructuring, retaining valuable employees, and increasing asset recovery for creditors. On the other hand, it may be perceived as inequitable should certain employees – particularly executives and management – receive bonuses while other employees are dismissed and/or do not receive full compensation for their unpaid wages, severance and termination or pension benefits.

The Sarra Report noted concerns that bonus programs created early in a CCAA proceeding may not be properly monitored or evaluated.[94] It also suggested that some practitioners have concerns that managers may be improperly proposing such programs to benefit from their "information capital".[95]

The *United States Bankruptcy Code*[96] permits the payment of bonuses if the bonus plan was in place prior to the commencement of insolvency proceedings, the employee has an alternative employment offer, he or she is required for the restructuring and the bonus would have the effect of retaining that employee.

Stakeholders are invited to make submissions regarding whether employee bonuses should be permitted in an insolvency proceeding and, if so, whether terms and conditions should be codified.

Stakeholders are also invited to make submissions regarding whether director and officer liability could be imposed for bonus programs created during an insolvency proceeding.

Oppression Remedy

Corporate statutes provide for an 'oppression remedy' to protect complainants from oppressive conduct by a corporation or its directors.[97] Some stakeholders have suggested that in insolvency scenarios the oppression remedy is sometimes used for improper purposes, such as venue shopping or to skew negotiations, and therefore there needs to be clearer direction as to when the remedy is available in an insolvency context.[98]

Stakeholders are invited to make submissions regarding whether restrictions on the availability of the oppression remedy should be imposed in the insolvency context.

Interest Claims

Stakeholders have raised concerns about the treatment of interest claims in insolvency proceedings. Although some guidance may be taken from the treatment of post-filing interest claims in bankruptcy, no clear rule exists for the treatment of such claims in CCAA proceedings.[99]

Stakeholders have suggested that interest stop accruing upon the commencement of insolvency proceedings (e.g. CCAA proceedings) in the event there is a subsequent bankruptcy. It has also been suggested that it be consistent across all insolvency legislation that no creditor be entitled to recovery post-filing interest unless all other creditors have received full payment on their claims. Finally, it has been suggested that the applicable interest rate should be the prime rate proclaimed by the Bank of Canada on the commencement of insolvency proceedings.

Stakeholders are invited to make submissions regarding the existing rules regarding interest claims.

Unpaid Suppliers

The BIA provides a supplier of goods with the right to repossess those goods, subject to certain conditions.[100] In the 2008-2009 reforms, the provision was amended to provide suppliers a longer period in which to make their claim to repossess goods. The provision remains contentious, however, because the conditions have been strictly interpreted by the courts, making it difficult to use this remedy successfully.

The *United States Bankruptcy Code* grants suppliers a repossession right[101] or an administrative priority for goods delivered in the 20 days prior to commencement of insolvency proceedings.[102]

Stakeholders have suggested that s. 81.1 of the BIA be repealed as it runs contrary to the general rule that unsecured stakeholders be treated similarly. However, other stakeholders view the provision as the only protection for suppliers.

Stakeholders are invited to make submissions regarding the treatment of supplier claims for goods delivered in the period immediately prior to insolvency proceedings.

Fruit and Vegetable Suppliers

On February 4, 2011, the Canada-United States Regulatory Cooperation Council (RCC) was created to better align the two countries' regulatory approaches, where possible. The RCC Joint Action Plan included a commitment to "develop comparable approaches to financial risk mitigation tools to protect Canadian and U.S. fruit and vegetable suppliers from buyers that default on their payment obligations."

In the United States, the *Perishable Agricultural Commodities Act* creates a number of financial risk mitigation tools specific to the fruit and vegetable marketplace, including information services, arbitration, temporary restraining orders and a statutory trust over the debtor's assets that were obtained from trading in produce. The statutory trust is available to any participant in the market, including farmers, packers, dealers, and wholesalers.

The BIA provides that farmers in Canada, fishers and aquaculturalists are entitled to a super-priority over all of the inventory of a bankrupt for unpaid amounts related to farming, fishing or aquaculture products delivered within 15 days of a bankruptcy or the appointment of a receiver.[103]

Under the RCC auspices, efforts were made to find solutions that would enhance the comparability between the Canadian and U.S. systems of financial risk mitigation in the fresh produce industry. For example, market-based solutions, such as credit insurance and bonding, were studied. Many fresh produce industry participants instead advocated for a legislative solution so that fresh produce claims would be paid ahead of most other creditors, including secured creditors (i.e. a super-priority). The proposed super-priority was to be paid out of any property of the bankrupt that was obtained from trading in fresh produce.

Industry Canada is interested in stakeholder views regarding the existing super-priority, including potentially expanding it to benefit U.S.-based fresh produce farmers and extending the delivery period from 15 days to 30 days, which is more consistent with practices in the marketplace.

Stakeholders are invited to make submissions regarding the existing farmers' super-priority in section 81.2 of the BIA.

Deterring Fraud and Abuse

Director Disqualification

Given their key role in corporate governance, misconduct by directors both before and during insolvency proceedings attracts considerable attention. Various statutory restrictions and obligations are placed on directors to prevent, reduce and remedy misconduct (e.g. corporate, tax, environmental and employment legislation). Further, insolvency law imposes liability on directors for repayment of corporate dividends paid before bankruptcy.[104] In corporate restructuring proceedings, their misconduct or negligence is not covered by the protective indemnification charge,[105] claims against them personally for wrongful conduct may survive,[106] and they can be removed from their positions if they are unreasonably impairing or acting inappropriately with respect to the proceeding, or are likely to do so.[107] The concern about directors using 'quick flips' to strip a company of valuable assets is addressed by mandated court scrutiny of purchases of corporate assets by directors.[108] Finally, if a corporation commits a bankruptcy offence – for example failing to comply with its duties as a bankrupt[109] – a director may be fined or jailed.[110]

However, directors are not disqualified from being a director of, or from incorporating another business, even if guilty of misconduct. The issue has been addressed in various reports, articles and proposed bills, but a disqualification regime has never become law in Canada.[111] This is in contrast with the United Kingdom, where a detailed disqualification regime is in place.[112]

The concept of a disqualification regime raises interesting questions regarding the need for and efficacy of such a regime. Important issues regarding the manner of implementing, the costs of implementing and maintaining, its constitutionality, and the impact on both directors' decision making and retention both before and during an insolvency proceeding must be considered.

Stakeholders are invited to make submissions regarding whether directors of a corporation that has become subject to insolvency proceedings should be disqualified from acting as a director due to misconduct.

Related Party Subordination and Set-Off

Stakeholders have suggested that the legislation be amended to allow debts among related parties to be subordinated, particularly with respect to those parties from the same corporate group. Similarly, stakeholders have suggested that the legislation be amended to prohibit set-off of debts among related parties.

Stakeholders are invited to provide input as to whether debts of related parties should be allowed to be subordinated, and whether set-off among related parties should be expressly prohibited.

Cross-Border Insolvencies

Foreign Claims under "Long-Arm" Legislation

Foreign jurisdictions, including the United States and the United Kingdom, have implemented legislation that imposes liabilities on corporate group members for the pension deficits of companies located within those jurisdictions.[113] This long-arm pension legislation has the potential to put the assets of Canadian corporations at risk if an associated corporate entity cannot meet its pension obligations in that foreign jurisdiction.

In order to protect the assets of Canadian corporations from long-arm pension legislation, some stakeholders have suggested amending Canadian insolvency legislation to provide that claims from foreign long-arm legislation, unless based on claims in Canada, are not enforceable in Canada.[114]

Alternatively, stakeholders have suggested that Canada should adopt long-arm legislation similar to that in the United States and the United Kingdom that would allow Canadian creditors to pursue the assets of corporate group members in foreign jurisdictions.[115]

Submissions are invited regarding an appropriate response to long-arm legislation.

Set-Off for Claims in Multiple Jurisdictions

The BIA and CCAA contain provisions regarding cross-border insolvencies that state that payments made to creditors in foreign proceedings must be taken into account by the Canadian court in determining the payment that may be made in the Canadian proceeding.[116] Some stakeholders have suggested these provisions should be more prescriptive. In situations where a creditor has claims in multiple jurisdictions for the same debt, and that creditor has successfully recovered amounts for post-filing interest in the foreign jurisdiction, such amounts should be deducted from amounts owing on account of principal from the Canadian estate.

Stakeholders are invited to make submissions regarding the set-off of interest claims from another jurisdiction against principal.

Allocation of Proceeds

It has been suggested that insolvency professionals face a myriad of challenges where assets and creditors of an insolvent entity are located in multiple jurisdictions. Stakeholders have recommended that Canadian insolvency legislation be clarified in order to provide insolvency professionals with guidance as to how to access and convey assets in cross-border insolvencies, as well as to clarify how to equitably allocate the liquidated value of assets among interested parties and jurisdictions.[117]

Submissions are invited regarding access to, and conveyance and allocation of, assets in cross-border insolvencies.

Treatment of Enterprise Groups

Stakeholders have raised concerns that the current insolvency legislation does not sufficiently address enterprise groups. The result is that the processes and procedures undertaken during the course of an insolvency proceeding may be driven by the most sophisticated parties.[118] The United Nations Commission on International Trade Law (UNCITRAL) has made recommendations regarding the treatment of enterprise groups in insolvency.[119] Stakeholders have suggested that Canadian insolvency legislation build on the work of UNCITRAL.

Stakeholders are invited to provide input regarding the treatment of enterprise groups in insolvency.

"Centre of Main Interests"

Concerns have been raised that Canadian courts have been quick to recognize foreign jurisdictions, particularly the United States, as a debtor's centre of main interest (COMI). This may have the effect of reducing the

ability of smaller creditors from effectively participating in the proceeding.[120]

Some stakeholders have suggested that Canadian courts should ensure that Canadian creditors have been given sufficient notice, disclosure and the opportunity to make submissions where an application has been made to recognize a U.S. or other foreign jurisdiction as the COMI of a Canadian debtor.[121]

Stakeholders are invited to make submissions regarding the need for procedural protections in cross-border recognition matters.

Unsecured Creditors' Committees

Canadian insolvency legislation is silent regarding unsecured creditors' committees (UCCs). Nonetheless, UCCs from the United States are increasingly using cross-border protocols to gain standing in Canadian insolvency proceedings leading to increased costs for Canadian creditors who find themselves before the court on a greater number of motions and contested positions.[122]

Stakeholders have suggested that the courts should be authorized to limit the participation of UCCs in Canadian insolvency proceedings. This may be accomplished by developing principles and criteria for the recognition of a UCC and by defining the scope of participation of a UCC in order to ensure better alignment with the objectives of Canadian insolvency legislation.[123]

Stakeholders are invited to provide input as to whether it is appropriate to develop principles and criteria for the recognition of foreign UCCs and to define the scope of UCC participation in Canadian insolvency proceedings.

Administrative Issues

Renaming the *Bankruptcy and Insolvency Act*

Some stakeholders have expressed concern that the term "bankruptcy" in the title of the legislation and for "trustee in bankruptcy" may create an unintended social stigma that may prevent some Canadians from seeking much needed professional assistance to obtain debt relief. As a result, these debtors may suffer greater economic and social consequences than would otherwise be the case. It has been suggested that the term "bankruptcy" be removed from use.

Stakeholders are invited to make submissions regarding the potential social stigma associated with "bankruptcy" and whether Canadians may be better served if that term is downplayed in the legislation.

A Unified Insolvency Law

The federal government has constitutional jurisdiction over bankruptcy and insolvency, and has exercised this mandate through several statutes targeting different entities:

- The BIA governs liquidations and proposals for individuals and businesses;
- The CCAA applies to corporations with debts exceeding $5 million;
- The *Winding-up and Restructuring Act* (WURA) applies to financial institutions as well as certain corporations;
- The *Canada Transportation Act* (CTA) contains provisions relating to insolvent railroads.

This fragmented approach has led to criticism that it creates uncertainty for both debtors and creditors, and that a merger of some or all of the statutes or relevant provisions into one comprehensive insolvency Act could increase transparency, fairness, consistency and efficiency. Others have noted that the separate insolvency statutes provide debtors and creditors with additional flexibility to achieve a successful solution to an insolvency.

Merger of the BIA and CCAA

It has been suggested that the BIA and CCAA could be merged into a single Act, similar to the *United States Bankruptcy Code* that contains various insolvency proceedings under a single statute. This would reduce the potential for "statute-shopping". It has been stressed, however, that the flexibility of the CCAA should be maintained in such a case.

Winding-up and Restructuring Act

WURA is the primary insolvency statute available for financial institutions. It applies, however, to some non-financial enterprises as well.[124] Part I of WURA, which provides the general insolvency regime, is under the mandate of the Minister of Industry. It has not been modernized recently and stakeholders have expressed concerns that it contains a large number of outdated provisions. Parts II and III, which provide specialized rules relating to insurance companies, are under the mandate of the Minister of Finance.

There are at least two options available for dealing with WURA. First, WURA could be amended to apply only to financial institutions. In such an event, the criticisms relating to uncertainty would be addressed as all non-financial corporations would be limited to the BIA or CCAA. The stakeholder concerns regarding Part I would remain. Alternatively, WURA could be merged into a unified insolvency Act while maintaining the specialized rules relating to insurance companies.

Canada Transportation Act

The CTA includes provisions for schemes of arrangements to be made by insolvent railway companies.[125] Neither the BIA nor the CCAA apply to "railway companies".[126]

Courts have, however, permitted companies that operate a railway to commence insolvency proceedings under the BIA and the CCAA.[127] The courts have, for example, differentiated between a company, incorporated under ordinary corporate legislation, that happens to operate a railway and a company incorporated specifically for the purpose of carrying on a railway.

It has been suggested that the policy rationales for a separate, railway companies legislative regime under the CTA should be re-examined.

Stakeholders are invited to make submissions regarding a unified insolvency statute.

Restricting Consumer Proposals

The BIA provides for proposals to be made by consumer debtors.[128] In 2009, the debt threshold for consumer proposals was increased from $75,000 to $250,000, excluding any debts secured by the individual's principal residence. Stakeholders have raised the concern that, with this increase, it is more likely that business debt will be captured under consumer proposals. It has been proposed that the consumer proposal provisions be further restricted to ensure that business debt is dealt with under Division I proposals.

Submissions are invited as to whether the consumer proposal process should be amended to ensure that it is not used with respect to business debt.

Special Purpose Entities

Special purpose entities (e.g. corporations, limited partnerships, trusts) are used by corporations for specific, limited business purposes. For example, assets could be transferred to a special purpose entity to achieve a particular objective while insulating the parent corporation from risk. If the special purpose entity is created as a corporation or partnership, it could qualify to commence proceedings under the BIA and CCAA. Neither the BIA nor the CCAA, however, apply to a special purpose entity created as a trust

It has been suggested that trusts operating as special purpose entities should qualify for relief under the BIA and CCAA. There may, however, be issues with defining what constitutes a special purpose entity and the proposed change may trigger other consequences.

Stakeholders are invited to provide input on whether to expand the application of the BIA and CCAA to trusts used as special purpose entities.

Receiverships

Codification of Receiverships

Part XI of the BIA allows a court to appoint a receiver with the power to act nationally over all, or substantially all, of the property of an insolvent person or bankrupt. Although stakeholders have suggested that receiverships are generally an effective tool in insolvency proceedings, further codification of the rules relating to receivers appointed under insolvency legislation may improve the receivership process.[129]

Other stakeholders have suggested that standardization of the rules regarding the authority of a receiver to act under the BIA, CCAA and provincial receivership legislation, including the creation of a standard set of appointment and engagement letters for receivers, would provide greater clarity and certainty in the insolvency process.[130]

Stakeholders are invited to provide input as to whether it is appropriate to amend the insolvency legislation to clarify the role and authority of a receiver appointed under s. 243 of the BIA; and whether it is appropriate to standardize a set of rules regarding the authority of a receiver to act across all insolvency statutes.

No Action against Receivers without Leave of Court

Some stakeholders have suggested that the reduction in the authority of interim receivers that resulted from the 2009 legislative amendments has led to an increase in the number of receivers appointed under s. 243 of the BIA. As such, these receivers face increased liability and therefore actions against them should not be allowed without leave of the court under s. 215 of the BIA.

Stakeholders are invited to provide input as to whether it is appropriate to amend the insolvency legislation to require leave of the court before taking any action against a receiver.

Marshalling of Charges

The doctrine of marshalling is an equitable concept that allows courts to arrange the assets of a debtor to ensure that all creditors are paid to the greatest extent possible. For example, where a senior creditor has recourse to two or more assets from which to satisfy its debt, and a junior creditor has access to only one asset, the senior creditor would be required to satisfy its debt first out of the asset in which the junior creditor has no interest.

The BIA does not currently include the concept of marshalling. It has been suggested that it may be beneficial if the Act expressly provided for marshalling of charges to ensure greater fairness and efficiency.

Stakeholders are invited to provide input as to whether it would be appropriate to amend the insolvency legislation to codify the doctrine of marshalling charges.

Tax Issues

The following tax-related issues have been raised by stakeholders in the insolvency context. The issues are included to solicit information regarding the nature of concerns and the extent to which such issues potentially affect insolvency proceedings:

- Whether a restructured tax debtor with prior tax obligations should be allowed "fresh start accounting" for tax purposes – specifically those resulting from debt forgiveness – being dealt with as "pre-filing claims";
- Whether tax authorities should be required to send a notice in accordance with section 244 of the BIA before issuing enhanced requirements to pay;
- Whether account receivables that are the object of pre-filing enhanced requirements to pay should "re-vest" in the estate; and
- Whether debt forgiveness rules should apply in consumer proposals.

Technical Issues

Bankruptcy and Insolvency Act

Section 197 - Costs Against the Debtor

Sometimes the conduct of the debtor with respect to his or her discharge hearing creates unnecessary expenses for the trustee or creditors. Stakeholders have suggested that one remedy for this could be granting the court the explicit authority to order costs against the debtor in the appropriate circumstances.

Submissions are invited as to whether subsection 197(6.1) should be amended to permit costs to be awarded against the debtor.

Section 204.3 – Losses Due to Bankruptcy Offences

Section 204.3 provides a mechanism for persons convicted of an offence under the BIA to provide compensation for the loss they have caused, but only where that loss is as a result of damage to property. Stakeholders have suggested that this be extended to all losses, not just those relating to damage to property.

Submissions are invited as to whether s.204.3 should be broadened to capture all losses resulting from the BIA offence.

Disallowance of Claims

One of the roles of a trustee is to assess creditor claims. If the claim cannot be supported, the trustee will disallow it. The impact is that the creditor may no longer participate in the BIA process and will receive no dividend out of the estate. This may be a significant impact on the creditor. The existing provision permits 30 days to appeal a disallowance or to seek an extension of the 30-day period.[131] Stakeholders have suggested that the court be granted the authority to permit an appeal beyond the 30-day period in appropriate circumstances.

Submissions are invited as to whether it is appropriate to provide the court with the authority to extend the period for appealing the disallowance of a claim.

Securities Firms Bankruptcies

Part XII of the BIA provides a streamlined procedural framework for the administration of the bankruptcies of securities firms. Stakeholders have noted that Part XII does not empower securities regulators or customer compensation bodies to petition insolvent securities firms into bankruptcy, and have called for BIA amendments to provide for this power and clarify the conditions under which it may be exercised.

Submissions are invited as to whether securities regulators or customer compensation bodies should be able to apply for a bankruptcy order.

Preview of Proposals by the Trustee

There have been anecdotal reports that proposal trustees, after having accepted an engagement, discover that the debtor's financial situation is worse than expected. It has been suggested that a trustee should have the right to examine the size and complexity of a BIA proposal file before accepting an engagement.[132]

Submissions are invited as to whether proposal trustees should be provided with a mechanism to preview the size and complexity of a BIA proposal file before they accept it.

Section 173 - Facts for Which Discharge Will be Suspended

Section 173(1) of the BIA sets out a list of facts for which the discharge of the bankrupt may be refused, suspended, or granted conditionally by the court. Some stakeholders have questioned whether the list of facts is out of date and needs to be updated.

Stakeholders are invited to make submissions regarding whether the list of facts for which a bankrupt's discharge will be refused, suspended or granted conditionally needs to be updated.

Treatment of RRSPs in Bankruptcy

In 2008, the BIA was amended to exempt registered retirement savings plans (RRSPs) from seizure in bankruptcy, subject to a clawback of contributions made in the 12 months immediately prior to a bankruptcy.[133] Some stakeholders criticized the measure because it creates a potential for abuse since a bankrupt may put funds into the RRSP prior to a bankruptcy and then have access to the funds immediately following their discharge for non-retirement purposes.

Stakeholders have suggested that a lock-in mechanism, which would require the bankrupt to keep the funds in the RRSP until retirement, would fulfill the policy intent of the measure.

Stakeholders are invited to make submissions regarding the treatment of RRSPs in bankruptcy and potential mechanisms to protect the integrity of the insolvency regime.

Secured Creditors Calling Proposal Meetings

The administrator of a consumer proposal must call a meeting of creditors in two circumstances: (1) where directed to do so by the official receiver or (2) where, at the expiration of the 45-day period following the filing of the consumer proposal, creditors having in the aggregate at least 25 percent in value of the proven claims have requested a meeting.[134] If neither of these circumstances arises the administrator is not obliged to call a meeting of creditors and the consumer proposal is deemed to be accepted by the creditors.[135]

In situations where the claims of unsecured creditors do not amount to at least 25 percent in value of the proven claims, the unsecured creditors would not be able to ensure that a meeting of creditors is called. As such, some stakeholders have advised that whether the consumer proposal is accepted or not in these situations can be controlled by secured creditors who may have little or no economic interest in the outcome of the proposal since they maintain their right to realize their security.

Stakeholders are invited to make submissions regarding the basis upon which a meeting of creditors may be called in the case of a consumer proposal.

Footnotes

1 *Husky Oil Operations Ltd.* v. *Minister of National Revenue*, 1995 CanLII 69 (SCC), [1995] 3 SCR 453, at paragraph 7.

2 *Schreyer* v. *Schreyer*, 2011 SCC 35 (CanLII), [2011] 2 SCR 605.

3 R.J. Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law Book, 2009) at page 4 (referring to UNCITRAL Legislative Guide on Insolvency Law at page 14).

4 Allan Crawford and Umar Faruqui, "What Explains Trends in Household Debt in Canada?" in *Bank of Canada Review* (Winter 2011) find that the aggregate debt-to-income ratio of Canadian households has trended upward over the past 30 years utilizing data collected from Ipso Reid's *Canadian Financial Monitor*. This trend has been documented by a 2011 TD Bank study "Assessing the Financial Vulnerability of Households Across Canadian Regions" and by Statistics Canada.

5 Bailliu *et al*. "Household Borrowing and Spending in Canada," in *Bank of Canada Review* (Winter 2011) find that the sizable increase in the ratio of household debt to income in Canada over the past decade has coincided with a period of sustained strong growth in house prices. They conclude that the main driver of the rise in household debt has been home-equity extraction—household borrowing against equity in existing homes through increases in mortgage debt and draws on home-equity lines of credit. The authors speculate that home equity may serve as a substitute for other types of consumer debt.

6 Source: The Office of the Superintendent of Bankruptcy. The consumer insolvency rate is defined as the number of consumer insolvencies per one thousand residents aged 18 years or above. The business insolvency rate is defined as the number of business insolvencies per one thousand businesses.

7 In recent years, economists and social scientists have found that the transition to adulthood is taking longer to complete. For example, using Statistics Canada survey data, Clarke (2007) finds that in "the transition to adulthood is now delayed and elongated. It takes today's young adults longer to achieve their independence: they are leaving school later, staying longer in their parents' home, entering the labour market later, and postponing conjugal unions and childbearing" (pp. 14). It is important to note that the implications of this trend for the financial situations of older cohorts and for insolvency trends have not been demonstrated conclusively. Clark, Warren. "Delayed transitions of young adults." *Canadian Social Trends 84 (2007)*: 14-22.

8 David Fieldhouse, Igor Livshits and James MacGee (2012), "Income Loss and Bankruptcies over the Business Cycle." Office of the Superintendent of Bankruptcy. The authors investigate factors that drive cyclical fluctuations in consumer insolvency filings, using an aggregate analysis using historical data at the national, provincial and city levels, and micro-level analysis which makes use of a unique dataset of Canadian filers.

9 In 2012, the GDP growth rate among the Atlantic Provinces ranged from negative to low (4.4 percent in Newfoundland and Labrador, to -1.1 percent in New Brunswick, and -0.1 percent in Nova Scotia), while Alberta (3.8 percent), Manitoba (2.6 percent) and Saskatchewan (1.9 percent) saw the highest levels of economic growth.

10 According to Statistics Canada, in 2012, Canada's unemployment rate was 7.2 percent. Newfoundland and Labrador had the highest unemployment rate in the country at 12.5 percent. Prince Edward Island and New Brunswick had the second and third highest unemployment rates at 11.3 percent and 10.2 percent, respectively. Alberta (4.6 percent) and Saskatchewan (4.7 percent) had the lowest unemployment rates. See Provincial and Territorial Economic Accounts, 2012 (Accessed on January 10, 2014).

11 Provincial exemption regimes are respected in the BIA, permitting bankrupts to keep certain property as set out in provincial legislation (e.g., work tools, a vehicle, personal belongings).

12 Section 178(1) of the BIA contains a list of debts that are not released upon discharge. Corporate bankrupts do not receive a discharge unless all debts are paid in full.

13 Section 168.1 of the BIA.

14 Standing Senate Committee on Banking, Trade and Commerce, 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the* Bankruptcy and Insolvency Act *and the* Companies' Creditors Arrangement Act.

15 Classes of non-releasable debts include fines or penalties related to criminal or quasi-criminal offences, debts owed in respect of fraud, embezzlement or misappropriation of funds, and alimony or family support orders. See BIA s.178(1) for the full list.

16 For example, see *Simone* v. *Daley*, 1999 CanLII 3208 (ON CA).

17 For a review of the issues raised by these regimes, see: "Section 270 of the *Highway Traffic Act*," Manitoba Law Reform Commission, 1997.

18 E.g., *Traffic Safety Act*, R.S.A. 2000, C. T-6, ss 102(1); *Highway Traffic Act*, R.S.O. 1990, c. H.8, ss.198(1); *Highway 407 Act*, 1998, S.O. 1998, c.28, s.22.

19 *Bankruptcy Code,* 11 U.S.C. §525(a).

20 For example, see *Canada (Superintendent of Bankruptcy)* v. *407 ETR Concession Company Limited*, 2013 ONCA 769; *Gorguis* v. *Saskatchewan Government Insurance*, 2011 SKQB 132, *Moloney* v. *Alberta (Administrator, Motor Vehicle Accident Claims Act)*, 2012 ABQB 644, and *Ontario (Finance)* v. *Clarke and Superintendent of Insurance for Ontario,* 2013 ONSC 1920.

21 Personal Insolvency Task Force: Final Report (2002).

22 Senate Report, *supra* note 22.

23 Janis Sarra and Susan B. Boyd, "Competing Notions of Fairness: A Principled Approach to the Intersection of Insolvency Law and Family Property Law in Canada," in J. Sarra ed., *Annual Review of Insolvency Law* 2011 (2012), 207 at 208 – citing a study that marital breakup accounts for approximately 10 percent of individual bankruptcies each year.

24 Section 136(1)(d.1) of the BIA.

25 Section 178(1)(b) and (c) of the BIA.

26 *Schreyer* v. *Schreyer*, 2011 SCC 35.

27 In the case, the non-bankrupt spouse successfully had the bankrupt spouse's discharge annulled and she received payment from the exempt assets.

28 BIA ss.60(4), 66.26(3) and s.147.

29 In summary administration bankruptcies, the levy is capped at $200 in accordance with Rule 123(3) of the BIA General Rules.

30 BIA ss. 121(4).

31 BIA paragraph 136(1)(d.1).

32 BIA paragraphs 178(1)(b) and (c).

33 *Re Cameron* 2003 CarswellAlta 624 (Alberta Court of Appeal).

34 Senate Report, *supra* note 22 at p. 86.

35 Senate Report, *supra* note 22 at p. 84.

36 *Ibid.*, at p. 52.

37 Repayment Assistance.

38 Section 178(1.1) of the BIA.

39 Dr. Janis Sarra is the Director of the Peter Wall Institute for Advanced Studies and Professor of Law, Faculty of Law, University of British Columbia.

40 Examining the Insolvency Toolkit: Report of the Public Meetings on the Canadian Commercial Insolvency Law System.

41 BIA section 82 permits a patent holder the right to repurchase patented goods from a trustee for the original invoice price, less any depreciation.

42 BIA section 83 provides limited protection to copyright authors.

43 Sarra Report at p. 23.

44 Sarra Report at p. 12.

45 Insolvency Institute of Canada, Report of the Task Force on Derivatives (Nov. 2013).

46 Sarra Report at pp. 58-60.

47 *Ibid.*

48 U.S. Department of Justice, Appendix B: Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under United States Code by Attorneys in Larger Chapter 11 Cases. *Federal Register*, Vol. 78, No. 116, June 17, 2013.

49 See Elaine Kempson, "*Review of Insolvency Practitioner Fees Report to the Insolvency Service*," July 2013.

50 See "*Proposal paper: A modernisation and harmonisation of the regulatory framework applying to insolvency practitioners in Australia*," Australian Government, December 2011.

51 Section 23(1)(a)(ii)(C) of the CCAA.

52 Sarra Report, p.13.

53 CCAA s.11.7.

54 Sarra Report, p. 73.

55 CCAA s.23-25.

56 CCAA s.25 and 28 to 31.

57 Sarra Report, p. 74.

58 Sarra Report, p. 76.

59 E.g., CCAA s.25.

60 CCAA subparagraph 11.7(2)(a)(iii).

61 CCAA sections 11.7, and 28 – 30.

62 *Re White Birch Paper Holding Co.*, 2010 CarswellQue 1780 (Que. S.C.J.); *Re Canwest Global Communications Corp.* (2009), 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]).

63 *United States Bankruptcy Code*, 363 k.

64 Sarra Report, p. 26.

65 Sarra Report, p. 32.

66 Sarra Report, pp. 31-32.

67 CCAA s.36.

68 BIA s.65.13(8); CCAA s.36(7).

69 CBCA s.192.

70 Sarra Report, p. 69.

71 Policy Concerning Arrangements Under Section 192 of the CBCA.

72 CBCA subsection 192(4).

73 Sarra Report, p. 71.

74 Sarra Report, p. 115.

75 Subsection 50.4(9) of the BIA.

76 Sarra Report, page 112.

77 Sarra Report, page 123.

78 Sarra Report, page 16.

79 BIA, s.81.3 and s.81.4.

80 E.g. section 81.3(3).

81 BIA, s.136(1)(d).

82 BIA, s.81.5 and s.81.6.

83 BIA, s.60(1.3); CCAA, s.6(5)(a)(i).

84 BIA, s.60(1.3); CCAA, s.6(5)(a)(ii).

85 BIA, s.60(1.5); CCAA, s.6(6).

86 Departmental researchers relied significantly on "Employee and Pension Claims During Company

Insolvency: A Comparative Study of 62 Jurisdictions," by Dr. Janis Sarra, June 2008.

87 Many OECD countries, including the United States, the United Kingdom and Germany, provide pension benefit guarantee funds that will pay pensions (capped) in the event the employer is not able to do so. Ontario is the only jurisdiction in Canada that offers a pension benefits guarantee fund.

88 Section 1114 sets out detailed requirements that must be met prior to the court being permitted to modify or terminate such plans.

89 CCAA ss.6(5) and (6); See also BIA 60(1.3) and (1.5).

90 CCAA ss.36(7); See also BIA ss.65.13(8).

91 BIA ss.136(2) and ss.148(1).

92 Sarra Report, p. 90.

93 Sarra Report, p. 92.

94 Sarra Report, p. 105.

95 Sarra Report, p. 105-106.

96 *Bankruptcy Code* 11 USC §503(c).

97 E.g. CBCA s.241.

98 Sarra Report, p. 108.

99 Carfagnini, J.A. and C. Costa, *Claims for Post-Filing Interest and Prepayment Premiums in a CCAA Proceeding*, Annual Review of Insolvency Law 2011 (J. Sarra, Editor)

100 BIA section 81.1.

101 USBC section 546(c)(1).

102 USBC section 503(b)(9).

103 BIA section 81.2.

104 BIA s.101.

105 BIA ss.64.1(4); CCAA ss.11.51(4)

106 BIA ss.50(14) and (15); CCAA ss.5.1(2) and (3)

107 BIA s.64; CCAA s.11.5.

108 BIA ss.30(4), ss.30(5), ss.65.1(5), ss.65.1(6); CCAA ss.36(4), ss.36(5)

109 BIA ss.198.

110 BIA s.204.

111 Tasse Report; Bill C-60 (1975); Bill C-17 (1976); Colter Committee; Girgis, Jasmine, "Corporate Directors' Disqualification: The New Canadian Regime?" (2009) Alberta Law Review 46:3.

112 *Company Directors Disqualification Act 1986* (U.K.), 1986, c. 46.

113 Sarra Report, pp. 40, 42.

114 Sarra Report, p. 42.

115 Sarra Report, p. 45.

116 BIA s. 283; CCAA s. 60.

117 Sarra Report, p. 23.

118 Sarra Report, p. 48.

119 UNCITRAL Legislative Guide on Insolvency Law—Part three: Treatment of enterprise groups in insolvency.

120 Sarra Report, p. 47.

121 Sarra Report, p. 51.

122 Sarra Report, p. 50.

123 Sarra Report, p. 51.

124 See section 6, WURA, R.S.C., 1985, c. W-11.

125 CTA sections 106-110.

126 BIA section 2, definition of "corporation"; CCAA section 2(1), definition of "company."

127 Cases in which the courts have accepted the filing involving a "railway" include: Quebec Southern Railway Co. (2001), Quebec C.A. 500-11-017184-017, Kelowna Pacific Railway Ltd. (2013), and Montreal, Maine & Atlantic Canada Co. (2013).

128 BIA s.66.12.

129 Sarra Report, p. 132.

130 Sarra Report, p. 132-133.

131 BIA subsection 135(4).

132 Sarra Report, p. 130-132.

133 BIA subsection 67(1)(b.3).

134 BIA section 66.15(2).

135 BIA section 66.18.

Court File No. CV-16-11257-00CL

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PT HOLDCO, INC., PRIMUS TELECOMMUNICATIONS CANADA, INC., PTUS, INC., PRIMUS TELECOMMUNICATIONS, INC., AND LINGO, INC.

ONTARIO
SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST
(PROCEEDING COMMENCED AT TORONTO)

BRIEF OF AUTHORITIES OF BANK OF MONTREAL AS AGENT FOR THE SYNDICATE

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