Court File No. CV-18-00611219-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

FTI CONSULTING CANADA INC., in its capacity as Court-appointed monitor in proceedings pursuant to the *Companies' Creditors Arrangement Act,* RSC 1985, c. c-36

Plaintiff

- and -

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM HARKER and WILLIAM CROWLEY

Defendants

Court File No. CV-18-00611214-00CL

B E T W E E N:

SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. DOUGLAS CUNNINGHAM, Q.C.

Plaintiff

- and -

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL, WILLIAM CROWLEY, WILLIAM HARKER, R. RAJA KHANNA, JAMES MCBURNEY, DEBORAH ROSATI, and DONALD ROSS

Defendants

Court File No. CV-18-00611217-00CL

B E T W E E N:

MORNEAU SHEPELL LTD. in its capacity as administrator of the Sears Canada Inc. Registered Pension Plan

Plaintiff

- and -

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM HARKER, WILLIAM CROWLEY, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI, R. RAJA KHANNA, JAMES MCBURNEY and DOUGLAS CAMPBELL

Defendants

Court File No. CV-19-617792-00CL

B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

- and -

SEARS CANADA INC., SEARS HOLDINGS CORPORATION, ESL INVESTMENTS INC., WILLIAM CROWLEY, WILLIAM R. HARKER, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI, R. RAJA KHANNA, JAMES MCBURNEY and DOUGLAS CAMPBELL

Defendants

JOINT BOOK OF AUTHORITIES OF THE FORMER DIRECTORS

(MOTION TO VARY TIMETABLE OR OBTAIN INTERIM FUNDING, RETURNABLE ON SEPTEMBER 19, 2019)

September 14, 2019

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TO: **Litigation Service List**

AND TO: **The Service List in the CCAA proceedings of Sears Canada Inc.**

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6. *Med-Chem Health Care Ltd. v. Misir*, 2010 ONCA 380

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17. C. Brown and T. Donnelly, *Insurance Law in Canada* (Toronto: Thomson Reuters Canada Limited, 2018), at § 18.15(b)

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The Manitoba Securities Commission (Applicant / Respondent) and Crocus Investment Fund (Respondent / Respondent) and Bernard Bellan (Intervener / Appellant) and Charles Curtis, Peter Olfert, Waldron (Wally) Fox-Decent, Lea Baturin, Albert Beal, Ron Waugh, Diane Beresford, Sylvia Farley, Robert Hilliard, Robert Ziegler, David G. Friesen, Sherman Kreiner, Jane Hawkins, James Umlah, John Clarkson and Hugh Eliasson (Interveners / Respondents)

M.A. Monnin, B.M. Hamilton, M.H. Freedman JJ.A.

Heard: November 30, 2006
Judgment: March 30, 2007
Docket: AI 06-30-06444

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Counsel: D.A. Klein, J.R.N. Boudreau for Appellant, B. Bellan
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K.A. Filkow, Q.C., D.M. Stasiuk for Interveners, C. Curtis, P. Olfert, W. Fox-Decent, L. Baturin, A. Beal, D. Beresford, S. Farley, R. Ziegler, D. Friesen, J. Clarkson, H. Eliasson
D.A. Primeau for Intervener, R. Waugh

M.G. Tadman for Intervener, R. Hilliard

Subject: Civil Practice and Procedure; Corporate and Commercial; Securities; Insolvency

Related Abridgment Classifications

Business associations
III Specific matters of corporate organization
III.1 Directors and officers
III.1.e Duty to manage
III.1.e.iii Indemnification by corporation

Debtors and creditors
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and when to authorize or direct receiver to advance defence costs — Fund decided to indemnify its directors and officers, and enacted by-law to that effect pursuant to s. 119(1) of Act — There was no evidence that former directors and officers had acted other than in good faith — Under circumstances, former directors and officers ought not to be obliged to finance their own defence costs.

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APPEAL by shareholder from judgment reported at *Manitoba (Securities Commission) v. Crocus Investment Fund* (2006), 2006 MBQB 19, 18 C.B.R. (5th) 143, 200 Man. R. (2d) 89, [2006] 7 W.W.R. 343, 2006 CarswellMan 33, 14 B.L.R. (4th) 229 (Man. Q.B.), authorizing and directing receiver to pay legal expenses of former directors and officers.

***M.H. Freedman J.A.*:**

Overview

1 Former directors and officers of Crocus Investment Fund (Crocus) have been, and continue to be, involved in certain legal matters. These include an investigation conducted by the Office of the Auditor General, an investigation conducted by the Manitoba Securities Commission and a proposed class action. The issue on this appeal is whether Crocus, a corporation which is not insolvent, although it is under the control of a receiver, should advance ongoing legal defence

costs incurred by the former directors and officers, prior to the conclusion of the related legal matters. The judge decided that such advances should be made. The appellant in the present action, a shareholder of Crocus, has appealed the decision. In my opinion, the judge was correct in law in her decision, and she acted reasonably in exercising her discretion to direct that such advances be made.

Background

2 Apart from one new issue raised for the first time by the appellant during oral argument, which I will address below, the background to this matter is clearly set out in the judge's detailed reasons (at paras. 2-5):

> On June 28, 2005 Deloitte [& Touche Inc.] was appointed Receiver and Manager of Crocus Investment Fund. This occurrence came fast on the heels of a series of rapidly unfolding events in the months preceding. They included an investigation into the operations of Crocus by the Office of the Auditor General; an investigation into the conduct of Crocus and its officers and directors by the Manitoba Securities Commission (MSC); the issuance by the MSC of a statement of allegations which, among other things, alleged improper conduct on the part of Crocus and certain officers and directors; the release of the Provincial Auditor's report in May 2005; and the mass resignation of the Crocus Board in June 2005. The Receiver was quickly appointed by the court at the behest of the MSC to fill the void.
>
> Prior to June 28, 2005, Crocus had made arrangements to pay the legal counsel representing the officers and directors in the course of these investigations. ...
>
> On July 7, 2005 the Receiver received a letter from counsel for Bernard Bellan and certain other shareholders advising that they were in the process of commencing a class action lawsuit. It contained a request that the Receiver not pay any fees on behalf of any former officers and directors who might be named in the litigation. A week later, on July 12, 2005, a statement of claim was issued although to date that claim has not been certified as a class action.
>
> It is important to note that in addition to the former officers and directors named in the proposed class action other officers and directors seek reimbursement from Crocus for legal fees incurred relating to the investigation of the Auditor General and the MSC. It should also be observed that Crocus has an officers' and directors' liability insurance policy with Chubb Insurance Company of Canada to a maximum of $5,000,000.00. For ease of reference this Venture Capital Asset Protection Policy #7043-0036 is referred to as the Chubb policy.

3 Deloitte & Touche Inc., as court-appointed receiver (Receiver) of Crocus, applied for an order authorizing it to pay legal fees of former directors and officers to the date of its appointment, subject to certain rights of reimbursement. It also sought an order authorizing it to refrain from paying ongoing legal expenses of those persons until the completion of certain proceedings (or until further court order). The former directors and officers resisted that latter part of the application.

4 In comprehensive reasons the judge, *inter alia*, authorized and directed the Receiver to pay all reasonably incurred ongoing legal expenses of the former directors and officers, as well as the amounts of any related unfavourable judgments, subject to certain rights of reimbursement.

5 The appellant raised several objections to the judge's decision; his argument may be summarized this way. While as a strict matter of law the judge had the discretion to order as she did regarding the advancement of costs, she erred by (1) finding no evidence of bad faith; (2) ordering advancement of costs prior to any determination that the requirements of the governing statute had been met; (3) directing that the indemnity extend to unfavourable judgments, and (4) disregarding the absence of evidence of the ability of indemnified persons to repay any amount, if it is ultimately determined that there was no entitlement to the indemnity. Additionally, as noted, a new argument was raised at the hearing.

Statutory and Other Provisions

6 Crocus is governed by the provisions of *The Corporations Act*, C.C.S.M., c. C225 (the *Act*) (see *The Crocus Investment Fund Act*, C.C.S.M., c. C308, s. 2(1)). Like its federal counterpart, the *Canada Business Corporations Act* (*CBCA*) and other provincial corporation statutes, the *Act* contains provisions dealing with corporate indemnification of persons such as the former directors and officers. The relevant provisions of the *Act* are attached as an Appendix.

7 The main indemnification provisions are in s. 119(1) and (3). Section 119(1) states:

> **Indemnification**
>
> **119(1)** Except in respect of an action by or on behalf of the corporation or body corporate to procure a judgment in its favour, a corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or a person who acts or acted at the corporation's request as a director or officer of a body corporate of which the corporation is or was a shareholder or creditor, and his heirs and legal representatives, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of the corporation or body corporate, if

> (a) he acted honestly and in good faith with a view to the best interests of the corporation; and
>
> (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, he had reasonable grounds for believing that his conduct was lawful.

8 Section 119(1) is permissive. Except in respect of an action by or on behalf of the corporation, a corporation such as Crocus may indemnify persons, such as the former directors and officers, who by virtue of their office reasonably incur legal costs in actions or proceedings, against such costs and the amount of related judgments, subject to two conditions. First, the person must have acted honestly and in good faith with a view to the corporation's best interests; this reflects part of the basic duty of a director and officer set out in s. 117(1) of the *Act*. Second, in certain instances, the person must have had reasonable grounds for believing his conduct was lawful.

9 Section 119(3) states:

> **Indemnity as of right**
>
> **119(3)** Notwithstanding anything in this section, a person referred to in subsection (1) is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by him in connection with the defence of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of the corporation or body corporate, if the person seeking indemnity
>
> (a) was substantially successful on the merits in his defence of the action or proceeding; and
>
> (b) fulfils the conditions set out in clauses (1)(a) and (b).

10 Section 119(3) creates an indemnity as of right. It entitles a person such as a former director or officer to the indemnity described in the section if the two conditions in s. 119(1) are satisfied and if he or she was substantially successful in the proceeding. That is an entitlement, in those circumstances, even if the corporation has not taken any steps pursuant to s. 119(1). The entitlement is enforceable only after the proceedings are concluded.

11 Section 113(2)(e) provides that directors may be liable if they approve "a payment of an indemnity contrary to section 119."

12 The corporate by-laws of Crocus are important. By-law 1.7 (also attached as an Appendix) is the expression of a corporate intention that directors and officers shall be indemnified. This by-law is based on s. 119(1) of the *Act* and it creates a right of indemnity, again, subject to the two conditions. As well, there are indemnification provisions in severance agreements entered into by certain former officers.

The Context and the Judge's Reasons

13 This plethora of provisions relating to the subject of indemnity for costs and amounts incurred while acting in good faith suggests both a legislative and a corporate recognition of a reality which, if not entitled to judicial notice in the traditional sense, is nevertheless obvious to observers of the Canadian business scene. That reality is simply that persons who serve as directors and senior officers of corporations whose securities are widely held expect, as incidental to that service, that, when they act honestly and in good faith, they will be indemnified for costs and amounts reasonably incurred in actions or proceedings, for which they might be personally responsible. The *Act*, like its counterparts, is framed to be consistent with this reality.

14 The interplay between the policy underlying the statutory provisions and the legitimate exigencies of the corporate world was well expressed in the unanimous Supreme Court decision in *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 (S.C.C.). Iacobucci J., writing for the court, made the following observation which was relied on by the judge here (at para. 74):

> ... [T]he broad policy goals underlying indemnity provisions ... allow for reimbursement for reasonable good faith behaviour, thereby discouraging the hindsight application of perfection. Indemnification is geared to encourage responsible behaviour yet still permit enough leeway to attract strong candidates to directorships and consequently foster entrepreneurism. It is for this reason that indemnification should only be denied in cases of *mala fides*. A balance must be maintained. ...

15 Although the issue at present focusses on the financing of ongoing legal costs, the policy context relating to indemnification, which is inextricably linked to the reason why the costs are being incurred, is both relevant and instructive.

16 One of the cases cited by the judge in her decision was *National Bank of Canada v. Merit Energy Ltd.*, 2001 ABQB 583, [2001] 10 W.W.R. 305 (Alta. Q.B.). The position advanced there by the directors and officers of the subject bankrupt corporation was that "directors and officers require indemnities and commercial necessity dictates that these indemnities have real value" (at para. 61). The judge in *National Bank* agreed with the fundamental argument, saying: "[a]n

indemnity is a well-known commercial concept business people routinely use to eliminate or reduce risk and should be recognized as a necessary and desirable obligation" (at para. 67).

17 The judge referred also to *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* (1989), 61 D.L.R. (4th) 161 (Alta. C.A.). In that case, the equivalent provision of s. 119(1) was not the governing section, because the action was one on behalf of the corporation itself, thus bringing into play the exception in the opening words: "[e]xcept in respect of an action by or on behalf of the corporation." The Alberta Court of Appeal held that, under the equivalent of s. 119(2) and (3), the right to an indemnity depended on the result of the action, so prior to the conclusion of the lawsuit ongoing defence costs could not be advanced.

18 The other case noted by the judge was *Chromex Nickel Mines Ltd. v. British Columbia (Securities Commission)* (1991), 4 B.L.R. (2d) 189 (B.C. S.C.). The British Columbia Securities Commission was investigating the president of Chromex. The board passed a resolution to indemnify him. Chromex and the president then sought a declaration that the indemnification was authorized under s. 124(1) of the *CBCA*, the equivalent of s. 119(1) of the *Act*. The Commission argued that indemnification had to wait until the proceedings were over and until the president was substantially successful. This argument failed.

19 Errico J. of the British Columbia Supreme Court found that the *CBCA* authorized Chromex to indemnify the president against legal expenses actually incurred. In the course of his reasons, he said (at paras. 8, 11-13):

> ... Section 124(3) is directed to circumstances where the applicant has the right to indemnity and s. 124(1) to circumstances where the corporation is permitted to indemnify. ...
>
> I do not think that the decision in *Canada Deposit Insurance Corp.*, supra, is authority for the proposition that ... s. 124(1) requires that the action be concluded before indemnity may be given.
>
> ... [N]o [court] approval is required under s. 124(1) and it is for the corporation through its directors, to determine if the applicant for indemnification has satisfied the conditions. ...
>
> I am reinforced in my conclusions by consideration of s. 118(2) of the Act which reads:
>
> > (2) Directors of a corporation who vote for or consent to a resolution authorizing
> >
> > . . . . .
> >
> > (e) a payment of an indemnity contrary to section 124,
> >
> > . . . . .
> >
> > are jointly and severally liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation.

> That section provides that the directors of a corporation are personally liable to ensure that the conditions set out in subss. 124(1)(a) and (b) are met. This does not suggest that they must await the outcome of the proceeding to grant indemnity, although it might be prudent for them to do so. Rather, it places the responsibility for compliance with s. 124 on those directors.

20 The judge said (at para. 33), and I agree with her, that *Chromex* stands for two propositions: that there is no statutory requirement to pay ongoing defence costs, and that if a corporation decides to pay such costs, payment need not await the completion of proceedings.

21 The judge concluded that there is a discretion in the court to direct payment of ongoing defence costs, or to delay such payment until substantial completion of the proceedings. She also found that the former directors and officers had a legitimate need for legal representation, and that there was no evidence of dishonesty or bad faith on their part. She found *Blair* to be persuasive, and said that it favoured payment of reasonable defence costs on an ongoing basis. She said (at paras. 45-46):

> Whereas it is recognized that the court should always exercise prudence in circumstances such as these, and particularly where the protection of s. 113 of **The Corporations Act** is not available, I am satisfied that those who are entitled to potential indemnification should be presumed to have acted in good faith in the absence of evidence to the contrary and should receive payment on an ongoing basis of all reasonable defence costs incurred. ...
>
> As agreed, I make no finding as to the entitlement of any individual former officer or director. It will be up to the Receiver, or alternatively the court, to make that determination on proper evidence. Should it happen that defence costs are paid and conduct which would disqualify a former officer and director subsequently comes to light, such payments would necessarily cease and the Receiver would be entitled to make a claim for reimbursement with interest at the Receiver's earned rate.

22 The judge's order authorized and directed that the Receiver pay:

> ... [A]ll reasonably incurred past and future legal expenses of former officers and directors on an on-going basis, and any resulting unfavourable judgments arising from the investigation of the Office of the Auditor General, proceedings taken by the Manitoba Securities Commission, the proposed class action proceeding ...

unless those persons did not meet the applicable qualifying criteria in s. 119(1) (or the related Crocus by-law or individual indemnity agreements). The order also required undertakings to repay funds if it is ultimately determined that the individual was not entitled to the indemnity.

Analysis

(1) New Argument on Appeal

23 I noted earlier that the appellant raised an argument at the hearing that had not been identified in his notice of appeal or factum. He argued that the motion by the Receiver, being an interim or interlocutory motion, should have been decided in accordance with the three-part test set out in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), and affirmed in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.). In particular, he argued, the judge did not consider the question of irreparable harm, an integral part of the test. He was not able to point to any authority for his argument that the three-part test should apply in a circumstance like this.

24 The three-part test applies in cases of interlocutory injunctions and stays of proceedings. It would also apply in other circumstances where a remedy is sought which, if granted, would impact the respondent as profoundly and potentially permanently as does a stay or an injunction. See Beetz J. in *Metropolitan Stores* (at p. 127):

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions... .
>
> [Emphasis added]

25 Both interlocutory injunctions and stays are recognized, for good reason, as "extraordinary" remedies (see, e.g., *Bhattacharya v. St. Boniface General Hospital*, 2000 MBCA 51, 148 Man. R. (2d) 115 (Man. C.A.), and *Merck & Co. v. Apotex Inc.*, 2003 FCA 234, 227 D.L.R. (4th) 106 (Fed. C.A.)). Nothing about this case meets that description. This motion about the funding of legal expenses is no more than an interim step during the course of an action which resulted in a remedy solidly grounded in the *Act* and in Crocus's by-law. It has none of the extraordinary features of a stay or an injunction.

26 In *Metropolitan Stores*, Beetz J. referred to tests prescribed by statute. It is clear that different tests have been legislated when a party seeks an interlocutory injunction, and when a receiver seeks relief from a court. In the first instance, *The Court of Queen's Bench Act*, C.C.S.M., c. C280, gives the court power to grant an injunction when it is "just or convenient to do so" (s. 55(1)). The three-part test applies on such an application; see, e.g., *T-W Insurance Brokers Inc. v. Manitoba Public Insurance Corp.* (1997), 115 Man. R. (2d) 305 (Man. C.A.),

and *4849052 Manitoba Ltd. v. Cairns*, 2005 MBQB 9, 207 Man. R. (2d) 7 (Man. Q.B.).

27 On the other hand, this application by the Receiver is governed by the *Act* (s. 95) which gives the court authority on such an application to "make any order it thinks fit." (See also, s. 119(5).) There is a conceptual distinction between the two standards. See *Ross v. Ross* (1984), 39 R.F.L. (2d) 51 (Man. C.A.), where Matas J.A. said (at p. 63):

> One of the meanings listed in The Oxford Universal Dictionary for "fit" is "Suited to the circumstances of the case, answering the purpose, proper or appropriate". As for "just", one of its definitions reads: "Consonant with the principles of moral right; equitable; fair. Of rewards, punishments, etc.: Merited. Constituted by law or by equity, lawful, rightful; legally valid." ...

28 There are different words used in the two statutes, and different tests are applicable. The standard is different when a court deals with a motion relating to indemnities and legal fees, which in my view does not lead to an extraordinary remedy, and when a court grants an interim injunction or a stay.

29 Even in certain cases of stays courts have sometimes not applied the three-part test. This may occur where the request is for an interlocutory stay of proceedings before a court, unlike the situation in *Metropolitan Stores* where the proceedings were before an administrative tribunal. A number of cases of stays of court proceedings have applied the test of whether the interests of justice clearly outweigh the respondents' right to proceed with their cause of action. See, *Assn. of Parents Support Groups Ontario Inc. v. York* (1987), 14 C.P.R. (3d) 263 (Fed. T.D.), and *Alberta v. Canada (Minister of Environment)* (1991), 46 F.T.R. 40 (Fed. T.D.).

30 All the authority I can find supports the view that the judge's analysis was not flawed because she did not apply the three-part test. I conclude that there is no merit in this argument.

(2) Corporate Indemnification and Advancement of Defence Costs

31 Pursuant to s. 119(1) of the *Act*, a corporation governed by the *Act*, like Crocus, may decide to indemnify its directors and officers. Crocus has so decided, and enacted By-law 1.7 pursuant to that section. Indemnification under that section (in contrast to the s. 119(3) indemnification) is permissive, but once a corporation decides to act under that section the indemnity becomes an entitlement subject only to the satisfaction of conditions (a) and (b). The right to be indemnified may, but will not necessarily, later be negated by the outcome of the lawsuit, that is, if it transpires that conditions (a) or (b) were not satisfied.

32 The policy underlying the indemnification provisions was explained in *Blair*. As the judge

noted, *Blair*, like the other cases cited by her, is factually distinguishable from the present situation. Nevertheless, it provides clear guidance to the proper interpretation of the statutory provisions.

33 *Blair* involved a battle for control of a corporation. Mr. Blair was the corporation's president and chaired a shareholders' meeting. In doing so, he acted on legal advice. He sought indemnification for his legal costs. The issue was not advancement of costs, but rather, as Iacobucci J. said for a unanimous court: "who should bear the costs of legally contesting a disputed directors' election: the corporation, or the chairman in his personal capacity...?" (at para. 2).

34 Whether Mr. Blair had acted in good faith was an issue. Iacobucci J. stated, as a premise, that (at para. 35):

> ... [P]ersons are assumed to act in good faith unless proven otherwise: *General Motors of Canada Ltd. v. Brunet*, [1977] 2 S.C.R. 537, at p. 548. In this respect, contrary to the appellant's submissions before this Court, I believe that a proper construction of the statute and law related to good faith issues reveals that Blair is not required to prove his good faith, although he may certainly call evidence in this regard to counter whatever evidence of bad faith may be adduced against him. To a large extent, it is the corporation that must establish, to the satisfaction of the court, exactly what Blair did that was inimical to its best interests.

35 In the present case there was no evidence before the judge that could support any finding that the former directors and officers had acted other than in good faith. This is an important point, to which I will return.

36 Iacobucci J. then identified the three conditions that must exist "in order to receive indemnification for the costs of defending in litigation" (at para. 36):

> (1) the person must have been made a party to the litigation by reason of being a director or an officer of the corporation;
>
> (2) the costs must have been reasonably incurred; and
>
> (3) the person must have acted honestly and in good faith with a view to promoting the best interests of the corporation.

37 The court found that Mr. Blair had met all three conditions. Moreover, permitting Mr. Blair to be indemnified conformed to "the broad policy goals underlying indemnity provisions" (at para. 74), and see para. 14 above).

38 Iacobucci J. also said (at para. 75):

> Given the circumstances of this appeal, denying Blair indemnification would, in my mind, run afoul of these policy concerns. See also Daniels and Hutton, "The Capricious Cushion: The Implications of the Directors' and Officers' Insurance Liability Crisis on Canadian Corporate Governance" (1993), 22 *Can. Bus. L.J.* 182, at p. 187:
>
> > To temper excessive care and activity level reactions to potential gatekeeper liability, modern corporate law statutes permit a corporation to indemnify a director for any expense reasonably incurred in defending, settling or satisfying a judgment for any action, provided that the director's fiduciary duty to act "honestly and in good faith and with a view to the best interests of the corporation" has been fulfilled.

39 Mainly on the persuasive reasoning articulated in *Blair*, the judge found that the circumstances favoured advancement of defence costs on an ongoing basis for the benefit of the former directors and officers. There was no evidence before her of dishonesty or bad faith, and she said that good faith must, therefore, be presumed (at para. 44-45).

40 The appellant referred to "serious allegations of wrongdoing" and argued that the Auditor General's report, the allegations of the Manitoba Securities Commission, and the existence of the receivership all point to a misleading of shareholders by the former directors and officers which constitute evidence of bad faith. That is not correct. There was no evidence of bad faith before the judge, even taking into account that "the concept of bad faith can and must be given a broader meaning that encompasses serious carelessness or recklessness" (*McCullock Finney c. Barreau (Québec)*, 2004 SCC 36, [2004] 2 S.C.R. 17 (S.C.C.) at para. 39). Allegations in pleadings or by the Manitoba Securities Commission, or the extra-judicial conclusions of the Auditor General, are not evidence, and cannot, unless and until they are established in a legal proceeding, displace the presumption of good faith which is well recognized at law.

41 The essence of the judge's decision is set out in two conclusions. First: "I am satisfied that those who are entitled to potential indemnification should be presumed to have acted in good faith in the absence of evidence to the contrary" (at para. 45). There is ample authority in *Blair* for this conclusion.

42 Second, she continued: "... and [they] should receive payment on an ongoing basis of all reasonable defence costs incurred" (*ibid.*).

43 The *Act*, and its federal counterpart, the *CBCA*, were each enacted, and then amended, in the 1970's. It was recognized at some later point that the statutory provisions were not as clear

as they might be on the present question, the advancement of legal costs under the indemnity provisions (see Lyne Tassé, *Canada Business Corporations Act, Discussion Paper, Director's Liability* (Ottawa: Industry Canada, 1995). In 2001 the *CBCA* was amended such that s. 124(2) now reads:

> **Advance of costs**
>
> **(2)** A corporation may advance moneys to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1). The individual shall repay the moneys if the individual does not fulfil the conditions of subsection (3).

44 No similar amendment has been made to the *Act*. Nevertheless, while such an amendment would remove any doubt about a corporation's authority to advance costs, I am satisfied that even without that amendment, a corporation governed by the *Act* has the power to make such advances in appropriate cases.

45 The appellant acknowledges that a corporation has broad powers of indemnification and advancement of costs. His factum states: "the board of directors of a corporation may vote to authorize indemnification of officers and directors for defence costs prior to the conclusion of litigation pursuant to s. 119(1)."

46 The appellant further recognizes that a judge has broad discretion when considering a receiver's application, such as the one before her: "[i]n a receivership, the court has discretion to determine *when* and whether directors' legal costs should be indemnified" (emphasis added).

47 The board of directors of a corporation has wide-ranging authority to manage the business and affairs of the corporation (see s. 97(1) of the *Act*). In my opinion it is within the power and authority of a board to decide that the corporation should advance defence costs to persons potentially indemnified by virtue of s. 119(1), so long as the board is satisfied that the three conditions referred to above (see para. 36) are satisfied. It would normally be expected that a board would require the kind of repayment undertaking that was required and obtained here.

48 Since a board of directors would have the authority described above, so would a receiver acting under court direction. It is, then, as the appellant accepts, a matter of a judge's discretion whether and when to authorize or direct the receiver to advance defence costs.

49 The appellant argued that in exercising her discretion, the judge erred in finding no evidence of bad faith, an argument I dealt with earlier. He also argued error in that there has been no judicial determination that the conditions in s. 119(1) have been satisfied, but that is a flawed argument. With the presumption of good faith, absent evidence to the contrary, the conditions in s. 119(1) must be presumed to be satisfied until it is established otherwise. To

adopt the appellant's argument would be to convert the s. 119(1)/By-law 1.7 entitlement into a s. 119(3) entitlement, which delays enforcement until proceedings are over. That is not what is meant by the indemnity provisions in the *Act*.

50 The judge's decision is founded on sound legal principles and is consistent with the commercial exigencies spoken of in *National Bank* and *Blair*. While it is possible that the present lawsuit will be resolved in short order, it is more likely that it will take some time before that happens. I agree with the judge when she said: "[t]hese matters are lengthy and complex and are unlikely to be completed for some considerable time" (at para. 41). In the meantime, the former directors and officers, presumed so far to have acted in good faith, have an immediate and legitimate need for counsel. Under the present circumstances they ought not to be obliged to finance their own defence costs.

51 The judge had the discretion to order the advancement. Consistent with the policy rationale explained in *Blair*, she had a sound basis for exercising her discretion as she did. In doing so, she directed that undertakings from the former directors and officers be obtained, promising repayment if it subsequently developed that "he or she was not entitled to payment," thus ensuring so far as possible that the interests of other stakeholders were protected.

52 Viewed from the corporation's perspective, a decision to advance defence costs is an interim financing decision. Based on the criteria and safeguards applicable here, the corporation is not necessarily at risk. I agree with the following observations of Chancellor Allen of the Delaware Court of Chancery in *Advanced Mining Systems Inc. v. Fricke*, 623 A.2d 82 (U.S. Del. Ch. 1992) which, while in the context of statutory language closer to the present *CBCA* than the *Act*, is nevertheless applicable (at p. 84):

> ... [T]he decision to extend advancement rights should ultimately give rise to no net liability on the corporation's part. The corporation maintains the right to be repaid all sums advanced, if the individual is ultimately shown not to be entitled to indemnification. Thus the advancement decision is essentially simply a decision to advance credit.

53 And that is the situation here. If a former director or officer ultimately is entitled to indemnification, costs would be part of that entitlement. If a former director and officer is ultimately disentitled to indemnification, that person has undertaken to pay back all advanced costs.

54 The appellant argued before us that the judge ought to have considered the ability of indemnified persons to repay amounts, if required to do so. While the obligation to repay is clear, the ability to do so in each case has not been assessed. The judge did not require security for the repayment undertakings. It was within her discretion, as it would have been in the discretion of Crocus's board of directors, not to require such security. The implications of a

decision to require security might be significant, but no such decision was made here, so consideration of those implications will be left for another day.

55 The reasons of the judge, and the related parts of her order, authorizing the Receiver to pay judgments unless the former directors and officers are not entitled to be indemnified, do no more than express in judicial form what is already permitted by s. 119(1) and mandated by Crocus's By-law. While the appellant objected to this part of the order, there is no justifiable basis for the objection.

Conclusion

56 As a general principle, we should be "highly reluctant" to interfere with the exercise of the judge's discretion (*Elsom v. Elsom*, [1989] 1 S.C.R. 1367 (S.C.C.), at 1374). There was no misdirection by the judge, nor any wrong amounting to an injustice (see *Elsom*, at p. 1374). Her decision was correct in law and the exercise of her discretion was reasonable. The decision should be endorsed, and I would dismiss the appeal with costs.

Appeal dismissed.

APPENDIX

The Corporations Act

Duty to manage or supervise management

97(1) Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation.

Further liability of directors

113(2) Directors of a corporation who vote for or consent to a resolution authorizing

. . . . .

(e) a payment of an indemnity contrary to section 119;

are jointly and severally liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation.

Duty of care of directors and officers

117(1) Every director and officer of a corporation in exercising his powers and discharging his duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Indemnification

119(1) Except in respect of an action by or on behalf of the corporation or body corporate to procure a judgment in its favour, a corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or a person who acts or acted at the corporation's request as a director or officer of a body corporate of which the corporation is or was a shareholder or creditor, and his heirs and legal representatives, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of the corporation or body corporate, if

(a) he acted honestly and in good faith with a view to the best interests of the corporation; and

(b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, he had reasonable grounds for believing that his conduct was lawful.

Indemnification in derivative actions

119(2) A corporation may with the approval of a court indemnify a person referred to in subsection (1) in respect of an action by or on behalf of the corporation or body corporate to procure a judgment in its favour, to which he is made a party by reason of being or having been a director or an officer of the corporation or body corporate, against all costs, charges and expenses reasonably incurred by him in connection with the action if he fulfils the conditions set out in clauses (1)(a) and (b).

Indemnity as of right

119(3) Notwithstanding anything in this section, a person referred to in subsection (1) is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by him in connection with the defence of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of the corporation or body corporate, if the person seeking indemnity

(a) was substantially successful on the merits in his defence of the action or proceeding; and

(b) fulfils the conditions set out in clauses (1)(a) and (b).

Directors' and officers' insurance

119(4) A corporation may purchase and maintain insurance for the benefit of any person referred to in subsection (1) against any liability incurred by him

(a) in his capacity as a director or officer of the corporation, except where the liability relates to his failure to act honestly and in good faith with a view to the best interests of the corporation; or

(b) in his capacity as a director or officer of another body corporate where he acts or acted in that capacity at the corporation's request, except where the liability relates to his failure to act honestly and in good faith with a view to the best interests of the body corporate.

Application to court

119(5) A corporation or a person referred to in subsection (1) may apply to a court for an order approving an indemnity under this section and the court may so order and make any further order it thinks fit.

Notice to director

119(6) An applicant under subsection (5) shall give the Director notice of the application, and the Director is entitled to appear and be heard in person or by counsel.

Other notice

119(7) Upon an application under subsection (5), the court may order notice to be given to any interested person and that person is entitled to appear and be heard in person or by counsel.

Crocus By-Law

1.7 Indemnity of Officers and Directors: Each Officer and each Director of the Fund and each former Officer and each former Director of the Fund and each person who acts and/or has acted at the Fund's request as a Director or Officer of a body corporate of which the Fund is or was a Shareholder or creditor and her or his heirs and legal representatives shall be indemnified against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by her or him in respect of any civil,

criminal or administrative action or proceeding to which she or he is made a party by reason of being or having been a Director or Officer of the Fund, if

(a) she or he acted honestly and in good faith with a view to the best interests of the Fund; and

(b) in the case of criminal or administrative action or proceeding that is enforced by a monetary penalty, she or he had reasonable grounds for believing that her or his conduct was lawful.

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Tab 2

2009 ONCA 198
Ontario Court of Appeal

Bennett v. Bennett Environmental Inc.

2009 CarswellOnt 1132, 2009 ONCA 198, [2009] O.J. No. 853, 175 A.C.W.S. (3d) 421, 264 O.A.C. 198, 308 D.L.R. (4th) 530, 53 B.L.R. (4th) 100, 94 O.R. (3d) 481

John Anthony Bennett (Applicant / Respondent) and Bennett Environmental Inc. (Respondent / Appellant)

S.E. Lang, R.G. Juriansz, G. Epstein JJ.A.

Heard: November 25, 2008
Judgment: March 5, 2009
Docket: CA C48644

Proceedings: affirming *Bennett v. Bennett Environmental Inc.* (2008), 2008 CarswellOnt 7285 (Ont. S.C.J.)

Counsel: Linda M. Plumpton, Andrew D. Gray for Appellant
Nigel Campbell, Bruce O'Toole for Respondent

Headnote

Business associations --- Specific corporate organization matters — Directors and officers — Miscellaneous issues
Indemnification — Company remediated contaminated soil — B was company's CEO and was later chair of company's board of directors — In June 2003, company announced that it was awarded largest soil remediation contract in its history — Company was told that competitor was protesting award of contract and was informed in August and September 2003 that contract was going to be re-bidded — Company won contract again but for smaller amount of soil — Company continued to list prior contract in inventory of projects — In June 2004, company disclosed that it had been awarded smaller contract and that status of contract had been in dispute since August 2003 — Company's share price fell almost 50 per cent within ten days — Company, B and other directors were subject to class action and securities proceedings in United States and Ontario — B sought indemnification from company — Company refused — B brought application for declaration that he was entitled to indemnification for all proceedings — Application judge held that company failed to establish that B did not satisfy requirements of s. 124(3) of Canada Business Corporations Act and company was ordered to indemnify B — Company appealed — Appeal dismissed — Issue arose as to interpretation of s. 124(3)(b) — Company should bear burden of establishing that director did not have reasonable grounds for his or her belief that conduct was lawful — Consideration must be given as to whether director acted reasonably when director's conduct or belief was considered in context of perspective of director in comparable circumstances at time — Examination of comparable circumstances required analysis of issue from perspective of knowledge and skill set of director and information and advice upon which director's conduct or belief was based.

Business associations --- Specific corporate organization matters — Directors and officers — Duty to manage — Indemnification by corporation
Company remediated contaminated soil — B was company's CEO and was later chair of company's board of directors — In June 2003, company announced that it was awarded largest soil remediation contract in its history — Company was told that

competitor was protesting award of contract and was informed in August and September 2003 that contract was going to be re-bidded — Company won contract again but for smaller amount of soil — Company continued to list prior contract in inventory of projects — In June 2004, company disclosed that it had been awarded smaller contract and that status of contract had been in dispute since August 2003 — Company's share price fell almost 50 per cent within ten days — Company, B and other directors were subject to class action and securities proceedings in United States and Ontario — B sought indemnification from company — Company refused — B brought application for declaration that he was entitled to indemnification for all proceedings — Application judge held that company failed to establish that B did not satisfy requirements of s. 124(3) of Canada Business Corporations Act and company was ordered to indemnify B — Company appealed — Appeal dismissed — B acknowledged that contract dispute was material change that company was obliged to disclose — B gave reasons why he did not take information about change in contract seriously — Honesty of B's belief was supported by absence of motive to withhold disclosure — Company failed to establish that B's stated belief was either opportunistic or amounted to reckless disregard of his obligations — Company failed to demonstrate that from perspective of someone in B's position at time, B did not have reasonable grounds to believe that he was acting lawfully — It was open to application judge to determine that company did not establish that B did not have reasonable grounds to believe his conduct was lawful.

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Blair v. Consolidated Enfield Corp. (1995), 128 D.L.R. (4th) 73, 1995 CarswellOnt 1393, 1995 CarswellOnt 1179, 187 N.R. 241, 86 O.A.C. 245, 25 O.R. (3d) 480 (note), 24 B.L.R. (2d) 161, [1995] 4 S.C.R. 5 (S.C.C.) — followed

Catalyst Fund General Partner I Inc. v. Hollinger Inc. (2006), 2006 CarswellOnt 1416, 15 B.L.R. (4th) 171, 208 O.A.C. 55, 79 O.R. (3d) 288, 266 D.L.R. (4th) 228 (Ont. C.A.) — considered

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General Motors of Canada Ltd. v. Brunet (1976), [1977] 2 S.C.R. 537, 77 C.L.L.C. 14,067, *(*sub nom. *Brunet v. General Motors of Canada Ltd.)* 13 N.R. 233, 1976 CarswellQue 46, 1976 CarswellQue 46F (S.C.C.) — referred to

Kerr v. Danier Leather Inc. (2007), 2007 SCC 44, 2007 CarswellOnt 6445, 2007 CarswellOnt 6446, 87 O.R. (3d) 398 (note), 36 B.L.R. (4th) 95, 231 O.A.C. 348, 286 D.L.R. (4th) 601, [2007] 2 S.C.R. 331, 48 C.P.C. (6th) 205, 368 N.R. 204 (S.C.C.) — considered

McCullock Finney c. Barreau (Québec) (2004), 24 C.C.L.T. (3d) 1, *(*sub nom. *McCullock Finney v. Barreau (Québec))* 240 D.L.R. (4th) 410, *(*sub nom. *Finney v. Barreau du Québec)* 2004 SCC 36, 2004 CarswellQue 1337, 2004 CarswellQue 1338, *(*sub nom. *McCullock Finney v. Barreau du Québec)* 321 N.R. 361, [2004] 2 S.C.R. 17, 16 Admin. L.R. (4th) 165, [2004] R.R.A. 713 (S.C.C.) — referred to

People's Department Stores Ltd. (1992) Inc., Re (2004), *(*sub nom. *Peoples Department Stores Inc. (Bankrupt) v. Wise)* 326 N.R. 267 (Eng.), *(*sub nom. *Peoples Department Stores Inc. (Bankrupt) v. Wise)* 326 N.R. 267 (Fr.), 4 C.B.R. (5th) 215, [2004] 3 S.C.R. 461, 2004 SCC 68, 2004 CarswellQue 2862, 2004 CarswellQue 2863, *(*sub nom. *Peoples Department Stores Inc. (Trustee of) v. Wise)* 244 D.L.R. (4th) 564, 49 B.L.R. (3d) 165 (S.C.C.) — considered

Statutes considered:

Business Corporations Act, R.S.A. 2000, c. B-9
s. 124 — referred to

Business Corporations Act, S.B.C. 2002, c. 57
s. 163 — referred to

Business Corporations Act, S.N.B. 1981, c. B-9.1
s. 81 — referred to

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

s. 136 — referred to

Business Corporations Act, R.S.S. 1978, c. B-10
s. 119 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44
s. 122(1) — referred to

s. 124 — referred to

s. 124(1) — referred to

s. 124(3) — considered

s. 124(3)(a) — considered

s. 124(3)(b) — considered

Companies Act, R.S.N.S. 1989, c. 81
s. 204 — referred to

s. 205 — referred to

Companies Act, R.S.P.E.I. 1988, c. C-14
s. 64 — referred to

Corporations Act, R.S.M. 1987, c. C225
s. 119 — referred to

Corporations Act, R.S.N. 1990, c. C-36
s. 90 — referred to

s. 184 — referred to

Securities Act, R.S.O. 1990, c. S.5
Generally — referred to

s. 75 — referred to

s. 122(1)(b) — referred to

s. 122(3) — referred to

***S.E. Lang J.A.*:**

1 This appeal concerns the interpretation and application of a statutory provision that, in certain circumstances, prohibits corporations from indemnifying officers and directors for the financial consequences of their regulatory offences. It arises in an appeal by Bennett Environmental Inc. (BEI) from a March 4, 2008 order. In that order, notwithstanding s. 124(3) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the CBCA), the application judge required BEI to indemnify its

former corporate director, John Anthony Bennett, for all costs, charges and expenses arising from certain civil and administrative proceedings, including proceedings under the *Securities Act*, R.S.O. 1990, c. S.5.

Background

2 BEI, a company publicly traded on both the Toronto and American Stock Exchanges, is a federally incorporated company. It carries on a business that includes the thermal remediation of contaminated soil. Bennett, the founder of BEI's predecessor company, was BEI's Chief Executive Officer and a member of its two-person Disclosure Committee. After Bennett resigned from both positions in February 2004, he was no longer involved in the details of management. However, he served as chair of BEI's Board of Directors until August 2004 and thereafter continued as a consultant to BEI.

3 In June 2003, BEI announced it had been awarded the largest soil remediation contract in its history, called the Phase III Contract (the Contract). The Contract was executed with Sevenson Environmental Services Inc. (Sevenson), which acted as subcontractor for the United States Army Corps of Engineers (the Corps). BEI had previously entered into and fulfilled similar contracts in the first two phases of the same soil remediation project.

4 After its announcement, BEI was notified in June 2003 that a competitor was protesting the award of the Contract to BEI. In August and September, 2003, BEI was notified that the Corps asserted a withdrawal of its consent to the award of the Contract to BEI and that the Corps was rebidding a contract (the Second Contract) through Sevenson for a much smaller volume of soil. Nonetheless, in intervening press releases, BEI continued to list the Contract, including its large volume of soil remediation, as part of its inventory of projects. In June 2004, BEI executed the Second Contract. That month and the next, the Corps definitively took the position that the Contract was at an end and that the Second Contract was the only outstanding contract.

5 In July 2004, BEI issued a press release disclosing that further shipments under the Contract were "highly unlikely" and that it had been awarded the smaller Second Contract. In the same press release, BEI disclosed that the status of the Contract had been in dispute since August 2003. The price of BEI shares fell almost 50% within ten days.

6 After the dramatic loss in share value, class actions were brought in the United States against BEI and BEI directors. As well, the U.S. Securities and Exchange Commission (the SEC) brought proceedings against BEI, Bennett, and other BEI directors. The class actions and SEC proceedings were ultimately settled in 2005 and 2006.

The Ontario Securities Commission Proceedings

7 In addition to the proceedings brought in the U.S., the staff of the Ontario Securities Commission (the OSC) also made allegations against BEI, Bennett, and other BEI directors, which included alleged violations of the disclosure requirements under the *Securities Act*. The OSC later abandoned an allegation that Bennett had provided misleading evidence during its investigation. There was no allegation of insider trading against Bennett, although his successor at BEI admitted to that offence.

8 In 2006, the OSC approved a settlement agreement between its staff and Bennett. In that agreement, Bennett admitted that, at the time it arose, the existence of the dispute about the Contract constituted a "material change" within the meaning of the *Securities Act* and that BEI had failed to disclose that change, contrary to s. 75 of the *Securities Act* and the public interest. In view of that admission, Bennett acknowledged "serious misconduct" in the violation of s. 122(1)(b) and s. 122(3) of the *Securities Act.* At the same time, the settlement agreement expressly acknowledged that Bennett had had an honest but mistaken belief that, despite the dispute, the Contract was enforceable and the dispute would ultimately be resolved in favour of BEI.

9 In accordance with the terms of the settlement agreement, the OSC prohibited Bennett from acting as an officer or director for a period of ten years, issued a reprimand, and ordered him to pay an administrative fine of $250,000, as well as $50,000 toward the cost of the OSC investigation. BEI was not ordered to pay any penalty.

The Indemnification Proceedings

10 In December 2006, Bennett sought indemnification from BEI for both the fine and the costs he had incurred in the OSC proceedings. However, BEI not only refused Bennett's request for OSC-related indemnification, but it also sought repayment of monies it had already advanced to indemnify Bennett in relation to the U.S. class action and the costs of the SEC proceedings. The minutes of BEI's Board meeting reflect this decision and refer to the prohibition against indemnification contained in its by-law as well as "limited cash resources" from which to indemnify Bennett. In response, Bennett brought an application for a declaration that he was entitled to indemnification in relation to all the proceedings.

11 Section 124(1) of the CBCA permits indemnification of a director or officer by the corporation for all costs, charges, or expenses incurred "in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation". BEI's General By-law No. 1, on the other hand, mandates indemnification.

12 However, s. 124(3) of the CBCA and BEI's by-law, which echoes the wording of s. 124(3), prohibit indemnification where the director or officer has not complied with certain requirements. The non-indemnification provisions of ss. 124(3)(a) and (b) of the CBCA contain two components, which are sometimes referred to as the "good faith and lawful conduct requirements":

> *A corporation may not indemnify an individual* under subsection (1) *unless the individual*
>
> (a) *acted honestly and in good faith with a view to the best interests of the corporation*, or, as the case may be, to the best interests of the other entity for which the individual acted as director or officer or in a similar capacity at the corporation's request; *and*
>
> (b) *in the case of a* criminal or *administrative action or proceeding that is enforced by a monetary penalty, the individual had reasonable grounds for believing that the individual's conduct was lawful.* [Emphasis added.]

13 In his affidavits in support of his application for indemnification, and in his cross-examination on those affidavits, Bennett attested that he did not consider the Contract to be in jeopardy. He also attested that he did not take seriously the Corps' notification in the summer and fall of 2003 that it was withdrawing its consent to the Contract. In Bennett's view, the Corps was only stating this position to placate the competitor who had protested the award of the Contract to BEI.

14 Bennett held this view because he considered such protests were standard and to be expected in the industry. Bennett was certain that the Contract remained extant because, from his extensive experience in the industry, he knew that BEI was the only company that could fulfill the Contract, BEI had been the successful bidder for Phases I and II of the project, and both BEI's U.S. representative and Sevenson's representative had assured BEI and Bennett that the Contract remained binding. Even when the Corps spoke of tendering a Second Contract, which Bennett believed would be for soil additional to the outstanding Contract, Bennett believed that this again was only done to placate the competitor. BEI and Bennett turned out to be wrong.

15 As evidence of the sincerity of his belief at the time in the binding nature of the Contract, Bennett pointed out that he had received his October 2003 bonus in the form of stock options instead of cash. In addition, against the advice of his financial adviser, he had refused to sell any BEI stock during the relevant period. This conduct, he argued, belied any director misconduct on his part.

16 BEI, on the other hand, asserted that Bennett had not held his belief honestly and, even if he had, that such a belief was unreasonable. Moreover, BEI took the position that Bennett could not have acted in good faith, or have had reasonable grounds for his belief, when he did not consult with legal counsel. Accordingly, BEI argued that it was prohibited by both its by-law and s. 124(3) of the CBCA from indemnifying Bennett.

The Application Judge's Reasons

17 The application judge noted Bennett's position and BEI's argument that Bennett had not fulfilled either requirement of s. 124(3). He also recognized BEI's view that a person in Bennett's position, who considered all the available information, would or should have known that BEI was required to disclose the Contract dispute, and that Bennett's position to the contrary was "untenable".

18 The application judge described the proceeding as raising the issue of whether the director seeking indemnification or the company opposing indemnification bears the onus of establishing the presence or absence of the director's "honesty, good faith and belief in lawful conduct". He quoted both prongs of the s. 124(3) requirement for indemnification. He determined that the onus fell on BEI to demonstrate that Bennett did not satisfy the requirements of s. 124(3) and that the correct test is reflected by asking the following question: "what would have been done by a reasonable person in the circumstances by a person acting as a director who possessed the skill, training and experience of the individual in question?" The application judge also recognized that a reasonable director is "not entitled to rely on an unreasonable subjective belief."

19 Since BEI had failed to establish that Bennett had acted "in bad faith or unlawfully", or that his belief in the lawfulness of his conduct was "unfounded or totally unreasonable", and since there was "no conclusive objective evidence" on which "to conclude that Bennett should not be believed on his version of the events", the application judge ordered BEI to indemnify Bennett.

Issues

20 BEI challenges both the application judge's interpretation and application of the appropriate tests required by s. 124(3) as well as his factual findings. BEI also argues that indemnification in the circumstances of this case is inconsistent with the policy rationale underlying s. 124.

21 For the reasons that follow, I would dismiss the appeal.

Analysis

Standard of review

22 Counsel agree that questions of law are to be reviewed on the standard of correctness, questions of fact and factual inference on the standard of palpable and overriding error, and questions of mixed fact and law, generally speaking, on a spectrum between the other two standards, dependent on whether the alleged error is closer to an error of law or one of fact.

The Policy Rationale

23 In interpreting the relevant provisions, I begin with the legislative rationale for permitting indemnification generally, while prohibiting it in specified circumstances. The primary purpose of indemnification is to provide assurance to those prepared to become corporate directors that they will be recompensed for any adverse consequences arising from well-intentioned entrepreneurism undertaken on the corporation's behalf. This assurance serves to attract and to protect competent directors who will advance the interests of the corporation.

24 However, to encourage appropriate conduct, Parliament and the provincial legislatures also provide deterrents against misconduct. Arguably, the most effective deterrent is the consequence, including the stigma, of director prosecution and conviction. Another deterrent is the legislative prohibition against corporate indemnification for director misconduct.[1]

25 This tension between the competing objectives of encouraging director entrepreneurism on the one hand, and discouraging director misconduct on the other, informs the interpretation of s. 124(3).

The Onus and the Test

26 From the perspective of these competing objectives, I turn to the wording of s. 124(3) of the CBCA. Section 124(3) requires a consideration of the particular context in which the individual acted. Subsection 124(3)(a) sets out, as a pre-condition to indemnification, that the individual must have acted honestly and in good faith in the best interests of the corporation. Section 124(3)(b) adds an additional prerequisite regarding indemnification arising from criminal or regulatory penalties: the individual must also have had reasonable grounds for believing his or her conduct was lawful.

27 In keeping with the contextual perspective, Parliament determined that entitlement to indemnification must be decided on the basis of the circumstances that existed at the time of the director's (a) conduct and (b) belief. This is clear not only from the wording of s. 124(3), but also from the leading case of *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 (S.C.C.), where Iacobucci J. observed, at para. 74, that the similar non-indemnification provision in the *Business Corporations Act*, R.S.O. 1990, c. B.16, allows "for reimbursement for reasonable good faith behaviour, thereby discouraging the hindsight application of perfection."

28 In addressing the required degree of misconduct, Iacobucci J. instructed, at para. 74, that indemnification will only be prohibited if the director acted with *mala fides*. At para. 35, he cited *General Motors of Canada Ltd. v. Brunet* (1976), [1977] 2 S.C.R. 537 (S.C.C.), at p. 548, for the proposition that "persons are assumed to act in good faith unless proven otherwise" and placed the onus of proving *mala fides* on the corporation opposing indemnification.

29 Noting that this interpretation of s. 124(3)(a) is in keeping with academic commentary, Iacobucci J. quoted, at para. 74, from Jacob S. Ziegel *et al.*, *Cases and Materials on Partnerships and Canadian Business Corporations*, 3d ed., vol. 1 (Scarborough, Ont.: 1994), at p. 523. There, the authors acknowledge the appropriateness of denying indemnification for "fraud or misappropriation", but recognize that a director should not be denied indemnification if the "conduct ... was not coloured by any opportunistic behaviour". Opportunistic or self-seeking behaviour may be encompassed within the term *mala fides* because such behaviour exhibits a type of dishonesty that should not be countenanced by an award for indemnification.

30 The scope of the bad faith described in *Blair* was clarified in *Entreprises Sibeca inc. c. Frelighsburg (Municipalité)*, [2004] 3 S.C.R. 304 (S.C.C.). At para. 25, Deschamps J., writing for the court and citing *McCullock Finney c. Barreau (Québec)*, [2004] 2 S.C.R. 17 (S.C.C.) at para. 39, accepted that bad faith can encompass recklessness in the sense that the conduct at issue is so inexplicable that it suggests an absence of good faith. Deschamps J. also noted, at para. 26, that this clarification means "no more than the admission in evidence of facts that amount to circumstantial evidence of bad faith where a victim is unable to present direct evidence of it." Thus, inexplicable, apparently reckless, conduct may lead to the inference that the conduct was deliberate, intentional and undertaken in bad faith.

31 Since the dispute in *Blair* involved a director's indemnification for a civil proxy dispute, it did not expressly consider the second branch of the CBCA's non-indemnification test under s. 124(3)(b), which requires reasonable grounds for belief in lawful conduct.

32 Nonetheless, in my view, for reasons analogous to the observation in *Blair* regarding honest and good faith conduct, the corporation also bears the burden of showing that the director did not have reasonable grounds for his or her belief that the conduct was lawful. Placing the burden on the corporation is consistent with the principle affirmed in *Blair* regarding s. 124(3)(a) that persons are assumed to act in good faith. In my view, under s. 124(3)(b), persons should also be assumed to believe they are acting lawfully and to have reasonable grounds for that belief, unless the contrary is proven. There is no indication in the wording of the legislation that suggests a different burden should be imposed for (b) than for (a). The imposition of the burden on the corporation best balances the promotion of strong director decision-making, on the one hand, while discouraging irresponsible behaviour on the other. Finally, as a practical matter, this placement of the burden makes sense because the corporation, and not the individual director, will most likely have the advantage of unrestricted access to corporate documents relevant to the indemnification proceeding.

33 Relying on *Catalyst Fund General Partner I Inc. v. Hollinger Inc.* (2006), 79 O.R. (3d) 288 (Ont. C.A.), BEI submits that an objective test must be applied in determining whether Bennett satisfied s. 124(3)(a) and that the application judge erred in applying a subjective standard.

34 In *Catalyst*, Cronk J.A., writing for the panel, determined, at para. 105, that a director was not entitled to indemnification under s. 124(3) because the significance of the changed circumstances "would have been apparent to even

the most untrained observer". Thus, she concluded, at para. 106, the director "cannot make out a claim for indemnification by relying on an unreasonable subjective belief."

35 In my view, *Catalyst* rightly concluded that a director cannot ground a claim for indemnification on an unreasonable belief where that belief would have been obviously erroneous to even the most untrained observer. Such a belief would be analogous to the reasoning in *Enterprises* that observed that a director cannot rely on recklessness to defend otherwise indefensible conduct. Thus, the conclusion in *Catalyst* reflects the finding that the director's evidence regarding his good faith was not credible in the circumstances of that case. Accordingly, I do not accept the appellant's submission that *Catalyst* changed the test from that set out in *Blair*, as clarified in *Enterprises*.

36 Indeed, the *Blair* reasonableness test achieves the same result by asking whether the director acted reasonably when the director's conduct or belief is considered in the context of the perspective of a director in comparable circumstances at the time. Looking at comparable circumstances involves looking at the issue from the perspective of the knowledge and skill set of the individual director and the information and advice upon which the director's conduct or belief was based.

37 The wording employed by Parliament in both s. 124(3)(a) and (b) supports this interpretation of the reasonableness test. That wording instructs that the question is whether "the individual" exhibited good faith conduct and had reasonable grounds for believing that his or her conduct was lawful. The answer must include consideration of the context in which the director decided on the conduct or formed the belief at issue. It is implicit in the wording that the conduct or belief at issue must have been reasonable when considered in context.

38 I turn to the application of the test to the circumstances of this case, an issue that I approach mindful of the factual findings made by the application judge.

Application of the test

39 By admitting to breaches of s. 122(1)(b) and s. 122(3) of the *Securities Act*, Bennett acknowledged to the OSC that, at the time, the Contract dispute was a material change that BEI was obliged to disclose. However, BEI acknowledges that this admission does not, in itself, preclude Bennett's indemnification. Otherwise, there would be no point in the CBCA's provision of director indemnification for such administrative penalties. Moreover, the onus and test regarding an offence under the *Securities Act* differ from the onus and test mandated by the non-indemnification provisions of the CBCA. Thus, while Bennett's admissions to the OSC may reflect on the credibility of his evidence before the application judge, the OSC findings do not predetermine the result of the indemnification application.

40 Both before the OSC and on his application, Bennett attested that, in the light of all the circumstances, he mistakenly believed the Contract dispute would be resolved in BEI's favour and so he did not consider the ongoing developments to be a change in the binding nature of the Contract, let alone a material one. For this reason, he did not identify any obligation to disclose. Thus, he argues, he acted honestly in BEI's interests and that he believed his conduct was lawful. Further, he asserts there is no basis on which to conclude his belief or conduct was reckless or that his view would have been obviously erroneous to even the most untrained observer at the time.

Section 124(3)(a)

41 Under s. 124(3)(a), the issue for the application judge was whether BEI had established that Bennett was not credible in his evidence that he had "acted honestly and in good faith with a view to the best interests of the corporation".

42 While the application judge was alive to BEI's position that Bennett was lying about his good faith conduct (or that he acted unreasonably), he concluded that BEI had failed to satisfy its onus to disprove Bennett's evidence. BEI argues that the application judge erred in so concluding. I do not agree.

43 While undoubtedly the obligation to disclose a material change is absolute, it is not always clear at the time that an event, or even a series of events, constitutes a material change. Such a determination may turn on an assessment of the reliability of the available information. In this case, Bennett gave reasons why he did not take the developing information

seriously at the time. Those reasons included the assurances about the Contract Bennett received from BEI's own U.S. representative and from Sevenson's representative. Bennett also had regular discussions about the Contract with another director who was a lawyer. In addition, Bennett had discussions with his fellow director on the Disclosure Committee, albeit those discussions were not couched in terms of any disclosure obligations since he did not consider the developments to constitute a material change. Bennett's evidence was further supported by his open discussions with other officers and directors at BEI and the candid discussions with the Board about the dispute. In other words, Bennett's belief was an informed one.

44 Furthermore, the honesty of Bennett's belief was supported by the absence of any motive to withhold disclosure. Indeed, Bennett pressed the BEI Board to proceed with the development of a new plant that would only have been required to honour the Contract. Bennett would not likely have done so if he believed the Contract was in jeopardy. Moreover, unlike others involved in BEI, Bennett did not stand to gain personally from the non-disclosure. This is also evident from Bennett's election to take his bonus in options and from his decision not to sell any BEI stock.

45 Based on this evidence, the application judge concluded that he was not able to reject Bennett's position. From reading the application judge's reasons as a whole, it is clear that BEI failed to establish that Bennett's stated belief was either opportunistic or amounted to a reckless disregard of his obligations. The application judge specifically observed the absence of "conclusive objective evidence on which to make such a finding." He considered and applied Iacobucci J.'s reasoning at para. 76 of *Blair*:

> It is insufficient to say retrospectively that Blair 'should have' acted differently or that he did not handle things perfectly in order to deny indemnification under s. 136(1). Actual *mala fides* must be shown such that the director did not act with a view to the best interests of the corporation.

Similarly, it is not enough in this case to say, with the benefit of hindsight, that Bennett should have done more. The application judge accordingly was entitled to conclude that BEI had not satisfied the burden of establishing that Bennett acted in bad faith.

Section 124(3)(b)

46 The trial judge did not expressly separate his consideration of the s. 124(3)(b) requirement that Bennett had reasonable grounds to believe that non-disclosure was lawful from his s. 124(3)(a) analysis. The two requirements are distinct: see *People's Department Stores Ltd. (1992) Inc., Re*, [2004] 3 S.C.R. 461 (S.C.C.), at para. 33, where Major and Deschamps JJ. discuss this distinction in the context of the different duties of directors under s. 122(1) of the CBCA.

47 Nonetheless, the application judge's reasons demonstrate that he was alive to the distinction between s. 124(3)(a) and (b). On more than one occasion, he referred to "belief in lawful conduct" as a requirement that was in addition to the requirement of honesty and good faith. Moreover, in the particular circumstances of this case, it is apparent that the facts and the evidence underpinning both branches of the test, to a certain extent, are intertwined, as are the arguments advanced by the appellant.

48 One of BEI's arguments, which applies to both branches of the test, is that Bennett could not possibly have had reasonable grounds to believe that his conduct was lawful (or that he was acting in good faith) when he did not consult legal counsel.

49 This issue arose in *Blair* where, unlike in this case, the director seeking indemnification relied on the fact that he had consulted counsel before proceeding with the impugned conduct as evidence that he had acted in good faith, In upholding an order for indemnification, Iacobucci J. explained, at paras. 58 and 65, that, while a director's *de facto* reliance on legal advice does not guarantee indemnification, reliance on counsel's advice "will strongly militate *against* a finding of *mala fides* or fiduciary breach" (emphasis in original). The court in *Blair* relied on several additional considerations in ultimately concluding that the director was entitled to indemnification.

50 In my view, while reliance on reasonable legal or professional advice will substantially assist a director seeking indemnification in establishing reasonable grounds for belief that his or her conduct is lawful, such consultation is not a

prerequisite to indemnification. Rather, the variety of additional considerations that may come into play in a particular case makes it both undesirable and unnecessary to promulgate an inflexible rule mandating legal advice as a prerequisite to indemnification under either branch of s. 124(3).

51 That said, however, a failure to obtain professional advice may raise questions in a particular case about a director's conduct or belief. In such a case, it may be necessary to assess the surrounding circumstances and conduct of the director at the relevant time to look for other evidence of the reasonableness of the relied-upon belief.

52 In this case, Bennett testified that he did not turn his mind to the issue of disclosure or seek legal advice because it simply did not occur to him to do so, in part, because he was an engineer and not a lawyer. Standing on its own, this explanation cannot constitute reasonable grounds under s. 124(3)(b). A director serving on a Disclosure Committee, lawyer or not, is expected to have at least a basic familiarity with disclosure obligations.

53 However, this was not a case where Bennett recognized and wilfully ignored an evident disclosure obligation or failed to make reasonable inquiries. To the contrary, as detailed above, the evidence shows that Bennett sought information from BEI's U.S. representative and from Sevenson's representative. He also had discussions with other directors and officers in the company. While Bennett was subsequently proven wrong in his decision not to make earlier disclosure, BEI failed to demonstrate that, from the perspective of someone in Bennett's position at the time, Bennett did not have reasonable grounds for believing he was acting lawfully.

54 While the application judge's reasons are couched in terms of Bennett's belief in the continued validity of the Contract, rather than in terms of his belief that he did not have disclosure obligations, in the circumstances of this case, the two beliefs are synonymous. If Bennett honestly and reasonably believed the Contract was not in jeopardy, and that it accordingly remained a binding contract, there was no basis upon which he ought to have believed that he was obliged to make disclosure of a material change. I see no error of law in the application judge's reasons and therefore no basis to interfere with his conclusions in this regard.

55 Accordingly, I conclude that it was open to the application judge to determine that BEI did not meet the onus on it to establish that Bennett did not have reasonable grounds to believe his conduct was lawful.

56 Finally, I note that this is not a case that invokes the business judgment rule discussed in *Kerr v. Danier Leather Inc.*, [2007] 2 S.C.R. 331 (S.C.C.). In *Kerr*, Binnie J. instructed, at para. 54, that the business judgment rule "is a concept well-developed in the context of *business* decisions but should not be used to qualify or undermine the duty of disclosure" under the *Securities Act* (emphasis in original) Accordingly, the test to be met in this case is that set out in s. 124(3) of the CBCA.

Other errors

57 BEI also submits that the application judge made factual errors. I reject this ground of appeal. To the extent that BEI argues that the application judge was obliged to refuse indemnification in the light of the factual findings of the OSC, I disagree. I have already given my view that the different burden and test under the *Securities Act* and the CBCA may result in different outcomes. I also disagree with BEI's characterization of the application judge's reasons as requiring expert or other evidence to refute Bennett's evidence. While this issue is more a question of law than of fact, in my view, the application judge's excerpted reasons do no more than reinforce his already-stated view that the evidence led by BEI was insufficient to meet the requisite onus under either branch of the s. 124(3) test.

58 Finally, BEI observes that the OSC specifically declined to impose a penalty on BEI on the basis that such a penalty would ultimately be borne by the shareholders. From this, the appellant argues that granting Bennett indemnification in this application would impose the financial burden on the shareholders, contrary to the OSC's intention.

59 In my view, BEI's argument is answered in two ways. First, while the argument is premised on the assumption that Bennett's conduct was sufficiently egregious to deny him indemnification, the application judge concluded that BEI failed to prove such misconduct and, as I have already stated, I see no reason to interfere with his conclusion. Second, BEI chose to protect directors against the imposition of financial penalties by enacting a by-law providing for director indemnification

except in the case of misconduct. Again, as found by the application judge, BEI has failed to prove such misconduct.

Result

60 In the result, I would dismiss the appeal. I would also award costs to Bennett fixed at $14,000, inclusive of disbursements and GST.

***R.G. Juriansz J.A.*:**
I agree.

***G. Epstein J.A.*:**
I agree.

Appeal dismissed.

Footnotes

[1] The relevant statute in every province permits indemnification generally, and restricts it in specified circumstances. Indeed, most of the provincial indemnification provisions prescribe the identical good faith and lawful conduct requirements set out in the CBCA (New Brunswick, Newfoundland, Ontario, Manitoba, Alberta, Saskatchewan, and British Columbia), and others deny indemnification where the charges, expenses, or liability were occasioned by the director's own fault (Quebec), wilful neglect of default (Prince Edward Island), or dishonesty (Nova Scotia): see *Companies Act*, R.S.P.E.I. 1988, c. C-14, s. 64; *Business Corporations Act*, S.N.B. 1981, c. B-9.1, s. 81; *Companies Act*, R.S.N.S. 1989, c. 81, ss. 204 and 205; *Corporations Act*, R.S.N.L. 1990, c. C-36, s. 205; *Companies Act*, R.S.Q. c. C-38, ss. 90 and 184; *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 136; *Corporations Act*, C.C.S.M. c. C225, s. 119; *Business Corporations Act*, R.S.A. 2000, c. B-9, s. 124; *Business Corporations Act*, R.S.S. 1978, c. B-10, s. 119; and, *Business Corporations Act*, [SBC 2002] c. 57, s. 163.

Tab 3

Most Negative Treatment: Distinguished
Most Recent Distinguished: McAteer v. Devoncroft Developments Ltd. | 2001 ABQB 917, 2001 CarswellAlta 1694, 24 B.L.R. (3d) 1, 307 A.R. 1, [2002] A.W.L.D. 108, [2001] A.J. No. 1481, [2002] 5 W.W.R. 388, 99 Alta. L.R. (3d) 6, 124 A.C.W.S. (3d) 680 | (Alta. Q.B., Nov 7, 2001)

1995 CarswellOnt 1393
Supreme Court of Canada

Blair v. Consolidated Enfield Corp.

1995 CarswellOnt 1179, 1995 CarswellOnt 1393, [1995] 4 S.C.R. 5, [1995] A.C.S. No. 29, [1995] S.C.J. No. 29, 128 D.L.R. (4th) 73, 187 N.R. 241, 24 B.L.R. (2d) 161, 25 O.R. (3d) 480 (note), 25 O.R. (3d) 480, 58 A.C.W.S. (3d) 230, 86 O.A.C. 245, J.E. 95-1939, EYB 1995-67681

CONSOLIDATED ENFIELD CORPORATION v. MICHAEL F. BLAIR

La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Oral reasons: March 21, 1995
Written reasons: October 19, 1995
Docket: Doc. 23887

Proceedings: On Appeal from the Court of Appeal for Ontario

Counsel: *Dennis R. O'Connor, Q.C.* and *Ronald Foerster*, for appellant.
Patricia A. Virc, for respondent.

Subject: Corporate and Commercial

Related Abridgment Classifications

Business associations
III Specific matters of corporate organization
III.1 Directors and officers
III.1.e Duty to manage
III.1.e.iii Indemnification by corporation

Headnote

Directors and officers — Liabilities — Indemnification by corporation — Director of corporation chairing annual shareholders' meeting — Director ruling that certain proxies could be used to vote only in favour of management slate of directors — Director relying in good faith on legal advice — Chairman's ruling overturned and costs awarded against director and corporation — Director entitled to be indemnified by corporation for costs of defending proceedings.

The respondent, B, was a director of the applicant, CE Corp., as well as its president and chairman of the board. At CE Corp.'s annual meeting, two individuals with proxies from shareholders held between them a majority of the votes attached to the applicant's outstanding voting shares. Those individuals voted against the election of B as a director and for the election of another surprise nominee. B, who chaired the meeting, had been advised by solicitors that the proxies were invalid. He was also advised by solicitors that it was his duty to make the ruling, despite his interest in the outcome. He ruled that the votes in favour of the surprise nominee were invalid and declared himself to be among the directors elected.

CE Corp.'s largest shareholder, CE Ltd., commenced legal proceedings against CE Corp. and B in his capacity as a director and chairman of the shareholders' meeting, challenging B's proxy ruling. B requisitioned CE Corp.'s board to hold a shareholders' meeting to conduct a fresh election of directors. The board, without B's involvement, decided to do nothing until the outcome of the litigation was known. In those earlier legal proceedings, the proxies were found to be valid, resulting in B's not being elected a director and CE Ltd. controlling the board of CE Corp. B was found to have been in breach of the quasi-judicial standard of conduct demanded of a chairman. Costs were awarded against CE Corp. and B. B appealed the order, but the appeal was quashed since the calling of another shareholders' meeting left the appeal moot.

B brought an application for a declaration that he was entitled to indem nification for the costs and expenses incurred by him in respect of the litigation, relying on the indemnity given to him as a director in the applicant's by-laws. CE Corp. by-laws essentially incorporated the terms of the statutory right to indemnification found in s. 136(1) of the *Business Corporations Act* (Ont.) ("OBCA"). That indemnity applied to all expenses a director reasonably incurred in respect of an action brought against him or her as a director, so long as the director acted honestly and in good faith with a view to the best interests of the corporation.

The trial judge held that directors must exercise their fiduciary power for a proper purpose, within the powers delegated to them. Preserving their own control was not a proper purpose. Accordingly, at trial, B's conduct at the meeting was held not to have been in the best interests of CE Corp. and thereby outside the scope of s. 136(1) of the OBCA and CE Corp.'s by-law. B appealed.

The appeal was allowed in part on the basis that there were implicit errors in the trial judge's

reasoning. The best interests of the corporation in this case centred not upon the choice of particular directors, but upon the integrity of the voting procedure and the validity of corporate acts of the directors following the vote. The sole interest of CE Corp. in the election of directors, and the sole proper concern of those advising and representing it, was to be assured of the propriety of the procedure.

The appellate court held that B's ruling as to the adequacy of the proxy was a purely legal issue of interpretation upon which he had received legal advice. He was acting honestly and in good faith and in the best interest of the corporation in accepting and implementing that advice. CE Corp. appealed.

Held:

The appeal was dismissed.

The appeal required the determination of who should bear the legal costs of contesting the results and procedures of the directors' election: the corporation, or B in his personal capacity as the individual making the impugned ruling.

Persons are assumed to act in good faith unless proven otherwise. Consequently, the burden of proving that B acted with mala fides rested upon CE Corp.

The CE Corp. by-law and s. 136(1) of the OBCA specify three conditions that a director or officer must fulfil in order to receive indemnification for the costs of defending litigation: (1) the person must have been made a party to the litigation by reason of being a director or an officer of the corporation; (2) the costs must have been reasonably incurred; and (3) the person must have acted honestly and in good faith with a view to promoting the best interests of the corporation. In the present case, all three conditions entitling B to indemnification were fulfilled.

There was no reason to disturb the findings of the Court of Appeal, which found that B's expenses in the litigation were reasonably incurred. Corporate counsel were retained to act for both B and CE Corp. as a consequence of the resulting litigation from the annual meeting. Following the review of the issue by the board, it was determined that there was no reason to employ separate counsel for B. Also, B's request for another shareholders' meeting for the purpose of electing directors, following the first meeting, was consistent with his protestations throughout that he had no interest in remaining a director if voted out by a majority of informed shareholders. Furthermore, B added nothing to the costs of the litigation arising out of the shareholders' meeting.

B was involved in the litigation in his capacity as chairman of the meeting and not in his personal capacity. The application by CE Ltd. directly involved CE Corp.'s reputation and the integrity of its voting procedures; moreover, B's participation in the impugned proceedings flowed entirely from his role as chairman of the meeting, not from his status as a shareholder.

The best interests of the corporation in this case centred solely on the maintenance of the integrity

and propriety of the corporation's voting procedure. The duty of a chairman is one of honesty and fairness to all individual interests and is directed generally toward the best interests of the corporation. The fact that a decision-maker has an interest in the outcome of his or her decision does not disqualify him or her from making the decision if the authority from which he or she obtains the status as decision-maker contemplates that he or she may act as judge in his or her own cause. The shareholders of CE Corp. provided in the corporation's by-laws that the president act as chairman of meetings of the shareholders. If the shareholders were concerned about prima facie impartiality, they could have specified that meetings were to be chaired by a neutral third party. Although a chairman has an obligation to promote administrative fairness, this is necessarily tempered with the need to control and organize a meeting so as to ensure that it proceeds effectively. By ending debate on the proxy issue, B was fulfilling his responsibility as chairman to see that the shareholders' instructions as set out in the proxies were followed. Furthermore, his actions were supported by his acting on corporate counsel's advice on a complex issue that clearly required legal advice. The fact that B made the impugned ruling with the bona fide intent that the corporation have a lawfully elected board of directors constituted evidence that he acted honestly and in good faith and with a view to the best interests of the corporation for the purposes of s. 136(1). Although the decision to disallow the proxies turned out, under judicial scrutiny, to be wrong, it did not evidence any mala fides.

Mere de facto reliance on legal advice will not guarantee indemnification. However, reliance that is reasonable and in good faith will establish that a director or officer acted "honestly and in good faith with a view to the best interests of the corporation." B's reliance on corporate counsel's advice in this case was both reasonable and in good faith. In fact, in deciding not to reject the advice of counsel, B fulfilled his fiduciary duty. The advice given would, to a layperson in B's circumstances (and with his business experience), have been ostensibly credible.

By following the instructions on the proxies and then requesting a new shareholders' meeting, B gave all shareholders an opportunity to make a fully informed decision regarding the election of the directors, thereby promoting the integrity of the corporation's voting procedures. CE Ltd. suffered no prejudice in respect of its voting rights in that it had a right to nominate and support its surprise nominee at the new meeting or pursue legal action against the corporation. Rather than wait for the next meeting, CE Ltd. took the far more circuitous route of obtaining election of its nominee through the court system, with the hope of transferring the costs of doing so on to B.

Granting indemnification to B was in keeping with the broad policy goals underlying indemnity provisions; these allow for reimbursement for reasonably good faith behaviour, thereby discouraging the hindsight application of perfection. The policy objective of indemnification is to encourage responsible behaviour on the part of directors, while accommodating a sufficient degree of leeway to attract strong candidates to directorships and consequently foster entrepreneurism. It is for this reason that indemnification should be denied only in cases of mala fides. Given the circumstances of this case, denying B indemnification would run afoul of these policy concerns.

Table of Authorities

Cases considered:

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Bathgate v. National Hockey League Pension Society (1994), 1 C.C.P.B. 209, 2 C.C.E.L. (2d) 94, 2 E.T.R. (2d) 1, 16 O.R. (3d) 761, 69 O.A.C. 269, 110 D.L.R. (4th) 609 (C.A.) , leave to appeal to S.C.C. refused, [1994] 2 S.C.R. viii (note), 4 C.C.P.B. 272 (note), 7 C.C.E.L. (2d) 42 (note), 4 E.T.R. (2d) 36 (note), C.E.B. & P.G.R. 8175 (note), 114 D.L.R. (4th) vii (note), 19 O.R. (3d) xvi (note), 76 O.A.C. 400 (note), 178 N.R. 142 (note) (S.C.C.) — *referred to*

Bomac Batten Ltd. v. Pozhke (1983), 43 O.R. (2d) 344, 23 B.L.R. 273, 1 D.L.R. (4th) 435, *(*sub nom. *Bomac Batten Ltd., Re)* B.C. Corps. L.G. 78,229 (H.C.) — *not followed*

Byng v. London Life Association Ltd. (1988), 42 B.L.R. 280, [1989] 1 All E.R. 560, [1989] 2 W.L.R. 738, [1990] Ch. 170, (1989) 5 B.C.C. 167, 1989 P.C.C. 190, [1989] B.C.L.C. 400, 139 New. L.J. 75 (C.A.) — *referred to*

C.M.S.G. v. Gagnon, 84 C.L.L.C. 14,043, [1984] 1 S.C.R. 509, 9 D.L.R. (4th) 641, 53 N.R. 100 — *referred to*

Canadian Express Ltd. v. Blair (1989), 46 B.L.R. 92 (Ont. H.C.) — *considered*

Central & Eastern Trust Co. v. Rafuse, 37 C.C.L.T. 117, 42 R.P.R. 161, 34 B.L.R. 187, *(*sub nom. *Central Trust Co. v. Rafuse)* [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481, 75 N.S.R. (2d) 109, 186 A.P.R. 109, 69 N.R. 321 [varied 44 C.C.L.T. xxxiv, *(*sub nom. *Central Trust Co. v. Rafuse)* [1988] 1 S.C.R. 1206] — *referred to*

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Exco Corp. v. Nova Scotia Savings & Loan Co. (1987), 35 B.L.R. 149, 78 N.S.R. (2d) 94, 193 A.P.R. 91 (T.D.) — *referred to*

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Gray v. Yellowknife Gold Mines Ltd., [1946] O.W.N. 938 (H.C.) — *referred to*

Johnson v. Hall (1957), 23 W.W.R. 228, 10 D.L.R. (2d) 243 (B.C. S.C.) — *referred to*

National Dwellings Society v. Sykes, [1894] 3 Ch. 159, 1 Mans. 457, 8 R. 758 — *referred to*

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Walters v. Essex (County) Board of Education (1973), [1974] S.C.R. 481, 5 L.C.R. 144, 38 D.L.R. (3d) 693 — *referred to*

Statutes considered:

Business Corporations Act, S.A. 1981, c. B-15

s. 119

Business Corporations Act, R.S.O. 1990, c. B.16

s. 97

s. 97(c)

s. 107

s. 107(1)

s. 134(1)

s. 135(4)

s. 135(4)(b)

s. 136

s. 136(1)

s. 136(1)(a)

Business Corporations Act, R.S.S. 1978, c. B-10

s. 119

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 124

Company Act, R.S.B.C. 1979, c. 59

s. 152

Corporations Act, The, R.S.M. 1987, c. C225, C.C.S.M., c. C225

s. 119

Corporations Act, R.S.N. 1990, c. C-36

s. 205

Securities Act, R.S.O. 1980, c. 466

Rules considered:

Rules of the Supreme Court of Canada

R. 5

R. 51

Appeal from judgment reported at (1993), 106 D.L.R. (4th) 193, 15 O.R. (3d) 783, 66 O.A.C. 121, 12 B.L.R. (2d) 303 (C.A.) reversing (October 28, 1992), Doc. B189/92, Carruthers J. (Ont. Gen. Div.) dismissing director's application for indemnification.

The judgment of the court was delivered by *Iacobucci J.*:

1 This appeal was dismissed from the bench on March 21, 1995, with reasons to follow. These are those reasons.

2 This appeal requires us to determine who should bear the costs of legally contesting a disputed directors' election: the corporation, or the chairman in his personal capacity as the individual making the impugned ruling?

I. Background

3 The respondent Blair was, from 1984 to 1989, the President and a Director of the appellant Consolidated Enfield Corporation ("Enfield"). In 1989, Enfield was plagued with fairly serious corporate infighting between Blair and another shareholder, Canadian Express Limited ("Canadian Express"), which had, in 1988, elected some of its officers (Willard L'Heureux and Manfred Walt) to Enfield's Board of Directors.

4 The dispute came to a head on July 20, 1989 when Enfield's annual shareholders' meeting was scheduled to take place. Blair, as President of the company, was obliged under the by-laws to act as chairman. One of the matters on the agenda was the election of the new Board of Directors. A management information circular had been previously issued in which 11 candidates were proposed for the 11 director positions. Blair was part of this slate, which divided 6-5 in favour of Blair's "camp" over the Canadian Express group.

5 Although the Board had agreed on these candidates, on the day of the shareholders' meeting, Canadian Express nominated a surprise 12th candidate from the floor, Timothy Price, thereby requiring a more formal election. According to Canadian Express, although it had originally intended to vote for the management slate of directors, including Blair, Blair's actions in the months before the election (during which Canadian Express alleges that it and Blair had signed an "accord" to work together in the best interests of Enfield) purportedly indicated that he had no intention of co-operating with the Canadian Express camp.

6 The Canadian Express camp, with Walt being the proxyholder for these shares, combined with Ravelston Corporation Limited (another shareholding group whose proxyholder was John Boultbee) and together pooled their voting shares. Their coalition represented 43 percent of the total shares and a majority of the shares actually voted at the meeting. The one candidate they did not vote for was Blair. For his part, Blair, through his own holdings (14 percent of Enfield), plus substantial management proxy support, culled together 41 percent of the total shares. The effect of the election was that Blair was out and Price was in as the 11th director. This reflected a total change in control of the Board in favour of the nominees of Canadian Express.

7 There was, however, one major complication. On July 19, 1989, the night before the shareholders' meeting, the respondent had met with a representative of the scrutineer, Montreal Trust Company, and Enfield's corporate counsel, Osler, Hoskin & Harcourt ("Osler"), who had advised him that the Canadian Express and Ravelston proxies which had been deposited that day could be used to vote only in favour of the management slate since the instructions in the proxies (specifically Note 3 thereof) restricted the proxyholders to voting for the management slate because no specifications had been made thereon by the shareholders to indicate voting otherwise. Osler also noted that the *Securities Act*, R.S.O. 1980, c. 466, provided that votes cast pursuant to proxies could not be counted in favour of a candidate not named in the circular. Osler also delivered to Enfield several written memoranda dealing with procedural matters, the role of the chair, and the principles relating to the validity of the proxies.

8 The next day, after the voting had taken place on the surprise candidacy of Price, Blair once again solicited Osler's advice on what he should do with the proxy votes. He turned towards corporate counsel and queried: "You know the law. I will take my direction from you. What should I do?" There were six senior corporate lawyers from Osler present at this ad hoc meeting and,

before they reached their decision, they deliberated for over one and one half hours in part with the scrutineers while remaining in constant contact with solicitors in their head office. Following Osler's advice that the proxy votes in favour of Price were invalid, Blair, reading verbatim from a statement prepared by Osler, declared that Price had received no votes and that the 11 candidates in the management circular had been elected. When L'Heureux vigorously objected to this decision, Blair refused to entertain any discussion thereon, telling L'Heureux to take the matter up with Enfield's counsel.

9 Instead, the Canadian Express representatives immediately filed an application in Ontario Supreme Court to the effect that Blair's ruling was wrong in law and that Price, not Blair, should have been elected as the 11th director. Both Blair and Enfield were named as co-respondents. Mention was made of the fact that Blair allegedly breached his quasi-judicial duties as chairman by not ceding the chair when the issue he was to rule upon so directly involved his own interests, as well as by foreclosing debate on the ruling and by not giving notice to Canadian Express as to the limitations of their proxy-holding power. On September 25, 1989, J. Holland J. found that Blair's ruling was wrong in law and that Blair was in breach of his fiduciary duties [reported at 46 B.L.R. 92 (Ont. H.C.)]. He thus allowed the application, concluding that the ballots were legally cast for Price, in accordance with the proxies, and, consequently, that the respondent had not been elected a director. Costs were issued against Blair and Enfield.

10 Blair sought to appeal the substantive findings of J. Holland J. to Ontario Divisional Court. This appeal was unsuccessful.

11 Since Canadian Express was then in control of Enfield, it sought to recover its costs from Blair alone. Blair then applied to Enfield to be indemnified for these costs, which indemnification was refused.

12 Blair then filed an application under s. 4.02 of Enfield By-law No. 3, which essentially incorporates the terms of the statutory right to indemnification found in s. 136(1) of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, and in the business corporations statutes of most of the provinces as well as the federal business corporations statute, for an order that he be indemnified by Enfield for the legal costs incurred in defending his corporate acts.

13 On October 28, 1992, Carruthers J. dismissed the respondent's application, concluding that the respondent's conduct was not in the best interests of Enfield and thereby outside the scope of s. 136(1): [1992] O.J. No. 2291 (QL). Blair's appeal to the Court of Appeal for Ontario was allowed on October 6, 1993: (1993), 15 O.R. (3d) 783, 106 D.L.R. (4th) 193, 66 O.A.C. 121, 12 B.L.R. (2d) 303. Enfield, now controlled by Canadian Express, appeals to this Court.

II. Relevant Statutory Provisions and Corporate By-laws

Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (OBCA):

> *134.* — (1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties shall,
>
> (*a*) act honestly and in good faith with a view to the best interests of the corporation; and
>
> (*b*) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
>
> *135.* (4) A director is not liable under section 130 or 134 if the director relies in good faith upon,
>
> . . . . .
>
> (*b*) a report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by any such person.
>
> *136.* — (1) A corporation may indemnify a director or officer of the corporation ... against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him or her in respect of any civil, criminal or administrative action or proceeding to which he or she is made a party by reason of being or having been a director of such corporation or body corporate, if,
>
> (*a*) he or she acted honestly and in good faith with a view to the best interests of the corporation ....

Enfield By-law No. 3:

> 4.02 *Indemnity of Directors and Officers*. Subject to the limitations contained in the [OBCA], every director or officer of the Corporation ... shall, from time to time, be indemnified and saved harmless ... from and against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of such corporation ... if (a) he acted honestly and in good faith with a view to the best interests of the Corporation ....

III. Judgments Below

A. Ontario Supreme Court (1989), 46 B.L.R. 92, per J. Holland J.(sub nom. Canadian Express Ltd. v. Blair)

14 It is important to emphasize that it is not J. Holland J.'s decision that is appealed to this Court. The application before J. Holland J. was launched by Canadian Express to overrule, on the

merits, Blair's decision to void the proxy votes tabulated in favour of Price. J. Holland J. found in favour of Canadian Express and named Price, not Blair, as the 11th director of Enfield. Blair appealed J. Holland J.'s decision; his application was summarily dismissed. However, a review of J. Holland J.'s decision is warranted since it (1) provides a factual background to the s. 136(1) issue involved in the present appeal, and (2) constitutes the first tier of the proceedings for which Blair is presently seeking indemnification. The matter before J. Holland J. is thus the underlying "litigation" for which Blair wishes his reasonable expenses defrayed by Enfield.

15 I note that the proceedings before J. Holland J. were commenced by Canadian Express even though Blair had convened another shareholders' meeting on July 24, 1989, ostensibly for the purpose of settling the outstanding voting issues. Blair was added to these proceedings in his capacity and status as a director of Enfield and as chairman of the shareholders' meeting of July 20, 1989.

16 J. Holland J. concluded (at p. 94) that "the true construction of the disputed proxies is that they conferred general discretion" on the proxyholders. He found that the proxies "were effectively converted to unsolicited shareholder proxies once the names of the proposed management proxyholders were deleted and the names of the shareholder designees were inserted". They were thus valid.

17 J. Holland J. noted "the importance of enabling shareholders to freely exercise their voting rights in accordance with their intentions" and underscored that "shareholder designees who hold blank proxies ... are recognized as having full discretion to vote as they see fit, just as the shareholders in person at the meeting could vote" (p. 94). He stated that the disputed proxies should be construed "in light of surrounding circumstances and, where possible, in a manner consistent with business common sense" (p. 95). With these considerations in mind, J. Holland J. held (at p. 95) that:

> ... I accept that [the proxyholders] were entitled to vote a total of 19,038,296 shares, which was more than 50 per cent of the shares represented at the meeting. There is no doubt on the evidence that the proxyholders intended to, and did, cast their votes for Price and not for Blair. [Emphasis in original.]

18 J. Holland J. found that the respondent "failed to meet the quasi-judicial standard of conduct demanded of a chairman" (p. 95). He stated that, based on the evidence, it could be reasonably inferred that the respondent was alerted to the fact that the election of directors would be contentious and that he was likely to be in a position of conflict. He noted that the respondent, when he reconvened the meeting to announce the results of the balloting, read from a statement prepared by his solicitors, stating that Price had received no votes and that he had been elected. He found that this was in accordance with the plan conceived by the respondent to protect his personal interests and that it was no excuse for Blair to say that he relied upon legal advice. J.

Holland J. then concluded (at p. 96) that:

> From the tally, it was clear that all the votes cast by [the proxyholders] for Price had, by reason of the chairman's decision, been counted as votes resulting in his own election. He did not permit discussion at the meeting as to this decision. At the very least, he had an obligation to allow those affected by his ruling on the disputed ballots an opportunity to be heard. He chose to act as Judge in his own cause and it is properly inferred from the evidence that he had determined to act in this way, at least at the time of the July 19 meeting and until the announcement of the voting results. In view of Blair's conduct alone and quite apart from the true construction of the proxies, his ruling cannot stand.
>
> It was Blair's decision and not that of the scrutineers to determine the ballots in this way. It is no excuse for Blair to say that in doing so he was relying upon legal advice. It was his responsibility to conduct himself quasi-judicially throughout the proceedings.

19 J. Holland J. stated that, in exercising his discretion as to costs, he did so on the basis of the relationship of the respondent and Enfield in the sense that the respondent breached his fiduciary duty following legal advice given by Enfield's solicitors. J. Holland J. concluded that Canadian Express was entitled to costs against both Blair as well as Enfield. These were assessed (after an assessment appeal) at $165,432.67.

20 Blair appealed J. Holland J.'s order as to the proxy votes. This appeal was dismissed. He then commenced an application on Ontario Court (General Division) for a declaration that Enfield was to indemnify him for all costs, charges and expenses incurred by him in respect of the proceedings before J. Holland J. It is to this issue that I now turn.

B. Ontario Court (General Division)

21 Carruthers J. denied Blair's claim for indemnification.

22 Carruthers J. stated that the onus was on the respondent, pursuant to s. 136(1) OBCA to demonstrate, on a balance of probabilities, that he "acted honestly and in good faith with a view to the best interests" of Enfield throughout the litigation. However, Carruthers J. stated that, "following my opportunity to reflect on the merits of this application on the basis of the material filed with the court to this point, I have been able to reach my conclusion without having to determine the issue of good faith on the part of Blair". In the end, Carruthers J. simply found that, since Blair's involvement in the Canadian Express application had not been undertaken with a view to Enfield's best interests, he was not entitled to indemnification.

23 Carruthers J. stated that the respondent's honesty and good faith were relevant for the

purposes of the trial judge, who was not concerned with whether the respondent acted "with a view to the best interests of" Enfield in defending the litigation. Carruthers J. then stated that he had to be concerned with this last issue as it related to the respondent's conduct or involvement in the litigation. He concluded that:

> The applicable provisions of the Act or by-law require that his involvement in that litigation be in the best interests of Enfield quite apart from whether it can also be described as honest and in good faith. Thus, whether Blair was in fact acting honestly and in good faith during the course of his disputing or defending the claims of Canadian Express raised in the litigation, he is not entitled to succeed in this present application unless, as well, what he did can be said to have been in the best interests of Enfield.

24 Carruthers J. was of the view that the dispute was about the control of Enfield and "involved efforts by both sides to either preserve or promote their respective desires and interests in this respect". He found that the respondent, on the advice of Enfield's solicitors, reached the decision that he had been elected. The question at this point was whether the respondent had done this "in order to promote the best interests of Enfield." Carruthers J. concluded that:

> ... Blair's conduct at the meeting, including his decision, was not something that can be said to have been in the best interests of Enfield. Accordingly, because the sole purpose of disputing the claims raised on behalf of Canadian Express in the litigation was to uphold Blair's conduct, again including his decision, Blair cannot fit himself into either the provisions of s. 136(1) of the OBCA or of s. 4.02 of the Enfield By-Law No. 3.
>
> Both Blair and Enfield were properly named as parties to the litigation; Blair chaired and ran the meeting and made the decision, and Enfield to be bound by the result .... [a]s that matter was one personal to him, and as well to the other shareholders who supported him, Enfield is not liable to indemnify Blair for the costs, charges and expense which he has incurred by reason of defending the litigation.

C. Ontario Court of Appeal (1993), 15 O.R. (3d) 783

25 The Court of Appeal set aside Carruthers J.'s decision and permitted Blair to be indemnified under s. 136 for all proceedings (i.e. before J. Holland J., Carruthers J. and the Court of Appeal), with the exception of the appeal of J. Holland J.'s decision regarding the validity of the impugned proxies, and the expenses related thereto, which Carthy J.A. found not to have been reasonably incurred.

26 Carthy J.A. stated that the issue before the Court was the proper application to the facts of the By-law which granted rights of indemnity in the terms authorized by s. 136(1) OBCA. He also

stated that "reliance upon legal advice cannot be excluded as a factor in determining whether a director acted 'honestly and in good faith with a view to the best interests of the corporation' as set forth in s. 136" (p. 787). He then held (at pp. 789-90) that:

> ... I read s. 136(1)(a) and the language 'acted ... with a view to the best interests of the corporation' as referring back to, in this case, the conduct of the vote for directors — not to the conduct of the litigation. The litigation that is contemplated by s. 136(1)(*a*) is against the director personally and the indemnity is against personal liability. There is no purpose in a requirement that personal litigation be conducted in the best interests of the corporation. The costs of litigation are dealt with separately in s. 136(1) and must be 'reasonably incurred'.

27 Carthy J.A. emphasized that the issue was Blair's ruling on the overall balloting, and "to conclude that his ruling was *male fide* because the result favoured him is to conclude that he was compelled to rule the other way, or give up the chair, no matter what advice he received" (p. 798). He then stated that, aside from the question of giving up the chair, "the real test should be whether the ruling was made with the *bona fide* intent that the company have a lawfully elected board of directors" (p. 798).

28 Carthy J.A. found that the authorities generally described the chairman's duty as quasi-judicial "without defining what that means in this context" (p. 799). He stated that it was confusing "to use, and seek to define, the word judicial or *quasi*-judicial in this context because an adjudicator or judge can never have a personal interest in the issue". He then concluded (at p. 799):

> A chairperson who is more than a nominal shareholder of a public company, on the other hand, always has a personal interest in everything that affects the company, which includes all of the rulings of the chair. If that distinction is not recognized the reflex reaction is to assume that a decision which benefits the chair personally is non-judicial and thus not *bona fide*. In my view, it is preferable to describe the duty as one of honesty and fairness to all individual interests, and directed generally toward the best interests of the company.

29 Carthy J.A. found that the events leading up to the election created an "aggressively competitive atmosphere". He also found that Blair "felt very strongly that the shareholders as a whole should be fully informed of a change in control" and that Blair "undoubtedly resented the surprise nomination of Price". In the end, this made the respondent "a protagonist in the duel for control". Carthy J.A. stated that, based on the sequence of events, Blair did not have a choice when he made the impugned ruling (at pp. 799-801):

> Given the necessity of determining who the legal directors of the company were, so that business could be carried on in a regular fashion, some decision had to be made. Even if a

> disinterested chairperson could have been found in the room, he or she would, in these circumstances, have had to look to the corporation's solicitors for an answer to this purely legal issue of interpretation. ...
>
> . . . . .
>
> No matter what debate might have ensued on July 20 and no matter who the chairperson might have been, there was no obvious error or oversight which would enable the chairperson to turn away from the advice of the company's solicitors.
>
> ... I am satisfied that Blair was acting honestly and in good faith and in the best interests of the corporation in accepting and implementing that advice.
>
> ... I am satisfied that the evidence shows that he properly performed his duty as chairman of the meeting.

30 Carthy J.A. considered whether Blair acted reasonably in his defence of the litigation and concluded that there was nothing unreasonable in Blair's involvement in the initial application as well as in the other proceedings.

IV. Issue on Appeal

1. Did the Ontario Court of Appeal err in concluding that the respondent Blair was entitled to be indemnified by the appellant Enfield regarding the costs of the Canadian Express application (and appeals on the costs issue emanating therefrom) pursuant to s. 4.02 of Enfield By-Law No. 3, modeled upon s. 136(1) OBCA?

V. Analysis

A. An Overview of the Legislation: Burden of Proof and the Scope of the Conduct That Is Caught

31 For purposes of convenience, I reproduce s. 136(1) OBCA (relevant portions underscored):

> *136.* — (1) A corporation *may* indemnify a director or officer of the corporation ... against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, *reasonably incurred* by him or her in respect of any civil, criminal or administrative action or proceeding to which he or she is made a party *by reason of being or having been a director* of such corporation or body corporate, if,
>
> (*a*) *he or she acted honestly and in good faith with a view to the best interests of the corporation* .... [Emphasis added.]

32 The effect of s. 4.02 of Enfield By-law No. 3 essentially duplicates that of s. 136(1), although the wording does vary:

> 4.02 *Indemnity of Directors and Officers*. Subject to the limitations contained in the [OBCA], every director or officer of the Corporation ... *shall, from time to time, be indemnified* and saved harmless ... from and against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party *by reason of being or having been a director or officer of such corporation* ... if (a) *he acted honestly and in good faith with a view to the best interests of the Corporation* ....

33 Given that the effect of s. 4.02 of By-law No. 3 is essentially the same as that of s. 136, any interpretation given to the By-law by this Court will affect the application of the Act. Furthermore, s. 136(1) is reproduced in turn in the corporations law of many provinces, as well as federally: *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, s. 124; Newfoundland Corporations Act, R.S.N. 1990, c. C-36, s. 205; Manitoba *Corporations Act*, R.S.M. 1987, c. C225, s. 119; Saskatchewan *Business Corporations Act*, R.S.S. 1978, c. B-10, s. 119; Alberta *Business Corporations Act*, S.A. 1981, c. B-15, s. 119; British Columbia *Company Act*, R.S.B.C. 1979, c. 59, s. 152.

34 The largest difference between s. 136(1) and s. 4.02 of By-law No. 3 is that, whereas under s. 136(1) the director *may* be indemnified, under the By-law the director shall be indemnified. Is this of any importance? The respondent submits that this difference is relevant to the issue of the burden of proof. Since under the By-law indemnification is mandatory, the onus should lie on the corporation to demonstrate that the director acted with *mala fides*. I do not find this argument terribly persuasive.

35 What I do find more persuasive is the proposition that persons are assumed to act in good faith unless proven otherwise: *General Motors of Canada Ltd. v. Brunet*, [1977] 2 S.C.R. 537, at p. 548. In this respect, contrary to the appellant's submissions before this Court, I believe that a proper construction of the statute and law related to good faith issues reveals that Blair is not required to prove his good faith, although he may certainly call evidence in this regard to counter whatever evidence of bad faith may be adduced against him. To a large extent, it is the corporation that must establish, to the satisfaction of the court, exactly what Blair did that was inimical to its best interests.

36 Section 136(1) and the Enfield By-law specify three conditions that the director or officer must fulfil in order to receive indemnification for the costs of defending in litigation:

> (1) the person must have been made a party to the litigation by reason of being a director or

an officer of the corporation;

(2) the costs must have been reasonably incurred; and

(3) the person must have acted honestly and in good faith with a view to promoting the best interests of the corporation.

37 As I will now discuss, Blair has fulfilled all three conditions entitling him to indemnification.

38 In terms of applying this law to the facts, I see no reason to disturb the findings of the court below that the expenses were reasonably incurred. The court grounded its assessment in the following factors:

(a) Osler was retained in the annual meeting litigation to act for both Enfield and Blair, in his capacity as chairman of the meeting;

(b) The Enfield board reviewed the issue of whether it should have separate counsel from Blair and determined that there were no grounds for Enfield taking such action;

(c) Blair added nothing to the costs of the litigation arising out of the shareholders' annual meeting;

(d) Blair's conduct following the shareholders' meeting, in requisitioning another shareholders' meeting for the purpose of electing directors, was consistent with his protestations throughout that he had no interest in leading the company if voted out by a majority of informed shareholders.

39 Thus, this appeal, when properly focused, involves only the "good faith" requirement contained within s. 136(1). In this connection, I now direct my attention to the respondent's conduct during the July 20, 1989 shareholders' meeting, bearing in mind that this conduct must be placed within the context of the longstanding corporate feud arising between the respondent and Canadian Express. However, before a determination can be made whether this conduct was undertaken in good faith and with a view to promoting the best interests of the corporation, I must respond to the appellant's contention that Blair is involved in this litigation in his personal capacity as opposed to his capacity as a director, thereby prima facie precluding him from the benefit of s. 136(1).

B. Is Blair Involved in this Litigation in his Capacity as Director/Chairman of Enfield or in his Personal Capacity?

40 The appellant submits that the Canadian Express application (and appeals related thereto) is essentially a dispute between two shareholders (Blair and Canadian Express) concerning the 11th position on Enfield's Board. As such, the logical inference to be drawn is that Enfield ought not to reimburse the losing shareholder, in this case Blair.

41 I disagree with this characterization of the Canadian Express application. It directly involved the reputation of Enfield and the integrity of its voting procedures; moreover, Blair's participation in the impugned proceedings flows entirely from his role as chairman of the meeting, not from his status as a shareholder. In fact, he was named as a respondent to the Canadian Express application in his capacity as "chairman of the meeting". The fact that, pending the outcome of that application, an interim order was adopted by McRae J. precluding Blair from acting as an Enfield director demonstrates the extent to which Blair was involved *qua* director, not *qua* shareholder or individual. Further, both Enfield and Blair were represented by the corporate counsel Osler. In a letter from Osler to counsel for Canadian Express dated July 25, 1989, Osler states:

> In your letter dated July 24, 1989, you asked us to clarify who we are representing in these proceedings. *In these proceedings we are counsel to Enfield and to Mr. Blair in his capacity as Chairman of the Annual Meeting. We are not acting for Mr. Blair in his personal capacity*. [Emphasis added.]

42 In short, the impugned acts in this case were corporate acts insofar as they were made within the authority accruing to the chairman of Enfield meetings. I now turn to the content of the chairman's responsibilities for the purposes of s. 136(1) and the question whether Blair's conduct on July 20, 1989 disentitled him from indemnification.

C. Factors Relevant in "Acting Honestly and in Good Faith with a View to the Best Interests of the Corporation"

(i) What are the "best interests of the corporation" in the context of this case?

43 The question is not who is the better director, or whether the corporation's best interests would be furthered by having one rather than the other as the 11th director. Rather, as Carthy J.A. held, the best interests of the corporation in the instant appeal centre solely on the maintenance of the integrity and propriety of the voting procedure.

(ii) The quasi-judicial role of a chairman

44 If chairmen at shareholders' meetings are under a quasi-judicial duty and if Blair is found

to have breached that duty, such a finding could constitute evidence in favour of denying him indemnification under s. 136(1).

45 At the outset, I would like to express my agreement with Carthy J.A. that the term "quasi-judicial" is, in a certain sense, inappropriate to describe the duty of a chairman when that chairman is also (as will often be the case in the corporate world) interested in the affairs that are being deliberated before him or her. A judge, adjudicator or arbitrator, on the other hand, will ideally never have any interest in the outcome of the proceedings before him or her. Consequently, chairmen of shareholders' meetings cannot labour under "quasi-judicial" duties in the strict sense because that term imports the idea of a wholly disinterested person.

46 In any event, Carthy J.A. correctly observed that it is one thing to state that a chairman is under a quasi-judicial duty, it is quite another to define the content of the responsibilities engendered by such a duty. Clearly, the chairman of any meeting, especially one mandated by and procedurally governed by statute, operates under certain duties of administrative fairness. The key question is to what extent a chairman will be permitted to be interested in the matters before him or her before a conflict of interest arises and he or she should be expected to cede the chair.

47 I would affirm Carthy J.A.'s standard; namely that the duty under which chairmen labour is "one of honesty and fairness to all individual interests, and directed generally toward the best interests of the company" (p. 799). However, when one turns to the application of this standard, a contextual approach is necessary. In this respect, it is very important to focus on the actual conduct of the chairman instead of perfunctorily finding bad faith simply because that person stands in a potential conflict and does not step down. As shall become evident, I do not find that Blair's conduct was such that he improperly used his position as chairman to further his own agenda. It was not his doing that the proxies were temporarily disqualified. We were not pointed to any evidence of a "design" or "plan" for the proxies to be invalidated.

48 In a sense, the argument of the appellant is rather simplistic: Blair was the chairman and because the proxies were deemed invalid and because no debate was fostered on the issue, Blair must have acted in bad faith. In response, I would affirm the following observations made by the Ontario Court of Appeal (at pp. 798 and 794):

> ... to conclude that [Blair's] ruling was *male fide* because the result favoured him is to conclude that he was compelled to rule the other way, or give up the chair, no matter what advice he received. ...
>
> It can also be assumed that he received the [legal] opinion agreeably and was not unhappy that he could make a ruling to thwart any attempt to alter the slate of directors. That falls short of a plan to deviously sidestep the entitlement of shareholders.

49 I also take issue with the appellant's statement that the fact that a chairman has an interest in the outcome of a decision impugns the integrity of the process because of the mere appearance of bias. With respect, it is the Enfield shareholders who concluded that it is to be the President of the company (who is allowed to be a director) — a person who invariably is interested in every matter discussed at the shareholders' meetings — who is to act as chairman (Enfield By- law No. 3, s. 5.05). In this respect, there is no unacceptable appearance of bias because it was never contemplated that the chairman was to be someone who would appear to be totally disinterested in the first place. The fact that a decision- maker has an interest in the outcome of his decision does not disqualify him or her from making decisions if the authority from which he or she obtains the status as decision-maker contemplates that he or she may act as judge in his or her own cause: *Alcyon Shipping Co. v. O'Krane*, [1961] S.C.R. 299, at p. 305; *Walters v. Essex County Board of Education* (1973), [1974] S.C.R. 481, at pp. 487-88.

50 The detailed organization of a corporation is essentially a private contractual matter. If the shareholders decide to designate the President as chairman, so be it. If the shareholders are concerned about the maintenance of *prima facie* impartiality, they can specify through the by-laws or otherwise that the corporate meetings are to be chaired by a neutral third party. It is helpful to note that the drafters of the OBCA considered these issues and in fact established as a default principle that interested parties should operate as chairmen of shareholders' meetings. Section 97(*c*) of this statute provides:

> *97.* Subject to this Act or the articles or by-laws of a corporation or a unanimous shareholder agreement,
>
> . . . . .
>
> (*c*) the president or, in his or her absence, a vice-president who is a director shall preside as chair at a meeting of shareholders. ...

51 On a broader note, I find that there are valid policy reasons militating against blindly precluding anyone holding more than a nominal share in a public company from acting as a chairman. This is not practical for many closely held corporations and, moreover, might pave the way for much litigation regarding the definition of "nominal holdings", instead of properly focusing on the actual conduct that is impugned. There are many chairmen who have large holdings in a company yet conduct themselves on a most professional basis in terms of chairing meetings; there may be persons who own just one share who conduct themselves improperly. The focus should thus not be on the size of the holdings, but on the nature of the conduct. This is not to say, however, that there might not be situations in which the nomination of a wholly disinterested chairman is advisable as has apparently been the case in a number of situations that have arisen recently or where the court has appointed such a person pursuant to specific statutory provisions. However, such an exceptional situation is not found in the facts of the present appeal.

52 I now turn to the jurisprudence cited by the appellant in favour of the proposition that a

chairman has a duty to act quasi-judicially: *Bomac Batten Ltd. v. Pozhke* (1983), 43 O.R. (2d) 344 (H.C.); *Gray v. Yellowknife Gold Mines Ltd.*, [1946] O.W.N. 938 (H.C.); *Johnson v. Hall* (1957), 10 D.L.R. (2d) 243 (B.C. S.C.); *Re United Canso Oil & Gas Ltd.* (1980), 12 B.L.R. 130 (N.S. T.D.); *Byng v. London Life Association Ltd.* (1988), 42 B.L.R. 280 (C.A.). I do not find that this jurisprudence supports the appellant's position. Quite the contrary: many of these cases demonstrate the extent to which courts, through hindsight, are reluctant to find chairmen to be in dereliction of their responsibilities barring proof of bad faith. Those remaining cases that offer some assistance to the appellant can readily be distinguished on the facts. To the extent that *Bomac Batten Ltd. v. Pozhke* is not distinguishable, I would overrule it.

53 On another note, although a chairman has an obligation to promote administrative fairness, this is necessarily tempered with the need to control and organize a meeting so as to ensure that it proceeds effectively. As noted by Chitty J. in *National Dwellings Society v. Sykes*, [1894] 3 Ch. 159, at p. 162:

> A question of some importance has been mooted in this case, with regard to the powers of the chairman over a meeting. Unquestionably it is the duty of the chairman, and his function, to preserve order, and to take care that the proceedings are conducted in a proper manner ....

54 In closing debate on the proxy issue, Blair was, based on Osler's instructions, fulfilling his responsibility as chairman to see that the shareholders' instructions as set out in the proxies were followed. Further, allowing the meeting to devolve into a shouting match between two rival camps debating a complex and unsettled area of corporations law could hardly be seen as enhancing the validity and integrity of Enfield's voting procedure. The function of a chairman is to oversee, not participate in a partisan sense. It may be sensible to refer briefly to the reason why the chairman is so ruling, but again courts should not attempt to hamstring in advance chairmen of meetings in contested settings. Although it is clearly proper for a shareholder to raise any relevant matter in the manner the Canadian Express representatives did, I cannot find anything improper in Blair's answer to the points raised, especially given his thorough consultation with Enfield's independent legal counsel.

55 In fact, s. 107 OBCA specifically contemplates that, in an imbroglio such as that presented in this appeal, recourse is to be had to the courts, not to the chairman. The rationale behind this provision is to avoid the spectacle that can result from continual challenges made during the corporate meeting to decisions made by the chair. Section 107 reads as follows:

> *107.* — (1) A corporation, shareholder or director may apply to the court to determine any controversy with respect to an election or appointment of a director or auditor of the corporation.

Blair properly instructed the Canadian Express representatives to take up their grievance with

corporate counsel on the basis that the issue involved was a legal one. Despite the fact that corporate counsel were present at the meeting, the Canadian Express representative did not communicate with them.

56 On a final note, the duty of a chairman is to give effect to the proxy and ensure that the instructions it contains are followed. In this appeal, many of the beneficial owners of the shares for which proxies had been issued were not present at the meeting. The appellant submits that it was self-evident that these proxy-"givers" wanted to vote for Price. I find this untenable. First, there is no evidence that they had ever turned their minds to Price's candidacy. Second, and more importantly, the chairman has no duty to inquire into the minds of the beneficial owners of shares represented at a meeting: *Cohen-Herrendorf v. Army & Navy Department Store Holdings Ltd.* (1986), 55 Sask. R. 134 (Q.B.), at p. 148 (at paras. 80 and 81 citing Ontario and U.K. authority). There is no obligation to look behind the proxies. The chairman is simply required to give effect to their instructions. This is precisely what Blair did, believing Osler's interpretation of the instructions and thereby acting with a view to Enfield's best interests. Absentees from the meeting have the right to expect that proxy rules will be followed, and that their proxies will be applied pursuant to the instructions they place upon them.

57 In sum, the fact that Blair made the impugned ruling with the *bona fide* intent that Enfield have a lawfully elected board of directors constitutes evidence that he acted honestly and in good faith and with a view to the best interests of Enfield for the purposes of s. 136(1). Although his decision to disallow the proxies turned out, under judicial scrutiny, to be wrong, it did not evidence any *mala fides*. I am further buttressed in this conclusion by the fact that Blair entirely relied upon objective legal advice from corporate counsel in arriving at this decision. It is to this factor that I now turn.

(iii) The Reliance on the Legal Advice of Corporate Counsel

58 How does reliance on legal advice support a claim for indemnification under s. 136(1)? At the outset, I note my agreement with the position of the Court of Appeal that mere *de facto* reliance on legal advice will not guarantee indemnification. However, reliance that is reasonable and in good faith will establish that a director or officer acted "honestly and in good faith with a view to the best interests of the corporation". In the instant appeal, Blair's reliance on Osler's advice was both reasonable and in good faith.

59 Blair sought Osler's advice in the broadest of terms:

> You know the law. I will take my direction from you. What should I do?

60 Implicit in this query was not only concern over whether the proxies should be allowed, but

also the question whether Blair should step down as chair, or whether he was in any position at all to make a decision. At no time did Enfield's corporate counsel ever suggest that Blair should relinquish control of the chair. If anything, Osler advised Blair that it was his duty, as chairman, to make a ruling. Osler did not advise Blair that he should hear submissions regarding the ruling; nor did they correct Blair's decision not to allow for such submissions. The ruling made by Blair was entirely prepared by Osler: Blair read verbatim from a script, with the exception of one gratuitous comment directed at Price which, although it probably should not have been made, was, given the tense atmosphere, understandable and, even if it were not excusable, certainly did not demonstrate bad faith or an intention to undermine the best interests of the corporation.

61 Osler deliberated over these issues for about an hour and a half. Blair did not participate in the substantive aspects of this discussion. There were six senior corporate lawyers present and they were in constant communication with Osler's head office. Furthermore, the conclusions they reached on July 20, 1989 were in line with the conclusions arrived at the night before as well as the results of the research memoranda prepared for Enfield. The point of the matter is that there was no reason for Blair, acting reasonably, to have believed Osler was making a hasty decision based on sketchy advice. In any event, Osler was Enfield's corporate counsel and it strikes me as odd that it would amount to "bad faith" or a dereliction of a chairman's duty of care not to solicit a second opinion from an independent legal counsel.

62 The evidentiary record reveals that Blair believed that, in relying on the advice of Enfield's corporate counsel, he acted in a prudent manner, in good faith and with a view to Enfield's best interests. Blair goes so far as to affirm in discovery:

> ... having gone through an hour, an hour and a half of deliberation, including a discussion with other counsel in their firm, and gone through a full process, I would have felt compelled to accept their advice and act on it.

63 If anything, I am sympathetic to the respondent's submission that he believed that the rejection of Osler's advice, which is what the appellant appears to suggest Blair should have done, could not be in Enfield's best interest:

> (a) Blair was not qualified to interpret and apply the law to the ballots and proxies;
>
> (b) Blair owed a duty to shareholders to see that the instructions contained in their proxies were followed;
>
> (c) The shareholders who had not received notice of the surprise nomination of Price and who were not present at the Shareholders' Meeting and who held enough votes to change the result had they received notice might have a cause of action if Price were declared elected against the advice of Enfield's counsel;

> (d) The shareholders who were represented by management proxies had no opportunity to assess Price or to vote in relation to his candidacy, and they relied on Enfield and its chairman to ensure that their rights at the meeting were protected.

64 In deciding not to reject the advice of counsel, Blair in fact fulfilled his fiduciary duty. Consequently, I would disagree with J. Holland J. to the extent that he held otherwise in a series of *obiter* comments not necessary to the resolution of the question before him (i.e. whether, upon their true construction, the proxies were validly voted).

65 The appellant cites some case law in favour of the proposition that reliance on legal advice in and of itself does not entitle an officer or director to indemnification: *Central & Eastern Trust Co. v. Rafuse*, *(*sub nom. *Central Trust Co. v. Rafuse)* [1986] 2 S.C.R. 147; *Exco Corp. v. Nova Scotia Savings & Loan Co.* (1987), 35 B.L.R. 149 (N.S. T.D.). Although this principle is found in the jurisprudence, it is not really relevant to the case at bar, given that the decision to permit Blair to be indemnified is not grounded in and of itself in Blair's reliance on the erroneous advice yet, instead, takes root in several considerations, such as the fact that he did not breach his duties as chairman, and is further coloured by the fact that the reliance on Osler's advice was fully made in good faith. I note that the case law cited by the appellant establishes that reliance on counsel's advice (even if it leads to a deleterious result) will strongly militate *against* a finding of *mala fides* or fiduciary breach, such a finding being necessary to disentitle one from indemnification. For example, in *Exco* at pp. 220-21, Richard J. held:

> *The presence of ... counsel ... do[es* have the result of absolving the directors of any allegation of bad faith with respect to their actions. Directors have a right, indeed a duty to rely on the opinion of counsel.] ...
>
> Although what the directors did, as a board, may have been unlawful, no liability can attach to the directors personally for what they did, having first received advice from ... counsel who held himself out as having experience and expertise in that area of the law. [Emphasis added.]

66 And, in *Rafuse, supra*, at pp. 215-16, Le Dain J. held:

> The executive officers of the ... Company and the members of the Executive Committee of the Board of Directors did not have a duty of care with respect to the legal aspects of a transaction other than to retain qualified solicitors to perform the necessary legal services. ... They might well have been negligent had they relied on their own legal judgment in such a case. ... the trust company "took the only course open to it to determine the validity of the mortgage, namely, consulting the solicitors."

67 It was reasonable for Blair to believe, and the evidence shows he did believe, that reliance on the advice of Osler was the only course open to him. Thus, it is clear that Blair fulfilled his duty of care under the Rafuse standard. This militates against a finding that he should not be indemnified for the subsequent litigation initiated by Canadian Express. I also note that such a conclusion is consonant with jurisprudence in other contexts which has held that reliance on actuarial and legal advice obtained from competent sources would militate against a finding of misconduct: *Bathgate v. National Hockey League Pension Society* (1994), 16 O.R. (3d) 761 (C.A.), leave to appeal to the Supreme Court of Canada refused, [1994] 2 S.C.R. viii (for trustees); *C.M.S.G. v. Gagnon*, [1984] 1 S.C.R. 509, at p. 532 (a union's decision not to take a grievance to arbitration).

68 Of considerable relevance is the fact that reliance on the work of a lawyer has been recognized within the OBCA itself as comprising part of the director's standard of care. Section 135(4) reads as follows:

> 135 (4) A director is not liable under section 130 or 134 [describing the fiduciary duties and duties of care governing directors' conduct] if the director relies in good faith upon,
>
> . . . . .
>
> (*b*) *a report of a lawyer*, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by any such person. [Emphasis added.]

Blair fits within the scope of s. 135(4)(*b*) given that there was no reason to doubt Osler's competence. Osler was apprised of all the relevant facts, and Blair acted in full accordance with the advice that was given.

69 I should also mention that s. 135(4) codifies the anterior common law director duties of care, in which a director would be absolved of liability if he or she relied upon the work of an official of the company (in the present appeal, corporate counsel) if such work is properly left to that official and, in the absence of grounds for suspicion, the director is justified in trusting that official to perform the duty: *Re City Equitable Fire Insurance Co.* (1924), [1925] Ch. 407 (C.A.), per Romer J., affirmed (1924), [1925] Ch. 500 (C.A.). Consequently, directors will be held liable for the misdeeds of officials of the company only if they have been personally negligent or if they have acted unreasonably in relying on an official whose honesty or competence they have reason to suspect.

70 On another note, I cannot accept Enfield's submission that Osler was partial to Blair and acted on behalf of Blair and was hence not independent counsel. At all material times, Osler was Enfield's corporate counsel and represented Blair in that capacity as it was professionally obliged to; in fact, the only reason Osler represented Blair at the Canadian Express application was because Enfield was joined as a co-defendant. There is no evidence whatsoever that Osler's advice to Blair during the meeting was influenced by any partiality. Its conclusion as to the validity of the proxies was reasonable and involved a complicated question of law over which J. Holland J.

heard, for eight days, expert testimony before reaching his conclusion. This seems to confirm that this issue would not have been solved by giving Canadian Express representatives a few moments to address the shareholders' meeting. Further, it should be remembered that Blair, a layperson, could not have been expected to be suspicious about advice that, prima facie, appeared legitimate and came from Enfield's own corporate counsel. I would affirm the Court of Appeal's finding that the advice given by Osler and followed by Blair would, to a layperson in Blair's circumstances (and with his business experience), have been "ostensibly credible" (p. 801). He thereby acted in accordance with the duties he owed.

(iv) The Interests of the Shareholders Not Present at the Meeting

71 Many of the persons issuing proxies were not present at the meeting. Although they may very well have been informed of the tensions between Blair and Canadian Express, they would certainly not have expected there to be a contested election for the position of 11th director. At the time the proxies were given to Ravelston and Canadian Express, it was assumed that the eleven persons listed in the management circular would simply be elected. The evidentiary record does not reveal that anyone's mind was alerted to the possibility that the proxyholders would use the proxies to nominate Price over Blair. No notice whatsoever was given of Price's nomination. In this context, I find some merit to Blair's submission that his decision to follow Osler's advice must be viewed also in light of the interests of the shareholders not present at the meeting.

72 In the end, by following the instructions on the proxies and then requisitioning a new shareholders' meeting on July 24, 1989, Blair gave all shareholders an opportunity to make a fully informed decision regarding the election of the directors, thereby promoting the integrity of Enfield's voting procedures. Shareholders holding fully 16 percent of the shares of Enfield who were not aware that Canadian Express would attempt to take control of the Board were thus placed in a position of being able to make an informed choice as to how to vote (see judgment of the Court of Appeal, at p. 801). The corollary is that Canadian Express suffered no prejudice in respect of its voting rights in that it had the opportunity to nominate and support Price at the new meeting or pursue legal action against Enfield. Instead of waiting for the newly requisitioned meeting (at which it could have ensured that its proxies be filled out as per Osler's instructions), Canadian Express took the far more circuitous route of obtaining Price's election through the court system, with the hope of transferring the costs thereof upon Blair. A similar observation was made by Carthy J.A. (at pp. 802-3):

> *Given the opportunity provided by Blair's requisition of the meeting on July 24 the more obvious question is why Canadian Express did not drop the litigation. In a way, it was being offered the opportunity to correct the mistake that had apparently been made on July 19 and 20*. It was up to the board of Enfield to set the date for the meeting, and at a meeting on July 27 it was decided, without dissent and without Blair's involvement, to do nothing until the

> outcome of the court case was known. ...
>
> Blair added nothing to the costs of the proceedings, *his requisition of an annual meeting made it possible for the board to hold one before the litigation reached the courtroom*, and his conduct was consistent with his protestations throughout that he had no interest in leading the company if voted out by a majority of informed shareholders. [Emphasis added.]

73 In my mind, the fact that Blair promptly, and contrary to his personal interests, requisitioned a new meeting constitutes further evidence that his actions were taken with a view to the best interests of Enfield. If anything, Canadian Express's decision to pursue this matter through litigation drives against the well- being of Enfield's shareholders, especially those who have no personal interest in who acts as the 11th director, provided simply that individual discharge his or her duties to the corporation in a competent and trustworthy manner.

(v) Policy Concerns

74 Permitting Blair to be indemnified is consonant with the broad policy goals underlying indemnity provisions; these allow for reimbursement for reasonable good faith behaviour, thereby discouraging the hindsight application of perfection. Indemnification is geared to encourage responsible behaviour yet still permit enough leeway to attract strong candidates to directorships and consequently foster entrepreneurism. It is for this reason that indemnification should only be denied in cases of *mala fides*. A balance must be maintained. As noted by Jacob S. Ziegel et al. *Cases and Materials on Partnerships and Canadian Business Corporations*, vol. 1, 3rd ed. (Scarborough, Ont.: 1994), at p. 523:

> If an officer or director is compensated for acts of fraud or misappropriation effected against the corporation and its shareholders, then, apart from the negative publicity aspect of an explicit judgment against the director or officer, there will be little deterrent value left in legal controls, and agency costs will be left uncontrolled. In essence, indemnification would be tantamount to an employment contract recognizing that a director owes no duty to various corporate constituencies.
>
> *Despite the concerns with unrestrained managerial opportunism, a blanket prohibition against arrangements designed to minimize the impact of civil liability may be overbroad. There may be situations in which directors and officers are held liable for conduct that was not coloured by any opportunistic behaviour, and reflects outcomes that are the by-product of legitimate business judgments*. [Emphasis added.]

75 Given the circumstances of this appeal, denying Blair indemnification would, in my mind, run afoul of these policy concerns. See also Ronald J. Daniels and Susan M. Hutton, "The

Capricious Cushion: The Implications of the Directors' and Officers' Insurance Liability Crisis on Canadian Corporate Governance" (1993), 22 Can. Bus. L.J. 182, at p. 187:

> To temper excessive care and activity level reactions to potential gatekeeper liability, modern corporate law statutes permit a corporation to indemnify a director for any expense reasonably incurred in defending, settling or satisfying a judgment for any action, provided that the director's fiduciary duty to act "honestly and in good faith and with a view to the best interests of the corporation" has been fulfilled.

VI. Conclusion and Disposition

76 The appeal is dismissed. Blair's ruling was made with the *bona fide* intent that the corporation have a lawfully elected Board of Directors. It is insufficient to say retrospectively that Blair "should have" acted differently or that he did not handle things perfectly in order to deny indemnification under s. 136(1). Actual *mala fides* must be shown such that the director did not act with a view to the best interests of the corporation. This has not been demonstrated in this case. Therefore Blair is entitled to indemnification for the costs arising out of the application before J. Holland J. (though not for the costs of appealing J. Holland J.'s decision regarding the validity of the impugned proxies, and the expenses related thereto, which Carthy J.A. found not to have been reasonably incurred.)

77 As pronounced at the hearing of the appeal, the appeal is dismissed with costs to the respondent on a solicitor-client basis. After the judgment was pronounced but before reasons were released, Blair brought a motion under Rules 5 and 51 of the Supreme Court of Canada Rules, for an extension of time and a rehearing, to seek clarification of this Court's order with respect to costs. Upon consideration of the materials filed by Blair and Enfield in connection with the motion, and upon consideration of all the circumstances, Blair is awarded his costs on a solicitor and client scale not only in this Court but also in the proceedings before Carruthers J. and in the Ontario Court of Appeal.

Appeal dismissed.

Tab 4

2019 ONSC 1173
Ontario Superior Court of Justice [Commercial List]

Noranco v. MidOcean Partners III

2019 CarswellOnt 2458, 2019 ONSC 1173, 302 A.C.W.S. (3d) 528

NORANCO INC. (Plaintiff / Respondent) and DAVID CAMILLERI, KELLY CLINTON, MICHAEL BAUGHAN, ROBERT STEVENS MILLER, RAY VALEIKA and BDO CANADA LLP (Defendants / Moving Parties) and MIDOCEAN PARTNERS III, L.P., MIDOCEAN PARTNERS III-A, L.P., MIDOCEAN PARTNERS III-D, L.P., MIDOCEAN PARTNERS III-E, L.P., GALVAUDE PRIVATE INVESTMENTS INC., ANTARES HOLDINGS LP (Defendant) and BDO Canada LLP (Defendant)

F.L. Myers J.

Heard: January 8, 2019
Judgment: February 19, 2019
Docket: Toronto CV-17-11770-00CL

Counsel: Jason W.J. Woycheshyn, John Rawlins, for Noranco Inc.
James Renihan, for David Camilleri
Benjamin Bathgate, Stephen BrownOkruhlik, Nicole Rozario, for Kelly Clinton
Wendy Berman, for Michael Baughan, Robert Stevens Miller, and Ray Valeika
Jeff Galway, for MidOcean Partners III, L.P., MidOcean Partners III-A, L.P., MidOcean Partners III-D, L.P., MidOcean Partners III-E, L.P. and Galvaude Private Investments Inc.
Sandy Lockhart, for BDO Canada LLP

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Evidence; Restitution; Torts

Related Abridgment Classifications

Business associations
II Creation and organization of business associations

II.3 Corporations
II.3.c Corporate constitution
II.3.c.ii By-laws
II.3.c.ii.C Miscellaneous

Business associations
III Specific matters of corporate organization
III.1 Directors and officers
III.1.e Duty to manage
III.1.e.iii Indemnification by corporation

Evidence
XVII Affidavits
XVII.5 Cross-examination
XVII.5.b Scope

Headnote

Business associations --- Creation and organization of business associations — Corporations — Corporate constitution — By-laws — Miscellaneous
Interpretation of indemnity provision — Former officers and directors of company had been among shareholders who sold their shares to purchaser — Purchaser and company were amalgamated into successor — Successor brought action against shareholders for damages for breaches of representations and warranties; against chief financial officer (CFO) for damages for failing to properly investigate accounting practices; and against auditor for damages for negligence and negligent misrepresentation — Auditor brought crossclaim against officers and directors for contribution and indemnity — Officers and directors brought motion for orders requiring successor to make advances for legal expenses arising from defence of action and crossclaim — Motion granted on terms — Officers and directors were entitled to advances for reasonable legal fees and disbursements, though issue of whether CFO was entitled to full indemnification or had to repay amounts to be advanced would be issue for trial, with corporate shareholders being jointly and severally liable for any repayments — Company's prior by-law providing indemnity to directors and officers who were sued in proceedings "in which such individual is involved because of his/her association with the Corporation" did not apply to parties in their capacity as shareholders — Purpose of indemnifying directors and officers is to protect and encourage people to serve as fiduciaries on behalf of others — Use of wording "association with" in by-law could not be so broadly interpreted so as to capture officers' and directors' capacities as shareholders.

Business associations --- Specific matters of corporate organization — Directors and officers — Duty to manage — Indemnification by corporation
Former officers and directors of company had been among shareholders who sold their shares to

purchaser — Purchaser and company were amalgamated into successor — Successor brought action against shareholders for damages for breaches of representations and warranties; against chief financial officer (CFO) for damages for failing to properly investigate accounting practices; and against auditor for damages for negligence and negligent misrepresentation — Auditor brought crossclaim against officers and directors for contribution and indemnity — Officers and directors brought motion for orders requiring successor to make advances for legal expenses arising from defence of action and crossclaim — Motion granted on terms — Officers and directors were entitled to advances for reasonable legal fees and disbursements, though issue of whether CFO was entitled to full indemnification or had to repay amounts to be advanced would be issue for trial, with corporate shareholders being jointly and severally liable for any repayments — Claims as drafted were far broader than attacking officers and directors solely in their capacities as shareholders — Successor's claims relating to accounting practices and misrepresentations, and auditor's crossclaim, directly implicated conduct of officers and directors in their fiduciary capacities — Factual matrix underlying successor's claims involved and explored officers' and directors' duties, knowledge, and actions — Evidence against CFO was not sufficient to establish strong prima facie case required to disentitle him to advances at this stage — Fact that officers and directors had benefit of agreements with corporate shareholders who were funding their defence was irrelevant in motion seeking to enforce corporate indemnity rights.

Evidence --- Affidavits — Cross-examination — Scope
Former officers and directors of company had been among shareholders who sold their shares to purchaser — Purchaser and company were amalgamated into successor — Successor brought action against shareholders for damages for breaches of representations and warranties; against chief financial officer (CFO) for damages for failing to properly investigate accounting practices; and against auditor for damages for negligence and negligent misrepresentation — Auditor brought crossclaim against officers and directors for contribution and indemnity — Officers and directors brought motion for orders requiring successor to make advances for legal expenses arising from defence of action and crossclaim — Motion granted on terms — Officers and directors were entitled to advances for reasonable legal fees and disbursements, though issue of whether CFO was entitled to full indemnification or had to repay amounts to be advanced would be issue for trial, with corporate shareholders being jointly and severally liable for any repayments — Assertion that CFO had suffered unfairness as result of learning about substance of bad faith allegations at his cross-examination on affidavit was rejected — Successor had properly disclosed its relevant documents in advance, and CFO and his counsel had months to prepare on documents — It had been open to CFO to address pleadings concerns by demand for particulars — If CFO believed cross-examination left incomplete story, he had opportunity to be re-examined, to move for leave to file further evidence, or to examine witnesses — Successor was entitled to try to prove its case in cross-examination.

Table of Authorities

Cases considered by *F.L. Myers J.*:

Bennett v. Bennett Environmental Inc. (2009), 2009 ONCA 198, 2009 CarswellOnt 1132, 53 B.L.R. (4th) 100, 94 O.R. (3d) 481, 308 D.L.R. (4th) 530, 264 O.A.C. 198 (Ont. C.A.) — referred to

Blair v. Consolidated Enfield Corp. (1995), 128 D.L.R. (4th) 73, 187 N.R. 241, 86 O.A.C. 245, 25 O.R. (3d) 480 (note), 24 B.L.R. (2d) 161, [1995] 4 S.C.R. 5, 1995 CarswellOnt 1393, 1995 CarswellOnt 1179, 25 O.R. (3d) 480 (S.C.C.) — considered

Boucher v. Public Accountants Council (Ontario) (2004), 2004 CarswellOnt 2521, 48 C.P.C. (5th) 56, 71 O.R. (3d) 291, 188 O.A.C. 201 (Ont. C.A.) — referred to

Cytrynbaum v. Look Communications Inc. (2012), 2012 ONSC 4578, 2012 CarswellOnt 12008, 7 B.L.R. (5th) 286 (Ont. S.C.J. [Commercial List]) — referred to

Cytrynbaum v. Look Communications Inc. (2013), 2013 ONCA 455, 2013 CarswellOnt 9090, 116 O.R. (3d) 241, 307 O.A.C. 152, 366 D.L.R. (4th) 415 (Ont. C.A.) — referred to

Entreprises Sibeca inc. c. Frelighsburg (Municipalité) (2004), 2004 SCC 61, 2004 CarswellQue 2404, 2004 CarswellQue 2405, *(*sub nom. *Entreprises Sibeca Inc. v. Frelighsburg (Municipality))* 243 D.L.R. (4th) 513, *(*sub nom. *Entreprises Sibeca Inc. v. Frelighsburg (Municipalité))* 325 N.R. 345, [2004] 3 S.C.R. 304, 4 M.P.L.R. (4th) 1, 27 R.P.R. (4th) 1, 2004 CSC 61 (S.C.C.) — referred to

Med-Chem Health Care Ltd. v. Misir (2010), 2010 ONCA 380, 2010 CarswellOnt 3497, 72 B.L.R. (4th) 1, 265 O.A.C. 390, 103 O.R. (3d) 769 (Ont. C.A.) — referred to

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

s. 136 — considered

s. 136(1) — considered

s. 136(2) — considered

s. 253 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 131 — considered

Negligence Act, R.S.O. 1990, c. N.1
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 1.05 — considered

R. 25.10 — considered

R. 39.03 — considered

R. 57.01 — considered

R. 57.01(1)(0.a) [en. O. Reg. 42/05] — referred to

R. 57.01(1)(0.b) [en. O. Reg. 42/05] — referred to

R. 57.01(1)(a) — referred to

R. 57.01(1)(c) — referred to

Words and phrases considered:

associated with

[Former company's] by-law provided indemnity to directors and officers who are sued in proceedings "in which such individual is involved *because of his/her association* with the Corporation". . . .

. . . . .

. . . I find that the words "association with" take their meaning from their context. The opening words of subsection 6.2(1)(a) of the by-law expressly limits indemnity rights to directors and officers of the corporation. That is the "association" referred to in the closing sentence of that subsection. I also find that the interpretation of "association with" in this by-law should be consistent with the other relevant indemnification provisions . . . which are all restricted to indemnifying claims in association with peoples' capacities as directors or officers. This interpretation is consistent with the policy goals underlying indemnification.

Therefore, I do not accept, on this basis alone, that the use of the wording "association with" in the by-law can be so broadly interpreted so also capture the [officers' and directors'] capacities as shareholders.

mala fides

[I]n order for [corporation] to deny [advance] payment [of legal expenses] to an officer who otherwise qualifies, the [corporation] must establish a strong *prima facie* case that [officer] acted *mala fides* towards the [corporation]. *Mala fides* or bad faith includes fraud or misappropriation against the corporation. It may also include conduct coloured by opportunistic or self-seeking behaviour which exhibits a type of dishonesty that should not be countenanced by an award of indemnity: . . . It can also encompass recklessness, described as conduct that is so inexplicable it leads to the inference of an absence of good faith: . . .

MOTION by former officers and directors of company, whose shares were sold to purchaser, for orders requiring successor of company and purchaser to make advances for legal expenses arising from defence of action brought by successor and crossclaim brought by auditor.

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

OVERVIEW

1 The defendants (other than BDO Canada LLP) were all indirect shareholders of Noranco Inc. (”Old Noranco”). In 2015 they sold their shares to a corporate purchaser. The purchaser was later amalgamated with Old Noranco. So the current plaintiff is the successor to both the old operating business and the corporation that purchased it. The corporate structure of Old Noranco is more complex than is indicated by these sentences. However, the details are not germane to the outcome and are ignored for simplicity in these reasons.

2 On April 18, 2017, the plaintiff sued the sellers - the institutional and individual shareholders of Old Noranco. The plaintiff claims that it paid too much for the business due to misrepresentations in the financial statements on which it relied in making the purchase.

3 The individual defendants owned shares and were also directors or officers of Old Noranco. The moving party David Camilleri was the President and CEO of Old Noranco. Kelly Clinton was the Chief Financial Officer of Old Noranco. Michael Baughan, Robert Miller, and Ray Valeika were members of the board of directors of Old Noranco.

4 The plaintiff claims damages in the amount of US$60,000,000 against the shareholder defendants who sold their shares to the plaintiff. Additionally, it claims against the individual defendant Clinton, personally, in the amount of US$60,000,000 for alleged breaches of his fiduciary duty and/or deceit for failing to properly investigate accounting practices at one of Old

Noranco's U.S. divisions which led to the misstatement of financial results on which the plaintiff bases its claim.

5 The plaintiff also claims damages in the amount of US$60,000,000 against BDO Canada LLP which served as auditor of Old Noranco. In turn, BDO has brought a crossclaim against the individual defendants, as directors and officers of the audited corporation, seeking contribution and indemnity for any amounts which BDO is adjudged liable to pay to the plaintiff.

6 The individual defendants seek orders requiring the plaintiff, as successor to Old Noranco, to make advances to them for the legal expenses that they have and will incur in defending this action. They rely on indemnification rights contained in: Old Noranco's corporate by-laws, the share purchase agreement between Old Noranco and the purchaser, a unanimous shareholder agreement that was put in place among the shareholders of Old Noranco, bilateral agreements between individual defendants and Old Noranco, and sections 253 and 136 of the *Ontario Business Act*, R.S.O. 1990, c., B. 16 (the "OBCA").

7 The plaintiff resists the motion, arguing that the moving parties have not met the conditions required for advancement of their legal expenses.

8 For the reasons that follow, I find that the moving parties are entitled to advances from the plaintiff for their reasonable legal fees and disbursements incurred defending this action. Whether the defendant Clinton is entitled to full indemnification or must repay the amounts to be advanced, will be an issue for the trial.

9 Additionally, on Monday February 4, 2019, a teleconference was held at the request of counsel for the plaintiff. He asked to make additional submissions on a question raised by me during the hearing of the motion. Counsel for Clinton objected, arguing that the plaintiff properly raised the issue in its factum already. I permitted counsel to file a two-page letter of additional submissions, giving parties opposite the opportunity to respond. In my view, given that: I raised the question in greater detail than had been addressed by the parties themselves; the plaintiff only sought to make brief submissions on a question of law; and no new facts were being submitted, in all the circumstances, it was in the interests of justice to receive the submissions as requested.

BACKGROUND

The Share Purchase Agreement

10 By share purchase agreement dated July 26, 2015 (the "SPA") the shareholder defendants agreed to sell all of the issued and outstanding shares of Old Noranco to the purchaser

corporation. The purchaser agreed to pay an aggregate price of US$560 million subject to adjustments.

11 A number of financial statements were attached as exhibits to the SPA including audited and unaudited consolidated financial statements of the company. Under s. 2.5 of the SPA, Old Noranco represented and warranted to the purchaser that the financial statements were prepared in conformity with International Financial Reporting Standards and that they presented fairly, in all material respects, the financial position of the company. Subection 7.1(a) of the SPA specified that the representations and warranties survived for a period of 18 months after closing. Subsection 7.1(b) of the SPA obligated the sellers to indemnify the purchaser for any inaccuracy of the representations and warranties.

Accounting Irregularities at Deer Valley

12 On October 6, 2015 - two months after the SPA was signed and 24 days before closing - Camilleri advised the purchaser of irregularities in the financial reporting concerning Deer Valley, a US division of Old Noranco. Camilleri advised that Deer Valley had overstated its inventory which had resulted in its reported earnings to be overstated. The overstatement in inventory was due to intentional, improper inventory accounting practices that were being carried out by the division's general manager and controller.

13 The purchaser expressed concern that as a result of the misstatements of the results of the Deer Valley division in the financial statements, the purchase price in the SPA had been inflated by a significant amount.

14 On October 30, 2015, the share sale closed with the purchaser reserving all rights and remedies regarding Deer Valley's accounting irregularities.

NORANCO'S CLAIMS AGAINST THE MOVING DEFENDANTS

15 In its statement of claim the plaintiff - the amalgamated Old Noranco and purchaser corporations - claims that as a result of the fraud in Deer Valley's financial reporting, Old Noranco's earnings were overstated by approximately US$2.6 million for fiscal 2014 and US$900,000 for 2015. It claims that Deer Valley's inflated figures directly impacted the EBITDA of Old Noranco which the purchaser had relied upon in calculating and agreeing to the purchase price in the SPA. The plaintiff claims that had it known about the accounting issues before signing the SPA, it would not have agreed to the purchase price.

The plaintiff limits its claims to the purchaser's entitlement against the former shareholders

under the SPA (other than for the defendant Clinton)

16 The plaintiff makes clear in its statement of claim that, apart from individual defendant Clinton, the claims advanced against the remaining shareholder defendants, both corporate and individual, are advanced against them solely in their capacities as shareholders and sellers under the SPA. The plaintiff pleads that it does not advance any claims against the individual defendants concerning their respective roles as directors or officers of Old Noranco (other than as against Clinton).

17 The plaintiff claims that the sellers breached their contractual obligations under the SPA because the financial statements attached to the SPA did not, in all material respects, fairly reflect the financial position of the company. It claims that pursuant to s. 7.1(b) of the SPA, the sellers are required to indemnify the plaintiff, as the purchaser, severally and based on their respective ownership interests from, the purchaser's losses relating to any inaccuracy in or breach of any representations and warranties. The plaintiff also claims against the shareholder defendants for unjust enrichment and for breach of the duty of good faith concerning the same financial misrepresentations.

18 The plaintiff alleges that the sellers' breaches of the SPA caused it financial harm because, as successor to the purchaser, it overpaid for the shares of Old Noranco. The plaintiff claims it is entitled to the difference between the purchase price paid under the SPA and the purchase price that would have been paid had the existence of the inventory fraud at the Deer Valley division been disclosed to it. The plaintiff pleads that it overpaid the sellers, at a minimum, an aggregate amount of approximately US$11.5 million.

The plaintiff's claim against Clinton qua officer

19 Unlike the other defendants, the plaintiff claims that Clinton, in his role as CFO of Old Noranco, breached his fiduciary duty owed to the company by concealing, failing to properly investigate, or failing to advise Old Noranco of the accounting irregularities at Deer Valley. At this stage, the plaintiff does not allege that at the time of the signing of the SPA Clinton knew of the actual fraudulent scheme being perpetrated by the officers of the Deer Valley Division. But it pleads that by then, he knew about significant red flags concerning inventory irregularities in Deer Valley. The plaintiff pleads that had he fulfilled his duties, Clinton ought to have discovered the fraud or at least the misstatement of results so as to prevent the misstatement in the financial statements attached to the SPA.

20 The plaintiff alleges that Clinton's breach of his fiduciary duties caused Old Noranco to improperly overstate its revenues and breach the representations and warranties in the SPA

regarding the accuracy of the financial statements. Therefore, the plaintiff claims that it is entitled to recover from Clinton the damages suffered as a result of his breach of his fiduciary duties to his employer. (I note that this claim melds Clinton's duties to Old Noranco with the losses allegedly suffered by the purchaser. Whether this affects the outcome is discussed below.)

THE INDEMNIFICATION PROVISIONS

21 The individual defendants bring this motion to claim that the plaintiff, as successor to Old Noranco, has an obligation to indemnify them to the same extent that Old Noranco was required prior to closing as provided for in: the company's by-laws; its unanimous shareholder agreement, bilateral agreements, and the *OBCA*.

22 Additionally, the individual defendants claim that the SPA requires the purchaser to cause Old Noranco to indemnify them for a further six years following the closing of the SPA transaction to the same extent that they were entitled to an indemnity from it immediately prior to closing.

23 The moving defendants, therefore, have claims for indemnity for legal expenses against both of the constituent corporations that make up the current amalgamated plaintiff entity.

24 The relevant indemnification provisions are as follows:

The Company's By-Laws

25 The relevant provision of Old Noranco's general by-law provides that:

> **6.2 Indemnity**
>
> 1. Subject to the Act and to Section 6.2(2), the Corporation shall:
>
> (a) indemnify any individual who is or was a Director or officer of the Corporation and any individual who acts or acted at the Corporation's request as a director or officer (or any individual acting in a similar capacity) of another entity, against all costs, charges and expenses, including, without limitation, an amount paid to settle an action or satisfy a judgment, reasonably incurred by any such individual in respect of any civil, criminal, administrative, investigative or other proceeding in which such individual is involved because of his/her association with the Corporation or such other entity; and
>
> (b) advance money to a Director, officer or other individual for the costs, charges, and expenses of a proceeding referred to in [...] (a). [...].

> 2. The Corporation shall not indemnify an individual under Section 6.2(1) unless such individual:
>
> > (a) acted honestly and in good faith with a view to the best interests of the Corporation or, as the case may be, to the best interests of the other entity for which such individual acted as a director or officer (or in a similar capacity) at the Corporation's request;
>
> 3. The Corporation shall also indemnify any individuals referred to in Section 6.2(1)(a) in such other circumstances as the Act or law permits or requires.

The Unanimous Shareholder Agreement

26 The unanimous shareholders agreement for Old Noranco provided that the corporation "shall indemnify its officers against expenses, liabilities, and judgments in respect of actions, suits or proceedings to the fullest extent permitted by Ontario law". The indemnity was limited to claims relating to the defendants in their capacities as directors or officers. Pursuant to the SPA, this agreement was terminated after the closing of the SPA.

Bilateral Indemnity Agreements

27 The individual defendants were parties to their own indemnity agreements with the Old Noranco. The agreements provided each of the directors and officers with comprehensive indemnification for, among other things, damages, costs, expenses and legal fees reasonably incurred in respect of any civil action in which they are sued in their respective capacities as directors or officers. These agreements were terminated on the closing of the SPA transaction.

The SPA

28 The purchaser assumed the indemnity obligations of Old Noranco pursuant to the terms of the SPA. In particular, s. 5.22 of the SPA states:

> 5.22 Director and Officer Liabilities. (a) D&O Liabilities. The Purchaser shall cause each Acquired Company to indemnify, from and after the Closing Date until the sixth anniversary of the Closing Date, each Person who was a director or officer of that Acquired Company immediately prior to the Closing to the extent that such Person was entitled to indemnification immediately prior to Closing, either pursuant to applicable Law or the

Acquired Company's organizational documents, provided that no Acquired Company shall be required, and the Purchaser shall not be required to cause any Acquired Company, to indemnify any such Person with respect to any claims made against such Person by a Seller or by any member of the board of directors, manager, board of managers, or any other supervisory board of the Acquired Companies.

The OBCA

29 The relevant sections of the *OBCA* are as follows:

Indemnification

136 (1) A corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or another individual who acts or acted at the corporation's request as a director or officer, or an individual acting in a similar capacity, of another entity, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity.

(2) A corporation may advance money...

BDO CANADA LLP CLAIM AND CROSSCLAIM

30 In this litigation, the plaintiff also claims against BDO for auditor's negligence and negligent misrepresentation concerning the Deer Valley inventory misstatement in Old Noranco's financial statements.

31 In response, BDO advanced a crossclaim seeking contribution and indemnity from the senior management and directors of Old Noranco who, BDO allege:

- undertook to ensure fair presentation of financial statements;
- were responsible, at all material times, for the accuracy of the company's financial statements; and
- knew, or ought to have known, about the alleged fraud, and either deliberately or recklessly misled BDO as auditor.

POSITIONS OF THE PARTIES ON THE MOTION

32 In *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 (S.C.C.) the Supreme Court of Canada listed three conditions for a director or officer to satisfy to become entitled to receive indemnification for his or her legal fees under the *OBCA:*

> (a) The director or officer is a party to the litigation by reason of being a director or an officer of the corporation;
>
> (b) The costs must have been reasonably incurred; and
>
> (c) The director or officer must have acted honestly and in good faith with a view to promoting the best interests of the corporation.

33 The plaintiff argues that the individual defendants, other than Clinton, have not satisfied the first two conditions. The plaintiff says it sued them as shareholders under the SPA and not for anything done by them as officers or directors of Old Noranco.

34 The plaintiff concedes that while Clinton is sued for conduct in his capacity as an officer of Old Noranco, it submits that Clinton cannot satisfy the third criterion because his breaches of duty amounted to bad faith. The plaintiff confirms that it does not take the position on this motion that any of the other shareholder defendants are disentitled to indemnification on the basis that they acted in bad faith.

The Claim against individual defendants qua shareholder

35 The individual defendant Camilleri argues that the court should approve the advance of monies to him on account of legal expenses under s. 6.2(1)(a) of the general by-law as made applicable to the purchaser and therefore to the plaintiff under the SPA. Camilleri argues that although he is sued under the SPA as a shareholder, he is involved in the proceeding because of his "association with" Old Noranco. He argues he has been sued because of his association with Old Noranco and that this is sufficient to trigger his entitlement to an indemnity under the particular wording of the by-law. The wording "association with" used in the by-law is wider than the wording used in the other indemnities and *Blair* that limit the obligation to indemnify more strictly to acts taken in the capacity as director or officer. Even as a shareholder, Camilleri argues, he is sued for acts done in "association with" Old Noranco.

36 The defendants Baughan, Miller, and Valeika similarly argue that the court should require payment of their legal expenses on the same basis because of their "association with" Old Noranco. They were members of its board of directors with oversight responsibility for the

financial reporting of the company.

37 All of the moving defendants add that even if the plaintiff's claims do not implicate their positions as directors or officers, BDO's crossclaim relates entirely to their conduct in their indemnified, fiduciary roles with the Old Noranco.

38 The plaintiff argues that its claims against the individual defendants in this action are brought against them exclusively as shareholders. The claims flow directly from the breach of the SPA. It adds that BDO's crossclaim against the defendants is not a new cause of action but instead is a derivative of the plaintiff's main claims advanced against the defendants and therefore it creates no additional rights in the defendants.

The Claim against Clinton

39 The plaintiff claims that Clinton breached his fiduciary duties owed to Old Noranco by recklessly ignoring the mounting accounting irregularities at Deer Valley for months, if not years, before the SPA was signed. The plaintiff alleges that, in so doing, Clinton acted in bad faith and contrary to the interests of Old Noranco, and therefore he is disentitled to indemnification under the by-laws and other indemnification provisions.

40 Clinton maintains that as CFO of Old Noranco, his employer owes him, at minimum, advanced payments of his legal costs to defend the claims of both the purchaser (who is now the plaintiff) and BDO. Clinton argues that the plaintiff has failed to satisfy its burden of establishing a strong *prima facie* case that he acted in bad faith as required by *Blair*. Clinton argues that the plaintiff has led no affidavit evidence on the motion supporting its position and instead relies upon its "alleged facts" set out in its statement of claim.

41 Clinton also argues that the cause of action that he is facing is really that of the purchaser rather than of Old Noranco. Clinton argues that even if he breached a duty to Old Noranco, he did not harm Old Noranco as the company whose shares were being sold. Clinton argues that any breach of his duties to his employer gave the purchaser no rights against him.

Existence of a funding agreement

42 The plaintiff asserts that the individual defendants have not and will never incur legal fees in defending this action because they are parties to funding agreements with the institutional shareholder defendants MidOcean and Galvaude. Therefore, the plaintiff submits that no expenses have been or will be reasonably incurred by the individual defendants and there are therefore no fee obligations for it to indemnify.

ISSUES

43 The overarching issue on this motion is whether the moving defendants' rights to payment of legal expenses in advance of obtaining judgment apply in this action. The following points will be addressed:

1. Is being sued as a shareholder an "association" sufficient to trigger indemnification rights under the Old Noranco's general by-law?

2. If not, is there any other basis upon which the moving defendants are entitled to advances on account of their legal expenses?

3. Is the evidence sufficient to establish a strong *prima facie* case of bad faith conduct by Clinton so as to disentitle him to funding?

4. Does the existence of third party funding preclude the individual defendants from recovering under their indemnity rights?

5. Has the process adopted by the plaintiff denied Clinton a fair opportunity to make his case?

6. Does the plaintiff have a good cause of action against Clinton or has it improperly blended a claim by the purchaser for the purchase price under the SPA with a claim for breaches of duty that Clinton owed to Old Noranco?

ANALYSIS

Issue 1: Is a shareholder "association" sufficient to trigger advancement of legal expenses?

44 Old Noranco's by-law provided indemnity to directors and officers who are sued in proceedings "in which such individual is involved *because of his/her association* with the Corporation". All of the other sources of indemnity and advancement rights relied upon by the moving defendants more carefully limit their entitlement to claims brought against them in their capacities as officers or directors of Old Noranco. The moving defendants assert that the word meaning in the by-law must be given effect with the result that even claims brought against them as shareholders under the APS are subject to indemnity and advancement.

45 I do not agree. The purpose of indemnifying directors and officers is to protect and encourage people to serve as fiduciaries on behalf of others. In *Blair*, the Supreme Court of Canada considered the policy goals underlying corporate indemnification: "Indemnification is

geared to encourage responsible behavior yet still permit enough leeway to attract strong candidates to directorship and consequently foster entrepreneurship" (*Blair*, at para. 74; See also: *Bennett v. Bennett Environmental Inc.* (2009), 94 O.R. (3d) 481 (Ont. C.A.), at paras. 23, 25).

46 Indemnification of potential directors and officers is so important that the topic is dealt with in the statute, the corporation's by-laws, the shareholders' unanimous shareholder agreement, and then further still, in individuals' bilateral agreements with Old Noranco. The shareholders of Old Noranco insisted that their indemnity rights be carried into the SPA and the purchaser agreed. These are important rights that should not be lightly interfered with and whose scope should be as certain as possible.

47 As pointed out by the plaintiff, the interpretation proposed on behalf of Mr. Camilleri would entitle him to be indemnified for his costs if the company sued him for failing to repay a shareholders' loan. Mr. Camilleri's counsel responded that the exception for acts contrary to the best interests of the company could then be relied upon by the company to refuse the indemnity. But that is an argument that just reaches for words without considering the intent and import of the provision. A shareholder has no general obligation to act in the best interests of the corporation. There is no policy reason to delve into a parsing of whether a shareholder who is adverse to the corporation in litigation may nevertheless be acting in the best interests of the corporation. Moreover, there is no policy basis to extend the scope of the indemnity to shareholders absent a bilateral agreement to that end.

48 It is not clear why the wording of the by-law omits the limiting wordings found in each of the other operative indemnification documents in this case. It appears that the author amended standard forms to insert a gender neutral "his/her." There is no indication of any negotiation of a different scope of indemnity or that the by-laws intended to change the scope of what each of the other documents provides. I find that the words "association with" take their meaning from their context. The opening words of subsection 6.2(1)(a) of the by-law expressly limits indemnity rights to directors and officers of the corporation. That is the "association" referred to in the closing sentence of that subsection. I also find that the interpretation of "association with" in this by-law should be consistent with the other relevant indemnification provisions including the SPA, the bilateral indemnities in place, and the *OBCA* which are all restricted to indemnifying claims in association with peoples' capacities as directors or officers. This interpretation is consistent with the policy goals underlying indemnification.

49 Therefore, I do not accept, on this basis alone, that the use of the wording "association with" in the by-law can be so broadly interpreted so also capture the moving defendants' capacities as shareholders.

Issue 2: Is there any other basis upon which the moving defendants are entitled to

advancement of their legal expenses?

50 While the plaintiff argues that its claim is limited solely to attacking the moving defendants (other than Clinton) in their capacities as shareholders alone, in my view, as drafted, the claims are far broader than that. The plaintiff, as the successor of the purchaser, claims for breach of contract, breach of a duty of good faith, and unjust enrichment - all of which are predicated on allegations of improper and fraudulent accounting practices, failing to investigate the irregularities at Deer Valley, and making inaccurate representations in the financial statements. These claims implicate directly the conduct of the individual defendants in their fiduciary capacities.

51 This finding is supported by Noranco's statement of claim, at paras. 51(h) and (i), which state:

> (h) Camilleri and Clinton **knew as** of (at the least) January 15, or were willfully blind to the fact, that the inventory reported by Deer Valley was overstated. Both Camilleri and Clinton also understood that understated inventory would have the effect of improperly overstating profits.
>
> (i) **Despite the knowledge and understanding by Camilleri and Clinton**, the issues with Deer Valley reporting were not properly investigated or corrected. **The Senior Management Sellers who knew of or were willfully blind** to these accounting issues and overstated profits at Deer Valley also failed to disclose these accounting issues or the fraudulent and wilful nature of these accounting issues to the Purchaser in the lead up to executing the SPA.
>
> [Emphasis added.]

52 The factual matrix underlying the plaintiff's claims involves and explores the individual defendants' duties, knowledge, and actions. The claim of unjust enrichment against all of the shareholder defendants will inevitably consider the justness of each receiving the purchase price as a result of their knowledge and actions. The knowledge that they had and the things that they did or did not do, make it impossible to distinguish between their roles in responding to plaintiff's allegations. For example, the plaintiff claims that the board members ought to be liable *qua* selling shareholders for failing to advise of the problems with the financial statements on a timely basis. But, if Clinton or Camilleri reported problems at Deer Valley to the board of directors, that information came to them with their fiduciary duties attached. The question of whether they would have, should have, or could have disclosed the information to the purchaser under the APS will necessarily involve a consideration of what they were entitled to do as fiduciaries - as officers and directors - owing, at the same time, duties to Old Noranco to act in

its best interest.

53 Moreover, the individual defendants' are completely implicated in their fiduciary capacities in the crossclaim by BDO. Had Old Noranco sued BDO in a separate action and BDO had added the individual defendants by way of a third party claim, there is no doubt that Old Noranco would be required to indemnify its officers and directors (absent bad faith). The fact that Old Noranco and the purchaser have amalgamated and purport to sue BDO and the individual defendants together makes it much harder to separate the capacities of the defendants even if the plaintiff sues the individual defendants only *qua* shareholder (which I have rejected above). In any event, the factual narrative for trial - the story of how the fraud at Deer Valley arose and was not discovered until mid-2015 - is identical in both the plaintiff's claims and the BDO crossclaim.

54 I add that I disagree with the plaintiff's submission that the BDO crossclaim is somehow derived from or limited by the plaintiff's claims against the shareholder defendants. BDO's right to claim-over is derived from the claim against it, the common law, and the *Negligence Act*, RSO 1990 c.N.1 and not from the plaintiff's claims against the other defendants. As mentioned above, if BDO alone were sued, it could add the individual defendants as third parties. Given the clear wording of BDO's crossclaim, which is aimed at the senior management and the directors of the Old Noranco, I find that the moving defendants are entitled to payment of their legal costs in relation to the BDO crossclaim and that the facts relating to the individual defendants' involvement in the cross-claim are not practically or legally distinguishable from the facts underlying the plaintiff's claims against them.

Issue 3: Is the evidence sufficient to establish a strong prima facie case of bad faith conduct by Clinton?

55 As set out in *Blair*, in order for the plaintiff to deny payment to an officer who otherwise qualifies, the plaintiff must establish a strong *prima facie* case that Clinton acted *mala fides* towards the Old Noranco (*Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455 (Ont. C.A.), at para. 27). *Mala fides* or bad faith includes fraud or misappropriation against the corporation. It may also include conduct coloured by opportunistic or self-seeking behaviour which exhibits a type of dishonesty that should not be countenanced by an award of indemnity: *Bennett* at para. 29. It can also encompass recklessness, described as conduct that is so inexplicable it leads to the inference of an absence of good faith: *Entreprises Sibeca inc. c. Frelighsburg (Municipalité)*, 2004 SCC 61 (S.C.C.), at para. 25; *Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455 (Ont. C.A.), at para. 90.

56 The strong *prima facie* test is a stringent one that gives significant protections to officers and directors. It is not sufficient for the plaintiff to simply raise an allegation of bad faith in the

pleadings or to make bald, unsubstantiated allegations to that effect. Counsel all agreed that a strong *prima facie* case is one that is very likely or nearly certain to succeed at trial. The high burden ensures that directors and officers will ordinarily receive advance funding, but still leaves open the possibility that payment of funds can be denied when there is strong evidence of wrongdoing. This result follows from the need to maintain a balance between, on the one hand, encouraging responsible behaviour by directors and officers and, on the other hand, permitting enough leeway to attract strong candidates to foster entrepreneurism (*Bennett*, at para. 3; *Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455 (Ont. C.A.), at para. 42).

57 The plaintiff relies on mounting "red flags" of inventory fraud beginning in 2013, culminating with the close of the share purchase transaction in October 2015. The plaintiff alleges that the "red flags" are evidence of Clinton's:

- knowledge of the improper inventory practices at Deer Valley;
- failure to investigate despite repeated concerns raised by senior management at the company; and
- failure to disclose that the financial statements contained overstated earnings - which were passed on to the purchaser and incorporated into the SPA.

58 Moreover, the plaintiff submits that Clinton's misconduct was motivated by and designed to further his personal financial interest in maximizing the purchase price under the SPA.

59 The basis of the plaintiff's bad faith allegations against Clinton stem from the alleged facts set out in its statement of claim, the transcript of the examination of Alyson Slapkauskas, the former Director of Operations of Old Noranco, the evidence of Camilleri and Clinton, as well as the plaintiff's lead witness, Cindy Fullmer, the Director of Finance of the purchaser.

60 The plaintiff argues that Clinton's knowledge of and failure to respond to a myriad of accounting irregularities are established by e-mails among him, senior management at Old Noranco, and management at Deer Valley. This includes, for example, e-mails from Camilleri openly questioning the capitalization of inventory costs, the legitimacy of reported inventory values, and Clinton's continued reliance on management at Deer Valley after they had been expressly reprimanded for improperly manipulating inventory reporting. Additionally, the plaintiff points to e-mails where Clinton instructs staff to release reports to Old Noranco senior management that are known to contain inaccurate figures.

61 Clinton, however, takes issue with the evidence relied on by the plaintiff, arguing that it fails to properly contextualize the narrative. Clinton argues that the plaintiff selectively references several e-mails and seeks to draw adverse inferences on what those e-mails meant

based on an incomplete evidentiary record. Many were older and involved discrete incidents that could not possibly have had anything to do with a future share sale that was not yet on the horizon.

62 Counsel for Clinton points to the decision of *Cytrynbaum v. Look Communications Inc.*, 2012 ONSC 4578 (Ont. C.A.) where, in response to an indemnification application, the company opposing indemnification delivered an eight volume record of approximately 4,000 pages containing affidavits from seven different affiants, including an expert in executive compensation, provided supplementary affidavits, and cross-examined five witnesses (*Cytrynbaum v. Look Communications Inc.*, 2012 ONSC 4578 (Ont. C.A.) at paras. 47, 51).

63 Here, while the evidence establishes that Clinton appreciated there were irregularities at Deer Valley, I find that this is insufficient by itself to support an inference that he knew of, was reckless, or willfully blinded himself to the improper inventory practices being carried out by management at that plant. Clinton maintains that he had no direct knowledge of the improper practices being carried out at Deer Valley until its discovery in September 2015 following which he immediately made arrangements to attend Deer Valley to investigate. He also submits that during the relevant time period, there were several operation-specific factors, unrelated to improper conduct, that caused spikes in inventory levels at Deer Valley. He maintains that this obscured his understanding that the inventory figures were inaccurate from an accounting perspective and the result of fraudulent actions by local management. Clinton submits that he carried out his duties to review any inventory concerns as they were discovered, explaining that he delegated appropriately to employees, consultants, and professional advisors who were most closely involved in Deer Valley's operations and who were in the best position to confirm the information being provided.

64 While I am entitled to engage in some limited weighing of the evidence at hand, in my view, I do not have a sufficient understanding of the full story to properly assess Clinton's conduct. The plaintiff's evidentiary record leaves me guessing at motive and trying to piece together a number of discrete events to find a basis to draw an overall inference. But without a better understanding of the individual incidents and the linkages — or lack of linkages — between one and the next, I cannot at this time, on this evidence, infer conduct reaching the level of opportunistic or self-serving behaviour that exhibits a type of dishonesty that would likely or very likely result in a finding of bad faith. (*Cytrynbaum v. Look Communications Inc.*, 2012 ONSC 4578 (Ont. C.A.) at para 88, 90).

65 There is no doubt that Clinton knew there were inventory problems at Deer Valley. The evidentiary record clearly shows that he was informed of and responded to issues being raised. The plaintiff hangs its *mala fides* argument on the basis that Clinton did not appropriately or effectively respond to the problems so as to detect the underlying inventory fraud at Deer Valley. It argues, in essence, that Clinton left the Deer Valley division in the hands of the foxes

whom he had reason to know were raiding the henhouse. Clinton maintains that, as CFO, he responded based on the information provided to him and his less fulsome understanding of the situation at the Deer Valley. While Clinton's actions or inaction raises questions as to why he did not do more, I find that this points more toward negligence than to bad faith at this stage. As such, I do not find that the plaintiff meets the evidentiary threshold required to support a strong *prima facie* case of bad faith on this motion. It remains open to it to try to do so at the trial or other disposition of the action.

Issue 4: Does the existence of a funding agreement preclude the individual defendants from recovering?

66 Within a few months of the plaintiff commencing the action, the individual defendants entered into legal fee funding agreements with the corporate shareholder defendants MidOcean and Galvaude. The terms of the agreements have not been disclosed due to privilege.

67 The plaintiff takes the position that the individual defendants should not be entitled to advances of funds for legal expenses because their costs are being funded pursuant to a funding agreement. It argues that the individual defendants have not incurred, and will not incur any legal expenses with respect to this action.

68 I do not agree. The existence of a funding agreement and the individual defendants' ability to pay for their legal costs through other means is irrelevant in a motion seeking to enforce corporate indemnity rights (*Med-Chem Health Care Ltd. v. Misir*, 2010 ONCA 380 (Ont. C.A.), at para. 27). None of the by-law, the SPA, the *OBCA*, or the other sources of indemnity rights and obligations requires a moving party to establish that he or she has no ability to pay as a basis for seeking indemnity.

Issue 5: Has there been procedural unfairness to Clinton?

69 Clinton claims that prior to his cross-examination, the plaintiff's only discernible allegations against him were those set out in its statement of claim. He submits that he learned about the substance of the bad faith allegations for the first time when the plaintiff's lawyers put documents and emails to him on cross-examination. He complains that the plaintiff's counsel refused to advise, in advance of Clinton's cross-examination, what documents would be put to him. Instead, Clinton argues that the plaintiff waited to put certain documents him at cross-examination from which it tried to make its case on this motion.

70 The plaintiff properly disclosed its relevant documents in advance, it chose not to introduce them into evidence in an affidavit that set out a story told by witness with personal

knowledge. Rather, the plaintiff's counsel first put the documents to Clinton on cross-examination. Clinton's counsel says that Clinton was not able to either prepare for the use made of the documents or to respond fully during or after cross-examination. I do not accept the procedural argument. Clinton and his counsel had months to prepare on the documents. If counsel believed that the cross-examination left an incomplete story, he had the opportunity to ask questions on re-examination or to move for leave to file further evidence. It was open to counsel for Clinton to address pleadings concerns by a demand for particulars pursuant to r. 25.10 under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Similarly, pursuant to r. 39.03, it was also open to the parties to summons further witnesses.

71 Having said that, I do recognize that this is not a motion for summary judgment. The plaintiff has presented a very summary view of the facts through a number of disembodied emails. Neither side was obliged to put its "best foot forward" in the sense of advancing all of the evidence on which it will rely at trial.

72 Given the myriad of tools available to the parties to address process concerns, I reject the assertion that Clinton suffered any unfairness as a result of learning about the substance of the allegations at his cross-examination. The plaintiff was entitled to try to prove its case in cross-examination. This is not an unfair process. But, in the end, it was one that in this case lacked proof of a sufficiently detailed and cohesive narrative to enable the court to draw the inference that the plaintiff sought.

Issue 6: Does the plaintiff have a good cause of action against Clinton or has it improperly blended a claim by the purchaser for the purchase price under the SPA with a claim for breaches of duty that were owing to Old Noranco?

73 Clinton submits that the plaintiff's theory of his liability is flawed. He argues that the personal claim against him purports to be a claim by his former employer, but is in substance one for damages suffered by the purchaser for the alleged diminution in the value of the target company in the SPA rather than any losses suffered by Old Noranco. Clinton submits that he was not an employee of the purchaser and he did not owe it any fiduciary or other duties.

74 Additionally, pointing to paras. 80-81 of the Statement of Claim, Clinton maintains that the only allegation against him is that he breached his duties owed to Old Noranco. This cannot make him liable to re-pay a piece of the purchase price to the purchaser. The happenstance of the amalgamation of the purchaser and Old Noranco has led the plaintiff to merge Old Noranco's claim against Clinton with the purchaser's claim for damages under the SPA.

75 The plaintiff alleges that it does not need to prove damages to hold Clinton liable for breach of fiduciary duty to Old Noranco. This was the issue on which the parties delivered

further submissions after the motion was taken under reserve.

76 In light of my holding that the plaintiff has not proven bad faith to the requisite standard, I do not need to resolve this issue. Clinton will receive advances of his legal expenses regardless of whether the plaintiff has a good cause of action against him or not. This issue can be taken up at trial if necessary.

ORDER

77 The moving defendants are entitled to an order requiring the plaintiff to pay them, in advance of judgment, the amount required to pay the reasonable costs, charges, and expenses that they incur to defend this action including the crossclaim of BDO regardless of any funding agreements that the moving defendants may have with anyone else.

78 Nothing in this order limits the plaintiff's entitlement to claim reimbursement of the funds that it pays under the preceding paragraph to the defendant Clinton at the trial of this action if it is able to prove its allegations of bad faith.

79 The parties agreed that as between the plaintiff and the defendants Camilleri, Baughan, Miller, and Valeika costs of the motion on a partial indemnity basis in the amount of $12,000 all-inclusive would be paid to the successful parties. The plaintiff will therefore pay Camilleri costs of $12,000 and the defendants Baughan, Miller, and Valeika a further aggregate sum of $12,000 forthwith.

80 The plaintiff incurred costs on a partial indemnity basis of approximately $112,000 for which it attributes 80% to dealing with its claims against Clinton. For his part, Clinton argued that he incurred costs of $235,000 to deal with the motion. Counsel for Clinton submitted that he had to review a large amount of documentation to try to glean the story against his client in view of the plaintiff's failure to identify for him the documents on which it intended to cross-examine his client. In my view, counsel has conflated the costs properly attributable to the motion with the costs of document discovery in the action proper. Counsel has to review documentary discovery in the action regardless of any motion practice. Moreover, I know of no rule that holds a party liable in costs for declining to advise the party opposite of the details of a proposed cross-examination in advance. There was no trial by surprise or ambush. All of the documents were properly disclosed. How counsel chose to deal with the claimed lack of particulars and the needs to learn the case were matters between him and his client.

81 The fixing of costs is a discretionary decision under section 131 of the Courts of Justice Act. That discretion is generally to be exercised in accordance with the factors listed in Rule 57.01 of the Rules of Civil Procedure. These include the principle of indemnity for the

successful party (57.01(1)(0.a)), the expectations of the unsuccessful party (57.01(1)(0.b)), the amount claimed and recovered (57.01(1)(a)), and the complexity of the issues (57.01(1)(c)). Overall, the court is required to consider what is "fair and reasonable" in fixing costs, and is to do so with a view to balancing compensation of the successful party with the goal of fostering access to justice: *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.), at paras 26, 37.

82 In my view, the costs claimed by Clinton are excessive. It is only due to the plaintiff's claim of nearly $90,000 that I consider a number nearer to that than to the amounts agreed with the others. Mr. Camilleri's cross-examination ran through much of the same events and emails as the cross-examination of Mr. Clinton. Nevertheless, it is clear that the issue of bad faith occupied the lion's share of the controversy. Accordingly, in my view, the plaintiff should be required to pay costs to Clinton of $90,000 on a partial indemnity basis all-inclusive. That would equate to 60% of full costs of approximately $150,000. Nothing in this order precludes Clinton from seeking costs at trial for document discovery that is not duplicative of the costs attributable to this motion ($150,000) for which partial indemnity recovery ($90,000) is already granted.

83 Finally, in my view, I should not lose sight of the fact that the real economic issues at play are between the purchaser and the corporate, institutional shareholders MidOcean and Galvaude. The issue on this motion, reduced to its practical essence, was whether the plaintiff had to cover the costs of the individual defendants or the corporate defendants had to do so. There is no doubt that the plaintiff's real target in the lawsuit is the corporate shareholders who received the vast bulk of the purchase price. I suspect that the plaintiff will find it particularly galling to have to fund costs of those whom it believes it overpaid for their shares due to their own wrongdoing which benefited the corporate shareholder defendants in the main. But the plaintiff has named individuals in its lawsuit for its own tactical reasons (presumably to ease its path to get at the corporate defendants) and the plaintiff has to accept the consequences of doing so.

84 Nevertheless, the court should not be blinded to the economic realities at play. The ultimate benefit of this order enures to the corporate shareholder defendants. Therefore, in the event that the plaintiff succeeds at trial in having Clinton ordered to reimburse the plaintiff for sums advanced on account of legal expenses as ordered herein, in my view, it is a fair exercise of my discretion to award costs under s. 131 of the *Court of Justice Act*, RSO 1990 c C.43 and Rule 57.01 and to attach terms to relief ordered under Rule 1.05, that the corporate shareholder defendants MidOcean and Galvaude each be jointly and severally liable to the plaintiff for any obligation on Clinton to repay the sums advanced to him on account of legal expenses. If Clinton cannot repay legal costs that the plaintiff advanced and proves it is entitled to have reimbursed, this term is required to prevent the corporate shareholder defendants from being unjustly enriched at the plaintiff's expense.

Motion granted on terms.

2019 ONSC 1173, 2019 CarswellOnt 2458, 302 A.C.W.S. (3d) 528

End of Document

Tab 5

Most Negative Treatment: Check subsequent history and related treatments.

2014 ONCA 538
Ontario Court of Appeal

Unique Broadband Systems Inc., Re

2014 CarswellOnt 9327, 2014 ONCA 538, [2014] O.J. No. 3253, 121 O.R. (3d) 81, 13 C.B.R. (6th) 278, 242 A.C.W.S. (3d) 80, 322 O.A.C. 122

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

In the Matter of a Plan of Compromise or Arrangement of Unique Broadband Systems, Inc.

Robert J. Sharpe, E.E. Gillese, C.W. Hourigan JJ.A.

Heard: June 17, 2014
Judgment: July 10, 2014
Docket: CA C57884

Proceedings: reversingi n part *Unique Broadband Systems Inc., Re* (2013), 5 C.B.R. (6th) 1, 2013 ONSC 2953, 2013 CarswellOnt 6926, Mesbur J. (Ont. S.C.J. [Commercial List]); additional reasons at *Unique Broadband Systems Inc., Re* (2013), 5 C.B.R. (6th) 241, 2013 ONSC 5121, 2013 CarswellOnt 11112, Mesbur J. (Ont. S.C.J. [Commercial List])

Counsel: Clifford I. Cole, Benjamin Na for Appellant, Unique Broadband Systems, Inc.
Joseph Groia, Tatsiana Okun for Respondents, Jolian Investments Limited and Gerald McGoey

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous
UBS alleged decisions relating to executive compensation made by former board were made in breach of fiduciary obligations to UBS and should be set aside — CEO and chairman sought payment of compensation and other amounts CEO claimed were due to CEO from UBS — CEO submitted proofs of claim against UBS totalling $9.5 million, which were denied — CEO sought to have claims, as amended, approved — Trial judge found SAR cancellation award and deferred bonus award in favour of CEO were set aside — Trial judge found there was no business rational for CEO's bonus — Trial judge found it was unclear how it was in best interests of UBS to pay large amount to CEO in order to incentivize CEO to remain with UBS — Trial judge found UBS breached fiduciary duties in failing to consider interests of shareholders when UBS came to decisions concerning SAR cancellation pool and deferred bonus pool — Trial judge found CEO was terminated without cause and was entitled to enhanced termination benefits — Trial judge found CEO's actions did not constitute cause — Trial judge found CEO not being elected to UBS board or being appointed CEO constituted termination without cause — Trial judge found potentially oppressive acts were cured — Trial judge found CEO breached fiduciary duties to UBS in relation to setting enhanced benefits for himself and UBS had no obligation to indemnify — Any money UBS paid on account ordered repaid — UBS appealed — Appeal allowed in part — Findings of breach of fiduciary duties to UBS driven by self-interest were well supported, and actions were not protected by business judgment rule — Finding that price of SAR units was unrealistic was reasonable — Trial judge properly found that bonus pool was breach of fudiciary duty — Removal from office of CEO did not affect his liability, as breach of duty is wrongdoing whether or not result can be foreseen — Trial judge properly found that indemnification provisions were not operative in face of breach of duty — Trial judge did not specifically state that director acted in bad faith, but did properly conclude that he was ineligible to receive indemnification because he had not met standard of acting honestly and in good faith — Trial judge erred in finding management services contract was not breached — Finding contract for management services was not breached was absurd result and ignored requirements under s. 134(3) of Ontario Business Corporations Act — Cause under agreement was not limited to enumerated

grounds of fraud, theft, or misappropriation, but included all serious misconduct that was materially injurious to UBS.

Business associations --- Specific matters of corporate organization — Directors and officers — Miscellaneous
UBS alleged decisions relating to executive compensation made by former board were made in breach of fiduciary obligations to UBS and should be set aside — CEO and chairman sought payment of compensation and other amounts CEO claimed were due to CEO from UBS — CEO submitted proofs of claim against UBS totalling $9.5 million, which were denied — CEO sought to have claims, as amended, approved — Trial judge found SAR cancellation award and deferred bonus award in favour of CEO were set aside — Trial judge found there was no business rational for CEO's bonus — Trial judge found it was unclear how it was in best interests of UBS to pay large amount to CEO in order to incentivize CEO to remain with UBS — Trial judge found UBS breached fiduciary duties in failing to consider interests of shareholders when UBS came to decisions concerning SAR cancellation pool and deferred bonus pool — Trial judge found CEO was terminated without cause and was entitled to enhanced termination benefits — Trial judge found CEO's actions did not constitute cause — Trial judge found CEO not being elected to UBS board or being appointed CEO constituted termination without cause — Trial judge found potentially oppressive acts were cured — Trial judge found CEO breached fiduciary duties to UBS in relation to setting enhanced benefits for himself and UBS had no obligation to indemnify — Any money UBS paid on account ordered repaid — UBS appealed — Appeal allowed in part — Findings of breach of fiduciary duties to UBS driven by self-interest were well supported, and actions were not protected by business judgment rule — Finding that price of SAR units was unrealistic was reasonable — Trial judge properly found that bonus pool was breach of fudiciary duty — Removal from office of CEO did not affect his liability, as breach of duty is wrongdoing whether or not result can be foreseen — Trial judge properly found that indemnification provisions were not operative in face of breach of duty — Trial judge did not specifically state that director acted in bad faith, but did properly conclude that he was ineligible to receive indemnification because he had not met standard of acting honestly and in good faith — Trial judge erred in finding management services contract was not breached — Finding contract for management services was not breached was absurd result and ignored requirements under s. 134(3) of Ontario Business Corporations Act — Cause under agreement was not limited to enumerated grounds of fraud, theft, or misappropriation, but included all serious misconduct that was materially injurious to UBS.

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s. 134(1) — considered

s. 134(3) — considered

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Generally — referred to

s. 20 — referred to

s. 20(1) — referred to

Words and phrases considered:

business judgment rule

It must be remembered that the business judgment rule is really just a

rebuttable presumption that directors or officers act on an informed basis, in good

faith, and in the best interests of the corporation. Courts will defer to business

decisions honestly made, but they will not sit idly by when it is clear that a board

is engaged in conduct that has no legitimate business purpose and that is in

breach of its fiduciary duties

***C.W. Hourigan J.A.*:**

1 Unique Broadband Systems Inc. ("UBS") appeals the judgment of Justice Mesbur, dated May 21, 2013, rendered in connection with a claim made by Gerald McGoey and his personal company, Jolian Investments Limited ("Jolian"), pursuant to s. 20 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

2 The trial judge ordered UBS to pay Jolian and Mr. McGoey's claim for an enhanced severance payment that was the equivalent to 300% of Mr. McGoey's compensation (the "Enhanced Severance"). That order is the subject of UBS' appeal.

3 The trial judge dismissed Mr. McGoey and Jolian's claims for payment of a SAR Cancellation Award, a Bonus Award, and indemnification for legal and other professional Services expenses.[1] That order is the subject of a cross-appeal by Mr. McGoey and Jolian.

4 For the reasons that follow, I would grant the appeal and dismiss the cross-appeal.

Facts

5 UBS is a public company listed on the TSX Venture Exchange. It is incorporated under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "*OBCA*").

6 In 2002, Mr. McGoey was appointed a director and acting CEO of the corporation. Eventually, Mr. McGoey took on the role of CEO on a permanent basis. His employment relationship with UBS was first governed by a personal employment contract and later by a management services agreement between UBS and Jolian dated May 3, 2006 (the "Jolian Management Services Agreement"). Both the personal employment contract and the Jolian Management Services Agreement contained a "golden parachute" provision which granted Mr. McGoey enhanced termination benefits in certain situations.

7 Since November 2006, UBS had in place an incentive-driven share appreciation rights plan ("SAR Plan") for its directors and senior management. Upon certain triggering events, a SAR unit holder would be paid an amount equal to the difference between the market trading price of a UBS share and a strike price specified in the SAR Plan.

8 In 2003, UBS acquired a controlling 51.8% equity interest in Look Communications Inc. ("Look"), a telecommunications company. Mr. McGoey also served as a director and CEO of Look. UBS and Look were parties to a services agreement pursuant to which Mr. McGoey performed management services for Look. Other than those services, UBS was essentially a holding company and did not engage in any active business.

9 Look's primary asset was a band of telecommunications spectrum. In early 2009, Look engaged in a process to sell the spectrum through a court-supervised plan of arrangement. Ultimately the spectrum was sold for $80 million on May 4, 2009 to Inukshuk Wireless Partnership ("Inukshuk"), a consortium of Rogers Communications Inc. ("Rogers") and Bell Canada (the "Spectrum Sale"). Mr. McGoey expected that the sale would generate a significantly higher sale price and was very disappointed with the figure offered by Inukshuk.

10 The board of directors of UBS (the "UBS Board") resolved to treat the Spectrum Sale as a triggering event pursuant to the SAR Plan. Prior to the announcement of the Spectrum Sale, UBS's shares were trading at approximately $0.15 per share. The UBS shares were anticipated to appreciate as a consequence of the Spectrum Sale's announcement. However, the anticipated share price increase did not materialize and the shares continued to trade at the $0.15 range after the announcement.

11 After court approval of the Spectrum Sale on May 14, 2009, Mr. McGoey engaged in negotiations with Rogers for a potential purchase of the balance of Look's assets, including roughly $300 million in tax losses and similar assets, subscribers, and real estate. Rogers withdrew from the negotiations on July 20, 2009 and the transaction never came to fruition.

12 Also after the Spectrum Sale, the UBS Board's compensation committee, which consisted of Mr. McGoey and two other UBS Board members, began reviewing the SAR Plan. Each member of the compensation committee had a considerable number of SAR units.

13 Executive compensation was on the agenda for the UBS Board meeting of June 17, 2009. In anticipation of that meeting, Mr. McGoey sought the advice of UBS' outside legal counsel, David McCarthy, regarding board approval of executive bonuses. Mr. McCarthy advised that, while s. 3.15 of National Policy 58-201 (which deals with the Corporate Governance Guidelines) says that a board should appoint a compensation committee entirely of independent directors, this was a guideline only and was not a requirement either pursuant to securities law or TSX Rules.

14 Mr. McGoey also requested that Mr. McCarthy provide the UBS Board with a letter outlining its authority, duties, and obligations in making payments to officers and employees. Mr. McCarthy provided such a letter, dated June 17, 2009. In that letter, he specifically advised the UBS Board that, in exercising its power to compensate officers and employees, the directors were obliged to meet their fiduciary obligations to the corporation.

15 At the June 17, 2009 UBS Board meeting, the directors considered the issue of the SAR Plan. Mr. McCarthy's letter was before the UBS Board and Mr. McCarthy was present for a portion of the meeting. Mr. McCarthy was not asked to opine on the UBS Board's decision at the meeting. He also did not provide the UBS Board with advice regarding the UBS Board's process or about the quantum of the benefits being considered.

16 At the meeting, each director disclosed his conflict of interest regarding their SAR unit holdings. The directors then unanimously resolved to cancel the SAR units and establish a SAR cancellation payment pool of $2,310,000, based on a fixed unit price of $0.40 per share. Under this new arrangement, Mr. McGoey, along with three other directors and one member of management, would receive a SAR cancellation award (the "SAR Cancellation Awards") based upon the $0.40 per unit figure.

17 The payment was contingent on: Look receiving the full compensation of $80 million from the Spectrum Sale; UBS receiving adequate cash resources; Mr. McGoey and the other SAR Plan unit holders relinquishing all rights to the SAR units awarded to them as of May 31, 2009; and the SAR Plan unit holders executing releases with respect to the SAR Plan and a stock option plan established in 2002.

18 The UBS Board met on July 8 and 9, 2009. At that meeting, the directors considered the issue of awarding bonuses for certain personnel. Mr. McGoey proposed the establishment of a bonus pool of $7 million. That plan was not approved. However, the UBS Board did approve the establishment of a bonus pool in the amount of $3.4 million (the "Bonus Pool").

19 The SAR Cancellation Awards and the Bonus Pool were allocated to the recipients in August 2009. Under the SAR Cancellation Awards, Mr. McGoey was allocated to receive $600,000 and, under the Bonus Pool, he was allocated to receive $1,200,000.

20 In addition to the SAR Cancellation Awards and the Bonus Pool, Mr. McGoey and the other directors of Look also established a SAR cancellation payment pool and a bonus pool for that company. The total amount funded directly by UBS or indirectly, through its 51.8% equity interest in Look, in the new compensation plans of the two companies was $14,637,025, or approximately 97.6% of the market capitalization of UBS.

21 The disclosure of the SAR Cancellation Awards and the Bonus Pool was met with resistance by UBS share holders. Faced with this resistance, Mr. McGoey caused UBS to advance to him $200,000 for the payment of anticipated legal fees.

22 A special shareholders' meeting was held pursuant to s. 122 of the *OBCA* on July 5, 2010. At that meeting, Mr. McGoey and the other directors were removed and not re-elected as directors of UBS. Mr. McGoey then resigned as CEO of UBS and took the position that he was terminated without cause because he was not re-elected to the UBS Board.

23 Mr. McGoey commenced an action against UBS seeking, *inter alia*, payment of Enhanced Severance in the amount of $9,500,000. He successfully moved for partial summary judgment before Marrocco J. on the issue of the payment of legal fees. However, Marrocco J.'s decision was subject to any finding of misfeasance that the court might make against Mr. McGoey.

24 On July 5, 2011, UBS was granted *CCAA* protection. It was ordered that Mr. McGoey's lawsuit be determined pursuant to the claims process under s. 20(1) of the *CCAA*. Mr. McGoey filed a proof of claim in the amount of $10,112,648, which the monitor disallowed in its entirety. Mr. McGoey sought to reverse that denial and a trial was ordered on the issue. That trial is the subject of this appeal and cross-appeal.

Decision of the Trial Judge

25 After thoroughly reviewing the underlying facts, the trial judge considered the law with respect to the business judgment rule. She concluded that the business judgment rule would only be of assistance to Mr. McGoey if he acted honestly and in good faith, with a view towards the best interests of the corporation.

26 The trial judge then examined Mr. McGoey's actions to determine whether they would be protected by the business

judgment rule or whether they constituted a breach of his fiduciary duty. She noted that, since Mr. McGoey was the only UBS director who testified, she had no independent evidence of what the compensation committee or the UBS Board discussed and considered when deciding on the SAR Cancellation Awards and the Bonus Pool. In particular, she had no evidence as to how or if the UBS Board followed Mr. McCarthy's advice that the directors were obliged to meet their fiduciary duties to the corporation when setting executive compensation.

27 The trial judge accepted the evidence of Michael Thompson, a partner at Mercer, who was qualified as an expert regarding executive compensation and best practices for establishing executive compensation. She noted that Mr. Thompson opined that Mr. McGoey's compensation package did not pass any test of reasonableness and that she had heard no other independent evidence to refute Mr. Thompson's opinion. The trial judge found that Mr. Thompson's evidence gave her a "helpful context" to consider the UBS Board's decision-making process as part of her fiduciary duty analysis.

28 The trial judge focused on the decision of the UBS Board to cancel the SAR Plan and set a price of $0.40 per unit "at a time when the board knew, or ought to have known, that the market had not reacted to the Inukshuk sale as they had hoped": at para. 140.

29 The trial judge noted that the UBS compensation committee did not have any independent members, as all of the directors on that committee held SAR units.

30 The trial judge made the following findings with respect to the SAR Cancellation Awards and the Bonus Pool, at paras. 145-147:

> The decision to cancel the SAR plan really came out of the blue, and only when it was apparent to the board members, who were the majority of the SAR unit holders that their SARs units would have little or no value on the triggering date.
>
> Absent any evidence to the contrary (and there is really none), I am led to the inescapable conclusion the decision to cancel [the] SARs and replace them with a fixed amount must have been driven by the board's own self interest, and not the interests of the corporation. There was nothing in it for UBS shareholders.
>
> As for Mr. McGoey's bonus, there was no business rationale for it. UBS was a holding company. It had no real employees, other than bookkeeping and secretarial staff. I fail to see how it was in UBS' interests to pay such a staggering amount of money to Mr. McGoey in order to "incentivize" him to remain with UBS. The situation at Look might be viewed differently; that issue, however, is not for me to decide.

31 The trial judge went on to find that the $0.40 unit value was not determined by any objective means, did not reflect the actual market price for the shares, and "represented more of a hope for share value based in large part on a Rogers sale transaction that was fraught with difficulty, and nowhere near a firm transaction": at para. 154. She stated that any valuation based on the possible Rogers transaction "should have been discounted for the real possibility the transaction might not close, or the purchase price might be significantly reduced": at para. 155.

32 With respect to the Bonus Pool, the trial judge found that it was not based on any objective criteria. She noted that, previously, Mr. McGoey's bonuses had been in the range of $400,000 to $440,000 and stated that she had "heard no evidence to support any reasonable rationale for a bonus at the level of $1.2 million": at para. 157.

33 The trial judge rejected the argument advanced by Mr. McGoey that the UBS Board's actions were done on the advice of Mr. McCarthy, finding that he "was not asked to opine on the reasonableness of the changes to the SAR and bonus plans": at para.159.

34 The trial judge concluded that the UBS Board breached its fiduciary duties to UBS in establishing the SAR Cancellation Awards and the Bonus Pool. She set aside the allocations to Mr. McGoey and Jolian pursuant to the SAR Cancellation Awards and the Bonus Pool.

35 The next issue was whether Mr. McGoey and Jolian triggered the default provisions in the Jolian Management Services Agreement, such that they were disentitled to the golden parachute benefits under the agreement. Specifically, Mr.

McGoey and Jolian are disentitled to golden parachute benefits if Mr. McGoey and Jolian are in default as that term is defined in the agreement. The trial judge concluded that a breach of fiduciary duty did not qualify as a default under the Jolian Management Services Agreement and, therefore, UBS was obliged to pay the amounts due under the golden parachute provisions of the agreement.

36 UBS relied upon the oppression remedy provisions in the *OBCA*. However, the trial judge found, at para. 180, as follows:

> Since I have determined the enhanced benefits represented a breach of the board's fiduciary duties and have set those benefits aside, it seems to me the potentially oppressive acts have been cured and I need not deal with whether the board's actions might also constitute oppressive conduct.

37 The trial judge concluded that UBS had no obligation to indemnify Mr. McGoey for his legal fees because he had breached his fiduciary duties to the corporation.

38 In her costs decision, the trial judge found that there was divided success at trial and ordered that there be no costs.

Issues

39 The appeal and cross-appeal raise the following issues:

(i) Did the trial judge err in finding that Mr. McGoey breached his fiduciary duties to UBS?

(ii) Did the trial judge err in finding that Mr. McGoey is not entitled to indemnification from UBS?

(iii) Did the trial judge err in finding that Mr. McGoey is entitled to Enhanced Severance under the Jolian Management Services Agreement? and

(iv) Did the trial judge err in failing to consider the oppression remedy argument advanced by UBS?

Positions of the Parties

40 UBS submits that the trial judge did not err in finding that Mr. McGoey had breached his fiduciary duties to UBS by virtue of his involvement in establishing the SAR Cancellation Awards and the Bonus Pool. Nor did the trial judge err in finding that, as a consequence of the breach, Mr. McGoey was not entitled to indemnification from UBS. However, UBS submits that the trial judge erred in finding that Mr. McGoey's conduct did not amount to "Cause" or a "Jolian Default" under the Jolian Management Services Agreement and that Mr. McGoey was entitled to Enhanced Severance. Specifically, UBS argues that the trial judge's interpretation of the Jolian Management Services Agreement is inconsistent with s. 134(3) of the *OBCA* and leads to a commercially absurd result. In addition, UBS submits that the trial judge, having rejected UBS's interpretation of the Jolian Management Services Agreement, was obliged to consider the oppression remedy argument it had advanced.

41 In his cross-appeal, Mr. McGoey submits that the trial judge erred in finding a breach of fiduciary duty. His position is that the actions taken regarding the SAR Cancellation Awards and the Bonus Pool were within a range of commercially reasonable decisions and are, therefore, protected by the business judgment rule. He also submits that the trial judge erred in finding that he was not entitled to indemnification from UBS under the terms of the Jolian Management Services Agreement. Mr. McGoey argues that the trial judge otherwise correctly interpreted the Jolian Management Services Agreement and that, because the oppression remedy does not apply, the trial judge was under no obligation to consider that argument.

Analysis

(i) Breach of Fiduciary Duty

42 As mentioned above, Mr. McGoey asserts that the trial judge erred in finding that he had breached his fiduciary duties. At the heart of Mr. McGoey's submission is that the decisions he made with respect to the SAR Cancellation Awards and the Bonus Award were done with the advice of experienced legal counsel and are protected by the business judgment rule.

43 In my view, the trial judge's finding that Mr. McGoey's breached his fiduciary duties to UBS was well supported in the evidence before her and by the lack of any clear explanation from Mr. McGoey as to how the UBS Board decided to establish the SAR Cancellation Awards and the Bonus Pool. For the reasons set forth below, I see no error in the trial judge's reasoning and in her conclusion that Mr. McGoey's actions were driven by self-interest, unsupported by any reasonable or objective criteria, and contrary to the best interests of UBS.

44 Below I consider the general principles of the law of fiduciary duties, an analysis of the trial judge's decision regarding the SAR Cancellation Awards and Bonus Pool, and the defences raised by Mr. McGoey.

General Principles

45 It is undisputed that, Mr. McGoey, as a director and CEO of UBS, owed the company fiduciary duties. The imposition of fiduciary duties on directors and officers of a corporation is consistent with the origins of the doctrine in trust law. A director or senior officer of a corporation is in a position of trust. He or she is charged with managing the assets of a corporation honestly and in a manner that is consistent with the objects of the corporation. Courts will be loath to interfere with the legitimate exercise of corporate duties, but they will intervene where a fiduciary breaches the trust reposed in him or her.

46 Mr. McGoey's fiduciary duties included an obligation to act in good faith and in the best interests of the corporation. He had a specific obligation to scrupulously avoid conflicts of interest with the corporation and not to abuse his position for personal gain: *People's Department Stores Ltd. (1992) Inc., Re*, 2004 SCC 68, [2004] 3 S.C.R. 461 (S.C.C.), at paras. 35 and 42; and *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.), at paras. 39 and 89.

47 As Granger J. stated in *Moffat v. Wetstein* (1996), 29 O.R. (3d) 371 (Ont. Gen. Div.), at p. 390:

> Subsumed in the fiduciary's duties of good faith and loyalty is the duty to avoid a conflict of interest. The fiduciary must not only avoid a direct conflict of interest but must also avoid the appearance of a possible or potential conflict. The fiduciary is barred from dividing loyalties between competing interests, including self-interest.

48 Disclosure of a directors' interest in a transaction is just the first step. Disclosure does not relieve a director of his or her obligation to act honestly and in the best interests of the corporation: *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J. [Commercial List]), aff'd (2004), 183 O.A.C. 310 (Ont. C.A.).

49 It is against these standards that the trial judge was obliged to consider the actions of Mr. McGoey.

SAR Cancellation Awards

50 With respect to the SAR Cancellation Awards, the trial judge concluded that there was no evidence as to how the UBS Board arrived at the non-market price of $0.40 per unit and how it determined that it was in the best interests of the corporation. The UBS Board provided no credible analysis to justify why they considered that these payments, which represented a significant percentage of UBS market capitalization, were fair and reasonable in the circumstances.

51 In considering the reasonableness of the UBS Board's actions in this regard, I find that the following facts are germane.

52 As of May 4, 2009, when the UBS Board resolved to treat the Spectrum Sale as a triggering event pursuant to the SAR Plan, it anticipated that the trading price of UBS shares would rise from $0.15 to a range of $0.30 to $0.50 per share.

53 On June 17, 2009, the shares of UBS were still trading at $0.15 per share. Thus, the anticipated gains between the strike price and the trading price had not materialized. It was in these circumstances that the UBS Board decided to implement the SAR Cancellation Awards without the benefit of any independent or third party advice that could speak to the reasonableness of their decision.

54 As found by the trial judge, the potential Rogers share transaction never went beyond the negotiation stage and was completely off the table by July 20, 2009 and could not serve as a justification for the $0.40 unit price.

55 Mr. McGoey's SAR Cancellation Award was allocated to him on August 28, 2009, pursuant to which he was entitled to receive a payment from UBS of $600,000, whereas, under the SAR Plan, he would have been entitled to a payment of $75,000.

56 Given these facts, and in the absence of any credible evidence regarding the *bona fides* of the SAR Cancellation Awards or the process by which they were created, the trial judge reached the reasonable conclusion that the decision to implement the new scheme was driven by UBS Board's self-interest. I see no error in that conclusion.

57 I also agree with the trial judge's conclusion that the $0.40 unit value was unjustified and unrealistic. It was notionally based on a transaction with Rogers that was far from certain and which had been terminated at the time when the SAR Cancellation Awards were allocated. What the SAR Cancellation Awards really achieved was the removal of the uncertainty that was part of the SAR Plan. Under this new scheme, the recipients' awards were not dependant on an increase in the share price, the awards would be granted regardless of the trading price of the shares. This removal of the uncertainty was to the benefit of the recipients and was of no benefit to the corporation.

Bonus Pool

58 The trial judge rejected the position of Mr. McGoey that there was a reasonable rationale for the establishment of the Bonus Pool and his allocation of $1.2 million. This finding was well supported by the evidence at trial, including the following.

59 The UBS Board did not seek or receive any expert advice on an appropriate bonus structure. Nor did they have any comparable or other data regarding executive compensation in the marketplace.

60 There was no documentation that stipulated the performance factors or criteria by which Mr. McGoey's performance would be evaluated. The trial judge rejected Mr. McGoey's evidence that the services he provided for Look qualified as the criteria under which he could be awarded a bonus by UBS. She concluded that, when the UBS bonus was awarded, there were, in fact, no criteria.

61 Similarly, there was no documentation that showed how the Bonus Pool was quantified. The best evidence we have is that Mr. McGoey went to a UBS Board meeting seeking to establish a $7 million bonus pool but the UBS Board found that amount "too high" and established a $3.4 million bonus pool instead.

62 In my view, on these facts, the trial judge was correct to conclude that Mr. McGoey's establishment of the Bonus Pool and the allocation of a part of the Bonus Pool to him breached his fiduciary duties to UBS.

Defences

63 I do not accept Mr. McGoey's rather novel argument that there can be no finding of a breach of fiduciary duty because, before he could be paid under the SAR Cancellation Awards or the Bonus Pool, he was removed from office by the shareholders of UBS. Counsel for Mr. McGoey suggests that the breach is incomplete because no damages have been suffered.

64 This submission is not correct at law. As stated by Mark Ellis in his text, *Fiduciary Duties in Canada*,[2] in the context of a discussing conflicts of interest:

> Entering into a *potential* conflict of interest is a breach whether or not the conflict is operative; once such a conflict becomes operative to jeopardize the beneficiary or his property, the fiduciary breach would then give rise to the remedies available in law. The point is important: to wait until damage or prejudice actually occurs is to prejudice the beneficiary's right to utmost loyalty and avoidance of conflict. If such a schism in theory is allowed, the law would be encouraging a finding that the duty "piggy-backs" the damage caused rather than premising damage on the basis of duty. [Emphasis in original.]

65 Similarly, in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.), at p. 553, McLachlin J. (as she then was) stated that "[a] breach of fiduciary duty is a wrong in itself, regardless of whether a loss can be foreseen".

66 It would be a remarkable result if a fiduciary could be allowed to act in a manner contrary to his duty with impunity, on the basis that he was prevented by the beneficiary's vigilance from receiving a personal benefit.

67 Mr. McGoey's counsel also argued that the trial judge erred in simply comparing the payments under the SAR Plan and the SAR Cancellation Awards, without considering that the SAR Cancellation Awards also required the recipients to execute releases and were contingent upon Look receiving the full payment of funds from the Spectrum Sale and UBS having sufficient resources.

68 I do not find this argument persuasive. The last payment under the Spectrum Sale was received on September 11, 2009. Mr. McGoey's release was executed four days later. It is true that the funds from the Spectrum Sale had not been paid over to UBS; however, it was hardly a doubtful proposition that the money would have found its way to UBS, given Mr. McGoey and his associates' control over Look's board.

69 The trial judge also rejected Mr. McGoey's argument that his actions were undertaken with the assistance of independent legal advice from Mr. McCarthy and, therefore, could not constitute a breach of his fiduciary duties. I agree with the trial judge's conclusion on this issue. The UBS Board never sought an opinion from Mr. McCarthy regarding the reasonableness of the changes to the SAR Plan and the bonuses. Indeed, the evidence is clear that Mr. McCarthy did not have any information during the relevant time regarding the quantity of the Bonus Award or the SAR Cancellation Awards allocated to Mr. McGoey or to any other director or officer of UBS.

70 Finally, the trial judge carefully considered Mr. McGoey's argument that his actions were protected by the business judgment rule. She reviewed the law and identified the critical issue at para. 122 of her reasons:

> I must now examine the board's and Mr. McGoey's actions and decide whether business judgment is what was exercised here, or whether it was self help, or worse, breach of fiduciary duty, dressed in business judgment's clothes.

71 The trial judge properly concluded that the business judgment rule was of no assistance to Mr. McGoey because he did not satisfy the rule's preconditions of honesty, prudence, good faith, and a reasonable belief that his actions were in the best interests of the company: *Corporacion Americana de Equipamientos Urbanos S.L. v. Olifas Marketing Group Inc.* (2003), 66 O.R. (3d) 352 (Ont. S.C.J.), at paras. 13 and 14.

72 It must be remembered that the business judgment rule is really just a rebuttable presumption that directors or officers act on an informed basis, in good faith, and in the best interests of the corporation. Courts will defer to business decisions honestly made, but they will not sit idly by when it is clear that a board is engaged in conduct that has no legitimate business purpose and that is in breach of its fiduciary duties. In the present case, there was ample evidence upon which the trial judge could base her conclusion that the presumption had been rebutted.

73 In summary, I conclude that the trial judge did not err in finding that Mr. McGoey breached his fiduciary duties to UBS.

(ii) Eligibility for Indemnification

74 The trial judge noted that UBS' indemnity obligations arise under various sources and documents: the Jolian Management Services Agreement; Article 7 of the UBS by-laws; specific indemnity agreements between Mr. McGoey and UBS; and s. 134(4.1) of the *OBCA*.

75 The trial judge also referred to Marrocco J.'s finding that the indemnification provisions under the UBS by-laws are "only available if the director or officer acted honestly and in good faith with a view to the best interests of the Corporation": at para. 183.

76 The trial judge concluded that, given her finding of a breach of fiduciary duty, the indemnity obligations were not operative.

77 I see no error in this finding. The purpose of statutory and contractual indemnity provisions is to ensure that officers and directors who are acting in good faith and in the best interests of a corporation are not exposed to legal costs. It is commercially sensible and good public policy to offer this protection. The rationale for offering the protection is eliminated, however, where the officer or director has not acted in good faith and in the best interests of the corporation.

78 In a related case, this court upheld an application judge's decision to refuse advanced funding for the legal costs of Look's directors and officers because the corporation had established a strong *prima facie* case of bad faith on the part of the parties seeking the funding: *Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455, 116 O.R. (3d) 241 (Ont. C.A.), leave to appeal refused, (2014), [2013] S.C.C.A. No. 377 (S.C.C.).

79 In the present case, while the trial judge did not specifically state that Mr. McGoey acted in bad faith, she did conclude that he was ineligible to receive indemnification because he had not met the standard of acting honestly and in good faith. This decision was open to the trial judge to make on the evidence before her and there is no basis for appellate interference.

(iii) Interpretation of the Jolian Management Services Agreement

80 The trial judge held that, pursuant to the terms of the Jolian Management Services Agreement, a breach of fiduciary duty did not constitute "Cause" or a "Jolian Default" as defined in the agreement, and, consequently, Mr. McGoey was entitled to receive Enhanced Severance. However, this payment was to be calculated on the basis of what the entitlement would have been prior to the SAR Plan cancellation and the establishment of the Bonus Pool.

81 Mr. McGoey and Jolian were directed to file a revised proof of claim within 30 days to reflect the trial judge's finding. The revised claim filed pursuant to this direction was in excess of $4 million.

82 For the reasons that follow, I am of the view that the trial judge erred in law in her interpretation of the Jolian Management Services Agreement and in her finding that Mr. McGoey was entitled to Enhanced Severance under the contract. Set forth below, I consider some general principles of contractual interpretation, the specific terms of the Jolian Management Services Agreement, and the trial judge's analysis of the agreement.

General Principles

83 The following principles of contractual interpretation are relevant in considering the trial judge's analysis of the Jolian Management Services Agreement.

84 In *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415 (S.C.C.), at pp. 439-40, quoting Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d. ed. (Toronto: Butterworths, 1994), at p. 131, L'Heureux-Dubé J., dissenting, described the interpretation of statutes in the following way that applies equally to contractual interpretation:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of [that which is to be judicially interpreted] in its *total context*, having regard to [its] purpose ..., the *consequences of proposed interpretations*, the *presumptions and special rules of interpretation*, as well as*admissible external aids.* In other words, the*courts must consider and take into account all relevant and admissible indicators of [...] meaning. After taking these into account, the court must then adopt an interpretation that is appropriate* [Emphasis added by L'Heureux-Dubé J.]

85 The subjective intent of one party to a contract "has no independent place" in interpreting contractual provisions: *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.), at para. 54.

86 While the plain meaning of the words used by the contracting parties is important, the contract must be read as a whole and in the context of the circumstances as they existed when the contract was created: *Dumbrell v. Regional Group of Cos.*, 2007 ONCA 59, 85 O.R. (3d) 616 (Ont. C.A.), at para. 52.

87 Courts will avoid a contractual interpretation which results in rendering the agreement unlawful. As Blair J.A. discussed in *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, 85 O.R. (3d) 254 (Ont. C.A.), at para. 57, quoting John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005), at p. 729,[3] "where an agreement admits of two possible constructions, one of which renders the agreement lawful and the other of which renders it unlawful, courts will give preference to the former interpretation"; see also *Cantor Art Services v. Kenneth Bieber Photography*, [1969] 1 W.L.R. 1226 (Eng. C.A.).

88 A commercial contract will be interpreted in a manner that is consistent with commercial principles and that avoids a commercial absurdity. In *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.), at p. 901, Estey J. stated:

> [w]here words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.

89 As stated by the House of Lords in *Mannai Investment Co. v. Eagle Star Life Assurance Co.*, [1997] 2 W.L.R. 945 (Eng. H.L.), at p. 964, commercial contracts should be "interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language".

90 The interpretation of a contract is a question of law. Accordingly, the standard of review by an appellate court is correctness: *Plan Group v. Bell Canada*, 2009 ONCA 548, 96 O.R. (3d) 81 (Ont. C.A.) .

Jolian Management Services Agreement

91 UBS and Jolian entered into the Jolian Management Services Agreement in 2006. However the terms of the agreement were not disclosed to UBS shareholders until May 2010, when it was filed on SEDAR.

92 The relevant sections of the agreement are as follows:

> "**Cause**" means an act of fraud, embezzlement or misappropriation or other act which constitutes "Cause" at common law, and, in each case, which is materially injurious to the Company.
>
> "**CEO Designee**" means Gerald T. McGoey or such other individual designated by the parties in conformity with Section 1.3 of this Agreement.
>
> "**CEO Services**" means the duties typically performed by, and responsibilities assumed by the chief executive officer of a company, including, without limitation, the overseeing of:

(a) the preparation and administration of the annual budget;

(b) the hiring, firing and supervising of all senior staff;

(c) UBS' compliance with all regulatory requirements and shareholder communication;

(d) the monitoring and, where appropriate, the updating of UBS' broadcast and information technology; and

(e) customer service.

. . .

"Jolian Default" means:

(a) an act of fraud, theft or misappropriation or other act which constitutes "Cause" at common law committed by the CEO designee; and

(b) the material failure by the CEO Designee to perform the CEO Services after having received written notice of such material failure and been given reasonable time to correct same;

in each case, which is materially injurious to USB or which has not been waived by UBS.

Interpretation by the Trial Judge

93 The trial judge's analysis of the Jolian Management Services Agreement was limited to considering the term "Jolian Default". After setting out the definition of that term found in the agreement, the trial stated, at paras. 172-77:

As I read the definition, both parts must be met before actions constitute "Jolian Default". I say this because the drafters clearly chose to use "and" between the two paragraphs, thus making them conjunctive.

Here, regardless of whether subsection (a) of the definition has been met, there is no question subsection (b) has not. No one provided Mr. McGoey with written notice of any "material failure to perform the CEO services" together with a reasonable time to correct any such material failure.

As to subsection (a), in my view it has not been met either. It would have been an easy matter for the drafters to include "breach of fiduciary duty" or "bad faith" as enumerated items of cause. They did not.

It also would have been an easy matter for the drafters to define "cause" simply as "cause at common law". They did not.

From this I infer that "cause at common law" in the context of this provision means acts of fraud and defalcation of the types enumerated. I cannot conclude breach of fiduciary duty falls into this category.

In any event, since both provisions of the section have not been met I therefore conclude there has been no "Jolian Default" under the Jolian Management Services Agreement. Thus UBS remains bound to pay the amounts due under the golden parachute provisions of the agreement. This is so unless there is another reason to find the obligation no longer exists.

94 In my view, the trial judge erred in law in her interpretation of the agreement for the following reasons.

95 First, the trial judge's interpretation of the agreement ignores the provisions of s. 134(3) of the *OBCA*. That section provides:

> Subject to subsection 108(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act and the regulations or relieves him or her from liability for a breach thereof.

96 Pursuant to s. 134(1) of the act, a director or officer of an *OBCA* corporation is required to act honestly and in good faith with a view to the best interests of the corporation. In addition, the director or officer must exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances.

97 The effect of the trial judge's interpretation is to eviscerate the prohibition found in s. 134(3). If her interpretation were accepted, Mr. McGoey would be relieved of his obligation to act in manner that is consistent with his duties under the legislation (*i.e.* he could breach his fiduciary duties to the company). Such conduct would not constitute a "Jolian Default" under the agreement and he would be entitled to receive Enhanced Severance.

98 Second, the trial judge's interpretation of the Jolian Management Services Agreement leads to a commercially absurd result. Given her finding that subparagraphs (a) and (b) are conjunctive, Mr. McGoey could commit theft from the company but such conduct would not constitute a "Jolian Default" under the agreement unless UBS gave Mr. McGoey written notice of the theft and provided him with the opportunity to cure the fraud.

99 Clearly this type of result could not be consistent with the intentions of reasonable business people entering into a commercial transaction. While the word "and" generally imports a conjunctive sense, this is not an inexorable cannon of construction. In some cases the word "and" will be interpreted as "or", in order to make sense and give effect to the contract: *H.H. Vivian & Co. v. Clergue* (1909), 41 S.C.R. 607 (S.C.C.); and *Boy Scouts of Canada, Provincial Council of Newfoundland v. Doyle* (1997), 149 D.L.R. (4th) 22 (Nfld. C.A.). This was one of those cases.

100 Third, the trial judge's interpretation of the agreement has the effect of ignoring the phrase "or other act which constitutes 'Cause' at common law". If the intention of the parties was to limit the prohibited conduct to the enumerated grounds of fraud, theft, or misappropriation, this additional phrase would be unnecessary.

101 When the contract is read as a whole, it is evident that the parties sought to ensure that a "Jolian Default" would be limited to serious misconduct that was materially injurious to UBS. The enumerated grounds of fraud, theft and misappropriation are examples of the types of conduct which would constitute a default.

102 A serious breach of fiduciary duty would logically meet this definition, as it would constitute a breach of Mr. McGoey's statutory and common law duties to the corporation and would amount to cause at common law. The conduct of Mr. McGoey, in establishing the SAR Cancellation Awards and the Bonus Pool and thereby preferring his own interests to the interests of UBS, qualifies as a serious breach of fiduciary duty.

103 Given the amount of money involved in the SAR Cancellation Awards and the Bonus Pool, these plans would have been materially injurious to UBS had the payouts been made. Again, in my view, the fact that Mr. McGoey was prevented by shareholder vigilance from receiving the funds allocated to him cannot serve as a defence. It would be commercially absurd to interpret the agreement to mean that UBS would be obligated to pay Jolian and Mr. McGoey an amount equivalent to 300% of Mr. McGoey's compensation because he had not succeeded in wrongfully diverting funds for his own benefit.

104 Interpreting "Jolian Default" to include a serious breach of fiduciary duty that was materially injurious to UBS, gives effect to the entirety of the words used in the definition of the term in their context. It is also commercially sensible and does not result in an interpretation that is inconsistent with the *OBCA*.

105 The trial judge erred in law in her contractual interpretation, and her finding that Mr. McGoey was entitled to Enhanced Severance cannot stand.

(iv) Oppression Remedy

106 Given my finding regarding the proper interpretation of the Jolian Management Services Agreement, it is not

necessary to consider UBS's argument that the trial judge erred in failing to consider the oppression remedy argument advanced by UBS. I only note that the trial judge, having concluded that Mr. McGoey was entitled to receive Enhanced Severance, had an obligation to consider the oppression argument. Contrary to her conclusion, the setting aside of the SAR Cancellation Award and the Bonus Award did not cure Mr. McGoey's wrongful conduct. It was still necessary to determine whether the entitlement to Enhanced Severance was oppressive.

107 The oppression remedy is a flexible, equitable remedy that affords the court broad powers to rectify corporate malfeasance. It is an important remedy for shareholders and other corporate stakeholders. In the circumstances of this case, it may well have provided a remedy to protect the interests of the shareholders.

108 It was an error in law not to consider the oppression remedy in these circumstances.

Disposition

109 I would allow the appeal and substitute paragraph 2 of the judgment with a finding that Mr. McGoey's actions constitute "Cause" and a "Jolian Default" under the Jolian Management Services Agreement, set aside paragraph 3 of the judgment, and substitute paragraph 4 of the judgment with a finding that Jolian/Mr. McGoey are not entitled to Enhanced Severance. I would dismiss the cross-appeal.

110 On the issue of costs of the trial, the trial judge's decision that there be no order as to costs was premised on her finding that both parties had achieved some measure of success at trial. Given my findings, the costs order cannot stand. As the successful party, UBS is entitled to costs of the trial. If the parties cannot agree on the scale and/or quantum of the costs, they may attend before the trial judge to fix the costs.

111 The parties agreed that, if one party were successful on both the appeal and the cross appeal, then that party would be entitled to costs of the appeal in the amount of $60,000. Accordingly, I would order that Mr. McGoey and Jolian are jointly and severally liable to UBS for the costs of the appeal in the amount of $60,000, inclusive of fees, disbursements, and H.S.T.

***Robert J. Sharpe J.A.*:**
I agree

***E.E. Gillese J.A.*:**
I agree

Appeal allowed in part.

Footnotes

[1] The capitalized terms are defined below.

[2] Mark Ellis, *Fiduciary Duties in Canada*, loose-leaf (consulted on 25 June 2014), (Carswell, Toronto: 2014), ch. 1 at 5.

[3] See also John D. McCamus,*The Law of Contracts* (Toronto: Irwin Law, 2012), at p. 773.

Tab 6

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Craig Packaging Ltd. v. Beaumont | 2019 QCCS 2336, 2019 CarswellQue 5110, EYB 2019-312722 | (C.S. Qué., May 9, 2019)

2010 ONCA 380
Ontario Court of Appeal

Med-Chem Health Care Ltd. v. Misir

2010 CarswellOnt 3497, 2010 ONCA 380, [2010] O.J. No. 4535, 103 O.R. (3d) 769, 191 A.C.W.S. (3d) 751, 265 O.A.C. 390, 72 B.L.R. (4th) 1

Med-Chem Health Care Limited (Plaintiff / Appellant) and Devendranauth Misir (also known as Dev Misir), Howie C. Wong, Richard Kinlough, CCFL Subordinated Debt Fund and Company, Limited Partnership, and CCFL Mezzanine Partners of Canada Limited (Defendants / Respondents)

Howie C. Wong, Richard Kinlough, CCFL Subordinated Debt Fund and Company, Limited Partnership, and CCFL Mezzanine Partners of Canada Limited (Plaintiffs by Counterclaim / Respondents) and Med-Chem Health Care Limited and Dr. Sultan Mahmood Alvi (Defendants by Counterclaim / Appellant)

S.T. Goudge, J.C. MacPherson, J. MacFarland JJ.A.

Heard: March 10, 2010
Judgment: May 27, 2010
Docket: CA C51010

Proceedings: affirming *Med-Chem Health Care Ltd. v. Misir* (2009), 2009 CarswellOnt 9101 (Ont. S.C.J.); additional reasons at *Med-Chem Health Care Ltd. v. Misir* (2009), 2009 CarswellOnt 9102 (Ont. S.C.J.); and affirming *Med-Chem Health Care Ltd. v. Misir* (2009), 2009 CarswellOnt 9102 (Ont. S.C.J.)

Counsel: Kevin D. Toyne for Appellant
Patricia Jackson, Emily Head for Respondent, Howie C. Wong
David S. Steinberg, Shantona Chaudhury for Respondent, Devendranauth Misir
Mary Jane Stitt for Respondents, Richard Kinlough, CCFL Subordinated Debt Fund and

Company, Limited Partnership, CCFL Mezzanine Partners of Canada Limited

Subject: Corporate and Commercial

Related Abridgment Classifications

Business associations
III Specific matters of corporate organization
III.1 Directors and officers
III.1.e Duty to manage
III.1.e.iii Indemnification by corporation

Debtors and creditors
XIV Miscellaneous

Headnote

Business associations --- Specific corporate organization matters — Directors and officers — Duty to manage — Indemnification by corporation
M Ltd. brought action against defendants including former directors of M Ltd. for breaching duties to M Ltd. — Defendants moved successfully for order that M Ltd. make advances from time to time of legal expenses they incurred defending action — M Ltd. appealed — Appeal dismissed — While M Ltd. argued obligation to advance was different from obligation to indemnify, which it acknowledged, M Ltd. by-law required it to indemnify eligible individuals in all circumstances in which Business Corporations Act (BCA) allowed indemnification — BCA allowed corporation to advance legal expenses it could indemnify, and by-law made this mandatory — M Ltd. was required to advance legal expenses it later had to indemnify, subject to repayment condition in s. 136(3) and court's approval required under s. 136(4.1) of BCA — Under s. 136(2) of BCA, directors or officers or any "other individual" being indemnified for legal expenses under s. 136(1) qualified for advances — Category of "other individual" in s. 136(2) was broad, designed to encompass in addition to directors and officers those who were listed in s. 136(1), including former directors — Under s. 136(3) of BCA, individual who does not act honestly and in good faith is disqualified from indemnification — No basis to interfere with motion judge's findings that mala fides of former directors was not established and that they sufficiently established bona fides of their conduct — No basis to interfere with motion judge's exercise of discretion to approve advances — Motion judge was within her discretion and did not err in requiring that advances she ordered be paid prior to assessment under Solicitors Act.

Debtors and creditors --- Miscellaneous issues
M Ltd. brought action against defendants including limited partnership C, which was secured

lender of M Ltd., for breaching their duties to M Ltd. — Defendants moved successfully for order that M Ltd. make advances from time to time of legal expenses they incurred defending action — Motion judge held that under terms of its loan agreement with M Ltd., C was entitled to advances from M Ltd. for expenses incurred in defending action — M Ltd. appealed — Appeal dismissed — M Ltd. took position that legal costs for which C sought indemnity fell outside relevant provision of loan agreement because they did not relate to implementation or completion of loan transaction and arose after loan was paid — Motion judge properly found that legal expenses were demanded of C by M Ltd. to defend activities of lender during course of loan transaction that M Ltd. attacked in litigation — Motion judge properly reasoned that since there was no provision in relevant clause of agreement specifying that obligations it provided for came to end with repayment of loan, there was no basis for M Ltd.'s complaint — Defendant general partner of C was not entitled to benefit of provision in issue since it was not lender, and order appealed from did not provide for that entitlement — Motion judge was within her discretion and did not err in requiring that advances she ordered be paid prior to assessment under Solicitors Act.

Table of Authorities

Cases considered by *S.T. Goudge J.A.*:

Blair v. Consolidated Enfield Corp. (1995), 128 D.L.R. (4th) 73, 1995 CarswellOnt 1393, 1995 CarswellOnt 1179, 187 N.R. 241, 86 O.A.C. 245, 25 O.R. (3d) 480 (note), 24 B.L.R. (2d) 161, [1995] 4 S.C.R. 5 (S.C.C.) — considered

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

s. 136 — considered

s. 136(1) — considered

s. 136(2) — considered

s. 136(3) — considered

s. 136(4.1) [en. 2006, c. 34, Sched. B, s. 26] — considered

s. 136(5) — considered

Solicitors Act, R.S.O. 1990, c. S.15
Generally — referred to

Words and phrases considered

other individual

The category of "other individual" [in s. 136(2) of *Business Corporations Act*, R.S.O. 1990, c. B.16] is a broad one, designed to encompass in addition to directors and officers those who are listed in s. 136(1).

APPEAL by plaintiff company from judgments reported at *Med-Chem Health Care Ltd. v. Misir* (2009), 2009 CarswellOnt 9101 (Ont. S.C.J.) and *Med-Chem Health Care Ltd. v. Misir* (2009), 2009 CarswellOnt 9102 (Ont. S.C.J.), concerning defendants' motion for order requiring plaintiff company to make advances from time to time of legal expenses they incurred in defending action.

***S.T. Goudge J.A.*:**

1 The appellant Med-Chem Health Care Limited (Med-Chem) has sued the respondents, three of its former directors and its secured lender, for breaching their duties to the company. The respondents moved successfully for an order requiring Med-Chem to make advances from time to time of the legal expenses they have incurred in defending the action, even though the action has not yet been concluded.

2 In this court, the appellant's position is that the motion judge erred in finding that (i) Med-Chem's By-law No. 12, coupled with s. 136 of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 (*OBCA*), requires Med-Chem to make these advances to the former directors; and (ii) Med-Chem's loan agreement with its secured lender requires the same result. The appellant does not contest its obligation to indemnify the respondents at the conclusion of the litigation, but disputes its obligation to make advances before that time.

3 For the reasons that follow, which closely parallel those of the motion judge, I agree with her conclusion. I would therefore dismiss the appeal.

The Facts

4 In December 1996, the respondents Misir, Wong and Kinlough became directors of Med-Chem when the respondent CCFL Subordinated Debt Fund and Company, Limited Partnership (CCFL) provided funding to enable Med-Chem to complete an initial public offering. In addition to being directors, Mr. Misir was an officer of Med-Chem, Mr. Wong was its corporate

solicitor and Mr. Kinlough was the president of the respondent CCFL Mezzanine Partners of Canada Limited (CCFL Mezzanine), the general partner of CCFL.

5 At that time, Dr. Sultan Mahmood Alvi was chairman of Med-Chem's board of directors, as well as its president and chief executive officer. He was also the company's controlling shareholder.

6 Over the next two years, Med-Chem's financial situation deteriorated badly and on February 1, 1999, it was adjudged bankrupt. By that time, Mr. Kinlough, Mr. Wong and Mr. Misir had all resigned as directors.

7 Med-Chem is now a discharged bankrupt. Its claim in this action, which is driven by Dr. Alvi, is that the respondents breached their duties to Med-Chem and were responsible for its bankruptcy.

8 Since at least 1998, Dr. Alvi has asserted that CCFL was responsible for Med-Chem's financial problems. During the course of Med-Chem's bankruptcy, he sought to pursue this claim by having the trustee commence an action against CCFL very similar to the current action. The trustee declined to do so, having received an opinion from external counsel that Med-Chem had no case against CCFL.

9 Instead, in 2004, Dr. Alvi commenced an action in his personal capacity as a shareholder against these respondents, alleging that their wrongful conduct occasioned Med-Chem's bankruptcy. He ultimately discontinued that action. On June 9, 2005, the former directors and CCFL obtained a court order indemnifying them for the costs they had incurred in defending Dr. Alvis shareholder claim.

10 The appellant commenced the present action on November 23, 2007. While the action is still at the pleadings stage, the former directors and CCFL have already incurred significant expenses in defending it. It is those expenses that they now seek to recover.

The Decision of the Motion Judge

11 The motion judge dealt first with the advance of expenses incurred by the former directors. She concluded that, subject to the court's approval, Med-Chem's By-Law No. 12 and s. 136 of the *OBCA* require the company to reimburse these respondents for these expenses. She then concluded that, in all the circumstances, she should exercise her discretion to approve the advances, and ordered that they be paid.

12 The motion judge then turned to the position of CCFL. She concluded that under the

terms of its loan agreement with Med-Chem, CCFL was entitled to advances from Med-Chem for expenses incurred in defending the action.

13 Finally, after receiving further submissions on the issue, the motion judge outlined the appropriate process to be used in determining the reasonableness of the expenses for which advancement is sought, and of future accounts that will be incurred by the respondents as the action continues. She decided that in both cases, payment should be first made by Med-Chem, which shall then have the right to have those accounts assessed pursuant to the *Solicitors' Act*, R.S.O. 1990, c. S. 15.

Analysis

14 The appellant does not dispute its obligation to indemnify the respondents at the conclusion of the litigation. However, it contests any obligation to reimburse the respondents by way of advancement; that is, to reimburse them from time to time for litigation expenses incurred as the action progresses. It raises three issues on this appeal:

> a) whether it is compelled by By-law No. 12 and s. 136 of the *OBCA* to make advances to the former directors;
>
> b) whether it is compelled by its loan agreement to indemnify CCFL from time to time for legal fees incurred by CCFL in defending the action; and
>
> c) whether the motion judge erred in requiring payment prior to assessment pursuant to the *Solicitors' Act*.

First Issue: Advancement to the Former Directors

15 On October 29, 1996, in anticipation of the company's initial public offering, Med-Chem enacted By-law No. 12. Article 6.3 of the By-law provides for indemnification by the company of designated persons who incur legal expenses because of their association with the company:

> **6.3 Indemnity**
>
> Subject to the limitations contained in the Act, the Corporation shall indemnify a director and officer of the Corporation, a former director or officer, or a person who acts or acted at the Corporation's request as a director or officer of a body corporate of which the Corporation is or was a shareholder or creditor (or a person who undertakes or has undertaken any liability on behalf of the Corporation or any such body corporate) and his heirs and legal representatives, against all damages, costs, charges and expenses, including

> an amount paid to settle an action or satisfy a judgment, reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of the Corporation or such body corporate, if (a) he acted honestly and in good faith with a view to the best interests of the Corporation or such body corporate; and (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, he had reasonable grounds for believing that his conduct was lawful. The Corporation shall also indemnify such person in such other circumstances as the Act permits or requires. Nothing in this By-law shall limit the right of any person entitled to indemnity to claim indemnity apart from the provisions of this By-law.

16 Section 1.1(a)(i) of the By-law defines "Act" to be the *OBCA* as from time to time amended. The relevant sections of the *OBCA* in effect at the time of the motion are the following:

> 136.(1) A corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or another individual who acts or acted at the corporation's request as a director or officer, or an individual acting in a similar capacity, of another entity, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity.
>
> **Advance of costs**
>
> (2) A corporation may advance money to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1), but the individual shall repay the money if the individual does not fulfil the conditions set out in subsection (3).
>
> **Limitation**
>
> (3) A corporation shall not indemnify an individual under subsection (1) unless the individual acted honestly and in good faith with a view to the best interests of the corporation or, as the case may be, to the best interests of the other entity for which the individual acted as a director or officer or in a similar capacity at the corporation's request.
>
> . . . . .
>
> **Derivative actions**

> (4.1) A corporation may, with the approval of a court, indemnify an individual referred to in subsection (1), or advance moneys under subsection (2), in respect of an action by or on behalf of the corporation or other entity to obtain a judgment in its favour, to which the individual is made a party because of the individual's association with the corporation or other entity as described in subsection (1), against all costs, charges and expenses reasonably incurred by the individual in connection with such action, if the individual fulfils the conditions set out in subsection (3).
>
> . . . . .
>
> **Application to court**
>
> (5) A corporation or a person referred to in subsection (1) may apply to the court for an order approving an indemnity under this section and the court may so order and make any further order it thinks fit.

17 The appellant makes three arguments in contesting its obligation to pay advances to the former directors.

18 First, it argues that the obligation to advance (which it disputes) is different from the obligation to indemnify (which it acknowledges). Since By-law No. 12 makes no reference to any obligation to advance, Med-Chem argues that it has no such obligation.

19 I do not agree. Section 6.3 of By-Law No. 12 clearly requires Med-Chem to indemnify the eligible individuals in all those circumstances in which the *OBCA* allows indemnification. The By-Law makes mandatory what the *OBCA* permits.

20 Section 136(2) of the *OBCA* allows the corporation (subject to a specified repayment condition) to pay advances of the legal expenses that the corporation may indemnify under s. 136(1). More importantly, s. 136(4.1), under which these proceedings are brought, allows the corporation to do the same (with the court's approval), if the action is brought by or on behalf of the corporation itself and the individuals are made parties to it by virtue of their association with the corporation. Thus, s. 136 provides for advancement of the same legal costs, charges and expenses that may be indemnified by the corporation. In short, the legislature has made advancement a part of the statutory indemnification scheme, recognizing the reality that requiring an individual to fund his or her costs of litigation until its conclusion before being provided with indemnification would seriously impair the objective of indemnification itself. As described by the Supreme Court of Canada in *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 (S.C.C.) at para. 74: "Indemnification is geared to encourage responsible behaviour yet still permit enough leeway to attract strong candidates to directorships and consequently foster entrepreneurship."

21 When s. 136 of the *OBCA* is read together with By-Law No. 12, the answer to the appellant's first argument is clear. The *OBCA* permits a corporation to advance those legal expenses that it may indemnify. The By-law makes this mandatory. The appellant must advance the legal expenses that it must later indemnify, subject only to the repayment condition in s. 136(3) and the court's approval required under s. 136(4.1).

22 The appellant's second argument is that the advancement provisions of s. 136(2) and s. 136(4.1) do not extend to former directors, since, unlike s. 136(1), former directors are not expressly referred to as eligible recipients.

23 I agree with the motion judge that the answer to this argument is one of statutory interpretation. Section 136(1) provides for indemnification to directors or officers, former directors or former officers, or other individuals acting at the corporation's request for another entity as directors or officers, or in a similar capacity. Under s. 136(2), those who qualify for advances are directors or officers, or any "other individual" being indemnified for legal expenses under s. 136(1). The category of "other individual" is a broad one, designed to encompass in addition to directors and officers those who are listed in s. 136(1). That includes former directors. It is simply legislative shorthand.

24 The appellant's third argument is that the motion judge erred in concluding that the former directors fulfilled the conditions set out in s. 136(3) and that, in all the circumstances, she should exercise her discretion under s. 136(4.1) to approve advances to them.

25 Section 136(3) provides that an individual who does not act honestly in good faith is disqualified from being indemnified. *Blair* says that the policy objective behind indemnification requires that individuals be assumed to act in good faith unless proven otherwise. The motion judge found that, on the evidence before her, the *mala fides* of the former directors had not been established. She went further and concluded that, given their conduct as described in the appellant's own material, and the court's previous approval of indemnification for them in the action brought by Dr. Alvi personally, the former directors have sufficiently established the *bona fides* of their conduct. There was ample evidence before the motion judge to sustain both these conclusions and there is no basis for this court to interfere with them.

26 In deciding to exercise her discretion under s. 136(4.1) to approve these advances, the motion judge considered a number of factors, all of which are relevant and reasonable in my view. However, the appellant says that she should have considered: (i) whether there was proof of an inability to pay for the litigation without advances; (ii) the presence of insurance to fund them, and (iii) the respondents' delay in seeking the advances.

27 There is no merit to these submissions. Neither By-law No. 12, nor s. 136 of the *OBCA*, requires an inability to pay or the presence of insurance coverage. Nor does common sense. At

an early stage of clearly complex litigation, any meaningful assessment of a party's ability to pay would be almost impossible. And indemnity, which is for the benefit of the designated individuals, ought not to be contingent on the existence of insurance, which is for the benefit of the company and which can be changed or cancelled by it. Finally, on the facts of this case, the delay by the respondents in seeking advances pales in comparison with the appellant's own delay in commencing the action itself. There is no basis to interfere with this exercise of discretion by the motion judge.

Second Issue: Indemnification of CCFL

28 Section 3.8 of the loan agreement between CCFL and the appellant reads as follows:

> **3.8 Expenses and Legal Fees.**
>
> The Borrower [Med-Chem] agrees to pay upon demand all of the Lender's [CCFL] and its agents' reasonable costs relating to the implementation and/or completion of the transaction herein contemplated, and to all other matters for which such costs may be incurred for so long as this Agreement shall be contemplated or in effect between the Lender and the Borrower. Without limiting the generality of the foregoing, the Borrower agrees to pay upon demand: ...(b) the reasonable legal fees and disbursements of any counsel retained in connection with advising the Lender generally on the subject matter of the transaction contemplated herein and the actions of the Lender hereunder and in connection with the protection and/or enforcement of any rights or remedies of the Lender hereunder... Until paid all such amounts shall be deemed to be Advances under the Credit.

29 The appellant argues that the legal costs for which CCFL seeks indemnity fall outside this provision because they do not relate to the implementation or completion of the loan transaction and arose after the loan had been repaid.

30 The motion judge disagreed with this reading of s. 3.8. She found that the legal expenses were demanded of CCFL by the appellant to defend the activities of the lender during the course of the loan transaction that the appellant attacks in the litigation. She reasoned that since there is no provision in s. 3.8 specifying that the obligations it provides for come to an end with repayment of the loan, there is no basis for the appellant's complaint. I agree. This argument must fail.

31 The appellant also says that CCFL Mezzanine is not entitled to the benefits of s. 6.3 since it is not the lender, but the general partner of the lender. I agree, and would not read the order appealed from to provide for that entitlement. I think it is clear, however, that this distinction has no real practical effect since Mr. Kinlough, CCFL and CCFL Mezzazine all have the same

counsel providing the same services to defend the action, all of which will be subject to indemnification and advancement in favour of two of these three parties.

The Third Issue: The Process to be Followed

32 The final issue is whether the motion judge erred in providing for a process that requires the advances to be paid before being assessed for reasonableness under the *Solicitors' Act*.

33 In my view, the motion judge was well within her discretion and did not err in requiring that the advances she ordered be paid prior to assessment. She received full submissions on the issue before reaching this conclusion. She did so for the reasons she articulated at para. 12 of her supplementary reasons, with which I agree:

> I accept that the delay that in this case would be entitled in requiring an assessment before payment is contrary to the aim of an advance. If the legal expenses are reduced on assessment, Med-Chem will be entitled to a refund. In this case, there is far greater risk to the indemnified parties of non-payment if payment is delayed by an assessment than there is that the indemnified parties would fail to pay any required refund. Moreover, I am prima facie satisfied as to the reasonableness of the portion of the expenses incurred to date that I am ordering be paid before an assessment.

34 The appeal is therefore dismissed. Since this means that the respondents are entitled to recover the legal costs that they incur in defending this action, there is no need for this court to make a specific order as to costs of this appeal.

***J.C. MacPherson J.A.*:**
I agree.

***J. MacFarland J.A.*:**
I agree.

Appeal dismissed.

Tab 7

Court File Number: CV-17-11770-CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

NORANCO INC.
Plaintiff(s)

AND

MIDOCEAN PARTNERS
Defendant(s)

Case Management ☒ Yes ☐ No by Judge: MYERS

Counsel	Telephone No:	Facsimile No:

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐ Time Table approved (as follows):

Motion adjourned to be heard (one) day on Jan 28/19. The examinations for discovery of all parties will have to be moved back to accommodate the adjournment. While delay is never helpful, I am cognizant of the prospect of appeal on matters the outcome of the motion. That has risks even greater by delay. So there is little or no prejudice by the outcome.

NOV 26/18
Date

Judge's Signature

☐ Additional Pages _____

Tab 8

2019 ONSC 3850
Ontario Superior Court of Justice

Sherman v. Monteith

2019 CarswellOnt 9830, 2019 ONSC 3850, 306 A.C.W.S. (3d) 838

Brian Allen Sherman (Applicant) and Robert Andrew Monteith (Respondent)

R.E. Charney J.

Heard: June 6, 2019
Judgment: June 20, 2019
Docket: CV-13-114694

Counsel: Brian Allen Sherman, for himself
Robert Andrew Monteith, for himself

Subject: Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications

Civil practice and procedure
XXII Judgments and orders
XXII.13 Consent judgments or orders
XXII.13.d Setting aside

Headnote

Civil practice and procedure --- Judgments and orders — Consent judgments or orders — Setting aside
Applicant was minority shareholder in M Inc. — M Inc. commenced action against three defendants for breach of distribution agreement — Applicant commenced application against respondent majority shareholder alleging oppression based on defendant's conduct in M Inc. action — M Inc. action was stayed pending final disposition of oppression action — Consent order was made restraining parties to application from effecting settlement of M Inc. action — No steps had been taken in oppression application for six years — Respondent brought motion to set aside consent order — Motion granted — Consent order was not final settlement of

application, but was designed as interim measure, and agreed to on premise that oppression application would proceed to final resolution — Consent order preventing settlement of action for six years had direct impact on administration of justice — It was in interests of justice to set aside consent order.

Table of Authorities

Cases considered by *R.E. Charney J.*:

Cookish v. Paul Lee Associates Professional Corp. (2013), 2013 ONCA 278, 2013 CarswellOnt 5070, 39 C.P.C. (7th) 227, 305 O.A.C. 359 (Ont. C.A.) — considered

D'Onofrio v. Advantage Car & Truck Rentals Ltd. (2017), 2017 ONCA 5, 2017 CarswellOnt 15, 97 C.P.C. (7th) 223, 409 D.L.R. (4th) 39, 135 O.R. (3d) 260, 135 O.R. (2d) 270 (Ont. C.A.) — considered

Gates Estate v. Pirate's Lure Beverage Room (2004), 2004 NSCA 36, 2004 CarswellNS 72, 44 C.P.C. (5th) 13, 237 D.L.R. (4th) 74, 222 N.S.R. (2d) 86, 701 A.P.R. 86 (N.S. C.A.) — distinguished

McCowan v. McCowan (1995), 14 R.F.L. (4th) 325, 24 O.R. (3d) 707, 84 O.A.C. 125, 1995 CarswellOnt 435 (Ont. C.A.) — considered

Monteith Mineralized Solutions Inc. v. Nu-Gro Ltd, et al (2018), 2018 ONSC 539, 2018 CarswellOnt 758 (Ont. Div. Ct.) — referred to

Nicholas C. Tibollo Professional Corp. v. Wasserman Associates Inc. (2013), 2013 ONSC 2685, 2013 CarswellOnt 5656 (Ont. Div. Ct.) — referred to

Towers, Perrin, Forster & Crosby Inc. v. Cantin (2000), 2000 CarswellOnt 3372, 50 O.R. (3d) 476 (Ont. S.C.J.) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 59.06(2) — considered

R. 59.06(2)(a) — considered

MOTION by respondent to set aside consent order.

***R.E. Charney J.*:**

Introduction

1 The respondent, Robert Monteith, brings this motion to set aside two consent orders. The first is the Order of Mullins J. dated July 9, 2013, sealing the court file in relation to the Application commenced by Brian Sherman against Mr. Monteith (the "sealing order").

2 The second is the Order of Vallee J. dated July 25, 2013 restraining the parties to this application (Mr. Sherman and Mr. Monteith) from effecting a settlement of an action between Monteith Mineralized Solutions Inc. (MMS) and three defendants: Nu-Gro Ltd., Agrium Advanced Technologies Inc. and Agrium Inc. (collectively referred to as "Agrium") (the "no-settlement order").

3 Mr. Sherman consents to the setting aside of the sealing order, but opposes the motion to set aside the no-settlement order.

Facts

4 This motion involves two separate proceedings.

5 The first proceeding involves an action between MMS and Agrium. That action was commenced in 2011. In that action, MMS is suing Agrium for breach of a distribution agreement in relation to a natural ingredient pesticide for killing bed bugs. MMS seeks $125 million damages in that action.

6 The second proceeding is an Application for shareholder oppression brought by the applicant, Brian Sherman, against the respondent, Robert Monteith. In that Application, which was commenced on May 27, 2013, Mr. Sherman, the minority shareholder of MMS, alleges that Mr. Monteith, the majority shareholder of MMS, has oppressed the applicant in various ways (the "shareholder oppression Application").

7 Mr. Sherman's primary complaint in the shareholder oppression Application alleges that Mr. Monteith "plans an early and perhaps inopportune settlement of the Agrium case that he would compel with his majority shareholdings, take the cheque for MMS from our lawyer, take the money from MMS, close the MMS accounts and move to where I could not find him". Much of the relief requested in the shareholder oppression Application relates to the conduct of the MMS action against Agrium.

8 In June, 2013, Mr. Sherman brought an urgent motion to the court for, *inter alia*, an interim order to appoint Mr. Sherman as interim receiver and manager of all aspects of the business of MMS, to require court approval of any proposed settlement of the MMS action against Agrium, and require that any settlement in that action be paid into court. The motion also sought an order that the court file in the shareholder oppression Application be sealed and treated as confidential.

9 The motion was settled on an interim basis by a consent Order dated July 9, 2013. That Order prevented either party from effecting a settlement of the MMS action against Agrium and sealed the court file related to the shareholder oppression Application. The Order provided:

> 1. Until further Order of this Court and without prejudice to the rights of the parties to contest the issues raised by this motion as they see fit on the return of this Application, the parties to this Application are hereby restrained, pending the return date of this Application, from effecting a settlement of Ontario Superior Court of Justice action #11-0245 (at Barrie) through their corporation Monteith Mineralized Solutions Inc.
>
> 2. The contents of this Application file are ordered sealed and treated as confidential, not forming part of the public record.

10 A second consent Order was obtained on July 25, 2013. Like the first Order, it prevents either party from effecting a settlement of the MMS action against Agrium. This Order provides:

> 1. In the interim, until the final hearing of this Application or the trial of the issues of this Application or in the event that one of the parties proposes the making of or acceptance of a settlement offer and without prejudice to the rights of the parties to contest the issues raised by this Application as they see fit at that time, the parties to this Application and anyone on their behalf are hereby restrained from effecting a settlement of Ontario Superior Court of Justice action #11-0245 (at Barrie) through their corporation Monteith Mineralized Solutions Inc.
>
> 2. The balance of this Application shall be adjourned *sine die* to permit the Applicant to serve and file a Reply Application Record, the parties to conduct examinations and cross-examinations, obtain transcripts and schedule a return date for this Application.

11 It appears that the shareholder oppression Application has been left to languish since July, 2013, and there have been no further proceedings with respect to that Application.

12 By email dated July 31, 2013, Mr. Sherman notified Agrium of the two consent Orders, although the Orders themselves were not provided. The email stated as follows:

> This is to inform you that on July 25 Madam Justice Vallee gave an order restraining the owners of Monteith Mineralized Solutions Inc, from effecting any settlement of the [Action] until further order of that court in Application # CV-13-114694-00. This is being sent to you as your clients are parties affected by the order. The contents of that Application file are sealed pursuant to the order of Madam Justice Mullins of July 9. Please make sure as well that your client is also aware of this letter to you and please confirm to me that this has been done. It is important for me to know that your client is aware in the unlikely event that you cease acting for them. Thank you.
>
> Brian Sherman
>
> Partner, Monteith Mineralized Solutions Inc.

13 Agrium made numerous requests for further information and sought evidence from MMS's then counsel about his authority to proceed with the Action in the circumstances. Those requests went unanswered. Agrium was eventually provided with redacted versions of the two Orders, which showed that Mr. Sherman is the applicant and Mr. Monteith the respondent in the Application. The redacted version indicated that Mr. Sherman and Mr. Monteith were restrained from effecting a settlement of MMS's action against Agrium until the hearing of the Application, which was adjourned *sine die*.

14 Based on this information, Agrium brought a motion for a stay of MMS's action against Agrium, pending the disposition of the shareholder oppression Application. Agrium's motion to stay was initially dismissed, but leave to appeal to the Divisional Court was granted, and the Divisional Court granted Agrium's motion to stay the MMS action against Agrium pending the final disposition of the shareholder oppression Application (*Monteith Mineralized Solutions Inc. v. Nu-Gro Ltd, et al*, 2018 ONSC 539 (Ont. Div. Ct.)).

15 The Divisional Court decision was released on January 24, 2019. It began by noting that the "appeal arises in highly unusual circumstances". In granting the appeal and the stay, the Divisional Court stated, at paras. 21 and 22:

> The appellants submit that the ability to settle an action is an important component of the authority of a plaintiff to pursue an action. I agree. The importance of that authority was well-described by Justice McCarthy on the leave motion, who was, in turn, referring to reasons given by Justice Mulligan on the refusals motion regarding Mr. Monteith's cross-examination:
>
> > In my view, the issue of whether a stay of proceedings in an action is appropriate when one of the litigants is restrained from settling the action for an indeterminate period is one that is of great importance. There exists a clear tension between one litigant's right to have a civil matter move forward without undue delay and the

> opposite litigant's right to pursue and conclude a resolution of that civil dispute in a timely and cost-effective manner. Here, a court has imposed a restraint upon the ability of the [respondent] to effect a settlement of the [Action] because of the unresolved issue of ownership of the [respondent] corporation. That issue, which remains to be determined in the Application, leaves the purported owner of the corporation, in Mulligan J.'s words, unable to "control these proceedings." . . .
>
> In the present case, settlement, which is the most desirable outcome of any civil dispute, is rendered impossible by the orders made in the Oppression Application. [Emphasis added.]

As put by the Supreme Court of Canada in *Kelvin Energy v. Lee*, 1992 CanLII 38 (SCC), [1992] 3 S.C.R. 235 at 259, citing *Sparling v. Southam Inc., et al* (1998) 1988 CanLII 4694 (ON SC), 66 O.R. (2d) 225 at 230 (H.C.J.):

> The courts consistently favour the settlement of law suits in general. To put it another way, there is an over-riding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already over-burdened provincial court system.

16 The Divisional Court was extremely critical of the terms of the consent Orders, and concluded, at para. 28:

> The Newmarket orders undercut the respondent's authority to pursue this Action so significantly that the failure to grant the stay pending disposition of the application amounts to an injustice. On this basis alone, the appeal is granted.

Analysis

17 The validity of the no-settlement order was not directly raised in the proceeding before the Divisional Court. That issue is raised for the first time on this motion.

18 Rule 59.06(2) provides:

> (2) A party who seeks to,
>
> (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;

. . .

may make a motion in the proceeding for the relief claimed.

19 The no-settlement order was an order made on consent. The only reason given in the endorsement by Vallee J. for making the Order was that it was on the consent of the parties.

20 In *D'Onofrio v. Advantage Car & Truck Rentals Ltd.*, 2017 ONCA 5 (Ont. C.A.), the Ontario Court of Appeal held:

> A consent judgment is not a judicial determination on the merits of a case but only an agreement elevated to an order on consent. The basis for the order is the parties' agreement, not a judge's determination of what is fair and reasonable in the circumstances: *Rick v. Brandsema*, 2009 SCC 10 (CanLII), [2009] 1 S.C.R. 295, at para. 64.

21 In *McCowan v. McCowan* [1995 CarswellOnt 435 (Ont. C.A.)], 1995 CanLII 1085, the Court of Appeal stated:

> [I]t is well established that a consent judgment may be set aside on the same grounds as the agreement giving rise to the judgment. These grounds go to the formation of the agreement, not to its subsequent performance.

22 In *Cookish v. Paul Lee Associates Professional Corp.*, 2013 ONCA 278 (Ont. C.A.), at para. 56, the Court of Appeal confirmed the authority of the court to set aside a consent judgment when it is in the interests of justice to do so:

> Courts are cautious about setting aside consent orders, of course, but will where it is necessary in the interests of justice to do so: see *Stoughton Trailers Canada Corp. v. James Expedite Transport Inc.*, 2008 ONCA 817 (CanLII), adopting the principles set out in *Beetown Honey Products Inc. (Re)* (2003), 2003 CanLII 32918 (ON SC), 67 O.R. (3d) 511 (S.C.), aff'd without comment on this issue, 2004 CanLII 34508 (ON CA), 3 C.B.R. (5th) 204 (Ont. C.A.).

23 See also the decision of the Divisional Court in *Nicholas C. Tibollo Professional Corp. v. Wasserman Associates Inc.*, 2013 ONSC 2685 (Ont. Div. Ct.), at para. 8.

24 In the present case, the July 25, 2013 no-settlement order was not made "subject to the further order of the court". Nonetheless, since a consent judgment is not a judicial determination of what is fair and reasonable in the circumstances, it must be subject to such a judicial

determination if it is contrary to public policy or subsequent events demonstrate that it is not fair and reasonable.

25 In this regard, there is a distinction between consent orders intended to finally resolve substantive issues between the parties, and consent orders intended to resolve a procedural issue that may arise within the dispute. The Court's discretion to set aside the latter is broader than the former. This distinction was highlighted by the Nova Scotia Court of Appeal in *Gates Estate v. Pirate's Lure Beverage Room*, 2004 NSCA 36 (N.S. C.A.), at paras. 28 and 29:

> I am conscious of the importance of consent orders in resolving substantive issues in litigation and the reliance rightfully placed upon such orders by litigants and their counsel. However, the rationale for courts not varying this type of consent order is that these orders give effect to agreements reached by the parties after negotiations which may include the litigants compromising their strict legal rights and obligations in order to finally resolve the dispute between themselves. Once the court exercises its discretion and accepts their agreement by granting a consent order, the negotiated terms and the finality the parties sought by their agreement should be respected. For a court to vary the terms of a consent order giving effect to such a negotiated contract may alter the parties' agreement in a way they would never have agreed to settle for. This is not to say that there will never be a situation where it will be just and equitable to set aside a consent order giving effect to a negotiated settlement.
>
> The order in this appeal is of a different nature. This type of order is used to ensure the carriage of an action proceeds as it should. In this case the order was an attempt to ensure timely documentary disclosure. The involvement of the court in varying this type of order does not carry the same risk of undoing a negotiated agreement of the parties. With interlocutory orders such as this dealing with the litigation process, there is residual discretion to grant relief against dismissal of the action or striking of the defences, in other words to relieve against the sanction provided for failure to comply.

26 Accordingly, the Nova Scotia Court of Appeal concluded that the Superior Court has inherent jurisdiction to set aside interlocutory consent orders of a procedural nature. This is simply part of the court's inherent jurisdiction to control its own process. In other words, interlocutory procedural orders are, by their very nature, always subject to the further order of the court.

27 The consent Order in the present case was not a final settlement of the Application, but was designed as an interim measure, and agreed to on the premise that the shareholder oppression Application would proceed to a final resolution. It did not purport to dispose of the issues in the Application on the basis of any substantive resolution.

28 Rule 59.06(2) provides that a party may move to have an "order set aside or varied on the ground of fraud *or of facts arising* or discovered *after it was made*" [Emphasis added].

29 The fact that the shareholder oppression Application has not moved forward in six years is a fact that has arisen after the consent order was made. Since the Application has remained static, the Court must revisit the fairness and reasonableness of the consent Order in light of subsequent events.

30 As the decision of the Divisional Court in *Monteith Mineralized Solutions* plainly demonstrates, a court order preventing a party to a court action from settling that action is contrary to the "over-riding public interest in favour of settlement". Given this over-riding public interest, it is an open question whether the court should ever grant an order preventing a party from effecting a settlement of an action unless strict timelines are imposed or it is expressly subject to the further order of the court. Whether the consent Order should ever have been granted in this case, it should not be permitted to continue. As Kiteley J. stated in *Towers, Perrin, Forster & Crosby Inc. v. Cantin* [2000 CarswellOnt 3372 (Ont. S.C.J.)], 2000 CanLII 22695, at para. 12:

> When counsel negotiate consent orders on matters affecting only their clients, they can have confidence in the durability of the compromise. The situation may be different where counsel agree and a consent order is made in a matter which affects the parties but which also has an impact on the administration of justice.

31 A consent order preventing settlement of an action for six years has a direct impact on the administration of justice.

32 While courts must be cautious about setting aside consent orders, it is my view that it is in the interests of justice to do so in this case.

33 Accordingly, the motion to set aside the Order of Mullins J. dated July 9, 2013, and the Order of Vallee J. dated July 25, 2013 are granted.

34 Since the moving party was not represented by counsel, there will be no order as to costs.

Motion granted.

Tab 9

Most Negative Treatment: Check subsequent history and related treatments.

2008 ONCA 817
Ontario Court of Appeal

Stoughton Trailers Canada Corp. v. James Expedite Transport Inc.

2008 CarswellOnt 7214, 2008 ONCA 817, [2008] O.J. No. 4864, 173 A.C.W.S. (3d) 75

Stoughton Trailers Canada Corp. (Plaintiff / Respondent) and James Expedite Transport Inc., York Region Courier Service Ltd., Jet Express Canada (2000) Inc., R.E.X. Courier Inc., and Jim Raso also known as Gennaro Raso (Defendants / Appellants)

J. Simmons J.A., K. Feldman J.A., and M. Rosenberg J.A.

Heard: November 20, 2008
Judgment: November 20, 2008
Docket: CA C48675

Proceedings: reversing *Stoughton Trailers Canada Corp. v. James Expedite Transport Inc.* (2008), 2008 CarswellOnt 7344 (Ont. S.C.J.) [Ontario]

Counsel: Brent Pearce for Appellants
Justin M. Jakubiak for Respondent

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
XXII Judgments and orders
XXII.17 Setting aside
XXII.17.a Jurisdiction to set aside

Headnote

Civil practice and procedure --- Judgments and orders — Setting aside — Jurisdiction to set

aside
Plaintiff brought motion for default judgment — Default judgment was awarded and defendants brought motion to set aside default judgment — Defendants sought to adjourn motion — Motion was adjourned on consent order — Defendants brought motion to vary or set aside consent adjournment order — Motion was dismissed and defendants appealed — Appeal allowed — Motion judge improperly limited her discretion to set aside consent judgment — Reasonable grounds existed to doubt correctness of underlying default judgment — As moneys in issue had been paid, it was proper to adjourn motion to set aside to time fixed on consent of parties.

Table of Authorities

Cases considered:

Beetown Honey Products Inc., Re (2003), 2003 CarswellOnt 3755, 46 C.B.R. (4th) 195, 67 O.R. (3d) 511 (Ont. S.C.J.) — considered

Chitel v. Rothbart (1984), 42 C.P.C. 217, 1984 CarswellOnt 358 (Ont. Master) — referred to

Chitel v. Rothbart (1985), 2 C.P.C. (2d) xlix (Ont. Div. Ct.) — referred to

APPEAL by defendants from judgment reported at *Stoughton Trailers Canada Corp. v. James Expedite Transport Inc.* (2008), 2008 CarswellOnt 7344 (Ont. S.C.J.) [Ontario], dismissing defendants' motion to vary consent order adjourning plaintiff's motion for default judgment.

Per Curiam:

1 In our view, the motion judge erred in principle in holding that her discretion to set aside the consent order was circumscribed by the factors set out by Master Sandler in *Chitel v. Rothbart* (1984), 42 C.P.C. 217 (Ont. Master). As pointed out by Sachs J. in *Beetown Honey Products Inc., Re* (2003), 67 O.R. (3d) 511 (Ont. S.C.J.), the discretion is broader and should be exercised where necessary to achieve the justice of the case. See also the decision of the Divisional Court in *Chitel* at (1985), 2 C.P.C. (2d) xlix (Ont. Div. Ct.). In this case, there were reasonable grounds for questioning the correctness of the default judgment especially as against the individual defendant. Also, the funds to comply with the order, while not paid by December 31, 2007, were available before the return date of the motion.

2 Accordingly the appeal is allowed. The parties have advised this court that all amounts

ordered have now been paid. Therefore, the order of Allen J. of March 18, 2008 is set aside and the order of October 23, 2007 is varied to provide that a new date for the motion to set aside the default judgment is to be agreed upon by the parties.

3 Accordingly, the appeal is allowed with costs fixed at $3,500 inclusive of G.S.T. and disbursements.

Appeal allowed.

Tab 10

Most Negative Treatment: Distinguished
Most Recent Distinguished: TNG Acquisition Inc., Re | 2013 ONSC 3098, 2013 CarswellOnt 7582, [2013] O.J. No. 2622, 2 C.B.R. (6th) 272, 230 A.C.W.S. (3d) 969 | (Ont. S.C.J. [Commercial List], May 28, 2013)

2003 CarswellOnt 3755
Ontario Superior Court of Justice

Beetown Honey Products Inc., Re

2003 CarswellOnt 3755, [2003] O.J. No. 3853, [2003] O.T.C. 866, 125 A.C.W.S. (3d) 805, 46 C.B.R. (4th) 195, 67 O.R. (3d) 511

IN THE MATTER OF THE BANKRUPTCY OF BEETOWN HONEY PRODUCTS INC., incorporated under the laws of the Province of Ontario, carrying on business in the Town of Beeton, Township of New Tecumseth, County of Simcoe, Province of Ontario

Sachs J.

Heard: September 10, 2003
Judgment: October 1, 2003
Docket: 31-OR-325795

Counsel: Peter J. Cavanagh for Trustee in Bankruptcy
Rachel Moses for Creditors

Headnote

Judges and courts --- Contempt of court — Procedure — Appeals — Right to appeal
Creditors' claim was disallowed by trustee in bankruptcy in September, 1998 — Creditors appealed from disallowance — Parties exchanged affidavits and attempted to arrange dates for cross-examination — Creditors changed solicitors in June, 2003 but before new solicitors were retained trustee served motion to dismiss creditors' appeal for delay — New solicitors requested withdrawal of dismissal motion — Trustee's solicitors would not withdraw motion without order scheduling dates for cross-examination on affidavits delivered by creditors in support of appeal — Specific dates were agreed to and consent order was obtained before creditors' new counsel had opportunity to complete his review of file — Creditors' counsel subsequently learned that trustee had obtained audit report that contained information relevant to issues on appeal — Creditors' counsel requested production of report and indicated he would not produce witness for cross-examination in accordance with consent order until he had opportunity to review report — Trustee refused to produce report and insisted that terms of consent order regarding dates of examinations be complied with — Trustee brought motion for order dismissing creditors' appeal from disallowance — Motion dismissed — Circumstances had changed subsequent to consent order — As soon as changed circumstances came to attention of creditors' counsel he advised other side and indicated that he would be taking steps to get matter back before court — Record did not disclose reason to believe that if creditors motion were not dismissed court's ability to enforce its own orders would be undermined — Alleged contempt arose out of single incident in context of legitimate dispute between counsel — Creditors' counsel was not motivated by desire to further delay proceedings — Negative impact on administration of justice would be greater if creditors were denied their right to have appeal heard than if another opportunity for cross-examinations to take place were granted.

Bankruptcy and insolvency --- Practice and procedure in courts — Discovery and examinations — Evidentiary issues — Privilege — General principles
Creditors' claim was disallowed by trustee in bankruptcy in September, 1998 — Creditors appealed from disallowance —

Parties exchanged affidavits and attempted to arrange dates for cross-examination — Creditors changed solicitors in June, 2003 but before new solicitors were retained trustee served motion to dismiss creditors' appeal for delay — New solicitors requested withdrawal of dismissal motion — Trustee's solicitors would not withdraw motion without order scheduling dates for cross-examination on affidavits delivered by creditors in support of appeal — Specific dates were agreed to and consent order was obtained before creditors' new counsel had opportunity to complete his review of file — Creditors' counsel subsequently learned that trustee had obtained audit report that contained information relevant to issues on appeal — Creditors' counsel requested production of report and indicated he would not produce witness for cross-examination until he had opportunity to review report — Trustee refused to produce report and insisted that terms of consent order regarding dates of examinations be complied with — Creditors brought motion for order requiring trustee in bankruptcy to produce audit report — Motion granted — Claiming litigation privilege over audit report ran contrary to general duties and responsibilities of trustee in bankruptcy — Harm of recognizing privilege would outweigh benefits — Unlike other parties to litigation trustee is officer of court and must represent all creditors impartially and evenhandedly — Claiming litigation privilege would call into question trustee's impartiality, particularly as creditors claimed that report demonstrated that there had been no improprieties — Trustees are expected to be dispassionate and non-adversarial — Claim of litigation privilege is claim that is meant to reinforce process that is fundamentally adversarial in nature.

Bankruptcy and insolvency --- Administration of estate — Trustees — Duty to act fairly
Creditors' claim was disallowed by trustee in bankruptcy in September, 1998 — Creditors appealed from disallowance — Parties exchanged affidavits and attempted to arrange dates for cross-examination — Creditors changed solicitors in June, 2003 but before new solicitors were retained trustee served motion to dismiss creditors' appeal for delay — New solicitors requested withdrawal of dismissal motion — Trustee's solicitors would not withdraw motion without order scheduling dates for cross-examination on affidavits delivered by creditors in support of appeal — Specific dates were agreed to and consent order was obtained before creditors' new counsel had opportunity to complete his review of file — Creditors' counsel subsequently learned that trustee had obtained audit report that contained information relevant to issues on appeal — Creditors' counsel requested production of report and indicated he would not produce witness for cross-examination until he had opportunity to review report — Trustee refused to produce report and insisted that terms of consent order regarding dates of examinations be complied with — Creditors brought motion for order requiring trustee in bankruptcy to produce audit report — Motion granted — Claiming litigation privilege over audit report ran contrary to general duties and responsibilities of trustee in bankruptcy — Harm of recognizing privilege would outweigh benefits — Unlike other parties to litigation trustee is officer of court and must represent all creditors impartially and evenhandedly — Claiming litigation privilege would call into question trustee's impartiality, particularly as creditors claimed that report demonstrated that there had been no improprieties — Trustees are expected to be dispassionate and non-adversarial — Claim of litigation privilege is claim that is meant to reinforce process that is fundamentally adversarial in nature.

Table of Authorities

Cases considered by *Sachs J.*:

Apple Computer Inc. v. Mackintosh Computers Ltd. (1987), 14 C.I.P.R. 1, 16 C.P.R. (3d) 1, *(*sub nom. *Mackintosh Computers Ltd. v. Apple Computers Inc.)* 78 N.R. 161, [1988] 1 F.C. 191, 1987 CarswellNat 649, 1987 CarswellNat 876 (Fed. C.A.) — considered

Chitel v. Rothbart (1984), 42 C.P.C. 217, 1984 CarswellOnt 358 (Ont. Master) — considered

Chitel v. Rothbart (1985), 2 C.P.C. (2d) xlix (Ont. Div. Ct.) — referred to

Chitel v. Rothbart (1985), 15 C.P.C. (2d) xlviii (Ont. C.A.) — referred to

Confederation Treasury Services Ltd., Re (1995), 37 C.B.R. (3d) 237, 1995 CarswellOnt 1169 (Ont. Bktcy.) — considered

Eskasoni Fisheries Ltd., Re (2000), 2000 CarswellNS 116, 16 C.B.R. (4th) 173, 187 N.S.R. (2d) 363, 585 A.P.R. 363 (N.S. S.C.) — referred to

General Accident Assurance Co. v. Chrusz (1999), 1999 CarswellOnt 2898, 45 O.R. (3d) 321, 124 O.A.C. 356, 180

D.L.R. (4th) 241, 38 C.P.C. (4th) 203 (Ont. C.A.) — considered

Hadkinson v. Hadkinson (1952), [1952] 2 All E.R. 567, [1952] 2 T.L.R. 416, [1952] P. 285 (Eng. C.A.) — considered

Harwood v. Wilkinson (1929), 64 O.L.R. 392, [1929] 4 D.L.R. 734 (Ont. H.C.) — referred to

Harwood v. Wilkinson (1929), 64 O.L.R. 658, [1930] 2 D.L.R. 199 (Ont. C.A.) — considered

Harwood v. Wilkinson (1930), [1931] S.C.R. 141, [1931] 2 D.L.R. 479, 1930 CarswellOnt 72 (S.C.C.) — referred to

Paul Magder Furs Ltd. v. Ontario (Attorney General) (1991), 3 C.P.C. (3d) 240, 85 D.L.R. (4th) 694, (sub nom. *Magder (Paul) Furs Ltd. v. Ontario (Attorney General))* 52 O.A.C. 151, (sub nom. *Ontario (Attorney General) v. Paul Magder Furs Ltd.)* 6 O.R. (3d) 188, 1991 CarswellOnt 403 (Ont. C.A.) — followed

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, 1988 CarswellPEI 11 (P.E.I. T.D.) — considered

Skipper Fisheries Ltd. v. Thorbourne (1997), 145 D.L.R. (4th) 28, 157 N.S.R. (2d) 241, 462 A.P.R. 241, 1997 CarswellNS 20 (N.S. C.A.) — considered

Touche Ross Ltd. v. Weldwood of Canada Sales Ltd. (1983), 48 C.B.R. (N.S.) 83, 1983 CarswellOnt 214 (Ont. S.C.) — considered

***Sachs J.*:**

INTRODUCTION

1 There were two motions before me. The first, brought by the Trustee in Bankruptcy, was a motion for an order dismissing the appeal of two Creditors from the disallowance by the Trustee of their claim. The grounds for the motion were that the Creditors were in contempt of a consent order that required one of them, and an expert they had retained, to attend to be cross-examined on affidavits filed by the Creditors in support of their appeal. The second motion before me was brought by the Creditors. In their motion, the Creditors sought an order requiring the Trustee to produce a report of an investigation conducted by Price Waterhouse into the affairs of the bankrupt company. They also sought an order varying the order they had originally consented to, such that their expert was not required to attend for cross-examination on his affidavit until he had had the opportunity to review, consider and reply to the Price Waterhouse report.

2 The Trustee submitted that I should not consider the Creditors' motion because of their alleged contempt and further, they resisted production of the report on two grounds:

(a) The request for production was premature; and

(b) The report was subject to a claim of litigation privilege.

THE FACTS

3 On January 29, 1997, Beetown Honey Products Inc. ("Beetown") filed an Assignment in Bankruptcy and a Trustee in Bankruptcy was appointed ("the Trustee"). A claim was made by Donald Couture and Beverly Couture ("the Creditors") in the bankruptcy of Beetown as secured creditors. The claim was disallowed by the Trustee on September 2, 1998.

4 On November 9, 1998 a motion was brought by the Creditors by way of appeal from the disallowance of their claim.

The motion was supported by an affidavit from Donald Couture. An affidavit in response was delivered on behalf of the Trustee. Thereafter, the solicitor for the Creditors advised that he intended to deliver reply material. In April of 1999, the Trustee began pressing for that material. For a variety of reasons, that material was not delivered until May of 2000. The material included an affidavit from David Pawlett, which contained a financial analysis of the business of Beetown an analysis directed at challenging the basis for the disallowance of the Creditors' claim. The reply material also included a supplementary affidavit from Donald Couture.

5 In November of 2001, the Trustee filed a responding affidavit and their counsel contacted the Creditors' counsel to arrange for dates to cross-examine Mr. Couture and Mr. Pawlett on their affidavits. In June of 2002, when no dates were forthcoming, the Trustee served Notices of Examination to cross-examine the deponents in question in July of 2002. Counsel for the Creditors advised the Trustees solicitor that the deponents would not attend and certificates of non-attendance were obtained. Subsequently, attempts were made to arrange further dates. These attempts were suspended when the Creditors decided to retain new solicitors to represent them. There was a gap of some months between the time that the Creditors original solicitors ceased to be solicitors of record and the new solicitors were retained.

6 In June of 2003, before the new solicitors were retained, the Trustee served a motion seeking an order dismissing the Creditors' appeal for delay. That motion was returnable on June 19, 2003. On June 6, 2003 the Creditors' current solicitors received the file and went on record. The file consisted of four boxes of material.

7 A request was made by the new solicitors to withdraw the June 19, 2003 motion. The Trustee's solicitors were not prepared to withdraw their motion without an order that scheduled the cross-examinations on the affidavits delivered by the Creditors in support of their appeal. Specific dates were agreed to, and a consent order was obtained from the Registrar in Bankruptcy that Donald Couture was to attend to be cross-examined on July 17, 2003 and David Pawlett was to be cross-examined on July 18, 2003.

8 According to the material before me, these dates were agreed to before the Creditors' counsel had had an opportunity to complete his review of the file. After the order, counsel completed his review, met with Mr. Couture and Mr. Pawlett, and learned that the Trustee had obtained an audit report from Price Waterhouse that contained information that was relevant to the issues on the appeal.

9 Counsel for the Creditors immediately wrote to the Trustee's counsel to request production of the report, and indicated that he would not be producing Mr. Pawlett for cross-examination until Mr. Pawlett had had the opportunity to review the report and file a supplementary affidavit in relation to it. Counsel for the Trustee refused to produce the report and was adamant that the terms of the court order be complied with. Counsel for the Creditors indicated that he would produce Mr. Couture as ordered, but intended to bring a motion seeking production of the report. In the result, neither cross-examination took place. Shortly thereafter the two motions before me were brought.

MOTION TO DISMISS

10 In the submission of the Trustee, the conduct of the Creditors in refusing to comply with the terms of the Registrar's order of June 16, 2003 was "egregious, calculated and amounted to the flagrant and intentional disregard of a valid and binding order of this Court to which they had given their consent". The Trustee argued that the contempt could not be remedied by setting another date for Mr. Pawlett's cross-examination as to do so would give the Creditors the delay they were seeking in the first place.

11 The Trustee did not dispute that I had the discretion to vary the consent order. However, they argued, based on the decision of *Chitel v. Rothbart*, [1984] O.J. No. 2238 (Ont. Master), that a consent order can only be set aside or varied by "subsequent consent, or upon the grounds of a common mistake, misrepresentation or fraud, or on any other ground which would invalidate a contract". They further argued that none of these grounds were present in this case. The decision in *Chitel v. Rothbart* was a decision of Master Sandler. It was upheld both by the Divisional Court [(1985), 2 C.P.C. (2d) xlix (Ont. Div. Ct.)] and by the Court of Appeal [(1985), 15 C.P.C. (2d) xlviii (Ont. C.A.)]. However, neither of the upper courts dealt specifically with the question of whether a court's discretion to intervene with respect to a consent court order was limited in the way articulated in paragraph 25 of Master Sandler's decision.

12 In the case before me, there is uncontradicted evidence that the circumstances changed subsequent to the consent. As soon as these circumstances came to the attention of counsel who entered into the consent, he advised counsel for the other side, and indicated that he would be taking steps to get the matter back before the court. In fact, while these steps were not taken before the examinations that were scheduled to be held took place, they were taken very shortly thereafter. In these circumstances, is it appropriate to dismiss the Creditors' appeal, thereby, in effect, refusing them the right to be heard?

13 The general rule concerning hearing from parties in contempt is stated by Brooke J.A. in *Paul Magder Furs Ltd. v. Ontario (Attorney General)* (1991), 6 O.R. (3d) 188, [1991] O.J. No. 2025 (Ont. C.A.):

> In my opinion, it is an abuse of process to assert a right to be heard by the court and at the same time refuse to undertake to obey the order of the court so long as it remains in force . . . . It is a general rule that a party in contempt will not be heard in the proceedings until the contempt is purged: *Hadkinson v. Hadkinson*, [1952] 2 All E.R. 567, [1952] 2 T.L.R.416 (C.A.), at p. 569 All E.R.; *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees* (1986), *59 Nfld. & P.E.I.R. 93* (Nfld. C.A.), at p. 95.

However, while there is a general rule, courts have also emphasized the seriousness of refusing to hear from parties to a dispute, and have held that disobeying a court order is not necessarily a bar to being heard.
In *Apple Computer Inc. v. Mackintosh Computers Ltd.* (1987), [1988] 1 F.C. 191, [1987] F.C.J. No. 516 (Fed. C.A.) Urie J. referred to the reasons of Denning J. in *Hadkinson v. Hadkinson*, [1952] P. 285 (Eng. C.A.), at 298:

> It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance. In this regard I would like to refer to what Sir George Jessel M.R. said in a similar connexion in *In re Clements v. Erlanger* ((1877) 46 L.J.Ch. 375, 383): "I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction." Applying this principle I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by [page205] making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.

Urie J. held at para. 34:

> . . . the preferable rule is that, in the exercise of its discretion to permit an appeal to proceed or to refuse to do so, a court must have regard, inter alia, to the particular circumstances of the contempt and its effect on the proper administration of justice, i.e. whether it constitutes an impediment to the course of justice. Whether or not it will, of course, will be dependent upon the facts of the contempt and the Court's view of their effect. It should thus be borne in mind that, in this case, the contempt arose out of a single incident. Whether there were other incidents of a similar kind we do not know. We must presume that there will not be and ought not to speculate that there will be additional acts of contempt committed. The situation thus differs from the factual situation in *Hadkinson* and other cases like it where the contempt continued and where, unlike here, there were no other remedies available to enforce the Court's order. To paraphrase Denning L.J., the course of justice is not continuing to be impeded. I would, therefore, refuse the application for a stay.

In *Skipper Fisheries Ltd. v. Thorbourne*, [1997] N.S.J. No. 56 (N.S. C.A.), Hallett J.A. held at para. 93,

> The sanction of dismissing a plaintiff's action is as serious a sanction as can be imposed for contempt for disobedience of a court order. Accordingly, such a sanction should be imposed only if the court order has been clearly disobeyed.

Hallett J.A. referred at para. 89 to *Harwood v. Wilkinson* (1929), [1930] 2 D.L.R. 199 (Ont. C.A.), rev'g [1929] 4 D.L.R. 734 (Ont. H.C.), aff'd [1931] 2 D.L.R. 479 (S.C.C.), where the Ontario Supreme Court, Appeal Division dealt with an appeal from an action which was dismissed partly because of the Plaintiff's alleged contempt in refusing to answer questions at a discovery examination. The Appeal Division allowed the appeal and overturned the dismissal of the action. Riddell, J.A. stated at p. 201:

> The dismissal of the action is only to be ordered in the case of a wilfully disobedient party, not of one who has made a mistake on the advice of counsel or otherwise and it is done only in the last resort. *Twycross v. Grant*, [1875] W.N. 201, 229; *Fisher v. Hughes* (1875), 25 W.R. 528; *Pike v. Keene* (1876), 35 L.T. 34.1. In general, another opportunity is given to act properly and answer the questions, even after an order has been made and disobeyed: *Denham v. Gooch* (1890), 13 P.R. (Ont.) 344.

In *Harwood v. Wilkinson*, the Supreme Court of Canada affirmed the judgment of the Appeal Division.

14 In this case, the record does not disclose a reason to believe that if discretion is not exercised the Court's ability to enforce its own orders may be undermined. The alleged contempt arose out of a single incident, in the context of what appears to me to be a legitimate dispute between counsel. While I can understand Trustees counsel's frustration with the delays that have occurred in this case, I do not accept that in this situation, Creditors' counsel was motivated by a desire to further delay these proceedings. In my view, the negative impact on the administration of justice would be greater if the Creditors were denied their right to have their appeal heard than if I exercised my discretion to grant another opportunity for cross-examinations to take place.

MOTION FOR PRODUCTION

15 The Trustee's first position on the Creditors' motion for production was that I should not hear it because of the moving parties' contempt. For the reasons given above, that submission is rejected.

16 The Trustee then argued that the motion was premature and improperly brought. An appeal from the disallowance of a Creditor's claim in a bankruptcy is a hearing *de novo* (*Eskasoni Fisheries Ltd., Re* (2000), 16 C.B.R. (4th) 173 (N.S. S.C.)). The Creditors submit that the report is relevant and thus, should be subject to production at the earliest possible opportunity. The Trustee did not make any argument before me that the report was not relevant. Their submission was that is was subject to litigation privilege. I agree with the Creditors that if the report has a semblance of relevance it should be produced sooner rather than later, unless production is inappropriate for reasons such as privilege.

17 The material filed by the Trustee with respect to the claim of litigation privilege was limited. However, for the purposes of determining this point, I am prepared to assume that the report was prepared for the Trustee after the Creditors filed their appeal and further, that it was prepared in order to assist the Trustee in dealing with that appeal. The question is whether, given the role of the Trustee in bankruptcy proceedings, and the rationale behind litigation privilege, it is appropriate for a Trustee to assert that privilege in these circumstances.

18 In *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (Ont. C.A.) the Court of Appeal discussed the rationale for litigation privilege. In doing so, they quoted from a lecture given by R.J. Sharpe, prior to his judicial appointment, where he stated . . .

> Litigation privilege . . . is geared directly to the process of litigation. Its process is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).
>
> **RATIONALE FOR LITIGATION PRIVILEGE**
>
> Relating litigation privilege to the needs of the adversarial process is necessary to arrive at an understanding of its content and effect. The effect of a rule of privilege is to shut out the truth, but the process which litigation privilege is aimed to protect the adversary process among other things, attempts to get at the truth. There are then, competing interests to be considered when a claim of privilege is asserted; there is a need for a zone of privacy to facilitate adversarial preparation; there is also the need for disclosure to foster fair trial". (*General Accident* at p. 3).

19 The Court of Appeal then went on to set out the two-fold test for litigation privilege. First, the party claiming the privilege must show that the document's dominant purpose was in contemplation of litigation. Second, a "competing interests approach" must be applied to determine whether "the harm flowing from non-disclosure clearly outweighs the benefit accruing from the recognition of the privacy interest resisting production".

20 In this case, even if I accept that the dominant purpose of the report in question was in contemplation of litigation, it is my view that claiming litigation privilege over this type of report would run contrary to the general duties and responsibilities of Trustees in Bankruptcy. As such, the harm of recognizing the privilege would outweigh the benefits.

21 I say this because, unlike other parties to litigation, a Trustee is an officer of the court and must represent all Creditors impartially and even-handedly. Claiming litigation privilege in this case would call into question the Trustee's impartiality, particularly in this instance where the claim by the Creditors is that the report demonstrates that there had been no improprieties.

22 In their text, *Bankruptcy and Insolvency Law of Canada*, Morowetz and Houlden state the following 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. . . .

In *Confederation Treasury Services Ltd., Re*, [1995] O.J. No. 3993 (Ont. Bktcy.), Farley J. of this Court further noted:

> 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.

Citing *Prince Edward Island v. Bank of Nova Scotia* (1988), 70 C.B.R. (N.S.) 209 (P.E.I. T.D.) 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 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.

Morowetz & Houlden state that:

> The trustee has an obligation to be neutral and evenhanded in its dealings with all classes or creditors and with the bankrupt. The court must ensure that the trustee has been transparent and evenhanded in meeting these obligations: *Engles v. Richard Killen & Associates Ltd.*(2002), 35 C.B.R. (4th) 77, 2002 Carswell Ont. 2435 (Ont. S.C.J.)

23 Trustees are expected to be dispassionate and non-adversarial. This expectation has been underlined in relation to Trustees giving evidence. While the motion before me does not involve the giving of evidence, the claim of litigation privilege is a claim that is meant to reinforce a process that is fundamentally adversarial in nature.
In *Touche Ross Ltd. v. Weldwood of Canada Sales Ltd.* (1983), 48 C.B.R. (N.S.) 83 (Ont. S.C.), Smith J. criticized the hostile nature of the trustee during his testimony.
Morawetz & Houlden state:

> In bringing proceedings such as an application to set aside a fraudulent preference, the trustee in giving evidence should not adopt an adversarial or hostile role . . . Rather, he should present the relevant facts to the court in a dispassionate, non-adversarial manner, and leave the mater to the court for decision.

Thus, I find that the report in question should not be shielded from production by a claim of litigation privilege.

CONCLUSION

24 For these reasons, the motion to dismiss the appeal is dismissed. The motion for an order requiring production of the Audit Report is allowed. The Report shall be produced on or before the 15th of October 2003. Any further material to be relied upon by the Creditors shall be delivered on or before the 15th of November 2003 and cross-examinations of Mr. Couture and Mr. Pawlett shall take place prior to December 15, 2003. If counsel cannot agree on a particular date, I may be spoken to. The parties may make submissions to me in writing on the question of costs within 10 days of the release of these reasons.

Trustee's motion dismissed; creditors' motion granted.

Tab 11

Most Negative Treatment: Check subsequent history and related treatments.

2016 ONCA 377
Ontario Court of Appeal

Clatney v. Quinn Thiele Mineault Grodzki LLP

2016 CarswellOnt 7878, 2016 ONCA 377, [2016] O.J. No. 2610, 131 O.R. (3d) 511, 265 A.C.W.S. (3d) 1072, 349 O.A.C. 286, 399 D.L.R. (4th) 343, 86 C.P.C. (7th) 1

Mark Clatney, Applicant (Appellant) and Quinn Thiele Mineault Grodzki LLP and Bertschi Orth Solictors and Barristers LLP, Respondents (Respondents)

E.A. Cronk, Gloria Epstein, Grant Huscroft JJ.A.

Heard: November 13, 2015
Judgment: May 19, 2016*
Docket: CA C60500

Counsel: Paul Auerbach, for Paul Auerbach
William R. Hunter, for Respondent, Quinn Thiele Mineault Grodzki
Cheryl Letourneau, for Respondent, Bertschi Orth Solicitors and Barristers

Subject: Civil Practice and Procedure; Public; Torts

Related Abridgment Classifications

Civil practice and procedure
XXII Judgments and orders
XXII.17 Setting aside
XXII.17.b Grounds for setting aside
XXII.17.b.vi Miscellaneous

Professions and occupations
IX Barristers and solicitors
IX.5 Fees
IX.5.f Accounting and refunding by solicitor
IX.5.f.iv Application for assessment, review, or taxation of account
IX.5.f.iv.A Entitlement to assessment or review

Headnote

Civil practice and procedure --- Judgments and orders — Setting aside — Grounds for setting aside — Miscellaneous
Consent order — Client retained law firm BO to represent him in action arising from motor vehicle accident, but later hired law firm QT — Client's tort action was settled for $800,000, which included total of $175,000 for client's wife and children — BO obtained charging order against settlement funds — As client was experiencing financial difficulties, he agreed to settle law firms' accounts in fee agreements, which were set out in consent order that provided for release of funds with law firms receiving $310,000 and client receiving $274,142 — Application judge dismissed client's application for order setting aside consent order and referring law firms' accounts to assessment, on basis that he lacked jurisdiction due to consent order — Client appealed — Appeal allowed — Judge erred in finding that he lacked jurisdiction to consider client's request for order assessing law firms' accounts and in failing to consider request to set aside consent order — It was necessary to set aside consent order to achieve justice between parties — Charging order should not have been granted over entire amount of settlement funds — QT's conduct was problematic, especially given client's vulnerability and financial pressure — Fee agreements were not negotiated in circumstances in which client would have understood impact on amount he would ultimately receive — Law firms would not suffer prejudice if consent order were set aside — Consent order did not promote public interest, ensure public confidence in administration of justice or protect client.

Professions and occupations --- Barristers and solicitors — Fees — Accounting and refunding by solicitor — Application for assessment, review, or taxation of account — Entitlement to assessment or review
Consent order — Client retained law firm BO to represent him in action arising from motor vehicle accident, but later hired law firm QT — Client's tort action was settled for $800,000, which included total of $175,000 for client's wife and children — BO learned of settlement and obtained charging order against settlement funds — As client was experiencing financial difficulties, he agreed to settle law firms' accounts in fee agreements, which were set out in consent order that provided for release of funds with law firms receiving $310,000 and client receiving $274,142 — Application judge dismissed client's application for order referring law firms' accounts to assessment pursuant to Solicitors Act — Client appealed — Appeal allowed — Consent order was set aside, and costs, fees, charges and disbursements were to be assessed — It was necessary to set aside consent order to achieve justice between parties — Because amounts agreed upon in fee agreements had been paid, s. 25 of Act applied — Special circumstances existed, as client was vulnerable, under intense financial pressure, and did not have independent legal advice — QT did not protect client's interests, provided erroneous legal advice, and exerted pressure on client to settle — These factors put client in position where he had little choice but to enter into fee agreements — Protection of client's interests and public's confidence in administration of justice required that fee agreements be reopened and assessment

be ordered — Consent order did not act as substitute for assessment.

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Cookish v. Paul Lee Associates Professional Corp. (2013), 2013 ONCA 278, 2013 CarswellOnt 5070, 39 C.P.C. (7th) 227, 305 O.A.C. 359 (Ont. C.A.) — referred to

Echo Energy Canada Inc. v. Lenczner Slaght Royce Smith Griffin LLP (2010), 2010 ONCA 709, 2010 CarswellOnt 8065, 92 C.P.C. (6th) 1, 325 D.L.R. (4th) 518, 269 O.A.C. 382, 104 O.R. (3d) 93 (Ont. C.A.) — referred to

Finlay v. Van Paassen (2010), 2010 ONCA 204, 2010 CarswellOnt 1543, 318 D.L.R. (4th) 686, 101 O.R. (3d) 390, 266 O.A.C. 239 (Ont. C.A.) — considered

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Price v. Sonsini (2002), 2002 CarswellOnt 2255, 215 D.L.R. (4th) 376, 22 C.P.C. (5th) 1, 60 O.R. (3d) 257, 162 O.A.C. 85 (Ont. C.A.) — considered

R. v. Wilson (1983), [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577, 51 N.R. 321, [1984] 1 W.W.R. 481, 26 Man. R. (2d) 194, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97, 1983 CarswellMan 154, 1983 CarswellMan 189 (S.C.C.) — referred to

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Stoughton Trailers Canada Corp. v. James Expedite Transport Inc. (2008), 2008 ONCA 817, 2008 CarswellOnt 7214 (Ont. C.A.) — referred to

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Family Law Act, R.S.O. 1990, c. F.3
Generally — referred to

Solicitors Act, R.S.O. 1990, c. S.15
Generally — referred to

s. 11 — considered

s. 15 — referred to

s. 16 — considered

s. 16(1) — considered

ss. 20-32 — referred to

s. 25 — considered

s. 28.1(10) [en. 2002, c. 24, Sched. A, s. 4] — referred to

Rules considered:

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R. 1.04(1) — considered

R. 2.01 — considered

R. 2.01(1) — considered

R. 2.01(2) — considered

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R. 59.06 — considered

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APPEAL by client from judgment, dismissing client's application for order setting aside consent order and referring law firms' accounts to assessment.

***Gloria Epstein J.A.*:**

Overview

1 At the heart of this appeal lies the importance of public confidence in the administration of justice and, in that context, the court's supervisory role over the appropriate compensation for legal services.

2 In March 2008, the appellant was seriously injured in a motor vehicle accident. The respondents are the law firms that represented him in his tort claim. This claim was settled in July 2013 for $800,000, an amount that included *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*") claims advanced by the appellant's wife and two teenaged sons. Certain funds were distributed,

as will be discussed in further detail below.

3 Under a court order dated August 21, 2013, the settlement monies that then remained, approximately $655,000, were held under a charging order pending resolution of the accounts of the respondent, Bertschi Orth Solicitors and Barristers LLP ("Bertschi Orth"),[1] for fees rendered and disbursements incurred in representing the appellant in the initial stages of his tort action. In November 2013, $70,000 of that $655,000 was paid into court on behalf of the appellant's sons.

4 On December 3, 2013, an order was issued on consent (the "Consent Order") that provided for the release of the remaining monies, approximately $585,000. The Consent Order specified payment to the respondents of amounts in full satisfaction of their fees and disbursements, with the remainder to the appellant. As a result of this order, the appellant realized a net amount of $274,142.47. The respondents received $310,000, in total.

5 On November 25, 2014, the appellant brought an application for an order referring the respondents' accounts to assessment pursuant to the provisions of the *Solicitors Act*, R.S.O. 1990, c. S.15. The application judge dismissed the application on the basis that, in the light of the Consent Order, he lacked jurisdiction to hear the matter. The appellant appeals.

6 For the reasons that follow, I am of the view that the application judge had jurisdiction to refer the respondents' accounts to assessment and erred in law in holding otherwise. I would allow the appeal, set aside the Consent Order, and direct the respondents' accounts to be assessed.

The Background Facts

7 At the time of the accident, the appellant was 46. He was then living with his wife and two teenaged sons. Following the accident, the appellant lost his job, and he and his wife separated.

The initial retainer

8 In January 2009, the appellant retained Bertschi Orth to represent him in his tort and accident benefits claims.[2] The appellant entered into a contingency retainer agreement with Bertschi Orth that provided for payment of fees equal to 35% of damages recovered, plus disbursements incurred on his behalf, plus GST. The agreement contained a provision stating that, if the appellant terminated the retainer prior to the resolution of his claim, he would pay Bertschi Orth all fees, disbursements and charges for services rendered by it to the date of termination.

The change in solicitors and the settlement

9 In November 2012, the appellant terminated Bertschi Orth's retainer and hired the respondent, Quinn Thiele Mineault Grodzki LLP ("Quinn Thiele"). Jaimie Noel, a lawyer at Quinn Thiele who had been representing the appellant's sons on their *FLA* claims, agreed to represent the appellant in his tort claim and to continue to represent his sons. She had previously worked at Bertschi Orth.

10 The appellant entered into a contingency fee agreement with Quinn Thiele that provided for payment of fees equal to 30% of damages recovered, plus disbursements incurred, plus HST.

11 No written undertaking was given by Quinn Thiele or by the appellant in relation to Bertschi Orth's fees and disbursements. Correspondence from Bertschi Orth indicates that it was prepared to negotiate the amount owing and recognized the potential need for "a reduction... on a pro rata basis depending upon the settlement amount, the amount recovered for fees, and the time [the] firms spent on the file." Ms. Noel informed Bertschi Orth that she did not have instructions from her client to agree to pay Bertschi Orth's account or disbursements. Her evidence was that she advised the appellant that the fees to be charged by Quinn Thiele pursuant to their retainer agreement were separate from any fees owing to Bertschi Orth.

12 In December 2012, Bertschi Orth delivered a draft account to the appellant setting out $106,000 in fees and over $7,000 in disbursements. The total balance due, including HST, was identified as $117,333.17.

13 Ms. Noel scheduled a mediation of the tort action for July 2, 2013. The mediation proceeded and the action was settled for $800,000 - $625,000 to the appellant, $105,000 to his wife and $35,000 to each of the two children. Of the appellant's $625,000, $20,000 had been received by him in advance and a further $20,000 was paid for costs of one of the co-defendants in the action.

14 Ms. Noel did not obtain written instructions from the appellant confirming his net recovery after payment of fees and disbursements to either of the respondent law firms. The appellant's contemporaneous notes suggest that he expected to receive a net amount of no less than $400,000 from the settlement.

The charging order

15 Later in July 2013, Bertschi Orth learned of the settlement and moved to obtain a charging order against the settlement funds.

16 On August 12, 2013, Smith J. of the Superior Court of Justice endorsed the record requesting a charging order, to the effect that "[n]one of the settlement funds" were to be disbursed until Bertschi Orth's account was assessed and the "respective share of fee[s] between Bertschi Orth and [Quinn Thiele had] been determined".

17 Quinn Thiele had prepared a response on the appellant's behalf to Bertschi Orth's motion for a charging order but the materials were not filed in time. The responding motion record was eventually filed and, on August 14, 2013, Smith J. further endorsed the record to the effect that all settlement funds were to be subject to a charging order until Bertschi Orth's account was assessed.

18 By order dated August 21, 2013, Smith J. revised the August 12 endorsement (as modified by the August 14 endorsement) by providing that "the settlement funds [would] be held in trust by [Quinn Thiele] but not distributed until such time as the completion of the assessment of the [Bertschi Orth] account; and distributed on consent or after a further order [was] obtained" (the "Charging Order").

Fee discussions and correspondence

19 Shortly after the date of the Charging Order, the parties started to address the amounts the appellant owed the respondents for their legal services.[3]

20 On October 7, 2013, Bertschi Orth obtained an order from the Registrar for the assessment of its account. Later, the assessment hearing was set for January 21, 2014.

21 At this point in time, the appellant was experiencing mounting financial pressure, a situation he made clear to Quinn Thiele on several occasions.

22 The first indication that the appellant communicated his financial problems to Quinn Thiele appears in an October 9, 2013 email from the appellant to Ms. Noel. In that email, the appellant requested $34,000 to "resolve debt issues" and stated that he "[would] need to claim bankruptcy". Ms. Noel responded the next day, stating that she would "look into whether payment [could] be issued".

23 In a lengthy email sent on October 23, 2013, Mikolaj Grodzki, a partner at Quinn Thiele, advised the appellant that the firm could not represent him in any assessment of Bertschi Orth's account because Ms. Noel had formerly been an associate at Bertschi Orth. Mr. Grodzki relied on the alleged conflict to urge the appellant to settle Quinn Thiele's account before dealing with Bertschi Orth's account, so that the "obstacle" to negotiating Bertschi Orth's fees could be removed:

> [Quinn Thiele's] interest to protect our earned fees and to assert a claim for them conflicts with the need to represent your interests against [Bertschi Orth] at this time. Accordingly, we need to remove this obstacle and settle our account with you now. This will be an amount that you agree to pay regardless of the outcome of the assessment of the [Bertschi Orth] matter.... lf we can do this, then I can focus entirely on representing your interests against [Bertschi Orth] and not on protecting [Quinn Thiele's] financial interests in the file.

24 Mr. Grodzki went on to advise the appellant that a resolution of Quinn Thiele's account would assist him in the pending assessment of Bertschi Orth's account:

> We would prefer to reach a mutually acceptable amount and consent to have [Quinn Thiele's] account assessed in that amount. This would then also be evidence for the assessment hearing of what you are paying the lawyers who did the work and settled the case. This is a relevant factor in assessing the [Bertschi Orth] law account.

25 In this email, Mr. Grodzki also stressed that the "the assessment process itself [would] be lengthy" and that the legal costs associated with the assessment would be high.

26 On October 29, 2013, Quinn Thiele delivered a form of account to the appellant claiming fees, disbursements and HST totalling $305,159.14.[4] Accordingly, at that point in time, Quinn Thiele and Bertschi Orth were asserting claims of fees and disbursements in an aggregate amount in excess of $422,000 — almost two-thirds of the $695,000 allocated to the appellant and his sons.

27 On November 4, 2013, Quinn Thiele offered to settle its account with the appellant for $215,000.

28 On November 5, 2013, the appellant delivered a Notice of Intention to Act in Person in the assessment of the Bertschi Orth account.

29 On November 13, 2013, the appellant again communicated his financial stress, this time to both firms. He wrote to several individuals at Quinn Thiele and Bertschi Orth, requesting $50,000 to "prevent any further financial hardship, bankruptcy and [to] pay off several long overdue bills." He asked both firms to confirm their agreement, and requested that Quinn Thiele advise what paperwork was required at his end.

30 On November 14, 2013, Cheryl Letourneau, counsel at Bertschi Orth, responded on behalf of the firm indicating that it would consent to the release of $50,000, provided the firm was given $8,175.35 of that amount to cover disbursements. By email that same day, the appellant accepted Bertschi Orth's offer.

31 Quinn Thiele, however, took a different position. On November 16, 2013, Mr. Grodzki emailed the appellant as follows: "Please review the [Charging Order], the Court ordered that both accounts ([Bertschi Orth] and us) have to be settled before any funds released. The consent from [Ms. Letourneau] is useless." The appellant responded the next day, explaining his belief that consent among the parties was sufficient for the funds to be released.

32 On November 19, 2013, the appellant again informed Quinn Thiele that, in his view, a court motion was not required for the release of the requested funds. The appellant requested payment of $8,175.35 to Bertschi Orth, and $41,824.65 to himself. He concluded, highlighting his mounting financial pressures a third time: "I want to stress to the partners HOW URGENT this matter is from a personal and financial matter."

33 Mr. Thiele responded to the appellant on November 20, 2013 in an email saying:

> I note your comment that a Court order is not required, that the consent from Ms. Letourneau is enough. Frankly, that is simply not true. The Court has ordered the proceeds charged and prohibits our dealing with the funds until the assessment. Ms. Letourneau's consent does not carry the same weight as a Court Order and she, (like every other lawyer) does not have the power to over-ride a Judge's order. Only a Judge may undo or change a Judge's order. That being said, with consent, we can fairly quickly get a Judge to make a new order releasing funds etc., so long as there is consent. This is often and normally done on a Friday in express motions court. The earliest that anyone in this office could draft and attend to such a motion would be November 29, 2013.

He noted that it was his understanding that Mr. Grodzki had offered to settle the firm's account with the appellant for $210,000.

The Settlement, the Fee Agreements and the Consent Order

34 The appellant responded at 4:29 a.m. on November 21, 2013, agreeing to take Quinn Thiele's settlement offer of $210,000. He noted that his acceptance came in the light of Quinn Thiele's confirmation that the $50,000 could not be released as a result of the Charging Order and that a failure to accept the $210,000 offer would lead to an assessment hearing with consequent costs and delay. That same day, the appellant signed a settlement agreement with Quinn Thiele.

35 Shortly thereafter, the appellant settled the Bertschi Orth account for $100,000. On November 28, 2013, the appellant signed a release as contemplated by this settlement.

36 These two agreements will collectively be referred to as the "Fee Agreements".

37 Quinn Thiele then obtained the Consent Order. Pursuant to the terms of this order, the Charging Order was set aside and the monies in trust were released to Quinn Thiele for distribution in accordance with the Fee Agreements, with the remainder to the appellant.

38 Quinn Thiele and Bertschi Orth delivered their final accounts to the appellant on December 4, 2013 and December 31, 2013, in the amounts of $264,195.74 and $92,541.35, respectively. Bertschi Orth's December 31 account also included a Trust Statement indicating a payment of $7,458.65 for two additional invoices.

Proceedings below

39 On November 25, 2014, the appellant applied for an order for both accounts to be assessed and, if required, an order setting aside the Consent Order and related settlement documents.

40 The application judge dismissed the application. The entirety of his brief endorsement reads as follows: "By virtue of the [Consent Order] I have no jurisdiction to hear this matter as it is in fact a matter for an appeal to the Court to Appeal subject to leave etc."

Issues

41 The appeal raises two issues:

1. Did the application judge err in concluding that he was unable to consider the application for want of jurisdiction?

2. If the application judge had jurisdiction to consider the matter, should this court order an assessment of the respondents' accounts?

Analysis

(1) Did the application judge err in concluding that he was unable to consider the application for want of jurisdiction?

42 I am of the view that the application judge erred in finding that he lacked jurisdiction to consider the appellant's request for an order directing the respondents' accounts be assessed.

The procedural argument

43 As previously indicated, within his application seeking an order that the Fee Agreements be assessed, the appellant requested an order setting aside the Consent Order.

44 The respondents submit that an order to set aside a court order can only be obtained by way of a motion under r. 59.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.[5] The appellant brought an application under r. 14.05. The remedies provided for under this rule do not include the order requested by the appellant. Consequently, the application judge was procedurally barred from considering the request.

45 In my opinion, acceding to this procedural argument would not be consistent with the principles that form the foundation of the *Rules of Civil Procedure.*

46 Rule 2.01(1) provides that a failure to comply with the *Rules* is an irregularity and does not render a proceeding, or a step in a proceeding, a nullity. The court may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute. Relatedly, r. 2.01(2) provides that the court shall not set aside an originating process on the ground that the proceeding should have been commenced by an originating process other than the one employed.

47 Rule 2.01 reflects the general principle outlined in r. 1.04(1), that the rules "shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits." As this court explained in *Finlay v. Van Paassen*, 2010 ONCA 204, 101 O.R. (3d) 390 (Ont. C.A.), at para. 14:

> Rule 1.04(1) and rule 2.01 are intended to do away with overly "technical" arguments about the effect of the Rules and orders made under them. Instead, these provisions aim to ensure that the Rules and procedural orders are construed in a way that advances the interests of justice, and ordinarily permits the parties to get to the real merits of their dispute.

48 In my view, the respondents' procedural argument is "overly technical". The appellant had no choice but to start a new proceeding as the tort action had been dismissed by order dated August 26, 2013. He did so by Notice of Application seeking an assessment of the respondents' accounts. It was within that valid application that the appellant sought an order setting aside the Consent Order.

49 It is worth noting that this court has previously addressed procedural or technical discrepancies in the context of assessments of solicitors' accounts. In *Price v. Sonsini* (2002), 60

O.R. (3d) 257 (Ont. C.A.), a decision to which I will again refer later in these reasons, Sharpe J.A. said, at para. 19:

> The court has an inherent jurisdiction to control the conduct of solicitors and its own procedures. This inherent jurisdiction may be applied to ensure that a client's request for an assessment is dealt with fairly and equitably despite procedural gaps or irregularities.

50 It is my opinion that, in these circumstances, it was open to the application judge to consider the appellant's request to set aside the Consent Order notwithstanding it was relief sought within an application.

Did the Consent Order deprive the application judge of jurisdiction to order an assessment, if one was warranted?

51 I agree with the application judge's view, expressed in his endorsement, that the Consent Order, as it stood, was a bar to his assuming jurisdiction to consider the request that the Fee Agreements be assessed. While the Consent Order remained in place, an assessment of the Fee Agreements would have allowed the appellant to avoid the consequences of the order issued against him; namely, the final acceptance and payment of the fees and disbursements to the respondents. In such circumstances, an order that the Fee Agreements be assessed would have constituted "an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order": *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at p. 599; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.), at para. 71. In short, an assessment order would have amounted to an impermissible collateral attack on the Consent Order.

52 My difficulty with the application judge's view is that, here, the appellant specifically requested that the application judge set the Consent Order aside, removing any collateral attack concerns. In my view, the application judge should have considered this request and his failure to do so constituted an error in law.

Should this court set aside the Consent Order?

53 In *Aristocrat v. Aristocrat* (2004), 73 O.R. (3d) 275 (Ont. C.A.), this court held that r. 59.06 does not confer jurisdiction to hear a motion to set aside an order, at first instance. Here, however, a request to set aside the Consent Order was brought before the application judge. And the application judge considered this request in the face of a complete record and arguments by the parties.

54 I therefore now turn to the question whether this record supports the granting of such an order.

55 The respondents submit that the application judge's comment in the brief hearing before him that there was a lack of evidence of "fraud, slip, [or] mistake" is fatal to the appellant's claim to have the Consent Order set aside. Furthermore, say the respondents, the objectives of finality and certainty would be undermined if the Consent Order were disturbed.

56 I disagree.

57 Courts are, with good reason, cautious about setting aside orders, particularly those made on consent. Finality is important in litigation. And, when dealing with a consent order, the objective that parties be held to their agreements is also an important consideration.

58 However, as this court remarked in *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (Ont. C.A.), at p. 272, there are ways, two in fact, by which an individual who would otherwise be bound by a previous order can seek to have that order set aside. First, the party can move in the original proceedings under r. 59.06(2)(a) in cases of "fraud or facts arising or discovered after [the order] was made". Or, the party can bring a separate action to set aside the order.

59 The role of r. 59.06 is to provide an expeditious procedure for setting aside court orders. However, it does not prescribe or delineate a particular test: *Mohammed v. York Fire & Casualty Insurance Co.* (2006), 79 O.R. (3d) 354 (Ont. C.A.), at para. 36, leave to appeal ref'd, (2007), [2006] S.C.C.A. No. 269 (S.C.C.); *Tsaoussis*, at p. 272. Ultimately, under r. 59.06 or within a separate action, an individual seeking to set aside an order is required to show "circumstances which warrant deviation from the fundamental principle that a final [order], unless appealed, marks the end of the litigation line": *Tsaoussis*, at p. 266.

60 Thus, a court is not limited to setting aside an order in instances of fraud or facts arising or discovered after the order has been made. This is reflected in a review of this court's decisions, which demonstrates a willingness to depart from finality and set aside court orders where it is necessary in the interests of justice to do so: see *Stoughton Trailers Canada Corp. v. James Expedite Transport Inc.*, 2008 ONCA 817 (Ont. C.A.), adopting the principles set out in *Beetown Honey Products Inc., Re* (2003), 67 O.R. (3d) 511 (Ont. S.C.J.), aff'd without comment on this issue, (2004), 3 C.B.R. (5th) 204 (Ont. C.A.); *Cookish v. Paul Lee Associates Professional Corp.*, 2013 ONCA 278, 305 O.A.C. 359 (Ont. C.A.).

Application

61 For the following reasons, it is my view that setting aside the Consent Order is necessary to achieve justice between the appellant and the respondents relating to the legal costs associated with the tort action.

62 I return to the background of the Consent Order.

63 There is no suggestion that Bertschi Orth was not entitled to request a charging order to secure payment for services rendered. I do question, however, why the Charging Order was sought and granted over the entire amount of the settlement funds rather than an amount sufficient to protect Bertschi Orth's interests.

64 What is also problematic, in my view, is Quinn Thiele's conduct once the Charging Order was in place.

65 As detailed above, the record demonstrates that Quinn Thiele was well aware of the significant financial pressure the appellant was facing in the fall of 2013.

66 Against that background, Quinn Thiele not once but twice informed the appellant that $50,000 of his own money could not be released to him, even with Bertschi Orth's consent. This advice was incorrect. And all Quinn Thiele had to do to know that this advice was incorrect was to review the Charging Order.

67 Quinn Thiele admits that the position it repeatedly took with the appellant that no money could be released to him, on consent, was not correct. It contends, however, that this error was immaterial for two reasons.

68 First, Quinn Thiele argues that the appellant instructed Ms. Letourneau to stop the process for the release of the funds because he was negotiating a settlement with both firms.

69 I cannot agree with this submission. It is not clear from the record that the appellant gave such instructions to Ms. Letourneau. Although in the appellant's email to Ms. Letourneau on November 21, 2013, he tells her to "put the filing on the back burner", it is unclear whether that comment referred to her earlier commitment to rectify an issue that had arisen with the court file number for the assessment, or her earlier expressed opinion that the parties' consent did not need to be filed in court. Even if the record does support a finding that the appellant made such a request, it was made after Quinn Thiele had erroneously led the appellant to believe that a small portion of the settlement funds could not be released on consent.

70 Second, Quinn Thiele submits that, during the negotiations relating to the settlement of the legal fees, the appellant had access to independent legal advice.

71 A review of the record indicates that this was not the case. The appellant briefly spoke to two lawyers in October 2013. Both lawyers told the appellant that they would require a retainer. To Quinn Thiele's knowledge, the appellant was unable to afford a retainer. He was approaching bankruptcy. He was in the middle of divorce proceedings. He had lost his job as a corporate account executive in 2010, and had achieved limited success at several different jobs thereafter. He had drained his savings and investments.

72 The application judge did not consider whether setting aside the Consent Order was necessary to achieve justice in this case. As such, this court is justified in weighing the relevant considerations and coming to its own conclusion. Having done so, I conclude that the Consent Order should be set aside. This would achieve a just result as it would allow the appellant's request for an assessment to be considered on its merits.

73 My conclusion is based on the cumulative impact of the following:

- In the fall of 2013, the time when his financial obligations to the respondents were being discussed, the appellant was, to the knowledge of the respondents, in a very vulnerable position. He had suffered a traumatic brain injury, the after-effects of which he continued to experience, and was suffering from depression. And, he was in desperate financial straits.

- Quinn Thiele increased the already existing pressure on the appellant in a number of ways.

    - Quinn Thiele did not take steps available to it to ensure that Bertschi Orth's fees and disbursements were protected. While Ms. Noel's correspondence indicated Bertschi Orth did not receive instructions from the appellant to sign an undertaking, there is no evidence that she explained the consequences of this decision to him. This failure to take steps gave rise to the need to obtain the Charging Order. The Charging Order made the Consent Order necessary.

    - There is no indication that, in responding to Bertschi Orth's request for a charging order, Quinn Thiele took the position, on behalf of the appellant, that the scope of the Charging Order should be limited to the amount claimed by Bertschi Orth, and not granted over all the settlement funds.

    - Quinn Thiele gave the appellant erroneous legal advice to the effect that he could not access a relatively small amount of his money. In doing so, Quinn Thiele admits, it misinterpreted the clear legal effect of the Charging Order.

    - Quinn Thiele urged the appellant to settle his account with it, arguing that Quinn Thiele would then assist the appellant in his negotiations with Bertschi Orth thereby saving him the considerable expenditure of time and legal costs associated with an assessment.

• In dealing with the issue of the Charging Order and amounts owed to the respondents, the appellant did not have independent legal advice.

• Quinn Thiele's initial draft account to the appellant was $305,159.14, an amount incorrectly calculated based on 30 percent of $800,000. The base amount should have been significantly lower, subtracting the $105,000 portion for the appellant's then wife, the $20,000 in costs awarded to one of the co-defendants, and the amount for party and party costs. This over-calculation of the amount the appellant may have owed to Quinn Thiele under the contingency agreement presented an inflated starting point for the fee negotiations that took place in the fall of 2013.

• There is no evidence that the Fee Agreements were "negotiated" with the appellant in circumstances in which he would have understood the impact of the Consent Order on the amount he would ultimately receive from the settlement.

• The respondents do not point to any specific prejudice they would suffer if the Consent Order were set aside.

74 Of additional relevance is the fact that the Consent Order pertained to agreements relating to the amount and payment of legal fees and disbursements. As I explain below, agreements of this type involve the public interest in a way other private contractual matters do not. Thus, the interests of justice in this case must be understood in the light of the court's supervisory role over the rendering and payment of legal accounts.

(2) Should this Court order an assessment of the respondents' accounts?

75 The conclusion that the Consent Order should be set aside allows this court to consider whether the Fee Agreements, which, under the terms of the Consent Order, have been paid, should be reopened and an assessment of the accounts rendered further to those agreements, ordered.

76 The respondents submit that the circumstances do not warrant ordering an assessment, primarily on the basis that the appellant willingly participated in the settlement of the amounts he owed the respondents through the Fee Agreements. In so doing, he chose to forego the scheduled assessment of the Bertschi Orth account and the opportunity to have the Quinn Thiele account assessed.

The role of the courts

77 The courts have inherent jurisdiction as well as jurisdiction under the *Solicitors Act* to

order lawyers' accounts to be assessed. Both sources of jurisdiction respond to the public interest component of the rendering of legal services and lawyers' compensation, and the importance of maintaining public confidence in the administration of justice.

78 In *Plazavest Financial Corp. v. National Bank of Canada* (2000), 47 O.R. (3d) 641 (Ont. C.A.), at para. 14, Doherty J.A. explained how the public interest informs the court's role in supervising the rendering of legal services and payment of legal fees:

> The rendering of legal services and the determination of appropriate compensation for those services is not solely a private matter to be left entirely to the parties. There is a public interest component relating to the performance of legal services and the compensation paid for them. That public interest component requires that the court maintain a supervisory role over disputes relating to the payment of lawyers' fees. I adopt the comments of Adams J. in *Borden & Elliot v. Barclays Bank of Canada* (1993), 15 O.R. (3d) 352 (Gen. Div.) at pp. 357-58, where he said:
>
> > The *Solicitors Act* begins with s. 1 reflecting the legal profession's monopoly status. This beneficial status or privilege of the profession is coupled with corresponding obligations set out in the Act and which make clear that the rendering of legal services is not simply a matter of contract. This is not to say a contract to pay a specific amount for legal fees cannot prevail. It may. But even that kind of agreement can be the subject of review for fairness: see s. 18 of the *Solicitors Act*.

79 In *Price*, at para. 19, Sharpe J.A. further elucidated the court's role:

> Public confidence in the administration of justice requires the court to intervene where necessary to protect the client's right to a fair procedure for the assessment of a solicitor's bill. As a general matter, if a client objects to a solicitor's account, the solicitor should facilitate the assessment process, rather than frustrating the process.... In my view, the courts should interpret legislation and procedural rules relating to the assessment of solicitors' accounts in a similar spirit. As Orkin argues, "if the courts permit lawyers to avoid the scrutiny of their accounts for fairness and reasonableness, the administration of justice will be brought into disrepute." The court has an inherent jurisdiction to control the conduct of solicitors and its own procedures. This inherent jurisdiction may be applied to ensure that a client's request for an assessment is dealt with fairly and equitably despite procedural gaps or irregularities. [Citations omitted.]

The applicable provisions of the Solicitors Act

80 For context, I start with s. 16(1) of the *Solicitors Act*, which provides:

> Subject to sections 17 to 33, a solicitor may make an agreement in writing with his or her client respecting the amount and manner of payment for the whole or a part of any past or future services in respect of business done or to be done by the solicitor, either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same rate or at a greater or less rate than that at which he or she would otherwise be entitled to be remunerated.

81 The term "agreement" includes but is not limited to contingency fee agreements, which, for the purposes of ss. 16 and 20-32, are considered to be "agreements": *Solicitors Act*, ss. 15, 28.1(10). As Salhany J. explained in *Ruetz v. Morscher & Morscher* (1995), 28 O.R. (3d) 545 (Ont. Gen. Div.), at p. 550, "Section 16 of the *Solicitors Act* does not require that the agreement take on any particular form. The authorities are clear that all that is required is that the document be an enforceable agreement." In this case, the "agreements" in question were not the initial contingency agreements or the Consent Order, but rather the Fee Agreements entered into in full satisfaction of each respondent's fees and disbursements.

82 Because the amounts agreed upon in the Fee Agreements have been paid, the operative provision for the purposes of reopening the agreements and ordering an assessment is s. 25 of the *Solicitors Act*:

> Where the amount agreed under any such agreement has been paid by or on behalf of the client or by any person chargeable with or entitled to pay it, the Superior Court of Justice may, upon the application of the person who has paid it if it appears to the court that the special circumstances of the case require the agreement to be reopened, reopen it and order the costs, fees, charges and disbursements to be assessed, and may also order the whole or any part of the amount received by the solicitor to be repaid by him or her on such terms and conditions as to the court seems just.
>
> [Emphasis added.]

Special circumstances

83 The question is, therefore, whether the record supports a finding that special circumstances exist here that require the Fee Agreements to be reopened and an assessment ordered. The jurisprudence reveals limited consideration of the scope of "special circumstances" as expressed in s. 25 of the *Solicitors Act*, in particular.

84 As noted by courts considering the meaning of "special circumstances" within other

provisions of the *Solicitors Act*, however, the language implies that the court has a broad discretion to determine the matter having regard to all the circumstances in the case, but that ordering an assessment after payment will be the exception rather than the rule: *Minkarious v. Abraham, Duggan* (1995), 27 O.R. (3d) 26 (Ont. Gen. Div.), at paras. 47, 51-52; *Guillemette v. Doucet*, 2007 ONCA 743, 88 O.R. (3d) 90 (Ont. C.A.), at para. 4; *Plazavest*, at paras. 29-30, 33; *Echo Energy Canada Inc. v. Lenczner Slaght Royce Smith Griffin LLP*, 2010 ONCA 709, 104 O.R. (3d) 93 (Ont. C.A.), at paras. 29, 32; *Bui v. Alpert*, 2014 ONCA 495 (Ont. C.A.), at para. 7.

85 In the s. 11 context, where the payment of a bill does not preclude the court from referring it for assessment if the special circumstances of the case appear to require it, this court has noted that "exceptional circumstances of either a contractual or equitable nature could lead a court to find that an assessment is necessary or essential on general principles or is called for as being appropriate or suitable in the particular case": *Plazavest*, at para. 33. In *Echo Energy*, at paras. 30-31, this court said that "in the context of s. 11, those special circumstances relate to the underlying principle that payment of the account implies that the client accepted that the account was proper and reasonable.... Thus, special circumstances will tend to either undermine the presumption that the account was accepted as proper or show that the account was excessive or unwarranted."

86 With this in mind, I view the authorities and the objectives of the *Solicitors Act* as supporting the following broader test: "Special circumstances" are those in which the importance of protecting the interests of the client and/or public confidence in the administration of justice, demand an assessment.

87 In *The Law of Costs*, loose-leaf, 2nd ed. (Toronto: Canada Law Book, 2015), at para. 306.3, Mark M. Orkin identifies the relevant circumstances as including but not limited to:

- the sophistication of the client;
- the adequacy of communications between solicitor and client concerning the accounts;
- whether there is evidence of increasing lack of satisfaction by the client regarding the services relating to the accounts;
- whether there is overcharging for services provided;
- the extent of detail of the bills;
- whether the solicitor/client relationship is ongoing; and
- whether payments can be characterized as involuntary.

Application

88 The appellant is not unsophisticated but was, at the time he entered into the Fee Agreements, vulnerable. He was permanently impaired by the brain injury he suffered in the car accident. He was under intense financial pressure. The appellant did not have independent legal advice when such was clearly called for. He expressed his dissatisfaction with the legal services rendered by both firms. He terminated his retainer with Bertschi Orth and, when it came to resolving the firms' fees and disbursements, the appellant expressed his frustration with Quinn Thiele. Finally, at the time the Fee Agreements were entered into, detailed accounts had not been rendered by Quinn Thiele.

89 Furthermore, of particular importance is Quinn Thiele's representation of the appellant. I refer to conduct referred to above that; 1) contributed to the need for Bertschi Orth to obtain the Charging Order, 2) resulted in an order that reflected no effort on Quinn Thiele's part to represent the appellant's interests by ensuring that the Charging Order affected him only to the extent necessary, 3) misled the appellant by providing erroneous legal advice and 4) exerted pressure on the appellant to settle — all of which put the appellant in a position in which he had little choice but to enter into the Fee Agreements.

90 In these circumstances, considered cumulatively, the protection of the appellant's interests and the public's confidence in the administration of justice demand that the Fee Agreements be reopened and an assessment be ordered.

Impact of the Consent Order

91 I now turn to a consideration of whether the Consent Order acted to fulfil the purposes of an assessment under the *Solicitors Act*.

92 A consent order "is not a judicial determination on the merits of a case but only an agreement elevated to an order on consent": *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295 (S.C.C.), at para. 64.

93 There is no evidence that Smith J., in granting the Consent Order, did what an assessment officer would do; namely, consider the fairness or reasonableness of the Fee Agreements. In these circumstances, the Consent Order did not act as a substitute for an assessment. It had nothing to do with promoting the public interest, ensuring public confidence in the administration of justice or protecting the appellant. It was issued to elevate the Fee Agreements to an order that would allow the parties to access the monies being held under the Charging Order.

94 The fact that the Consent Order forms part of the background in which the assessment order is being requested does not detract from the conclusion that the special circumstances in this case demand that an assessment be ordered.

Conclusion regarding the Request for an Assessment Order

95 I therefore conclude that, in the circumstances of this case, relief should be granted under s. 25 of the *Solicitors Act.* The Fee Agreements should be reopened and an assessment of the respondents' fees and disbursements should take place.

Disposition

96 For these reasons, I would allow the appeal, set aside the Consent Order and direct that the costs, fees, charges and disbursements incurred or chargeable in respect of the matters included therein be assessed.

97 The application judge did not determine the costs of the application. I would award the appellant his costs of the application, fixed in the amount of $10,000, including disbursements and applicable taxes.

98 Further to the parties' written submissions as to costs, I would award the appellant his costs of this appeal in the amount of $15,000, including disbursements and applicable taxes.

***E.A. Cronk J.A.*:**
I agree

***Grant Huscroft J.A.*:**
I agree

Appeal allowed.

Footnotes

* A corrigendum issued by the court on May 24, 2016 has been incorporated herein.

1 Then known as Bertschi Orth Smith LLP.

2 The accident benefit claim was settled by a paralegal firm working out of Bertschi Orth's offices, and is not relevant to this appeal.

3 Any reference in this decision to fees and disbursements owed by the appellant to the respondents encompasses those for services rendered both to the appellant himself and to his children, as the appellant agreed to pay for both sets of fees and disbursements.

4 In an email dated November 20, 2013, Michael Thiele, a partner at Quinn Thiele, revised this amount. He informed the appellant that the total amount of fees and disbursements owed was $264,210.50, more than $40,000 less than the original amount stated.

5 Rule 59.06(2)(a) provides as follows: "A party who seeks to, (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made... may make a motion in the proceeding for the relief claimed."

End of Document

Tab 12

2018 ONSC 7519
Ontario Superior Court of Justice

David v. Loblaw

2018 CarswellOnt 21280, 2018 ONSC 7519, 300 A.C.W.S. (3d) 32

Marcy David and Brenda Brooks (Plaintiffs) and Loblaw Companies Limited, George Weston Limited, Weston Foods (Canada) Inc., Weston Bakeries Limited, Canada Bread Company, Limited, Grupo Bimbo, S.A.B. De C.V., Maple Leaf Foods Inc., Empire Company Limited, Sobeys Inc., Metro Inc., Wal-Mart Canada Corp., Wal-Mart Stores, Inc. and Giant Tiger Stores Limited (Defendants)

E.M. Morgan J.

Heard: December 12, 2018
Judgment: December 14, 2018
Docket: CV-17-586063-00CP

Counsel: James Orr, Kyle Taylor, Annie Tayyab, David Wingfield, for Plaintiffs
Katherine Kay, Sinziana Hennig, for Defendant, Sobeys Inc.
Robert Russell, Davit Akman, for Defendants, Loblaw Companies Limited, George Weston Limited, and Weston Foods (Canada) Inc.
Christopher Naudie, Adam Hirsh, for Maple Leaf Foods Inc.
Adam Fanaki, Derek Ricci, for Giant Tiger Stores Limited
Evangelia Kriaris, Joe McGrade, for Canada Bread Company
Michael Brown, Danny Urquhart, for Metro Inc.
Kristine Spence, for Wal-Mart Canada Inc.

Headnote

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Miscellaneous
Plaintiff commenced proposed class action alleging that defendants conspired together in price fixing scheme regarding retail price of bread — Plaintiff proposed representing consumer class of purchasers of bread from defendants, or any of them, since 2002 — Certification hearing had not been held but plaintiff had served expert reports — Defendants brought motion for pause of proceedings pending judgment in another action before Supreme Court of Canada (SCC) — Motion granted — Action before SCC dealt with cause of action by umbrella purchasers and whether s. 38 of Competition Act was complete code, so that assertion of tort and restitutionary claims at common law were precluded — Question of whether umbrella purchasers had cause of action was issued in present case and in parallel case in British Columbia — Given legal uncertainties around that class of purchaser and pending resolution of that uncertainty by SCC, it would seem imprudent to barge ahead without hearing SCC's answer — SCC decision could also impact expert reports — Avoiding parties having to re-do expert reports, or substantially supplement reports in future was valid goal in scheduling path to certification hearing — SCC decision may require re-arguing of certification or result in appeal based on new state of law — Certification motion was adjourned and action temporarily paused.

Table of Authorities

Cases considered by *E.M. Morgan J.*:

Airia Brands Inc. v. Air Canada (2012), 2012 ONSC 4773, 2012 CarswellOnt 17631 (Ont. S.C.J.) — considered

Asquith v. George Weston Limited (2018), 2018 BCSC 1557, 2018 CarswellBC 2420 (B.C. S.C.) — considered

Godfrey v. Sony Corp. (2016), 2016 BCSC 844, 2016 CarswellBC 1313 (B.C. S.C.) — considered

Hollick v. Metropolitan Toronto (Municipality) (2001), 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, (sub nom. *Hollick v. Toronto (City))* 205 D.L.R. (4th) 19, (sub nom. *Hollick v. Toronto (City))* 56 O.R. (3d) 214 (headnote only), 24 M.P.L.R. (3d) 9, 277 N.R. 51, 13 C.P.C. (5th) 1, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279, (sub nom. *Hollick v. Toronto (City))* [2001] 3 S.C.R. 158, 56 O.R. (3d) 214 (note), 56 O.R. (3d) 214, 2001 CSC 68 (S.C.C.) — referred to

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7, 366 D.L.R. (4th) 641 (S.C.C.) — referred to

Pro-Sys Consultants Ltd. v. Microsoft Corp. (2013), 2013 SCC 57, 2013 CarswellBC 3257, 2013 CarswellBC 3258, 364 D.L.R. (4th) 573, 50 B.C.L.R. (5th) 219, 45 C.P.C. (7th) 1, [2014] 1 W.W.R. 421, 40 N.R. 201, 345 B.C.A.C. 1, 589 W.A.C. 1, [2013] 3 S.C.R. 477, 19 B.L.R. (5th) 177, 12 C.C.L.T. (4th) 171 (S.C.C.) — followed

Sony Corp. v. Godfrey (2017), 2017 CarswellBC 3105 (S.C.C.) — followed

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

Competition Act, R.S.C. 1985, c. C-34
s. 38 — considered

Rules considered:

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

***E.M. Morgan J.*:**

1 This motion is brought by the Defendants collectively for a pause in the proceedings pending the judgment in *Sony Corp. v. Godfrey* [2017 CarswellBC 3105 (S.C.C.)] (SCC File No. 37810), which was heard by the Supreme Court of Canada on December 11, 2018 and is under reserve. In my case management capacity I have previously fixed a hearing date of July 8, 2019 for the certification motion, with various interim deadlines for serving materials, conducting cross-examinations, etc.

2 Ms. Kay, representing Sobeys Inc. and taking the lead on behalf of the moving Defendants, submits that there are issues in *Godfrey* which are highly relevant to the issues here. She states that the Supreme Court's ruling is bound to have an impact on how the parties complete the evidentiary record, brief the legal issues, and present their arguments at the certification hearing. The Defendants are particularly concerned that the*Godfrey* ruling will impact on the extent and content of the expert evidence to be produced.

3 The Plaintiffs have already served their expert reports. If the Supreme Court changes the law in a substantive way those reports will doubtless have to be amended or supplemented. The Defendants are anxious to be able to respond to the final version of the Plaintiffs' expert reports. They do not want to encounter a situation where they are required to produce one set of reports and then later produce an amended or supplementary set.

4 Under the schedule that I have set, the Defendants are required to serve their expert reports by January 2, 2019. If possible, they would like to be able to avoid that deadline. I am sure they have been working diligently to make the due date, which is rapidly approaching. Although Defendants' counsel have been good sports about it, since setting the schedule they have made me understand that T.S. Eliot was incorrect; it is not April but early January that is the cruelest month.

5 It was, of course, not my intention to turn Defendants' counsel's holiday season into a Waste Land. However, one of the primary tasks of a judge under the *Class Proceedings Act*, as under all of the *Rules of Civil Procedure*, is to ensure access to justice: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.), at para 27. In this regard, it is by now well understood that expeditious justice is part and parcel of access to justice: *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87 (S.C.C.), at para 32. The protracted nature of much civil litigation tends to undermine the goal of access, and avoiding delays is one of the challenges that case management is aimed at rectifying.

6 Counsel for the Plaintiffs submits that the Defendants' request for a pause in this action, which, as indicated, has been set on a tight schedule, amounts to an effort at delay. Mr. Orr, for the Plaintiffs, states that the impact of an eventual ruling in *Godfrey* will likely be minimal. It is the Plaintiffs' view that allowing one or two small issues to upset the schedule that has governed the parties in this action would be to allow the tail to wag the dog.

7 It is the Defendants' position that *Godfrey* will predictably have a major impact on the issues in this action. As they see it, a temporary pause now will likely prevent the need for a hurried adjournment later. In effect, Ms. Kay states that it is a pause that represents the most efficient way to proceed given the uncertainty in the state of important areas of the law pending the Supreme Court's ruling.

8 The issues argued in *Godfrey* that are also at play in this case are:

> (a) whether 'umbrella purchasers' (i.e. those who purchased the product at issue in the alleged price-fixing conspiracy from parties other than the alleged conspirators) have a cause of action;
>
> (b) whether section 36 of the *Competition Act* is a 'complete code', so that the assertion of tort and restitutionary claims at common law are precluded;
>
> (c) the standard to be met, and the economic methodology to be pursued in fixing that standard, by the Plaintiffs and their experts in seeking to certify harm as a common issue.

9 I will leave aside the 'complete code' question, as that strikes me as a strictly legal issue that is unlikely to effect the production of evidence. The most immediate deadlines in the schedule set for certification are aimed more at compiling the evidentiary record than they are at addressing legal issues, although it is at least conceivable that the *Godfrey* ruling will remain under reserve for sufficient time that it will impact on all aspects of the certification motion, including the filing of factums and the oral hearing.

10 As for the 'umbrella purchasers' issue, it is obvious that question will impact on the not only the argument but the evidence presented by the parties in the case. Mr. Orr concedes that this is an open issue. There have been differences in recent years between some courts in Ontario and British Columbia on whether these purchasers have a cause of action or are too remote and represent too indefinite a class. Indeed, the Plaintiffs' expert, Dr. Jeffrey Leitzinger, states in his affidavit dated July 30, 2018 that his instructions included a question mark over the issue of umbrella purchasers:

> [I was] informed by Plaintiffs' counsel that the law on umbrella purchasers in Canada is in a state of flux and that Plaintiffs' motion for class certification in the present matter will not seek to certify an umbrella class at this time. Consequently, issues related to the Umbrella Class members can be addressed at a later date, to the extent appropriate and instructed by counsel.

11 It is the Plaintiffs' position that while umbrella purchasers represent an unresolved question in terms of having a cause of action, the number of potential class members that fall into that category in the present case is small. Mr. Orr explains that to be an umbrella purchaser here, a person would have to not have bought bread from any of the Defendants (who represent

the major retailers and producers in the country) or anyone in their direct distribution chain during the entire class period. It is only purchasers of bread from entirely independent producers and retailers who would qualify.

12 The question of whether umbrella purchasers have a cause of action has been of some debate both in the carriage motion in the present case as well as in the parallel case in British Columbia. In fact, the issue of umbrella purchasers was identified in B.C. as one of the issues that may distinguish the action in that province from the present one:

> While the plaintiff class in the David Action may be notionally broad enough to include all purchasers, even umbrella purchasers who may have purchased Fresh Commercial Bread once in the span of the class period, I am satisfied, based on the regional market differences identified by Mr. Bessette and Dr. Leitzinger, that the plaintiff in the Asquith Action has raised a serious question that the impacts on BC purchasers at the retail level is substantively different from the impacts on purchasers in the rest of Canada.
>
> *Asquith v. George Weston Limited*, 2018 BCSC 1557 (B.C. S.C.), at para 53.

13 Perhaps most importantly, the prominence of this issue in *Godfrey* is one of the reasons that the British Columbia Supreme Court granted a pause similar to the one requested by the Defendants here [*Asquith*, at paras 80-81]:

> [80] It is common ground that the decision in *Godfrey* is expected to have a significant impact on the pleading of a cause of action for umbrella purchasers.
>
> [81] In preparation for certification, expert materials will have to be prepared to address the economic impacts of the conspiracy, including the economic impact on umbrella purchasers. The pending decision of the Supreme Court of Canada is expected to significantly impact the methodology underlying the expert reports to be marshalled on a certification hearing, including whether umbrella purchaser claims can be advanced at all.

14 The reason the question was "common ground" between counsel in B.C. but is contentious here is that the market is arguably different in each region. Everyone, including Plaintiffs' counsel, was convinced that the umbrella purchasers would represent a significant portion of the class given the nature of the west coast market. That certainty is not shared by Plaintiffs' counsel in Ontario.

15 Unfortunately, I find it difficult to assess the potential class numbers at this point. There is no evidence to go on right now, and I would not want to make any decision based on conjecture. What I do know is what Dr. Leitzinger has confirmed — i.e. that the umbrella purchasers issue will have to be revisited by Plaintiffs' counsel once the Supreme Court rules on the issue. That is the same here as in British Columbia. The B.C. court did not want the parties to have to engage in a two-stage expert report process, and neither do I. Given the legal uncertainties around this class of purchaser and the pending resolution of that uncertainty by the Supreme Court of Canada, it would seem imprudent to barge ahead without hearing the Supreme Court's answer.

16 Turning to the standard to be met by the Plaintiffs in identifying loss to indirect purchasers as a common issue, and the economic methodology to be deployed in meeting that standard, there is an equally contentious issue before the Supreme Court. The leading case to date in this area is *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [2013] 3 S.C.R. 477 (S.C.C.). There, the Court observed [at para 115]:

> [The] role of the expert methodology [for indirect purchasers] is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole...[and that] the critical element that the methodology must establish is the ability to prove 'common impact' from the alleged conspiracy.

17 Defendants' counsel take the position here, and apparently in defending other price-fixing claims, that in *Microsoft* the Court set a rather onerous standard for plaintiffs to meet. Ms. Kay points out in her factum that under *Microsoft* there must be a means of demonstrating that the overcharge was actually passed through to all purchasers, which means that at the certification stage there "must be some evidence of the availability of the data to which the methodology is to be applied": *Microsoft*, at para 118.

18 This onerous standard appears to have been disregarded, or at least softened, in the *Godfrey* case. The British Columbia Supreme Court opined that, "all that *Microsoft*requires is that 'the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain": *Godfrey v. Sony Corp.*, 2016 BCSC 844 (B.C. S.C.), at para 167. The British Columbia Court of Appeal confirmed that this means that there is no need for an economic methodology that demonstrates that each class member suffered harm. In other words, the reading of *Microsoft* in the B.C. courts places a substantially lower onus on plaintiffs at the certification stage than that suggested by the Defendants' strict reading of that case.

19 Depending on whether the Supreme Court confirms the B.C. courts' softer reading of *Microsoft* or the Defendants' stricter reading of *Microsoft*, the burden on the Plaintiffs' economics expert may vary greatly. If Defendants' counsel are right, Dr. Leitzinger may have to amend or supplement his report to demonstrate that there is data available that establishes in a specific way the passing though of the price increases to every indirect purchaser. If the Court upholds the B.C. version of *Microsoft*, the task of the economics expert, including the Defendants' expert in response, will be lessened and, presumably, the extent of the data to be produced in support of the expert reports will be equivalently reduced.

20 The extent and content of expert reports is a legitimate concern to take into account in assessing whether a pause in the action is merited. Preparation of expert reports is crucial to both the prosecution and defense of an action based on an alleged price fixing conspiracy, and it is an expensive and time consuming step in the preparation of a certification record. Avoiding parties having to re-do the expert reports, or substantially supplement them down the road, is a valid goal in scheduling the path to a certification hearing.

21 Likewise, the timing of the certification motion itself is a concern to be taken into account. No one knows today whether the Supreme Court will release its *Godfrey* decision before or after the scheduled July 8th certification hearing, or whether I will have released my own decision or still have it under reserve. Depending on that timing, the certification may have to be re-argued or an appeal based on the new state of the law may be sought.

22 In *Airia Brands Inc. v. Air Canada*, 2012 ONSC 4773 (Ont. S.C.J.), Leitch J. was faced with a similar dilemma in a cased managed class action. As she observed, it is rare that we know in advance that a crucial set of questions like this will be answered within a relatively short time by the Supreme Court of Canada. She agreed with the defendants in that case that in those circumstances expeditious conduct of the litigation means pausing the action rather than moving quickly ahead [at para 15]:

> ...it is not fair and expeditious to commit resources to a process that will unquestionably have to be redone to some extent once the judgments of the Supreme Court of Canada are released. An adjournment will avoid inevitable duplication. If the certification motion proceeds as scheduled and the Supreme Court of Canada decisions are released while the certification decision is under reserve, the parties will be asked to make further submissions as a result of those decisions. If the certification motion proceeds as scheduled and I release a decision before the Supreme Court of Canada decisions are released, it is not hard to imagine that appeals will be commenced considering the uncertain state of the law and leave to appeal, if required, would most likely be readily attainable. Neither scenario provides an expeditious determination.

23 A pause such as that requested by the Defendants will give guidance to counsel. In the wake of a Supreme Court ruling on the issues identified in *Godfrey*, the expert evidence here will only have to be done once by each side and will be tailored to the most current state of the law. A pause will also help ensure that the motion for certification will correctly include or exclude umbrella purchasers in accordance with whether or not they are determined to have a cause of action.

24 The benefit of economizing of resources and proceedings in this way will likely outweigh any delay engendered by a pause at this stage. In my assessment, the Supreme Court of Canada's pending judgment in*Godfrey* is worth the wait.

25 The certification motion scheduled for July 8, 2019 is hereby adjourned and the action is temporarily paused. The schedule for the steps leading up to certification, including the looming January 2nd date for Defendants' expert reports, is no longer applicable.

26 If there are other steps to be taken in this action that do not impact on the route to certification in this direct way, they may be scheduled with my assistant as usual. A case management conference is to be convened by the parties with me as soon as practicable after release of the Supreme Court's judgment in*Godfrey*.

Motion granted.

Tab 13

2011 CarswellOnt 13766
Ontario Court of Appeal [In Chambers]

Lawrence v. Peel Regional Police Force

2011 CarswellOnt 13766, 210 A.C.W.S. (3d) 296

Andrew Mark Alexander Lawrence, Plaintiff (Appellant) and Peel Regional Police Force* , Carol Lawrence and Theresa MacLean, Defendants (Respondents)

David Watt J.A.

Judgment: March 30, 2011
Docket: CA M39681

Counsel: Andrew Mark Alexander Lawrence, for himself
Sean Dewart, Sarah Pottle, for Respondent, Theresa MacLean
Eugene Mazzuca, Rafal Szymanski, for Respondent, Peel Regional Police Force

Subject: Civil Practice and Procedure; Public; Torts

Related Abridgment Classifications

Civil practice and procedure
XXIII Practice on appeal
XXIII.6 Time to appeal
XXIII.6.b Extension of time
XXIII.6.b.iii Grounds for extension

Headnote

Civil practice and procedure --- Practice on appeal — Time to appeal — Extension of time — Grounds for extension
Husband was involved in matrimonial litigation with wife — Wife made criminal complaints against husband and police laid charges — Husband was acquitted of all charges except for breach of recognizance — Husband alleged wife and her solicitor had falsely accused him of criminal conduct to further wife's interests in matrimonial litigation — Husband unsuccessfully

brought action against wife and solicitor for damages for conspiracy and against police for damages for negligence — Husband unsuccessfully appealed to Divisional Court — Husband allegedly believed further appeal was to Supreme Court of Canada and so did not commence motion for leave to appeal to Court of Appeal before deadline — Husband brought motion for extension of time to seek leave to appeal to Court of Appeal — Motion dismissed — Delay of five to six weeks was not substantial but also not inconsequential — Husband's explanation for delay strained credulity — Husband had been represented by counsel and would have been advised about correct court for further appeal — Granting extension would have aggravated and perpetuated prejudice already caused to solicitor — Action had been commenced in September 2003 but had not been tried until December 2008, largely due to mischief on part of husband — Husband's dawdling and obfuscation continued at Divisional Court — Most cogent reason for refusing extension of time was lack of merit — Husband was seeking to revisit and reverse adverse findings of fact made by trial judge after Divisional Court had already determined there had not been any palpable or overriding error.

Table of Authorities

Cases considered by *David Watt J.A.*:

Campbell v. Hudyma (1985), 1985 CarswellAlta 266, 42 Alta. L.R. (2d) 59, [1986] 2 W.W.R. 444, 66 A.R. 222 (Alta. C.A.) — referred to

Chartier v. Quebec (Attorney General) (1979), [1979] 2 S.C.R. 474, 9 C.R. (3d) 97, 27 N.R. 1, 104 D.L.R. (3d) 321, 1979 CarswellQue 48, 48 C.C.C. (2d) 34, 1979 CarswellQue 162 (S.C.C.) — referred to

Dumbell v. Roberts (1944), [1944] 1 All E.R. 326, 60 T.L.R. 231 (Eng. C.A.) — referred to

Frey v. MacDonald (1989), 33 C.P.C. (2d) 13, 1989 CarswellOnt 343 (Ont. C.A.) — referred to

Kefeli v. Centennial College of Applied Arts & Technology (2002), 2002 CarswellOnt 2539, 23 C.P.C. (5th) 35 (Ont. C.A. [In Chambers]) — referred to

Mauldin v. Cassels Brock & Blackwell LLP (2011), 2011 CarswellOnt 288, 2011 ONCA 67, *(*sub nom. *Bruno Appliance & Furniture Inc. v. Cassels Brock & Blackwell LLP)* 274 O.A.C. 353 (Ont. C.A. [In Chambers]) — referred to

R. v. Golub (1997), 34 O.R. (3d) 743, 9 C.R. (5th) 98, 102 O.A.C. 176, 45 C.R.R. (2d) 254, 117 C.C.C. (3d) 193, 1997 CarswellOnt 2448 (Ont. C.A.) — referred to

Rizzi v. Marvos (2007), 2007 ONCA 350, 2007 CarswellOnt 2841, 224 O.A.C. 293, 85 O.R. (3d) 401 (Ont. C.A. [In Chambers]) — referred to

Sault Dock Co. v. Sault Ste. Marie (City) (1972), 34 D.L.R. (3d) 327, [1973] 2 O.R. 479, 1972 CarswellOnt 440 (Ont. C.A.) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 3.02 — considered

R. 3.02(1) — referred to

R. 3.02(3) — referred to

MOTION by husband for extension of time to seek leave to appeal to Court of Appeal.

***David Watt J.A.*:**

1 Andrew Lawrence (Lawrence) sued his former wife, Carol Lawrence (Carol), her lawyer, Theresa MacLean (MacLean), and Peel Regional Police Services Board (Peel).

2 Lawrence claimed that Carol and MacLean put their heads together to falsely accuse him of criminal conduct to further Carol's interest in matrimonial litigation then ongoing between the estranged spouses.

3 Lawrence alleged that Peel was negligent in its investigation of Carol's spurious allegations. Peel converted Carol's allegation into criminal charges with unseemly haste, and without any meaningful investigation of their legitimacy.

4 A trial judge dismissed Lawrence's claims in their entirety. The Divisional Court dismissed Lawrence's appeal.

5 Lawrence wants an extension of time within which to seek leave to appeal to this court from the decision of the Divisional Court. By agreement, he has brought his motion in writing. For the reasons that follow, Lawrence's motion fails.

The Background Facts

6 The canvas requires some background strokes to frame the discussion that follows:

The Claim

7 Lawrence sought damages from Carol[1] and MacLean on the basis that they had conspired together to falsely accuse Lawrence of criminal conduct during their marriage. The conspirators' motive, according to Lawrence, was to gain the upper hand for Carol in the then ongoing divorce proceedings between the spouses. Lawrence claimed that MacLean counselled Carol to report her false allegations to Peel and that Carol did so. In the result, Lawrence was charged with several criminal offences.

8 According to Lawrence, Peel did nothing to determine whether Carol's allegations bore any relationship to reality. Peel interviewed no witnesses. Peel did not ask Lawrence to provide a statement. The charges Peel laid as a result of Carol's complaint were all dismissed, except for a charge of breach of recognizance of which Lawrence was convicted.

The Trial Judgment

9 The trial took several days. The trial judge reserved her judgment. About three months later, the trial judge provided written reasons for dismissing Lawrence's claims in their entirety.

10 The trial judge concluded that Lawrence had adduced no evidence of any conspiracy between Carol and MacLean

> i. to have Carol make false allegations of criminal conduct against Lawrence;
>
> ii. to have Carol report those allegations to Peel so that Peel would lay charges against Lawrence; or
>
> iii. to make and use these allegations and charges to gain an advantage for Carol in divorce proceedings against Lawrence.

The trial judge declined to draw an adverse inference against MacLean because she did not call Carol as a defence witness at trial.

11 The trial judge determined that Peel's investigation of the allegations of which Lawrence was ultimately acquitted was not negligent because its officers did not

> i. take a statement from Lawrence prior to arrest;
>
> ii. listen to a message from MacLean left on Lawrence's answering machine on the day the alleged criminal conduct occurred; or
>
> iii. contact potential witnesses to the incident prior to Lawrence's arrest.

12 Despite the absence of any finding of liability, the trial judge went on to consider the quantum of Lawrence's damages in the event that she had erred in her decision about liability. She assessed his damages as $0.

The Judgment of the Divisional Court

13 At the conclusion of argument, the Divisional Court unanimously dismissed Lawrence's appeal. The court noted that, reduced to its essence, Lawrence sought to have the appellate court reverse critical findings of fact made by the trial judge. In the absence of any palpable and overriding error, the Divisional Court declined to do so. The court also concluded that the trial judge was right in failing to draw an adverse inference against MacLean for failing to call Carol as a defence witness.

The Motion for Leave to Appeal

14 Lawrence's motion for leave to appeal is dated January 17, 2011. In his accompanying affidavit, on which he was not cross-examined, Lawrence claims that he decided immediately after dismissal of his appeal by the Divisional Court to undertake a further appeal. Since an original notice of appeal at which he looked was styled "Court of Appeal for Ontario" and filed in this court, Lawrence thought that the proper appellate forum was the Supreme Court of Canada. When he learned of his mistake, he took the steps necessary to obtain the order he now seeks.

15 Lawrence frames his grounds for seeking leave to appeal as follows:

> 1. The decision of the Divisional Court below fails to give effect to the principle that the police have a duty to explore the reliability of the information which they receive as was set out in the cases of *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (Eng. C.A.) and *Campbell v. Hudyma* (1985), 66 A.R. 222 (Alta. C.A.).
>
> 2. The Divisional Court erred in law by failing to find that the police had not taken into account all the information available to it and give due regard for evidence that was believable and reliable.
>
> 3. The Divisional Court erred in law in making a decision that was contrary to the principles set out in the case of *Chartier v. Quebec (Attorney General)*, 1979 CanLII 17, [1979] 2 S.C.R. 474 (S.C.C.) and *R. v. Golub* [1997 CarswellOnt 2448 (Ont. C.A.)], 1997 CanLII 6316.
>
> 4. The Divisional Court erred in law in misconstruing the principle that deference was

owed to a trial judge's findings of fact and credibility.

5. The Divisional Court erred in law in failing to find that the trial judge should have drawn a negative inference against Ms. MacLean.

6. The Divisional Court erred in law in failing to find the *Nelles* case test; namely, that the police who initiated the proceedings against him must have believed that he was probably guilty and that this belief must be founded on reasonable grounds in the circumstances.

Analysis

16 A helpful beginning for the discussion that follows is a brief recapture of the positions of the parties, then an examination of the governing principles and, finally, their application to the circumstances of this case.

The Positions of the Parties

17 Lawrence contends that he always intended to appeal the decision of the Divisional Court, but failed to do so in a timely way because of his confusion about the court that heard his first appeal, thus the appellate court to which his further appeal should be taken. He has diligently pursued his original and abiding intention and explained the reasons for his delay. His grounds of appeal, he submits, are meritorious and of importance beyond the peculiar circumstances of this case. Neither respondent is prejudiced by this minimal delay.

18 Ms. MacLean resists the motion on three discrete grounds. First, Lawrence has proffered no credible explanation for the delay in pursuing his motion for leave to appeal. Second, the proposed grounds of appeal, no matter how phrased, are all issues of fact, resolved against Lawrence at trial and incapable of ascending to the level of palpable and overriding error as the Divisional Court decided. Said in another way, the proposed appeal lacks merit. And third, to grant the extension would perpetuate and aggravate the prejudice already suffered by MacLean, a practising barrister, by tainting her reputation with allegations already determined to be without foundation.

19 Peel opposes the extension on two grounds. First, Lawrence has offered no credible explanation for the delay in serving and filing his notice of motion for leave to appeal. The reasons he advances for the delay are mutually inconsistent and the explanation inadequate to the task. Second, the proposed grounds of appeal are nothing more than a repackaging of factual complaints made to and rejected by the Divisional Court as an attempt to retry the action.

The Governing Principles

20 Lawrence invokes Rules 3.02(1) and (3) of the *Rules of Civil Procedure* to extend the time within which to serve and file his motion for leave to appeal from the decision of the Divisional Court on November 16, 2010.

21 Rule 3.02 is of general application, permitting a court to extend or abridge any time that the rules or an order prescribes on any terms that the court or judge considers just. The language of the rule is permissive, but the Rule eschews any listing of factors that require or permit consideration.

22 The authorities have coloured in some of the bare spots in Rule 3.02. Relevant factors that inform the discretion for which Rule 3.02 provides include, but are not limited to:

i. the length of the delay;

ii. any explanation advanced by the moving party for the delay;

iii. any prejudice to the respondent caused, perpetuated or exacerbated by the delay;

iv. the merits of the proposed application or appeal; and

v. the "justice of the case".

See, *Frey v. MacDonald* (1989), 33 C.P.C. (2d) 13 (Ont. C.A.), at p. 14; *Kefeli v. Centennial College of Applied Arts & Technology* (2002), 23 C.P.C. (5th) 35 (Ont. C.A. [In Chambers]), at para. 14; *Rizzi v. Marvos* (2007), 85 O.R. (3d) 401 (Ont. C.A. [In Chambers])), at para. 16; and *Mauldin v. Cassels Brock & Blackwell LLP*, 2011 ONCA 67 (Ont. C.A. [In Chambers]), at para. 5.

The Principles Applied

23 A consideration of the relevant factors, informed by the overarching principle that an extension should be granted if the justice of the case requires it, persuades me that this is not a case in which to grant an extension of time. My reasons follow.

24 To take first, the length of the delay. The Divisional Court gave its decision on November 16, 2010, at the conclusion of argument. A written version of the oral reasons was released on November 25, 2010. The times within which Lawrence was to serve and file his motion for leave to appeal to this court were December 1 and December 8, 2010.

25 The notice of motion seeking an extension of time and the supportive affidavit are dated January 17, 2011. The delay is 5-6 weeks, neither substantial nor inconsequential.

26 Lawrence's explanation for the delay in filing his materials on the leave application strains credulity. In his supportive affidavit, Lawrence deposes

> 3. I immediately formed the intent to seek leave from this Honourable Court to appeal that decision.
>
> 6. However, in considering what course to pursue to obtain leave, I mistakenly concluded that the Supreme Court of Canada was the appropriate venue for a motion for leave. This was because I had in front of me a copy of the Notice of Appeal engrossed "Court of Appeal for Ontario". This led me to believe that the *[sic]* this was the court I was appealing from.
>
> . . . . .
>
> 13. I have brought this motion as expeditiously as I have been able to since becoming aware of the fact that I was seeking leave in the wrong court.

27 The excerpted paragraphs of Lawrence's affidavit are self-contradictory. He first asserts an intention to seek leave to appeal "from this Honourable Court", then purports to rely on a prior notice of appeal "engrossed 'Court of Appeal for Ontario'", in late December, to conclude that the proper appellate court was the Supreme Court of Canada.

28 Lawrence was represented by counsel at trial and on the appeal to the Divisional Court. Counsel was present when oral reasons for judgment were given by the Divisional Court. Written reasons are sent to counsel. It is beyond belief that counsel would not have advised Lawrence of the availability of further appellate remedies, including the appellate forum.

29 Apart from the internal inconsistencies in Lawrence's affidavit, sworn before a Commissioner in the office of his trial and appellate counsel, it passes strange that in determining the appropriate appellate forum, a litigant would rely on a previous notice of appeal rather than the formal order or reasons for judgment of the court from which the appeal was to be taken. All the more so, when at trial and on appeal the litigant was represented by counsel.

30 Third, to grant the extension sought would aggravate and perpetuate the prejudice already caused MacLean, a practising barrister. The statement of claim was issued in September, 2003. The trial, originally scheduled for April, 2006, was finally reached in December, 2008. The delay in getting the case to trial was chiefly mischief of Lawrence's doing. The dawdling and obfuscation continued at the first level of appeal.

31 The most cogent reason for refusing the extension of time has to do with the merits of the

motion for leave to appeal.

32 The decision from which Lawrence seeks leave to appeal is a decision of the Divisional Court exercising its appellate jurisdiction. It is established that leave to appeal from decisions of the Divisional Court exercising its appellate jurisdiction should be given only in exceptional cases: *Sault Dock Co. v. Sault Ste. Marie (City)* (1972), [1973] 2 O.R. 479 (Ont. C.A.), at p. 480. The question raised must not be or involve questions of fact alone.

33 In the final analysis, the issues Lawrence proposes to argue if leave were granted seek to revisit and reverse adverse findings of fact made by the trial judge with which the Divisional Court did not interfere because they did not reveal any palpable or overriding error. Despite the veneer in which some of the grounds are masked, what underlies them remains the same: reversal of factual findings.

Conclusion

34 For these reasons, the motion to extend time within which to seek leave to appeal to this court is dismissed. If the respondents are seeking costs, they shall have 10 days following the release of this judgment to make brief written submissions. The appellant shall have 10 days to reply.

Motion dismissed.

Footnotes

* The correct description is Peel Regional Police Services Board.

1 The claim against Carol did not proceed to trial because she had declared personal bankruptcy.

Tab 14

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	MONDAY, THE 3RD
	)	
MR. JUSTICE HAINEY	)	DAY OF DECEMBER, 2018

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

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

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

ORDER
(APPOINTMENT OF LITIGATION TRUSTEE, LIFTING OF STAY, AND OTHER RELIEF)

THIS MOTION, made by the Litigation Investigator, for an Order pursuant to section 11 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36,, as amended (the "**CCAA**") and Rule 6.01 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194, as amended (the "***Rules***") for an order, among other things, appointing a Litigation Trustee to pursue certain claims on behalf of the Applicants and/or any creditors of the Applicants and providing for the process by which a

common issues trial will be heard, was heard this day at 330 University Avenue, 8th Floor, Toronto, Ontario.

ON READING the Monitor's 27th Report to the Court dated November 5, 2018 and the Litigation Investigator's First Report to the Court dated November 5, 2018 (the "**First Report**"), and on reading and hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for the Litigation Investigator, and such other counsel for various creditors and stakeholders as were present, no one else appearing although duly served as appears from the Affidavit of Service.

SERVICE

1. THIS COURT ORDERS that this motion is properly returnable today and hereby dispenses with further service thereof.

TERMINATION OF LITIGATION INVESTIGATOR APPOINTMENT

2. THIS COURT ORDERS that the appointment of the Litigation Investigator pursuant to the Amended Litigation Investigator Order dated April 26, 2018 (the "**Amended Litigation Investigator Order**"), is hereby terminated, effective immediately.

CONTINUATION AND EXTENSION OF LITIGATION CREDITORS' COMMITTEE

3. THIS COURT ORDERS that the Creditors' Committee established pursuant to the Amended Litigation Investigator Order dated April 26, 2018 shall continue as currently constituted thereunder to consult with and provide input to the Litigation Trustee Parties in respect of the claims brought by the Litigation Trustee in accordance with this Order.

4. THIS COURT ORDERS that the Litigation Trustee Parties shall meet with the Creditors' Committee on a monthly basis unless otherwise agreed for a particular month by said parties, and which meetings shall be subject to confidentiality and that privilege shall be maintained.

APPOINTMENT OF LITIGATION TRUSTEE

5. THIS COURT ORDERS that the Honourable J. Douglas Cunningham, Q.C. is hereby appointed as an officer of this Court to be the Litigation Trustee over and in respect of the Applicants' claims identified in the First Report of the Litigation Investigator (the "**Litigation Assets**" or the "**Claims**") on the terms described herein.

LITIGATION TRUSTEE'S POWERS

6. THIS COURT ORDERS that the Litigation Trustee is hereby empowered, authorized and directed to do all things and carry out all actions necessary to prosecute the Claims, including:

(a) to engage, give instructions and pay counsel as well as consultants, appraisers, agents, advisors, experts, auditors, accountants, managers and such other persons from time to time on whatever basis the Litigation Trustee may agree, in consultation with the Monitor, to assist with the exercise of his powers and duties. Notwithstanding such authority, the Litigation Trustee shall be under no obligation to consult with its counsel, consultants, appraiser, agents, advisors, experts, auditors, accountants, managers and its good faith determination not to do so shall not result in the imposition of liability on the Litigation Trustee, unless such determination is based on gross negligence or willful misconduct;

(b) to execute, assign, issue and endorse documents of whatever nature in the name of and on behalf of Sears Canada for any purpose in connection with the Claims or otherwise pursuant to this Order; and

(c) to pursue the Claims, defend any counter claim, third party claim or other claim brought against Sears Canada, and subject to further Order of the Court, and in consultation with the Monitor, to settle or compromise, abandon, dismiss or otherwise dispose of such proceeding. The authority hereby conferred shall extend to any appeals or applications for judicial review in respect of any order or judgment pronounced in such proceeding.

7. THIS COURT ORDERS that, notwithstanding the generality of paragraph ~~5(d)~~ 6(c) above, the Litigation Trustee is hereby authorized and empowered to commence claims, in his own name or on behalf of the Applicants, against ESL Investments Inc. (and certain affiliates), Edward Lampert, William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, Deborah E. Rosati, R. Raja Khanna, James McBurney and Douglas Campbell.

8. THIS COURT ORDERS that the stay of proceedings provided for in paragraph 25 of the Initial Order dated June 22, 2017 (the "**Initial Order**"), is hereby lifted as against William C. Crowley, William R. Harker, Donald Campbell Ross, Ephraim J. Bird, Deborah E. Rosati, R. Raja Khanna, James McBurney and Douglas Campbell for the purposes of permitting the claims referred to in the First Report, including those of the Litigation Trustee, to be commenced and pursued against those persons.

INDEMNITY

9. THIS COURT ORDERS that the Litigation Trustee shall incur no liability or obligation as a result of his appointment or in carrying out of any of the provisions of this Order, save and except for any gross negligence or any willful misconduct. Sears Canada shall indemnify and hold harmless the Litigation Trustee and his designated agents, representatives and professionals with respect to any liability or obligations as a result of his appointment or the fulfillment of his duties in carrying out the provisions of this Order, save and except for any gross negligence or willful misconduct. For clarity, in no event shall the Litigation Trustee be personally liable for any costs awarded against Sears Canada in the action. Any such costs awarded shall be a claim solely against Sears Canada estate. No action, application or other proceeding shall be commenced against the Litigation Trustee as a result of, or relating in any way to his appointment, the fulfillment of his duties or the carrying out of any Order of this Court except with leave of this Court being obtained. Notice of any such motion seeking leave of this Court shall be served upon Sears Canada, the Monitor and the Litigation Trustee at least seven (7) days prior to the return date of any such motion for leave.

10. THIS COURT ORDERS that the indemnity pursuant to paragraphs ~~4-8~~ 5-9 above shall survive any termination, replacement or discharge of the Litigation Trustee. Upon any termination, replacement or discharge of the Litigation Trustee, on not less than 10 business days' notice, all claims against the Litigation Trustee, his designated agents, representatives and professionals for which leave of the Court has not already been sought and obtained shall be, and are hereby forever discharged, other than claims for which a party seeks leave prior to the discharge date to bring a claim against the Litigation Trustee and (i) such leave has been obtained; or (ii) the request for leave remains outstanding.

LITIGATION TRUSTEE'S ACCOUNTS

11. THIS COURT ORDERS that the Litigation Trustee and counsel to the Litigation Trustee (collectively, the "**Litigation Trustee Parties**") shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by Sears Canada as part of the costs of these proceedings. Sears Canada is authorized and directed to pay the accounts of the Litigation Trustee Parties on a bi-weekly basis (or such other interval as may be mutually agreed upon) and, in addition, Sears Canada is hereby authorized to pay to the Litigation Trustee Parties retainers not exceeding $50,000.00 each, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

12. THIS COURT ORDERS that the Litigation Trustee Parties shall pass their accounts from time to time, and for this purpose the accounts of the Litigation Trustee Parties are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

13. THIS COURT ORDERS that the Litigation Trustee Parties shall be entitled to the benefit of and are hereby granted a charge in the maximum amount of $500,000.00 (the "**Litigation Trustee's Charge**") on the "**Property**" of Sears Canada as defined by paragraph 4 of the Initial Order, ranking *pari passu* with the Administration Charge (as defined in the Initial Order), in priority to all other security interests, trusts (statutory or otherwise), liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any person, including all charges granted by the Initial Order (other than the Administration Charge) and all other Orders of this Court granted in these proceedings.

14. THIS COURT ORDERS that the filing, registration or perfection of the Litigation Trustee's Charge shall not be required, and that the Litigation Trustee's Charge shall be valid and enforceable for all purposes, notwithstanding any such failure to file, register, record or perfect.

15. THIS COURT ORDERS that the granting of the Litigation Trustee's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Litigation Trustee's Charge shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declaration of insolvency herein; (b) any application(s) for bankruptcy order(s) issued pursuant to *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; or (d) the provisions of any federal or provincial statutes, and notwithstanding any provision to the contrary in any agreement.

16. THIS COURT ORDERS that the payments made by Sears Canada pursuant to this Order and the granting of the Litigation Trustee's Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

LIMITATION ON ENVIRONMENTAL LIABILITIES

17. THIS COURT ORDERS that nothing herein contained shall require the Litigation Trustee to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the

disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Litigation Trustee from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Litigation Trustee shall not, as a result of this Order or anything done in pursuance of the Litigation Trustee's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

PROCEDURE

18. THIS COURT ORDERS that a case management judge for the claims brought by the Monitor, the Litigation Trustee, the Pension Administrator, and the Class Action plaintiffs as referred to in the First Report will be appointed as soon as possible.

19. THIS COURT ORDERS that the procedure to be followed for the claims brought by the Monitor, the Litigation Trustee, the Pension Administrator, and the Class Action plaintiffs as referred to in the First Report shall be determined by the case management judge.

GENERAL

20. THIS COURT ORDERS that, without limiting any other provisions of this Order, the Litigation Trustee may from time to time apply to this Court for advice and directions in the discharge of his powers and duties hereunder.

21. THIS COURT ORDERS that the Monitor and the Litigation Trustee may report to the Court on their activities from time to time as any of them may see fit or as this Court may direct.

22. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Litigation Trustee and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Litigation Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Litigation Trustee and its agents in carrying out the terms of this Order.

23. THIS COURT ORDERS that the Litigation Trustee be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Litigation Trustee is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

24. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Litigation Trustee and the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

ENTERED AT / INSCRIT À TORONTO
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LE / DANS LE REGISTRE NO:

DEC 04 2018

PER / PAR: UM

HAINEY, J.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985 c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUEBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041, ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

ORDER
(APPOINTMENT OF LITIGATION TRUSTEE, LIFTING OF STAY, AND OTHER RELIEF)

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Litigation Investigator

Tab 15

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	MONDAY, THE 3RD
	)	
JUSTICE HAINEY	)	DAY OF DECEMBER, 2018

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

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

Applicants

TRANSFER AT UNDERVALUE PROCEEDING APPROVAL ORDER

THIS MOTION, made by FTI Consulting Canada Inc., in its capacity as Court-appointed Monitor (the "**Monitor**") of the Applicants in these proceedings for an order to commence certain proceedings was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of the Monitor and the twenty-seventh report of the Monitor dated November 5, 2018 (the "**Twenty-Seventh Report**") and the first supplement to the Twenty-Seventh Report, dated November 20, 2018, and on hearing the submissions of counsel for the Monitor and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of Catherine Ma, sworn November 6, 2018, filed:

TRANSFER AT UNDERVALUE CLAIM

1. **THIS COURT ORDERS** that the Monitor is authorized and empowered pursuant to section 36.1 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") to commence and continue a claim against ESL Investments Inc., ESL Partners, LP, SPE I Partners, LP, SPE Master I, LP, ESL Institutional Partners, LP, Edward S. Lampert, William Harker and William Crowley (the "**Transfer at Undervalue Proceedings**") under section 96 of the *Bankruptcy and Insolvency Act* (Canada), R.S.C. 1985, c. B-3, as amended (the "**BIA**"), as incorporated into the CCAA under Section 36.1, relating to the dividend paid to shareholders of Sears Canada Inc. ("**SCI**") on December 6, 2013 in the amount of approximately $509 million (the "**2013 Dividend**") as further described in the Twenty-Seventh Report, and as set out in the draft statement of claim appended thereto, with such amendments as the Monitor deems appropriate.

2. **THIS COURT ORDERS** that the granting of this Order permitting the Monitor to commence the Transfer at Undervalue Proceedings does not constitute a determination of any liability under the Monitor's claim.

3. **THIS COURT ORDERS** that the Monitor is authorized to bring the Transfer at Undervalue Proceedings in this Court.

4. **THIS COURT ORDERS** that the stays of proceedings provided for under the initial order issued by this Court, as amended and restated on July 13, 2017 (the "**Initial Order**"), as they apply to former directors of SCI are hereby lifted solely to allow the Monitor to commence and continue the Transfer at Undervalue Proceedings against William Crowley and William Harker.

5. **THIS COURT ORDERS** that in addition to the powers provided to the Monitor pursuant to the Initial Order and the obligations imposed upon those with information and records

pertaining to the Applicants, the Applicants shall cooperate fully with the Monitor in relation to the Transfer at Undervalue Proceedings and the Applicants shall incur no liability by reason of the cooperation referred to in this paragraph.

6. **THIS COURT ORDERS** that the Creditors' Committee established pursuant to the Amended Litigation Investigator Order dated April 26, 2018 shall continue as currently constituted thereunder to also consult with the Monitor in respect of the Transfer at Undervalue Proceedings.

PROTECTIONS TO THE MONITOR

7. **THIS COURT ORDERS** that in relation to all matters connected with the Transfer at Undervalue Proceedings, the Monitor shall have all of the rights, powers and protections provided for pursuant to the Initial Order.

8. **THIS COURT ORDERS** that the Monitor shall continue to have the benefit of the protections provided under paragraph 34 of the Initial Order in the exercise of its powers under this Order, including, without limitation, the commencement and continuation of the Transfer at Undervalue Proceedings.

9. **THIS COURT ORDERS** that the foregoing does not preclude the Court from awarding legal costs associated with the Transfer at Undervalue Proceedings in favour of a party to the Transfer at Undervalue Proceedings and in the event that such costs are awarded against the Monitor, the Monitor shall have a claim for indemnity against the Property (as such term is defined in paragraph 4 of the Initial Order) to satisfy any such costs award ("**Monitor's Cost Indemnity Claim**") and such indemnity claim shall be secured by the Administration Charge (as such term is defined in paragraph 37 of the Initial Order) created in accordance with the Initial Order, as amended by this Order.

10. **THIS COURT ORDERS** that the Initial Order shall be amended as necessary so as to provide that the maximum aggregate amount of the Administration Charge is equal the sum of $5 million plus the amount of the Monitor's Cost Indemnity Claim.

COSTS AND OPT-OUT MECHANISM

11. **THIS COURT ORDERS** that the Monitor shall separately account for any costs directly related to the Transfer at Undervalue Proceedings and any claims pursued on the recommendation of the Litigation Investigator (as defined in the Twenty-Seventh Report) (the "**LI Claims**") from any other costs to administer the estates of the Applicants.

12. **THIS COURT ORDERS** that unsecured creditors of SCI who do not wish to have their distributions, if any, affected by the costs or recoveries of the Transfer at Undervalue Proceedings or the LI Claims (the "**Opt-out Creditors**") shall have the option to opt out of such participation and such Opt-out Creditors' recoveries will be neither increased by any recoveries from such claims nor reduced by the costs of pursuing such claims, including the costs of any Monitor's Cost Indemnity Claim.

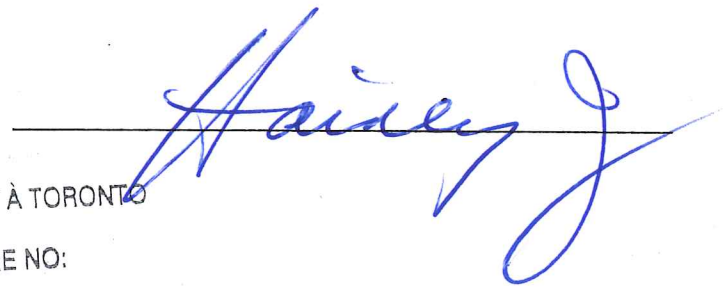
13. **THIS COURT ORDERS** that the form of opt-out notification attached as Appendix "C" to the Twenty-Seventh Report (the "**Opt-out Notice**") is hereby approved and the Monitor is authorized and directed to, as soon as practicable, deliver the Opt-out Notice to all unsecured creditors of SCI (other than those creditors represented by Employee Representative Counsel and Pension Representative Counsel (in each case as defined in the Twenty-Seventh Report)) having unsecured claims that are either resolved or disputed in amounts in excess of $5,000 to the address shown on such unsecured creditor's proof of claim filed in accordance with the Claims Procedure Order granted on December 8, 2018 in these proceedings. The Monitor is further authorized and directed to, as soon as practicable, deliver the Opt-out Notice to Employee Representative Counsel, Pension Representative Counsel and to Morneau Shepell

Limited, as administrator of the Sears Canada Pension Plan. Employee Representative Counsel and Pension Representative Counsel shall each be authorized to determine whether an Opt-out Notice should be completed and delivered on behalf of those parties they represent and, following such determination, either elect to deliver or not deliver such Opt-out Notice on behalf of those parties they represent. Morneau Shepell Limited, as administrator of the Sears Canada Pension Plan, shall be authorized to determine whether an Opt-out Notice should be delivered in connection with the Sears Pension Claim (as defined in the Employee and Retiree Claims Procedure Order granted on February 22, 2018) and, following such determination, either elect to deliver or not deliver such Opt-out Notice in connection with the Sears Pension Claim. Any creditor, including Morneau Shepell Limited, (or Employee Representative Counsel or Pension Representative Counsel on behalf of the parties they represent) who receives an Opt-out Notice and returns such Opt-out Notice executed to the Monitor at the address shown on the Opt-out Notice so that it is received by the Monitor on or before sixty days after the date of delivery thereof to such creditor (or Employee Representative Counsel or Pension Representative Counsel on behalf of the parties they represent) shall have irrevocably agreed to be treated as an Opt-out Creditor in these proceedings. All other unsecured creditors of SCI shall be deemed not to be Opt-out Creditors.

GENERAL

14. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States or any other jurisdiction to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order, including the U.S. Bankruptcy Court. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and the Monitor, as an

officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order



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DEC 04 2018

PER / PAR: UM

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., et al.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

TRANSFER AT UNDERVALUE PROCEEDING APPROVAL ORDER

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Lawyers to the Monitor, FTI Consulting Canada Inc.

Tab 16

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR. JUSTICE HAINEY	)	THURSDAY, THE 22ND DAY OF JUNE, 2017

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., CORBEIL ÉLECTRIQUE INC., S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.
(each, an "**Applicant**", and collectively, the "**Applicants**")

AMENDED AND RESTATED INITIAL ORDER

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Billy Wong sworn June 22, 2017, and the Exhibits thereto (collectively, the "**Wong Affidavit**"), and the pre-filing report dated June 22, 2017 of FTI Consulting Canada Inc. ("**FTI**"), in its capacity as the proposed Monitor of the Applicants (the "**Pre-Filing Report**"), and on hearing the submissions of counsel to the Applicants and SearsConnect (the "**Partnership**", and collectively with the Applicants, the "**Sears Canada**

Entities"), counsel to the Board of Directors (the "**Board of Directors**") of Sears Canada Inc. ("**SCI**") and the Special Committee of the Board of Directors (the "**Special Committee**") of SCI, counsel to FTI, counsel to Wells Fargo Capital Finance Corporation Canada (the "**DIP ABL Agent**"), as administrative agent under the DIP ABL Credit Agreement (as defined herein), and counsel to GACP Finance Co., LLC (the "**DIP Term Agent**"), as administrative agent under the DIP Term Credit Agreement (as defined herein), Koskie Minsky LLP as counsel for Store Catalogue Retiree Group, counsel for the Financial Services Commission of Ontario, and on reading the consent of FTI to act as the Monitor.

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Applicants are companies to which the CCAA applies. Although not an Applicant, the Partnership shall enjoy the benefits of the protections and authorizations provided by this Order.

PLAN OF ARRANGEMENT

3. **THIS COURT ORDERS** that the Applicants, individually or collectively, shall have the authority to file and may, subject to further Order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. **THIS COURT ORDERS** that the Sears Canada Entities shall remain in possession and control of their respective current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). For greater certainty, the "Property" includes all inventory, assets, undertakings and property of the Sears Canada Entities in the possession or control of the Hometown Dealers (as defined in the Wong Affidavit) and all inventory, assets, undertakings and property of the Sears Canada

Entities in the possession or control of the Corbeil Franchisees (as defined in the Wong Affidavit). Subject to further Order of this Court, the Sears Canada Entities shall continue to carry on business in a manner consistent with the preservation of the value of their business (the "**Business**") and Property. The Sears Canada Entities shall each be authorized and empowered to continue to retain and employ the employees, independent contractors, advisors, consultants, agents, experts, accountants, counsel and such other persons (collectively, "**Assistants**") currently retained or employed by them, with liberty, subject to the terms of the Definitive Documents (as defined herein) to retain such further Assistants, as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. **THIS COURT ORDERS** that the Sears Canada Entities shall be entitled to continue to utilize the central cash management services currently in place as described in the Wong Affidavit, or, with the consent of the Monitor, the DIP ABL Agent on behalf of the DIP ABL Lenders (as defined herein) and the DIP Term Agent on behalf of the DIP Term Lenders (as defined herein), replace it with another substantially similar central cash management services (the "**Cash Management System**") and that any present or future bank or other institution providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Sears Canada Entities of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Sears Canada Entities, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System; provided, however, that no bank or other institution providing such Cash Management System shall be obliged to extend any overdraft credit, on an aggregate net basis, directly or indirectly in connection therewith and further provided that, to the extent any overdraft occurs, on an aggregate net basis, the Sears Canada Entities shall make arrangements to repay such overdraft forthwith.

6. **THIS COURT ORDERS** that the Sears Canada Entities, subject to availability under, and in accordance with the terms of the DIP Facilities (as defined herein) and the Definitive Documents, and subject to further Order of this Court, shall be entitled but not required to pay the following expenses whether incurred prior to, on or after this Order to the extent that such expenses are incurred and payable by the Sears Canada Entities:

(a) all outstanding and future wages, salaries, commissions, employee and retiree benefits (including, without limitation, medical, dental, life insurance and similar benefit plans or arrangements), pension benefits or contributions, vacation pay, expenses, and director fees and expenses, payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements (but not including termination or severance payments), and all other payroll, pension and benefits processing and servicing expenses;

(b) all outstanding and future amounts owing to or in respect of Persons working as independent contractors in connection with the Business;

(c) all outstanding or future amounts owing in respect of customer rebates, refunds, discounts or other amounts on account of similar customer programs or obligations;

(d) all outstanding or future amounts related to honouring customer obligations, whether existing before or after the date of this Order, including customer financing, product warranties, pre-payments, deposits, gift cards, Sears Club programs (including redemptions of Sears Club points) and other customer loyalty programs, offers and benefits, in each case incurred in the ordinary course of business and consistent with existing policies and procedures;

(e) the fees and disbursements of any Assistants retained or employed by the Sears Canada Entities at their standard rates and charges; and

(f) with the consent of the Monitor, amounts owing for goods or services actually supplied to the Sears Canada Entities prior to the date of this Order by:

(i) logistics or supply chain providers, including customs brokers and freight forwarders, fuel providers, repair, maintenance and parts providers, and security and armoured truck carriers, and including amounts payable in respect of customs and duties for goods;

(ii) providers of information, internet, and other technology, including e-commerce providers and related services;

(iii) providers of credit, debit and gift card processing related services; and

(iv) other third party suppliers up to a maximum aggregate amount of $25 million, if, in the opinion of the Sears Canada Entities, the supplier is critical to the business and ongoing operations of the Sears Canada Entities.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein and subject to the terms of the Definitive Documents, the Sears Canada Entities shall be entitled but not required to pay all reasonable expenses incurred by them in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order and any other Order of this Court, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors' and officers' insurance), maintenance (including environmental remediation) and security services; and

(b) payment for goods or services actually supplied to the Sears Canada Entities following the date of this Order.

8. **THIS COURT ORDERS** that the Sears Canada Entities shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from the Sears Canada Entities' employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services taxes, harmonized sales taxes or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Sears Canada Entities in connection with the sale of goods and services by the Sears Canada Entities, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order;

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business, workers' compensation or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Sears Canada Entities; and

(d) taxes under the *Income Tax Act* (Canada) or other relevant taxing statutes to the extent that such taxing statutes give rise to statutory deemed trust amounts in favour of the Crown in right of Canada or any Province thereof or any political subdivision thereof or any other taxation authority.

9. **THIS COURT ORDERS** that, except as specifically permitted herein, the Sears Canada Entities are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by any one of the Sears Canada Entities to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of the Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business or pursuant to this Order or any further Order of this Court.

RESTRUCTURING

10. **THIS COURT ORDERS** that the Sears Canada Entities shall, subject to such requirements as are imposed by the CCAA, and subject to the terms of the Definitive Documents, have the right to:

(a) permanently or temporarily cease, downsize or shut down any of their Business or operations, and to dispose of redundant or non-material assets not exceeding $2 million in any one transaction or $5 million in the aggregate in any series of related transactions, provided that, with respect to leased premises, the Sears Canada Entities may, subject to the requirements of the CCAA and paragraphs 11 to 13 herein, vacate, abandon or quit the whole (but not part of) and may permanently (but not temporarily) cease, downsize or shut down any of their Business or operations in respect of any leased premises;

(b) terminate the employment of such of its employees or temporarily lay off such of its employees as the relevant Sears Canada Entity deems appropriate; and

(c) pursue all avenues of refinancing, restructuring, selling and reorganizing the Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing, restructuring, sale or reorganization,

all of the foregoing to permit the Sears Canada Entities to proceed with an orderly restructuring of the Sears Canada Entities and/or the Business (the "**Restructuring**").

REAL PROPERTY LEASES

11. **THIS COURT ORDERS** that until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Sears Canada Entities shall pay, without duplication, all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under its lease, but for greater certainty, excluding accelerated rent or penalties, fees or other charges arising as a result of the insolvency of any or all of the Sears Canada Entities or the making of this Order) or as otherwise may be negotiated between the applicable Sears Canada Entity and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

12. **THIS COURT ORDERS** that the Sears Canada Entities shall provide each of the relevant landlords with notice of the relevant Sears Canada Entity's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the entitlement of a Sears Canada Entity to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the relevant Sears Canada Entity, or by further Order of this Court upon application by the Sears Canada Entities on at least two (2) days' notice to such landlord and any such secured creditors. If any of the Sears Canada Entities disclaims or resiliates the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer or resiliation of the lease shall be without prejudice to the relevant Sears Canada Entity's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer or resiliation is delivered pursuant to Section 32 of the CCAA by any of the Sears Canada Entities, then: (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the relevant Sears Canada Entity and the Monitor 24 hours' prior written notice; and (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the relevant Sears Canada Entity in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE SEARS CANADA ENTITIES, THE BUSINESS OR THE PROPERTY

14. **THIS COURT ORDERS** that until and including July 22, 2017, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the

Sears Canada Entities or the Monitor or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, except with the written consent of the Sears Canada Entities and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Sears Canada Entities or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. **THIS COURT ORDERS** that during the Stay Period, no Person having any agreements or arrangements with the owners, operators, managers or landlords of commercial shopping centres or other commercial properties (including retail, office and industrial (warehouse) properties) in which there is located a store, office or warehouse owned or operated by the Sears Canada Entities shall take any Proceedings or exercise any rights or remedies under such agreements or arrangements that may arise upon and/or as a result of the making of this Order, the insolvency of, or declarations of insolvency by, any or all of the Sears Canada Entities, or as a result of any steps taken by the Sears Canada Entities pursuant to this Order and, without limiting the generality of the foregoing, no Person shall terminate, accelerate, suspend, modify, determine or cancel any such arrangement or agreement or be entitled to exercise any rights or remedies in connection therewith.

16. **THIS COURT ORDERS** that during the Stay Period, no Person having any agreements or arrangements with the Hometown Dealers or the Corbeil Franchisees shall take any Proceedings or exercise any rights or remedies under such agreements or arrangements that may arise upon and/or as a result of the making of this Order, the insolvency of, or declarations of insolvency by, any or all of the Sears Canada Entities, or as a result of any steps taken by the Sears Canada Entities pursuant to this Order and, without limiting the generality of the foregoing, no Person shall terminate, accelerate, suspend, modify, determine or cancel any such arrangement or agreement or be entitled to exercise any rights or remedies in connection therewith.

17. **THIS COURT ORDERS** that during the Stay Period all rights and remedies, of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Sears Canada Entities or the Monitor or their respective employees and representatives acting in

such capacities, or affecting the Business or the Property, are hereby stayed and suspended, except with the written consent of the Sears Canada Entities and the Monitor, or leave of this Court, provided that nothing in this Order shall: (a) empower the Sears Canada Entities to carry on any business that the Sears Canada Entities are not lawfully entitled to carry on; (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA; (c) prevent the filing of any registration to preserve or perfect a security interest; (d) prevent the registration of a claim for lien; (e) prevent any holder of a valid and enforceable right of first refusal, option to purchase or other similar right in respect of any real property from being entitled to exercise all such rights; or (f) empower the Sears Canada Entities to fail to comply with their obligations under leases (other than the payment of rent on a twice-monthly basis, in accordance with paragraph 11 herein), operating agreements or similar agreements for the period from and after the commencement of this proceeding.

NO INTERFERENCE WITH RIGHTS

18. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, lease, sublease, licence or permit in favour of or held by the Sears Canada Entities, except with the written consent of the Sears Canada Entities and the Monitor, or leave of this Court. Without limiting the foregoing, no right, option, remedy, and/or exemption in favour of the relevant Sears Canada Entity shall be or shall be deemed to be negated, suspended, waived and/or terminated as a result of this Order.

CONTINUATION OF SERVICES

19. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Sears Canada Entities or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all trademark license and other intellectual property, computer software, communication and other data services, centralized banking services, payroll and benefit services, insurance, warranty services, transportation services, freight services, security and armoured truck carrier services, utility, customs clearing, warehouse and logistics services or other services to the Business or the Sears Canada Entities are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply or license of such goods, services, trademarks and other

intellectual property as may be required by the Sears Canada Entities, and that the Sears Canada Entities shall be entitled to the continued use of the trademarks and other intellectual property currently licensed to, used or owned by the Sears Canada Entities, premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Sears Canada Entities in accordance with normal payment practices of the Sears Canada Entities or such other practices as may be agreed upon by the supplier or service provider and each of the Sears Canada Entities and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

20. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Sears Canada Entities. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

KEY EMPLOYEE RETENTION PLAN

21. **THIS COURT ORDERS** that the Key Employee Retention Plan (the "**KERP**"), as described in the Wong Affidavit, is hereby approved and the Sears Canada Entities are authorized to make payments contemplated thereunder in accordance with the terms and conditions of the KERP.

22. **THIS COURT ORDERS** that the key employees referred to in the KERP (the "**Key Employees**") shall be entitled to the benefit of and are hereby granted the following charges on the Property, which charges shall not exceed: (a) an aggregate amount of $4.6 million (the "**KERP Priority Charge**") to secure the first $4.6 million payable to the Key Employees under the KERP; and (b) an aggregate amount of $4.6 million (the "**KERP Subordinated Charge**") to secure any other payments to the Key Employees under the KERP. The KERP Priority Charge and the KERP Subordinated Charge shall have the priority set out in paragraphs 47, 48 and 50 hereof.

APPROVAL OF FINANCIAL ADVISOR AGREEMENT

23. **THIS COURT ORDERS** that the agreement dated May 15, 2017 engaging BMO Nesbitt Burns Inc. (the "**Financial Advisor**") as financial advisor to SCI and attached as Confidential Appendix C to the Pre-Filing Report (the "**Financial Advisor Agreement**"), and the retention of the Financial Advisor under the terms thereof, is hereby ratified and approved and SCI is authorized and directed *nunc pro tunc* to make the payments contemplated thereunder in accordance with the terms and conditions of the Financial Advisor Agreement.

24. **THIS COURT ORDERS** that the Financial Advisor shall be entitled to the benefit of and is hereby granted a charge (the "**FA Charge**") on the Property, which charge shall not exceed an aggregate amount of $3.3 million, as security for the fees and disbursements payable under the Financial Advisor Agreement, both before and after the making of this Order in respect of these proceedings. The FA Charge shall have the priority set out in paragraphs 47, 48 and 50 hereof.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

25. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Sears Canada Entities with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Sears Canada Entities whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Sears Canada Entities, if one is filed, is sanctioned by this Court or is refused by the creditors of the Sears Canada Entities or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

26. **THIS COURT ORDERS** that the Sears Canada Entities shall jointly and severally indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Sears Canada Entities after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or

liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

27. **THIS COURT ORDERS** that the directors and officers of the Sears Canada Entities shall be entitled to the benefit of and are hereby granted the following charges on the Property, which charges shall not exceed: (a) an aggregate amount of $44 million (the "**Directors' Priority Charge**"); and (b) an aggregate amount of $19.5 million (the "**Directors' Subordinated Charge**"), respectively, and in each case, as security for the indemnity provided in paragraph 26 of this Order. The Directors' Priority Charge and the Directors' Subordinated Charge shall have the priority set out in paragraphs 47, 48 and 50 hereof.

28. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary: (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Priority Charge and the Directors' Subordinated Charge; and (b) the Sears Canada Entities' directors and officers shall only be entitled to the benefit of the Directors' Priority Charge and the Directors' Subordinated Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 26 of this Order.

APPOINTMENT OF MONITOR

29. **THIS COURT ORDERS** that FTI is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Business and financial affairs of the Sears Canada Entities with the powers and obligations set out in the CCAA or set forth herein and that the Sears Canada Entities and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Sears Canada Entities pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

30. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Sears Canada Entities' receipts and disbursements;

(b) liaise with the Sears Canada Entities and the Assistants and, if determined by the Monitor to be necessary, the Hometown Dealers and Corbeil Franchisees, with respect to all matters relating to the Property, the Business, the Restructuring and such other matters as may be relevant to the proceedings herein;

(c) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, the Restructuring and such other matters as may be relevant to the proceedings herein;

(d) assist the Sears Canada Entities, to the extent required by the Sears Canada Entities, in their dissemination of financial and other information to the DIP ABL Agent, the DIP ABL Lenders, the DIP Term Agent, the DIP Term Lenders and each of their respective counsel and financial advisors, pursuant to and in accordance with the Definitive Documents;

(e) advise the Sears Canada Entities in their preparation of the Sears Canada Entities' cash flow statements and any reporting required by the Definitive Documents, which information shall be reviewed with the Monitor and delivered to the DIP ABL Agent, the DIP ABL Lenders, the DIP Term Agent, the DIP Term Lenders and each of their respective counsel and financial advisors, pursuant to and in accordance with the Definitive Documents;

(f) advise the Sears Canada Entities in their development of the Plan and any amendments to the Plan;

(g) assist the Sears Canada Entities, to the extent required by the Sears Canada Entities, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(h) have full and complete access to the Property (including any Property in the possession of the Hometown Dealers and the Corbeil Franchisees), including the premises, books, records, data, including data in electronic form, and other financial documents of the Sears Canada Entities, to the extent that is necessary to adequately

assess the Business and the Sears Canada Entities' financial affairs or to perform its duties arising under this Order;

(i) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(j) assist the Sears Canada Entities, to the extent required by the Sears Canada Entities, with any matters relating to any foreign proceeding commenced in relation to any of the Sears Canada Entities, including retaining independent legal counsel, agents, experts, accountants, or such other persons as the Monitor deems necessary or desirable respecting the exercise of this power; and

(k) perform such other duties as are required by this Order or by this Court from time to time.

31. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

32. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of

any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

33. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Sears Canada Entities, the DIP ABL Agent, the DIP ABL Lenders, the DIP Term Agent and the DIP Term Lenders with information provided by the Sears Canada Entities 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 Sears Canada Entities is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Sears Canada Entities may agree.

34. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

35. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, counsel to the Sears Canada Entities and counsel to the Board of Directors and the Special Committee shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to or subsequent to the date of this Order, by the Sears Canada Entities as part of the costs of these proceedings. The Sears Canada Entities are hereby authorized and directed to pay the accounts of the Monitor, counsel to the Monitor, counsel to the Sears Canada Entities and counsel to the Board of Directors and the Special Committee on a weekly basis and, in addition, the Sears Canada Entities are hereby authorized to pay to the Monitor, counsel to the Monitor, counsel to the Sears Canada Entities and counsel to the Board of Directors and the Special Committee, retainers in the aggregate amount of $700,000, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

36. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

37. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, counsel to the Sears Canada Entities and counsel to the Board of Directors and the Special Committee shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $5 million, as security for their professional fees and disbursements incurred at their respective standard rates and charges, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 47, 48 and 50 hereof.

DIP FINANCING

38. **THIS COURT ORDERS** that the Sears Canada Entities are hereby authorized and empowered to obtain and borrow or guarantee, as applicable, on a joint and several basis, under:

(a) the Senior Secured Superpriority Debtor-in-Possession Amended and Restated Credit Agreement dated as of June 22, 2017 and attached to the Wong Affidavit as Exhibit K, among the Sears Canada Entities, the DIP ABL Agent and the lenders from time to time party thereto (the "**DIP ABL Lenders**") (as may be amended, restated, supplemented and/or modified, subject to approval of this Court in respect of any amendment that the Monitor determines to be material, the "**DIP ABL Credit Agreement**"), in order to finance the Sears Canada Entities' working capital requirements and other general corporate purposes and capital expenditures, all in accordance with the Definitive Documents, provided that borrowings under DIP ABL Credit Agreement shall not exceed $300 million unless permitted by further Order of this Court (the "**DIP ABL Credit Facility**"); and

(b) the Senior Secured Superpriority Credit Agreement dated as of June 22, 2017 and attached to the Wong Affidavit as Exhibit K, among the Sears Canada Entities, the DIP Term Agent and the lenders from time to time party thereto (the "**DIP Term Lenders**") (as may be amended, restated, supplemented and/or modified, subject to approval of this Court in respect of any amendment that the Monitor determines to be material, the "**DIP Term Credit Agreement**"), in order to finance the Sears Canada Entities' working capital requirements and other general corporate purposes and capital expenditures, all in accordance with the Definitive Documents, provided that borrowings under the DIP Term Credit Agreement shall not exceed $150 million

unless permitted by further Order of this Court (the "**DIP Term Credit Facility**", and together with the DIP ABL Credit Facility, the "**DIP Facilities**").

39. **THIS COURT ORDERS** that the DIP Facilities shall be on the terms and subject to the conditions set forth in the DIP ABL Credit Agreement, the DIP Term Credit Agreement and the other Definitive Documents.

40. **THIS COURT ORDERS** that the Sears Canada Entities are hereby authorized and empowered to execute and deliver the DIP ABL Credit Agreement, the DIP Term Credit Agreement and such mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, and including any schedules (as amended and updated from time to time) thereto, the "**Definitive Documents**"), as are contemplated by the DIP ABL Credit Agreement and the DIP Term Credit Agreement or as may be reasonably required by the DIP ABL Agent on behalf of the DIP ABL Lenders and the DIP Term Agent on behalf of the DIP Term Lenders pursuant to the terms thereof, as applicable, and the Sears Canada Entities are hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP ABL Agent, the DIP ABL Lenders, the DIP Term Agent and the DIP Term Lenders under and pursuant to the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

41. **THIS COURT ORDERS** that the DIP ABL Agent and the DIP ABL Lenders shall be entitled to the benefit of and are hereby granted a charge (the "**DIP ABL Lenders' Charge**") on the Property as security for any and all Obligations (as defined in the DIP ABL Credit Agreement) other than the Prepetition Obligations (as defined in the DIP ABL Credit Agreement) (including on account of principal, interest, fees, expenses and other liabilities, and the aggregate of all such obligations, the "**DIP ABL Obligations**"), which DIP ABL Lenders' Charge shall be in the aggregate amount of the DIP ABL Obligations outstanding at any given time under the DIP ABL Credit Agreement. The DIP ABL Lenders' Charge shall not secure an obligation that exists before this Order is made. The DIP ABL Lenders' Charge shall have the priority set out in paragraphs 47, 48 and 50 hereof.

42. **THIS COURT ORDERS** that the DIP Term Agent and the DIP Term Lenders shall be entitled to the benefit of and are hereby granted a charge (the "**DIP Term Lenders' Charge**") on the Property as security for any and all Obligations (as defined in DIP Term Credit Agreement)

(including on account of principal, interest, fees, expenses and other liabilities, and the aggregate of all such obligations, the "**DIP Term Obligations**"), which DIP Term Lenders' Charge shall be in the aggregate amount of the DIP Term Obligations outstanding at any given time under the DIP Term Credit Agreement. The DIP Term Lenders' Charge shall not secure an obligation that exists before this Order is made. The DIP Term Lenders' Charge shall have the priority set out in paragraphs 47, 48 and 50 hereof.

43. [Intentionally deleted.]

44. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP ABL Agent on behalf of the DIP ABL Lenders, as applicable, may take such steps from time to time as they may deem necessary or appropriate to file, register, record or perfect the DIP ABL Lenders' Charge, the DIP ABL Credit Agreement or any of the other Definitive Documents;

(b) the DIP Term Agent on behalf of the DIP Term Lenders, as applicable, may take such steps from time to time as they may deem necessary or appropriate to file, register, record or perfect the DIP Term Lenders' Charge, the DIP Term Credit Agreement or any of the other Definitive Documents;

(c) upon the occurrence of an event of default under the DIP ABL Credit Agreement, the other related Definitive Documents or the DIP ABL Lenders' Charge, the DIP ABL Agent and the DIP ABL Lenders, as applicable, may, subject to the provisions of the DIP ABL Credit Agreement with respect to the giving of notice or otherwise, and in accordance with the DIP ABL Credit Agreement, the other related Definitive Documents and the DIP ABL Lenders' Charge, as applicable, cease making advances to the Sears Canada Entities, make demand, accelerate payment and give other notices; provided that, the DIP ABL Agent and the DIP ABL Lenders must apply to this Court on seven (7) days' prior written notice (which may include the service of materials in connection with such an application to this Court) to the Sears Canada Entities, the DIP Term Agent, the DIP Term Lenders and the Monitor, to enforce against or exercise any other rights and remedies with respect to the Sears Canada Entities or any of the Property (including to set off and/or consolidate any amounts

owing by the DIP ABL Agent and the DIP ABL Lenders to the Sears Canada Entities against the obligations of the Sears Canada Entities to the DIP ABL Agent and the DIP ABL Lenders under the DIP ABL Credit Agreement, the other related Definitive Documents or the DIP ABL Lenders' Charge), to appoint a receiver, receiver and manager or interim receiver, or to seek a bankruptcy order against the Sears Canada Entities and to appoint a trustee in bankruptcy of the Sears Canada Entities;

(d) upon the occurrence of an event of default under the DIP Term Credit Agreement, the other related Definitive Documents or the DIP Term Lenders' Charge, the DIP Term Agent and the DIP Term Lenders, as applicable, may, subject to the provisions of the DIP Term Credit Agreement with respect to the giving of notice or otherwise, and in accordance with the DIP Term Credit Agreement, the other related Definitive Documents and the DIP Term Lenders' Charge, as applicable, cease making advances to the Sears Canada Entities, make demand, accelerate payment and give other notices; provided that, the DIP Term Agent and the DIP Term Lenders must apply to this Court on seven (7) days' prior written notice (which may include the service of materials in connection with such an application to this Court) to the Sears Canada Entities, the DIP ABL Agent, the DIP ABL Lenders and the Monitor, to enforce against or exercise any other rights and remedies with respect to the Sears Canada Entities or any of the Property (including to set off and/or consolidate any amounts owing by the DIP Term Agent and the DIP Term Lenders to the Sears Canada Entities against the obligations of the Sears Canada Entities to the DIP Term Agent and the DIP Term Lenders under the DIP Term Credit Agreement, the other related Definitive Documents or the DIP Term Lenders' Charge), to appoint a receiver, receiver and manager or interim receiver, or to seek a bankruptcy order against the Sears Canada Entities and to appoint a trustee in bankruptcy of the Sears Canada Entities; and

(e) the foregoing rights and remedies of the DIP ABL Agent, the DIP ABL Lenders, the DIP Term Agent and the DIP Term Lenders shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Sears Canada Entities or the Property.

45. **THIS COURT ORDERS AND DECLARES** that the DIP ABL Agent, the DIP ABL Lenders, the DIP Term Agent and the DIP Term Lenders shall be treated as unaffected in any plan of arrangement or compromise filed by the Sears Canada Entities or any of them under the CCAA, or any proposal filed by the Sears Canada Entities or any of them under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any advances made under the DIP ABL Credit Agreement, the DIP Term Credit Agreement and the other Definitive Documents.

46. **THIS COURT ORDERS AND DECLARES** that this Order is subject to provisional execution and that if any of the provisions of this Order in connection with the DIP ABL Credit Agreement, the DIP Term Credit Agreement, the other Definitive Documents, the DIP ABL Lenders' Charge or the DIP Term Lenders' Charge shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "**Variation**") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the priority, protections, rights or remedies of the DIP ABL Agent, the DIP ABL Lenders, the DIP Term Agent and the DIP Term Lenders whether under this Order (as made prior to the Variation), under the DIP ABL Credit Agreement, the DIP Term Credit Agreement and the other Definitive Documents, with respect to any advances made prior to the DIP ABL Agent, the DIP ABL Lenders, the DIP Term Agent or the DIP Term Lenders being given notice of the Variation and the DIP ABL Agent, the DIP ABL Lenders, the DIP Term Agent and the DIP Term Lenders shall be entitled to rely on this Order as issued (including, without limitation, the DIP ABL Lenders' Charge and the DIP Term Lenders' Charge) for all advances so made.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

47. **THIS COURT ORDERS** that the priorities of the Administration Charge, the FA Charge, the DIP ABL Lenders' Charge, the DIP Term Lenders' Charge, the Directors' Priority Charge, the Directors' Subordinated Charge, the KERP Priority Charge and the KERP Subordinated Charge (collectively, the "**Charges**"), as among them, with respect to ABL Priority Collateral (as defined in the Intercreditor Agreement dated March 20, 2017 and attached as Exhibit J to the Wong Affidavit) shall be as follows:

> First – Administration Charge, to the maximum amount of $5 million, and the FA Charge, to the maximum amount of $3.3 million, on a *pari passu* basis;

Second – KERP Priority Charge, to the maximum amount of $4.6 million;

Third – Directors' Priority Charge, to the maximum amount of $44 million;

Fourth – DIP ABL Lenders' Charge, to the maximum amount of the quantum of the DIP ABL Obligations at the relevant time;

Fifth – the DIP Term Lenders' Charge, to the maximum amount of the quantum of the DIP Term Obligations at the relevant time;

Sixth – KERP Subordinated Charge, to the maximum amount of $4.6 million; and

Seventh – the Directors' Subordinated Charge, to the maximum amount of $19.5 million.

48. **THIS COURT ORDERS** that the priorities of the Charges as among them, with respect to all Property other than the ABL Priority Collateral shall be as follows:

First – Administration Charge, to the maximum amount of $5 million, and the FA Charge, to the maximum amount of $3.3 million, on a *pari passu* basis;

Second – KERP Priority Charge, to the maximum amount of $4.6 million;

Third – Directors' Priority Charge, to the maximum amount of $44 million;

Fourth – DIP Term Lenders' Charge, to the maximum amount of the quantum of the DIP Term Obligations at the relevant time;

Fifth – DIP ABL Lenders' Charge, to the maximum amount of the quantum of the DIP ABL Obligations at the relevant time;

Sixth – KERP Subordinated Charge, to the maximum amount of $4.6 million; and

Seventh – the Directors' Subordinated Charge, to the maximum amount of $19.5 million.

49. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as

against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

50. **THIS COURT ORDERS** that each of the Charges shall constitute a charge on the Property, and such Charges shall rank in priority to all other security interests, trusts (including constructive trusts), liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (including without limitation any deemed trust that may be created under the Ontario *Pension Benefits Act*) (collectively, "**Encumbrances**") other than (a) any Person with a properly perfected purchase money security interest under the *Personal Property Security Act* (Ontario) or such other applicable provincial legislation that has not been served with notice of this Order; and (b) statutory super-priority deemed trusts and liens for unpaid employee source deductions.

51. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Sears Canada Entities shall not grant any Encumbrances over any of the Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Sears Canada Entities also obtain the prior written consent of the Monitor, the DIP ABL Agent on behalf of the DIP ABL Lenders, the DIP Term Agent on behalf of the DIP Term Lenders and the other beneficiaries of affected Charges, or further Order of this Court.

52. **THIS COURT ORDERS** that the Charges, the DIP ABL Credit Agreement, the DIP Term Credit Agreement, and the other Definitive Documents shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") thereunder shall not otherwise be limited or impaired in any way by: (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Sears Canada Entities, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP ABL Credit Agreement, the DIP Term Credit Agreement or the other Definitive Documents shall create or be deemed to constitute a breach by the Sears Canada Entities of any Agreement to which it is a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Sears Canada Entities entering into the DIP ABL Credit Agreement and the DIP Term Credit Agreement, the creation of the Charges, or the execution, delivery or performance of the other Definitive Documents; and

(iii) the payments made by the Sears Canada Entities pursuant to this Order, the DIP ABL Credit Agreement, the DIP Term Credit Agreement or the other Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

53. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the relevant Sears Canada Entity's interest in such real property leases.

54. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order, the L/C Collateral Account (as defined in the DIP ABL Credit Agreement) shall be deemed to be subject to a lien, security, charge and security interest in favour of the DIP ABL Agent solely for the reimbursement obligation of SCI related to the letters of credit issued under the Wells Fargo Credit Agreement which remain undrawn from and after the Comeback Motion (as defined herein). The Charges as they may attach to the L/C Collateral Account, including by operation of law or otherwise: (a) shall rank junior in priority to the lien, security, charge and security interest in favour of the DIP ABL Agent in respect of the L/C Collateral Account; and (b) shall attach to the L/C Collateral Account only to the extent of the rights, if any, of any Sears Canada Entity to the return of any cash from the L/C Collateral Account in accordance with the DIP ABL Credit Agreement.

CORPORATE MATTERS

55. **THIS COURT ORDERS** that SCI be and is hereby relieved of any obligation to call and hold an annual meeting of its shareholders until further Order of this Court.

56. **THIS COURT ORDERS** that SCI be and is hereby relieved of any obligation to appoint any new directors until further Order of this Court.

SERVICE AND NOTICE

57. **THIS COURT ORDERS** that the Monitor shall: (a) without delay, publish in The Globe and Mail (National Edition) and La Presse a notice containing the information prescribed under the CCAA; and (b) within five days after the date of this Order, (i) make this Order publicly available in the manner prescribed under the CCAA, (ii) send or cause to be sent, in the prescribed manner, a notice to every known creditor who has a claim against the Sears Canada Entities of more than $1,000 (excluding individual employees, former employees with pension and/or retirement savings plan entitlements, and retirees and other beneficiaries who have entitlements under any pension or retirement savings plans), and (iii) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder, provided that the Monitor shall not make the claims, names and addresses of the individuals who are creditors publicly available.

58. **THIS COURT ORDERS** that the Monitor shall create, maintain and update as necessary a list of all Persons appearing in person or by counsel in this proceeding (the "**Service List**"). The Monitor shall post the Service List, as may be updated from time to time, on the Monitor's Website (as defined herein) as part of the public materials to be made available thereon in relation to this proceeding. Notwithstanding the foregoing, the Monitor shall have no liability in respect of the accuracy of or the timeliness of making any changes to the Service List.

59. **THIS COURT ORDERS** that any employee of any of the Sears Canada Entities that receives a notice of termination from any of the Sears Canada Entities shall be deemed to have received such notice of termination by no more than the seventh day following the date such notice of termination is delivered, if such notice of termination is sent by ordinary mail, courier or registered mail.

60. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List

website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial/) shall be valid and effective service. Subject to Rule 17.05, this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: cfcanada.fticonsulting.com/searscanada (the "**Monitor's Website**").

61. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Sears Canada Entities and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Sears Canada Entities' creditors or other interested parties at their respective addresses as last shown on the records of the Sears Canada Entities and that any such service or distribution by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

62. **THIS COURT ORDERS** that the Applicants, the Monitor, the Financial Advisor, the DIP Term Agent on behalf of the DIP Term Lenders and the DIP ABL Agent on behalf of the DIP ABL Lenders, and their respective counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Applicants' creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the Electronic Commerce Protection Regulations, Reg. 81000-2-175 (SOR/DORS).

COMEBACK MOTION

63. **THIS COURT ORDERS** that the comeback motion shall be heard on July 13, 2017 (the "**Comeback Motion**").

GENERAL

64. **THIS COURT ORDERS** that the Sears Canada Entities or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

65. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Sears Canada Entities, the Business or the Property.

66. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Sears Canada Entities, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Sears Canada Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Sears Canada Entities and the Monitor and their respective agents in carrying out the terms of this Order.

67. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada, including acting as the foreign representative of the Applicants to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code*, 11 U.S.C. §§ 101-1515, as amended, and to act as foreign representative in respect of any such proceedings and any ancillary relief in respect thereto, and to take such other steps as may be authorized by the Court.

68. **THIS COURT ORDERS** that any interested party (including the Sears Canada Entities and the Monitor) may apply to this Court to vary or amend this Order at the Comeback Motion

on not less than seven (7) calendar days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

69. **THIS COURT ORDERS** that Confidential Appendix B and Confidential Appendix C to the Pre-Filing Report shall be and are hereby sealed, kept confidential and shall not form part of the public record pending further Order of this Court.

70. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

JUL 13 2017

PER / PAR:

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

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 SEARS CANADA INC., CORBEIL ÉLECTRIQUE INC., S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC. (collectively, the "Applicants")

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

AMENDED AND RESTATED INITIAL ORDER

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Lawyers for the Applicants

Tab 17

(b) — Nature of D&O Coverage

Directors and officers insurance supplements and complements, but does not replace, corporate indemnities. It is intended in part to fill gaps where indemnities may not apply. For example, an indemnity may be useless if the corporation is insolvent.

There are differences between indemnities and insurance. A corporate indemnity is generally unlimited regarding the amount the corporation will pay. There may be no conditions or exclusions attached to an indemnity, other than the paraphrasing of the statutory indemnity wording. On the other hand, D&O policies often contain retentions (similar to deductibles) and always contain limits of liability, conditions, and exclusions.[33a]

There is no standard D&O policy wording. Each insurer has its own policy forms, which have typically been altered over the years, either to narrow coverage (in response to adverse court decisions) or to expand coverage (to make the policies more marketable). In fact, any given insurer may have different D&O policy forms for public companies, private companies, and non-profit organizations. It is therefore important to be aware of the different wordings when analyzing coverage and comparing forms.

With this in mind, it is still helpful to make some general observations about the nature of D&O insurance. One of the most important points is that D&O policies usually do not cover the corporation for its own wrongful acts. Instead, D&O policies normally contain two coverages. Coverage A typically covers amounts the directors and officers are legally obligated to pay resulting from claims made for a wrongful act, if the directors and officers have not been indemnified by the corporation.[34] Coverage B usually reimburses the corporation where it has indemnified the directors and officers for such expenses and losses.[35] Therefore, any coverage is contingent on there being a covered claim against a director or officer. There will be no coverage for the corporation's own wrongful acts unless the policy contains a third insuring agreement known as "entity coverage".[36]

The second general observation is that D&O policies are indemnity insurance, as opposed to true liability insurance.[37] The distinction arises from two features of D&O policies. Unlike liability policies where the insurer is obligated to pay for the liability of the insured, the obligation of the insurer under a D&O policy is triggered by a "Loss" incurred by reason of a claim. There must be a determination of the insured's legal liability before coverage is triggered.[38] Second, unlike general liability policies, the typical D&O policy does not require the insurer to defend the claim on behalf of its insured (although such coverage can sometimes be purchased).[39] Rather, there is only an obligation to reimburse the cost of defending claims (or those portions of claims) which are actually covered by the policy.[40]

The third observation is that D&O policies are "claims-made" policies, as opposed to "occurrence" policies.[41] They usually only apply to claims that are first made during the policy period and reported either during the policy period or any applicable extended reporting periods. It is the

making and reporting of the claim, and not the happening of the wrongful act, that typically triggers coverage.[42]

Cross References: See Abridgment — Insurance Law — XI.7 — Principles applicable to specific types of insurance — Directors' and officers' liability insurance

FOOTNOTES

[33a] See e.g. *Nortel Networks Corp., Re* (2012), 2012 CarswellOnt 14672, 16 C.C.L.I. (5th) 150 (Ont. S.C.J. [Commercial List]), leave to appeal refused 2013 CarswellOnt 11241 (Ont. C.A.).

[34] See section 18.15(d).

[35] See section 18.15(e).

[36] See section 18.15(f).

[37] See note 79 below, and accompanying text.

[38] There are some exceptions. See for example note 60 and accompanying text.

[39] Duty to defend coverage can be purchased from some insurers, particularly for non-profit organizations. See, e.g., *Doering v. Economical Insurance Group* (2000), 2000 CarswellOnt 2737, 20 C.C.L.I. (3d) 278 (Ont. S.C.J.), where a D&O policy issued to a condominium corporation had a duty to defend clause.

[40] See note 78, below, and accompanying text.

[41] See section 18.15(j), below.

[42] The date the *Wrongful Act* took place will, however, be relevant where the policy stipulates that the *Wrongful Act* must take place subsequent to a specified Retroactive Date. See section 18.15(j)(i), below. See also *Precidio Design Inc. v. Great American Insurance Co.* (2013), 2013 ONSC 7148, 2013 CarswellOnt 17353, 118 O.R. (3d) 306, 12 C.C.E.L. (4th) 338 (Ont. S.C.J.).

Tab 18

Most Negative Treatment: Check subsequent history and related treatments.

2004 NSCA 36
Nova Scotia Court of Appeal

Gates Estate v. Pirate's Lure Beverage Room

2004 CarswellNS 72, 2004 NSCA 36, [2004] N.S.J. No. 70, 129 A.C.W.S. (3d) 277, 222 N.S.R. (2d) 86, 237 D.L.R. (4th) 74, 44 C.P.C. (5th) 13, 701 A.P.R. 86

Estate of Hedley Harry Gates, by Sharon Darlene Gates, Administratrix, Sharon Darlene Gates, and Kendall David Gates, an infant, by Sharon Darlene Gates, his Parent/Guardian, (Appellants) v. Pirate's Lure Beverage Room, a registered partnership/business name, 1882201 Nova Scotia Limited, a body corporate, Robert J. Wentzell and James "Jim" Sampson (Respondents)

Saunders, Oland, Hamilton JJ.A.

Heard: January 23, 2004
Judgment: March 2, 2004
Docket: C.A. 205008

Counsel: Ann E. Smith for Appellants
Philip M. Chapman for Respondents

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
XVI Disposition without trial
XVI.3 Stay or dismissal of action
XVI.3.b Jurisdiction and discretion to stay or dismiss

Headnote

Civil practice and procedure --- Disposition without trial — Stay or dismissal of action —

Jurisdiction and discretion to stay or dismiss
Plaintiff's husband was killed in motor vehicle accident — Plaintiff alleged that defendant was liable for serving husband alcohol and allowing him to drive — Plaintiff brought action for damages — Requests by defendant for disclosure were not complied with, and eventually defendant obtained consent order requiring production of certain documents within 30 days, with failure resulting in dismissal of action — Plaintiff was not told of order by counsel — All documents required were not made available to defendant — Defendant informed plaintiff's counsel by letter that defendant considered matter closed — All required documents later given to defence — Plaintiff's application to set aside disclosure order was dismissed — Chambers judge found that authority did not exist to set aside order — Plaintiff appealed decision — Appeal allowed — Chambers judge had inherent authority to set aside order — As order was not negotiated agreement disposing with legal matter, but only made for moving proceedings forward, greater leeway existed for court to alter terms of order — Chambers judge erred in not considering whether order should be set aside — Plaintiff did not instruct counsel to consent to order — Prejudice to plaintiff was great, and prejudice to defendant if order set aside was small — Order was not deliberately flouted.

Table of Authorities

Cases considered:

Atkins v. Holubeshen (1984), 43 C.P.C. 166, 1984 CarswellOnt 375 (Ont. H.C.) — considered

Chitel v. Rothbart (1987), 19 C.P.C. (2d) 48, 1987 CarswellOnt 429 (Ont. Master) — referred to

Golden Forest Holdings Ltd. v. Bank of Nova Scotia (1990), 43 C.P.C. (2d) 16, (sub nom. *Bank of Nova Scotia v. Golden Forest Holdings Ltd.)* 98 N.S.R. (2d) 429, (sub nom. *Bank of Nova Scotia v. Golden Forest Holdings Ltd.)* 263 A.P.R. 429, 1990 CarswellNS 63 (N.S. C.A.) — not followed

Goodwin v. Rodgerson (2002), 2002 NSCA 137, 2002 CarswellNS 454, 26 C.P.C. (5th) 14, 210 N.S.R. (2d) 42, 659 A.P.R. 42 (N.S. C.A.) — considered

Hytech Information Systems Ltd. v. Coventry City Council (1966), [1966] 1 W.L.R. 1666 (Eng. C.A.) — referred to

Lownes v. Babcock Power Limited (1998) (Eng. C.A.)

Monarch Construction Ltd. v. Buildevco Ltd. (1988), 26 C.P.C. (2d) 164, 1988 CarswellOnt 369 (Ont. C.A.) — referred to

Pereira v. Beanlands (1996), [1996] 3 All E.R. 528 (Eng. Ch. Div.) — referred to

Scherer v. Paletta (1966), [1966] 2 O.R. 524, 57 D.L.R. (2d) 532, 1966 CarswellOnt 119 (Ont. C.A.) — referred to

Siebe Gorman & Co. v. Pneupac Ltd. (1982), [1982] 1 W.L.R. 185, [1982] 1 All E.R. 377 (Eng. C.A.) — considered

van de Wiel v. National Life Assurance Co. of Canada (2002), 2002 NSSC 209, 2002 CarswellNS 374, 208 N.S.R. (2d) 221, 652 A.P.R. 221, 28 C.P.C. (5th) 120 (N.S. S.C.) — referred to

Rules considered:

Civil Procedure Rules, N.S. Civ. Pro. Rules
R. 3.03 — referred to

R. 15.08 — referred to

R. 20.01 — referred to

APPEAL by plaintiff of decision to dismiss application to set aside consent order for dismissal of action upon non-production of documents.

***Hamilton J.A.*:**

1 This is an appeal from the July 28, 2003 order of Chief Justice Joseph P. Kennedy of the Supreme Court, ("the Chambers judge"), dismissing the appellants' application to set aside an interlocutory order granted by Justice Margaret J. Stewart on June 27, 2002. The June 27, 2002 order was drafted by counsel for the respondents, Mr. Chapman, and agreed to by the former counsel for the appellants, ("the former counsel"), when he was faced with the respondents' court application for production of documents. The order required the appellants to produce specified documents to the respondents within 30 days of the date of the order, in default of which "the action of the plaintiffs (appellants) shall be dismissed without costs." Not all of the documents were produced within the time period specified in the order and in October, 2002 the respondents took the position the action stood dismissed although they never applied for or obtained an order dismissing the action.

FACTS

2 The appellants are the plaintiffs in the action and the respondents are the defendants. Hedley Harry Gates, the husband of the appellant Sharon Gates and the father of the appellant Kendall David Gates, died as a result of injuries he received in a single vehicle accident at Chester Basin, Lunenburg County, on August 27, 2000.

3 Ms. Gates retained the former counsel in September, 2000 to act on behalf of the estate of her late husband, on her own behalf, and on behalf of her infant son. He commenced an action against the respondents in February, 2001. The action alleges that the respondents were negligent and thereby caused or contributed to the death of Hedley Harry Gates by contributing to his drunkenness on the evening that he died, and by failing to prevent him from driving his motor vehicle after leaving the premises.

4 About the middle of May, 2001 Mr. Chapman provided the former counsel with a copy of the defence and requested production of documents. A further letter requesting discovery was sent to the former counsel in November, 2001.

5 Discovery examinations were scheduled for January 28 and 29, 2002. By letter dated January 4, 2002, Mr. Chapman requested the former counsel to forward the appellants' list of documents prior to the discovery examinations. A full copy of all family physicians' files, employment records, income tax returns for both Mr. and Mrs. Gates, and a copy of the medical examiner's report, or a completed authorization form to obtain same, were also requested.

6 By letter dated January 21, 2002, Mr. Chapman wrote to the former counsel advising that if he did not receive the requested documentation by January 23, 2002, he would cancel the discovery examinations and make a chambers application for production.

7 On January 22, 2002, the former counsel wrote to Ms. Gates and advised her of the documents being sought by the respondents and wrote to Mr. Chapman and advised him that he was not ready to proceed with discoveries on January 28 and 29, 2002.

8 As a result of meeting with her former counsel on January 31, 2002, Ms. Gates agreed to provide him with the required income tax returns, which she did, and instructed him to obtain the remaining documents on her behalf. Unknown to Ms. Gates, her former counsel did not take any steps to obtain the remaining documents.

9 On June 6, 2002 Mr. Chapman commenced the application that gave rise to the Order. The application was set down for hearing on June 27, 2002. On June 26, 2002, the former counsel wrote to Mr. Chapman advising that the appellants would consent to the order for production of documents proposed by the respondent, provided the costs sought by them were deleted. On June 27, 2002, Justice Stewart signed the order in the form to which the former counsel had agreed.

10 The consent order provided:

> IT IS HEREBY ORDERED that:
>
> (1) The plaintiffs shall file the plaintiffs' List of Documents pursuant to R. 20.01 of the Nova Scotia *Civil Procedure Rules* in this action against the defendants within 30 days of the date of this Order, which List of Documents shall include:
>
> (a) A full copy of the family physicians' files for the deceased;
>
> (b) Employment records of the deceased, including documentation of earnings, performance, and disciplinary history;
>
> (c) Income tax returns for both Hedley Harry Gates and Darlene Sharon Gates, for a period of three years prior to the accident, forward; and
>
> (d) A copy of the medical examiner's report for Hedley Harry Gates, showing cause of death, etc.
>
> (2) <u>If the plaintiffs fail to file the plaintiffs' List of Documents in this action against the defendants within 30 days of this Order, the action of the plaintiffs shall be dismissed without costs</u>;
>
> (Underlining mine)

11 The former counsel did not advise Ms. Gates of the application for production or the order. She was completely unaware of them or their terms. Consequently she gave no instructions to him concerning them. The respondents were not aware that Ms. Gates had not done so.

12 On August 6, 2002 the former counsel filed the appellants' list of documents. The copy of the list faxed to the respondents did not contain either the family physicians' files for the deceased or the employment records of the deceased as required by the order. By letter dated October 8, 2002, Mr. Chapman wrote to the former counsel advising:

> . . . Given the current status of this matter and the Order of Justice Stewart, I will now consider this action at being at an end and will close my file. I would suggest that you contact the Barristers' Society to report a possible claim against you by your client.

13 The Nova Scotia Barristers' Liability Claims Fund engaged counsel to review the matter

and on November 21, 2002, she provided Mr. Chapman with the remaining documents, completing the production of documents required by the order.

14 On May 22, 2003 an interlocutory application was made on behalf of the appellants seeking to have the Order set aside pursuant to *Civil Procedure Rule 15.08* and/or the inherent jurisdiction of the court. They did not make an application under *Rule 3.03* for an extension of the time period provided for in the order, which may have been the preferable procedure.

15 The issues before the Chambers judge were whether he had jurisdiction to set aside the order, and if he did, whether he should exercise his discretion. Noting the inequities that would result, the Chambers judge nonetheless decided that he lacked jurisdiction to set aside the order relying on this court's decision in *Golden Forest Holdings Ltd. v. Bank of Nova Scotia* (1990), 98 N.S.R. (2d) 429 (N.S. C.A.), and dismissed the application.

ISSUES

16 Did the Chambers judge err in deciding he lacked jurisdiction to set aside the consent order, and if so, did he err in not exercising his discretion to set it aside?

ANALYSIS

17 Appellants' counsel argued the Chambers judge erred in deciding he did not have jurisdiction to set aside the order, because of the evidence before him that was not before Justice Stewart; namely, that the appellants were not aware of and did not instruct counsel to agree to the order. She argued that the Chambers judge had jurisdiction to set aside the order because it was not a consent order disposing of the case on its merits.

18 In the alternative, appellants' counsel argued the Chambers judge erred by not extending the time period for filing the documents provided for in the order pursuant to *Rule 3.03*, although there was no application before him seeking such an extension.

19 Appellants' counsel also argued that the Chambers judge erred in not exercising his discretion to set aside the order because: the evidence of the former counsel and Ms. Gates, indicates Ms. Gates did not instruct her former counsel to agree to the order; the documents to be produced were in the hands of third parties and not under the control of the appellants; and if the order is not set aside it will result in the appellants' action being dismissed after only 17 months and one application to court for production. She also pointed out that there was no evidence of prejudice to the respondents and that they had all of the documents within four months of the time specified in the order.

20 Mr. Chapman argued that the Chambers judge did not err in following *Golden Forest* and deciding that he had no jurisdiction to set aside the order because it was a consent order. He argued that the fact Ms. Gates had not instructed the former counsel to consent was irrelevant given her counsel's apparent authority to consent on her behalf in the absence of an indication to the contrary. He argued the former counsel's authority to bind his client went beyond consent orders settling the claim. He argued that *Rule 3.03* is not applicable in this appeal because the appellants' did not make an application pursuant to that rule and it was not argued before the Chambers judge.

21 Mr. Chapman also argued that even if the Chambers judge did have jurisdiction to set aside the order, he did not err in declining to exercise it. He argued that just because the order prejudices the appellants is not a reason to set it aside. He argued negligence by the former counsel is not a reason to set the order aside.

22 The appellants have persuaded me that the Chambers judge erred in dismissing their application to set aside the order.

23 I am satisfied the law concerning consent orders referred to in *Golden Forest* does not apply to the type of order at issue in this appeal. Beginning at paragraph 10 of *Golden Forest* Hallett, J.A., states:

> 10. However, unlike the vast majority of actions for foreclosure and sale, this action was defended. Subsequently, the action was settled upon terms which included the unusual provision for twelve newspaper advertisements of the sale rather than the customary three. The consent order was presented to Madam Justice Roscoe incorporating the advertising requirements agreed to by the parties. The fact that it was a consent order following a settlement is a very material fact that has led me to conclude that Mr. Justice Tidman did not have the power under the Court's inherent jurisdiction to vary the order of Roscoe, J., as it gave effect to a settlement reached by the parties. The appellant was entitled to have the advertising agreed upon for the sale of this somewhat unique property. The Court does not have the power to vary a consent order that gives effect to a settlement unless the settlement agreement itself could be varied. This point was dealt with by the Ontario Court of Appeal in Monarch Construction Ltd. v. Buildevco Ltd. et al. (l988), 26 C.P.C. (2d) l 64. The Court stated at pp. l65-l66:
>
> > A consent judgment is final and binding and can only be amended when it does not express the real intention of the parties or where there is fraud. In other words, a consent judgment can only be rectified on the same grounds on which a contract can be rectified. Here, there was no allegation of fraud and, in our opinion, there was no basis on the material before the Local Judge on which she

> was entitled to grant rectification. The contract is unambiguous on its face; on the motion of Monarch, it was incorporated in a consent judgment and should be performed in accordance with its terms.
>
> 11. In Chitel v. Rothbart et al. (l987), l9 C.P.C. (2d) 48 (Ont.S.C.) a similar statement was made at p. 52:
>
> > A consent order may only be set aside or varied by subsequent consent, or upon the grounds of common mistake, misrepresentation or fraud, or on any other ground which would invalidate a contract. None of these grounds are present in the within case.
>
> 12. Although the limits of a Superior Court's power in the exercise of its inherent jurisdiction are not fully defined, there are nevertheless limits that have been established in certain areas and the power of a Court to vary a consent order is one of them.
>
> 13. Applying even the broadest of tests, it would not be just or equitable in this case to vary the order of Roscoe, J., as the appellant did not get the advertising it bargained for and there is no way to determine that the appellant was not prejudiced by the failure to comply with the advertising requirements of the order. Furthermore, even if one were to consider there was substantial compliance, there would be no way of compensating the plaintiff in damages for the failure to have performed the agreement as incorporated into the consent order. (Emphasis mine)

24 As can be seen from the above quote, the consent order considered in *Golden Forest* was an interlocutory order for foreclosure and sale, the terms of which were negotiated by the parties after a defence to the foreclosure action was filed. The Supreme Court granted a consent order which provided for twelve advertisements of the sheriff's sale, rather than the usual three. Following an application by the respondent after the newspaper failed to insert one of the advertisements, it subsequently varied that order by reducing the number of advertisements to eleven. The appellant appealed successfully to this Court. This Court held that while the Supreme Court normally had jurisdiction to vary this type of order as part of its inherent jurisdiction to control its own processes, it had no such jurisdiction where the order was a consent order unless there were grounds for varying the agreement itself.

25 The cases relied on in *Golden Forest* to support the principle that consent orders cannot be varied unless the underlying agreement itself can be varied, also dealt with consent orders where the merits of the case were resolved: *Monarch Construction Ltd. v. Buildevco Ltd.* (1988), 26 C.P.C. (2d) 164 (Ont. C.A.) and *Chitel v. Rothbart* (1987), 19 C.P.C. (2d) 48 (Ont. Master). A

consent order settling the case on its merits was also at issue in *Scherer v. Paletta* (1966), 57 D.L.R. (2d) 532 (Ont. C.A.).

26 The fact that the law relied on in *Golden Forest* was dealing with consent orders settling substantive issues between the litigants was noted in *van de Wiel v. National Life Assurance Co. of Canada* (2002), 208 N.S.R. (2d) 221 (N.S. S.C.), ¶ 6, and by this court in *Goodwin v. Rodgerson* (2002), 210 N.S.R. (2d) 42 (N.S. C.A.):

> ¶ 9 In Bank of Nova Scotia v. Golden Forest Holdings Ltd., supra relied on by the chambers judge and the respondents, this Court determined that an order to which counsel for the parties had consented as to substance could not be set aside. It incorporated a settlement. Hallett, J. A., for the Court stated at para 9:
>
> > [9] Apart from those matters covered by rules l5.07 and l5.08, the inherent jurisdiction of judges of the Supreme Court of Nova Scotia does not extend to varying "final" orders of the court disposing of a proceeding unless the order does not express the true intent of the court's decision. If it were otherwise, there would not be the certainty or finality to court orders that the judicial process requires. . . .
>
> The respondents take comfort in this passage because the order of the deputy prothonotary was a "final order". It is clear however that the court in the Golden Forest case was referring to final orders disposing of the case on its merits in a decision in which the substantive rights and obligations of the parties were considered and determined. The order in that case could not be set aside because it was a consent order which can only be varied in special circumstances not present there.
>
> (Emphasis mine)

27 Reference to fact situations in which courts have varied consent orders settling the merits of the case is found in Vol. 37 of Halsbury's *Laws of England*, 4th ed., (London: Butterworths, 1979) ¶ 1210:

> A judgment given or an order made by consent may be set aside on any ground which would invalidate a compromise not contained in a judgment or order. Compromises have been set aside on the ground that the agreement was illegal as against public policy, or was obtained by fraud or misrepresentation, or non-disclosure of a material fact which there was an obligation to disclose, or by duress, or was concluded under a mutual mistake of fact, ignorance of a material fact, or without authority. A compromise in ratification of a contract which is incapable of being ratified is not enforceable; and a compromise which is conditional on some term being carried out, or on the assent of the court or other persons being given to the arrangement, is not enforceable if the term is not carried out or the assent

is give effectually.

28 I am conscious of the importance of consent orders in resolving substantive issues in litigation and the reliance rightfully placed upon such orders by litigants and their counsel. However, the rationale for courts not varying this type of consent order is that these orders give effect to agreements reached by the parties after negotiations which may include the litigants compromising their strict legal rights and obligations in order to finally resolve the dispute between themselves. Once the court exercises its discretion and accepts their agreement by granting a consent order, the negotiated terms and the finality the parties sought by their agreement should be respected. For a court to vary the terms of a consent order giving effect to such a negotiated contract may alter the parties' agreement in a way they would never have agreed to settle for. This is not to say that there will never be a situation where it will be just and equitable to set aside a consent order giving effect to a negotiated settlement.

29 The order in this appeal is of a different nature. This type of order is used to ensure the carriage of an action proceeds as it should. In this case the order was an attempt to ensure timely documentary disclosure. The involvement of the court in varying this type of order does not carry the same risk of undoing a negotiated agreement of the parties. With interlocutory orders such as this dealing with the litigation process, there is residual discretion to grant relief against dismissal of the action or striking of the defences, in other words to relieve against the sanction provided for failure to comply.

30 While the issue dealt with in *Siebe Gorman & Co. v. Pneupac Ltd.*, [1982] 1 All E.R. 377 (Eng. C.A.) was not on all fours with this case (it dealt with the jurisdiction of the court to extend the time provided for in an order to give further discovery of documents within a period of ten days, in default of which the plaintiff's claim was to be struck out), the comments of Lord Denning MR are instructive:

> We have had a discussion about 'consent orders'. It should be clearly understood by the profession that, when an order is expressed to be made 'by consent', it is ambiguous. There are two meanings to the words 'by consent'. That was observed by Lord Greene MR in *Chandless-Chandless v. Nicholson*, [1942] 2 All E.R. 315 at 317, [1942] KB 321 at 324. One meaning is this: the words 'by consent' may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words 'by consent' may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without obligation?

> . . .
>
> I cannot put any such interpretation on the order which was drawn up in this case. It often happens in the Bear Garden that one solicitor or legal executive says to the other: 'Give me ten days.' The other agrees. They go in before the master. They say: 'We have agreed the order'. The master initials it. It is said to be 'by consent'. But there is no real contract. All that happens is that the master makes an order without any objection being made to it. It seems to me that is exactly what happened here. The solicitors for the plaintiffs were saying: 'We do not object to the order. Give us the extra ten days from the time of inspection, and that is good enough.' It seems to me quite impossible in this case to infer any contract from the fact that the order was drawn up as 'by consent'.

31 The comments of Templeman LJ. are also instructive:

> . . . By the summons dated 18 December 1980 the defendants sought an order that the plaintiffs give further discovery within ten days after the date of the order and a provision in the order provided that in default of complying the plaintiffs' claim against the defendants be struck out. The service of this summons was not an offer and was not intended to create or result in a contractual relationship. The summons constituted a demand and a threat. The threat could only be made effective subject to the power of the court under RSC Ord 3, r 5 and under its inherent jurisdiction at any one or more times to extend the plaintiffs' time for compliance. If the plaintiffs had written back to the defendants announcing that they would consent to the order sought by the defendants, the announcement would not and could not have constituted acceptance of a non-existent offer or be capable of creating a contractual relationship. The announcement would have been no more than the intimation of an intention on the part of the plaintiffs not to argue against the grant of the relief sought by the defendants but to submit to an order in the terms of the summons. If, for example, the plaintiffs had subsequently before the hearing of the summons written again to the defendants, saying that they had just seen counsel and had been advised to withdraw their consent and intended on the hearing to oppose the grant of the relief sought by the summons, it seems to me unarguable that the plaintiffs would have thereby repudiated any contract. If the defendants were then embarrassed by a late change of mind on the part of the plaintiffs, they might have bee entitled to some favourable adjournment of the summons and they might have been entitled to some favourable order as to costs; but that would not have prevented the plaintiffs from changing their minds.
>
> (Emphasis mine)

32 The difference in the nature of 'consent orders', some settling the merits of an action after negotiations and others settling pre-trial procedures, is alluded to in at the end of ¶ 14 of *Atkins v. Holubeshen* (1984), 43 C.P.C. 166 (Ont. H.C.):

> . . . The agreement can in no sense be regarded as a compromise of the action as it did not purport to dispose of the issues in the action on the basis of any substantive resolution.

33 In *Atkins* the plaintiff's solicitor gave undertakings at an examination for discovery and agreed that if he failed to fulfill them within a specified time the defendants could apply ex parte to have the action dismissed. The undertakings were not fulfilled and the action was dismissed. The plaintiff knew nothing of her counsel's agreement or the default provision and found out two years later that her action had been dismissed. The court set aside the order dismissing the action so that the action could proceed to trial.

34 I am satisfied the Chambers judge had inherent jurisdiction to set aside the consent order at issue in this appeal for as stated by this court in ¶ 10 of *Golden Forest*, the Supreme Court would normally have inherent jurisdiction to vary an interlocutory order of this kind:

> . . . Therefore, prior to sale, the Court has jurisdiction to amend or vary its order respecting the advertising requirements in a proper case. This power exists because of the Court's inherent jurisdiction to control its own processes.

35 Paragraph 8 of *Golden Forest* provides the following with respect to the court's inherent jurisdiction:

> 8. In *Halsbury's Laws of England*, 4th ed., vol. 37 (l982), at p. 23, the inherent jurisdiction of the Court is described as follows:
>
> > In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

36 Being satisfied the Chambers judge had jurisdiction to set aside the order, I then considered if he erred in not exercising his discretion in favour of setting it aside. Since the Chambers judge decided he did not have jurisdiction, he did not turn his mind to whether he should set aside the order. I am satisfied this was an error. His decision suggests that if he had turned his mind to it he may have set it aside:

> p.11 . . . There's no argument but that the plaintiffs in this matter have been victimized by the process, and that point is obviously and well made by the applicants in relation to - -

when they seek that this court intervene.

p.24 . . . This is surely the case that it would seem to be inequitable to allow that order to stand. . . . I repeat that I am fully aware of the inequitable situation that the plaintiffs find themselves in, and I gather they will pursue other remedies, . . .

37 The object of the Chambers judge's discretion is to do justice between the parties.

38 In light of the evidence before him I am satisfied the Chambers judge erred in not exercising his discretion to set aside the order. The evidence indicates Ms. Gates did not instruct her former counsel to agree to the order, a fact taken into account in *Scherer v. Paletta*; the documents that had to be produced were not under the control of the appellants or its counsel; Ms. Gates was acting in a fiduciary duty with respect to her son and perhaps her husband's estate, a fact considered in *Pereira v. Beanlands*, [1996] 3 All E.R. 528 (Eng. Ch. Div.); and if the order was not set aside it would result in the appellants' action being dismissed after only 17 months and one application to court for production, a fact considered in *Lownes v. Babcock Power Limited*, [1998] EWCA Civ 211. The prejudice to the appellants would be great, while there was no prejudice to the respondents except the passage of four months. There is no indication the appellants or their counsel intentionally flouted the order, a fact given significant weight in *Hytech Information Systems Ltd. v. Coventry City Council*, [1966] 1 W.L.R. 1666 (Eng. C.A.).

39 This case is a reminder of the need for judges granting interlocutory orders to ensure they are clear in providing that in the event of default, the other party can move for an order dismissing the action or appeal, so that the matter can be assessed by the same or another judge before the action or appeal is dismissed.

40 Accordingly I would allow the appeal, and set aside the order of Stewart, J., with the result the action will continue. I would nevertheless award costs payable by the appellants to the respondents in the amount of $1,500 plus disbursements because without the failure of appellants' former counsel to comply with the June 27 order this issue would not have arisen.

Appeal allowed.

Tab 19

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Qarizadha v. Qarizadha | 2019 ONSC 654, 2019 CarswellOnt 1128 | (Ont. S.C.J., Jan 25, 2019)

2014 ONSC 4677
Ontario Superior Court of Justice

Joshi v. Joshi

2014 CarswellOnt 12591, 2014 ONSC 4677, 244 A.C.W.S. (3d) 432

Sharmishtha Joshi, Chandrakala Joshi, Mahendra Joshi, Minakshi Dave, Narendra Joshi and Yogendrakumar Joshi, Plaintiffs and Elaxi Ben Joshi, Respondent

Carole J. Brown J.

Heard: August 12, 2014
Judgment: August 13, 2014
Docket: CV-13-492389

Counsel: Jonathan Kulathungam, for Plaintiffs
Dennis VanSickle, for Defendants

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
XXII Judgments and orders
XXII.13 Consent judgments or orders
XXII.13.d Setting aside

Headnote

Civil practice and procedure --- Judgments and orders — Consent judgments or orders — Setting aside
Under consent order, respondent was required to vacate house on specified date — Respondent

did not want to move until house sold — Respondent brought motion to set aside or vary consent order — Motion dismissed — There was no basis to set aside or vary consent order — Order was negotiated between parties and their counsel over three days and agreed upon by respondent — While respondent indicated that, prior to agreeing to order, she was concerned about fact that she may have to move before house sold, she still provided executed consent to order — Order was clear, unambiguous, and detailed — Order clearly set forth date for respondent to provide vacant possession — There was no credible evidence of fraud, that order did not reflect parties' intentions, material changes in circumstance or misrepresentation — Respondent's arguments regarding frustration of contract, implicit incorporation of prior order and that she could not afford rental accommodation were not persuasive — Order was final and binding and should not be varied in absence of extraordinary factors.

Table of Authorities

Cases considered by *Carole J. Brown J.*:

Gibson v. Gibson (2002), 2002 CarswellOnt 1647 (Ont. S.C.J.) — referred to

Masters v. MIS International Inc. (September 19, 2000), Doc. 98-CV-159218 (Ont. S.C.J.) — referred to

Mohammed v. York Fire & Casualty Insurance Co. (2006), 34 C.C.L.I. (4th) 161, [2006] I.L.R. I-4482, 21 C.P.C. (6th) 389, 79 O.R. (3d) 354, 2006 CarswellOnt 829 (Ont. C.A.) — considered

Rosen v. Rosen (1994), 1994 CarswellOnt 390, 3 R.F.L. (4th) 267, 18 O.R. (3d) 641, 72 O.A.C. 342, [1994] 1 W.L.R. 629 (Ont. C.A.) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 59.06 — considered

MOTION by respondent to set aside or vary consent order.

Carole J. Brown J.:

1 The moving party respondent moves pursuant to Rule 59.06 to set aside or vary the consent order of A. O'Marra J. dated April 25, 2014. In fact, the moving party seeks to vary the order as regards the vacating of the premises on August 23, 2014, given that the house has not, to date,

sold. She does not wish to move from the home until the house sells.

2 The parties have produced voluminous materials and have referred me to transcripts of cross-examination of the parties. They have further referred me to case law relevant to this motion.

3 It is the moving party's position that the responding parties have failed to comply with the order as regards disclosure and thereby, in essence, frustrated the order, that the consent order must be read in light of the previous order of Croll J. in the family law action, which has not been complied with as regards disclosure and that material circumstances have changed, justifying the varying or setting aside of the order.

4 It is the position of the responding party that, pursuant to Rule 59.06, the discretion to set aside an order must be exercised judiciously. The responding party argues that the moving party has not established any grounds on which to set aside the consent order. Further, as regards any failure to disclose, the responding party argues that it is the moving party which has failed to respond in order that examinations can occur.

5 As stated in *Mohammed v. York Fire & Casualty Insurance Co.* (2006), 79 O.R. (3d) 354 (Ont. C.A.), at paragraph 34-35:

> Minutes of settlement are a contract. A consent judgment is binding. Both are final, subject to reasons to set them aside. Finality is important in litigation. This is so for the sake of the parties who reached their bargain on the premise of an allocation of risk, and with an implicit understanding that they will accept the consequences of their settlement. Finality is also important for society at large, which recognizes the need to limit the burden placed on justice resources by relitigation, a limitation reflected in the doctrine of res judicata: See *Tsaoussis (Litigation Guardian of) v Baetz* (1998), 41 O.R. (3d) 257, [1998] O.J. No. 3516, 165 D.L.R. (4th) 268 (C.A.), at paras. 15, 17, 18.
>
> For these reasons, the avenues to set aside a settlement and consent dismissal are restricted. Rule 59.06 sets out the procedure for setting aside such an order. It provides that a party may bring a motion in the original proceeding to "have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made".

6 Based on the jurisprudence, in order to set aside a consent order, there must be proven grounds of common mistake, misrepresentation, fraud, or any other ground which would invalidate contract or, alternatively, a material change in circumstance occurring after the consent order: *Gibson v. Gibson*, [2002] O.J. No. 1784 (Ont. S.C.J.) paras. 15-16; *Masters v. MIS International Inc.*, [2000] O.J. No. 3524 (Ont. S.C.J.) and see *Rosen v. Rosen*, [1994] O.J. No. 1160 (Ont. C.A.).

7 Based on all of the evidence before me and the submissions of counsel, there is no basis on which to set aside or vary the Consent Order of A. O'Marra J. dated April 25, 2014 and negotiated between the parties and their counsel over three days (April 22-24), and, pursuant to the moving parties cross-examination on her affidavit, agreed upon by her. While she indicated that, prior to agreeing to the Consent Order, she was concerned about the fact that she may have to move out before the house sold, she nevertheless, following negotiations on this issue, consented and provided an executed consent to the order, including the term that she move from the home by August 23, 2014.

8 The order is clear, unambiguous, and detailed. It clearly sets forth the date for the moving party to provide vacant possession. There is no credible evidence of fraud, no credible evidence that the order does not reflect the parties' intentions, no evidence of material changes in circumstance following the consent order sufficient to set aside or vary the consent order, nor any evidence of misrepresentation sufficient to permit this Court to vary or set aside the order. I do not find the moving party's arguments as regards frustration of the contract, or implicit incorporation of the order of Croll J. persuasive. Nor do I find the argument that the moving party will be "homeless" and cannot afford rental accommodation if she is required to move persuasive.

9 A consent judgment is final and binding and should not be varied in the absence of extraordinary factors.

10 The Consent Order of A. O'Marra J. dated April 25, 2014 stands and the moving party is to comply fully with the Consent Order.

11 Based on the costs outlines submitted by the parties, the responding party to this motion seeks its costs on a partial indemnity basis. I grant costs in the amount of $21,000 all inclusive.

Motion dismissed.

End of Document

Tab 20

Most Negative Treatment: Distinguished
Most Recent Distinguished: Krishnamoorthy v. Zaidi | 2016 ONSC 5689, 2016 CarswellOnt 14255, 271 A.C.W.S. (3d) 76 | (Ont. S.C.J., Sep 12, 2016)

2012 ONCA 544
Ontario Court of Appeal

1196158 Ontario Inc. v. 6274013 Canada Ltd.

2012 CarswellOnt 10154, 2012 ONCA 544, [2012] O.J. No. 3877, 112 O.R. (3d) 67, 220 A.C.W.S. (3d) 533, 295 O.A.C. 244, 353 D.L.R. (4th) 129

1196158 Ontario Inc., Plaintiff (Appellant) and 6274013 Canada Limited, Rob Kumer, CB Richard Ellis Limited, John LaFontaine, Karen Pickernell, Carl Lavoie, William Neilson Limited, Toronto Hydro Corporation, Toronto Hydro-Electric System Ltd. and Toronto Hydro Energy Services Inc., Defendants (Respondents)

John Laskin, Robert J. Sharpe, G.J. Epstein JJ.A.

Heard: June 7, 2012
Judgment: August 21, 2012
Docket: CA C54452

Proceedings: affirming *1196158 Ontario Inc. v. 6274013 Canada Ltd.* (2011), 2011 CarswellOnt 12289, 2011 ONSC 5410 (Ont. S.C.J.); additional reasons at *1196158 Ontario Inc. v. 6274013 Canada Ltd.* (2012), 2012 ONCA 689 (Ont. C.A.)

Counsel: William Pepall, Louise Moher, for Appellant
J. Schatz, D. Holden, for Respondents, 6274013 Canada Limited, Rob Kumer
Sonja Williams, for Respondents, Toronto Hydro Corporation, Toronto Hydro-Electric System Ltd., Toronto Hydro Energy Services Inc.
S. Pettipiere, for Respondent, CB Richard Ellis Limited
Christiaan Jordaan, for Respondent, William Neilson Limited

Subject: Civil Practice and Procedure; Contracts; Property; Public

Related Abridgment Classifications

Civil practice and procedure
XVI Disposition without trial
XVI.4 Dismissal for delay
XVI.4.e Length of time constituting delay
XVI.4.e.iii Miscellaneous

Civil practice and procedure
XIX Pre-trial procedures
XIX.5 Case management and status hearing
XIX.5.b Status hearing or review
XIX.5.b.iv Miscellaneous

Headnote

Civil practice and procedure --- Pre-trial procedures — Case management and status hearing — Status hearing or review — Miscellaneous
In plaintiff's action against defendants brought in 2006, order was issued setting out timetable at first status hearing, held after several adjournments, and action was dismissed at second status hearing — Plaintiff appealed — Appeal dismissed — Reasons of status hearing judge revealed no errors of fact or law to justify appellate intervention — It was clear from review of chronology by status hearing judge that he was under no misapprehension as to number of status hearings that had actually been held — Plaintiff was not absolved of prior delay by order setting out timeline, as that order was properly described as lifeline that plaintiff ignored and failed to respect its timeline — It was open to status hearing judge to accept that defendants believed that plaintiff was not pursuing action without affidavit evidence to that effect, as such belief was virtually inevitable after five years of inaction — Defendants could not be accused of lying in weeds and hoping to gain tactical advantage and were not required to allege they would face actual prejudice if action were allowed to proceed for dismissal of action — Absence of actual prejudice to defendants did not automatically trump values of timeliness and efficiency, as at some point, party who failed to respect procedural rules would lose right to have its dispute decided on merits — Despite unexplained and lengthy initial period, plaintiff was permitted to proceed with action but again failed to take any meaningful step toward trial for lengthy period and it was properly held that time for further indulgence had passed — Even without actual prejudice, allowing stale claims to proceed would often be unfair to litigants and it was open to status hearing judge to find that as time went on, it would be more and more difficult to defend plaintiff's claim.

Civil practice and procedure --- Disposition without trial — Dismissal for delay — Length of time constituting delay — General principles

In plaintiff's action against defendants brought in 2006, order was issued setting out timetable at first status hearing, held after several adjournments, and action was dismissed at second status hearing — Plaintiff appealed — Appeal dismissed — Procedural rules should be interpreted to allow civil actions to be decided on merits if possible, but such rules could only achieve goal of resolving disputes in timely and efficient manner if they were respected and enforced — Plaintiff was not absolved of prior delay by order setting out timeline, as that order was properly described as lifeline that plaintiff ignored and failed to respect its timeline — It was open to status hearing judge to accept that defendants believed that plaintiff was not pursuing action without affidavit evidence to that effect, as such belief was virtually inevitable after five years of inaction — Defendants could not be accused of lying in weeds and hoping to gain tactical advantage and were not required to allege they would face actual prejudice if action were allowed to proceed for dismissal of action — Absence of actual prejudice did not automatically trump values of timeliness and efficiency, as at some point, party who failed to respect procedural rules would lose right to have its dispute decided on merits — Despite unexplained and lengthy initial period, plaintiff was permitted to proceed with action but again failed to take any meaningful step toward trial for lengthy period and it was properly held that time for further indulgence had passed — Even without actual prejudice, allowing stale claims to proceed would often be unfair to litigants and it was open to status hearing judge to find that as time went on, it would be more and more difficult to defend plaintiff's claim — Reasons of status hearing judge revealed no errors of fact or law to justify appellate intervention.

Table of Authorities

Cases considered by *Robert J. Sharpe J.A.*:

Blencoe v. British Columbia (Human Rights Commission) (2000), 2000 SCC 44, 2000 CarswellBC 1860, 2000 CarswellBC 1861, 3 C.C.E.L. (3d) 165, (sub nom. *British Columbia (Human Rights Commission) v. Blencoe)* 38 C.H.R.R. D/153, 81 B.C.L.R. (3d) 1, 190 D.L.R. (4th) 513, [2000] 10 W.W.R. 567, 23 Admin. L.R. (3d) 175, 2000 C.L.L.C. 230-040, 260 N.R. 1, (sub nom. *British Columbia (Human Rights Commission) v. Blencoe)* 77 C.R.R. (2d) 189, 141 B.C.A.C. 161, 231 W.A.C. 161, [2000] 2 S.C.R. 307 (S.C.C.) — considered

Bolohan v. Hull (2012), 2012 CarswellOnt 2200, 2012 ONCA 121, 99 C.C.E.L. (3d) 307 (Ont. C.A.) — referred to

Broniek-Harren v. Osborne (2008), 2008 CarswellOnt 2544 (Ont. S.C.J.) — followed

Finlay v. Van Paassen (2010), 266 O.A.C. 239, 101 O.R. (3d) 390, 2010 ONCA 204, 2010 CarswellOnt 1543, 318 D.L.R. (4th) 686 (Ont. C.A.) — considered

Hamilton (City) v. Svedas Koyanagi Architects Inc. (2010), 97 C.L.R. (3d) 1, 104 O.R. (3d)

689, 271 O.A.C. 205, 328 D.L.R. (4th) 540, 2 C.P.C. (7th) 114, 2010 ONCA 887, 2010 CarswellOnt 9774 (Ont. C.A.) — referred to

Khan v. Sun Life Assurance Co. of Canada (2011), 2011 CarswellOnt 10750, 2011 ONCA 650, 1 C.C.L.I. (5th) 183 (Ont. C.A.) — considered

Marché d'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd. (2007), 2007 ONCA 695, 2007 CarswellOnt 6522, 47 C.P.C. (6th) 233, 247 O.A.C. 22, 286 D.L.R. (4th) 487, 87 O.R. (3d) 660 (Ont. C.A.) — considered

Riggitano v. Standard Life Assurance Co. (2009), 2009 CarswellOnt 2685 (Ont. S.C.J.) — followed

Riggitano v. Standard Life Assurance Co. (2010), 2010 CarswellOnt 369, 2010 ONCA 70 (Ont. C.A.) — referred to

Sepehr Industrial Mineral Exports Co. v. Alternative Marketing Bridge Enterprises Inc. (2007), 2007 CarswellOnt 3969, 49 C.P.C. (6th) 360, 86 O.R. (3d) 550 (Ont. S.C.J.) — considered

Wellwood v. Ontario Provincial Police (2010), 319 D.L.R. (4th) 412, 102 O.R. (3d) 555, 262 O.A.C. 349, 2010 ONCA 386, 2010 CarswellOnt 3521, 90 C.P.C. (6th) 101 (Ont. C.A.) — considered

Rules considered:

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

R. 1.04(1) — considered

R. 48.14 — referred to

R. 48.14(1) — referred to

R. 48.14(8) — referred to

R. 48.14(10) — referred to

R. 48.14(12) — referred to

R. 48.14(13) — considered

Authorities considered:

Archibald, Todd, Gordon Killeen and James C. Morton, *Ontario Superior Court Practice* (Markham, Ont.: LexisNexis, 2011)

Morden, John W. and Paul M. Perell, *The Law of Civil Procedure in Ontario* (Markham, Ont.: LexisNexis, 2010)

Ontario, Ministry of the Attorney General, Civil Justice Reform Project, *Civil Justice Reform Project: Summary of Findings & Recommendations*, Coulter A. Osborne, Q.C., Commissioner (Toronto: The Ministry, 2007)

Pitel, Stephen G.A., "Revival After Dismissal for Delay: *Marché d'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.*" (2008), 34 Adv. Q. 240

APPEAL by plaintiff from judgment reported at *1196158 Ontario Inc. v. 6274013 Canada Ltd.* (2011), 2011 CarswellOnt 12289, 2011 ONSC 5410 (Ont. S.C.J.), dismissing its action for delay.

***Robert J. Sharpe J.A.*:**

1 The plaintiff's action, commenced in September 2006, had not proceeded beyond the close of pleadings five years later in September 2011 and was dismissed on a rule 48.14 status hearing.

2 The court issued a status notice pursuant to rule 48.14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, in October 2008 as the matter had not been set down for trial within two years of the filing of a defence. After several adjournments, a status hearing was finally held in January 2010 and a timetable was agreed-upon requiring discoveries be completed and the action be set down for trial by June 2011. The plaintiff failed to take the steps within the time limits required by the timetable and, at a status hearing held in September 2011, the presiding judge dismissed the action for delay.

3 The plaintiff appeals that order. For the following reasons, I would dismiss the appeal.

The Plaintiff's Claim

4 The plaintiff purchased a commercial property from 6274013 Canada Limited ("627") in June 2005. The plaintiff commenced this action in September 2006 alleging that 627 breached its contractual obligation to provide a 600 ampere electrical service and that the defendants 627,

its officer Rob Kumer, and the agents CB Richard Ellis Ltd., John Lafontaine, Karen Pickernell and Carl Lavoie misrepresented that the property had a 600 ampere service. The plaintiff also alleged that the defendant William Neilson Ltd. ("Neilson"), the lessee of the property from 1994 to 2005, had breached its lease agreement with the prior owner before its lease terminated in September 2005. The plaintiff subsequently moved successfully to join the defendants Toronto Hydro-Electric System Ltd. and Toronto Hydro Energy Services Inc. ("Toronto Hydro"), alleging that they negligently damaged the electrical service at the property.

Rule 48.14

5 Where an action has not been placed on the trial list within two years of the defence being filed, the registrar issues a status notice indicating that the action will be dismissed for delay unless the matter is set down for trial within 90 days of the notice: rule 48.14(1). A party may request a status hearing, held before a judge or case management master (rule 48.14(8)), which will be held in writing where the party files an agreed timetable for the necessary steps to be completed to ensure that the matter is set down for trial within 12 months (rule 48.14(10)). If no such timetable is filed a status hearing is held pursuant to rule 48.14(12).

6 Rule 48.14(13) provides:

> 48.14(13) At the status hearing, the plaintiff shall show cause why the action should not be dismissed for delay and,
>
> (a) if the presiding judge or case management master is satisfied that the action should proceed, the judge or case management master may,
>
> (i) set time periods for the completion of the remaining steps necessary to have the action placed on or restored to a trial list and order that it be placed on or restored to a trial list within a specified time,
>
> (ii) adjourn the status hearing to a specified date on such terms as are just, or
>
> (iii) if the action is an action to which Rule 77 may apply under rule 77.02, assign the action for case management under that Rule, subject to the direction of the regional senior judge,
>
> (iv) make such other order as is just; or
>
> (b) if the presiding judge or case management master is not satisfied that the action should proceed, the judge or case management master may dismiss the action for delay.

The Chronology of this Action

7 The statement of claim was issued on September 6, 2006. 627 and Neilson delivered their statements of defence on October 19, 2006 and November 15, 2006 respectively. The plaintiff amended its statement of claim on January 25, 2007, and 627 and Neilson served amended statements of defence in February and March 2007. The plaintiff took no steps to move the action beyond the pleading stage. A status notice was issued on October 31, 2008, two years after the commencement of the action. At the plaintiff's request, a Notice of Status Hearing for December 9, 2008 was issued. At that point, the plaintiff had still taken no steps to move the action beyond the pleading stage. The December 9, 2008 status hearing was adjourned on consent at the plaintiff's request to allow the plaintiff to move to add the Toronto Hydro defendants. That motion was heard and decided in May 2009. Status hearings set for January 27, 2009, August 25, 2009 and October 27, 2009 were adjourned and a status hearing was finally held on January 19, 2010. By that point, three years and four months after commencing the action, the plaintiff still had not moved the action beyond the pleading stage.

8 At this status hearing, the presiding judge approved an agreed timetable requiring the completion of pleadings by February 26, 2010 and delivery of affidavits of documents by March 19, 2010. The timetable also required the parties to agree to a discovery plan by March 19, 2010, or alternatively to bring a motion to fix a plan by April 2, 2010. Examinations for discovery were to be completed by September 30, 2010, undertakings given at examination for discovery completed by November 30, 2010, related discovery motions completed by January 2011 and the action set down for trial by June 30, 2011. If the action was not set down by that date, a further status hearing was to be conducted on September 13, 2011.

9 The plaintiff delivered an amended statement of claim on January 19, 2010, adding the Toronto Hydro defendants. The defendants filed amended statements of defence and related pleadings in February and March 2010. On March 16, 2010, plaintiff's counsel, without presenting his own discovery plan, asked the defendants for their proposed discovery plans. Counsel for 627 responded that it would make more sense for the plaintiff to circulate a proposed discovery plan. Plaintiff's counsel did not respond to that suggestion and took no further steps in the action for the next year and five months.

10 Before the September 13, 2011 status hearing, counsel for defendants 627 and Kumer indicated that they would ask to have the action dismissed for delay. On September 1, 2011, plaintiff's counsel served an affidavit of documents and proposed a new timetable and discovery plan. The plaintiff also filed affidavit evidence in an attempt to meet the defendants' request to have the action dismissed for delay.

11 At the September 13, 2011 status hearing, the defendants asked that the action be dismissed. The plaintiff relied on the fact that none of the parties had complied with the timetable set at the January 19, 2010 status hearing and that the attention of the principal and counsel for the plaintiff, who are brothers, had been diverted from the action by financial concerns and personal problems including the death of their father and brother and elder care for their mother.

The Reasons of the Status Hearing Judge

12 The status hearing judge reviewed the chronology of the action and the positions of the parties. He identified and applied the legal test requiring the plaintiff to satisfy the status hearing judge that there is *both* an explanation for the delay that justifies the continuation of the action and that there would be no prejudice to the defendant in allowing the action to proceed. The status hearing judge found that the plaintiff had failed to satisfy that test. He observed that although the plaintiff had failed to move the action beyond the pleadings, it had been give a "lifeline" at the January 19, 2010 status hearing but had failed to comply with the timetable it agreed to follow at that time. The status hearing judge stated "[d]espite being given this opportunity, the Plaintiff did nothing to move this action along for a further year and a half! Other than serving the Hydro Defendants, the Plaintiff simply ignored January 19, 2010 Order."

13 The status hearing judge noted that the defendants had done nothing to move the action along but that they reasonably believed, in light of the history of the action and the plaintiff's failure to comply with the January 19, 2010 order, that the plaintiff was not pursuing the action. The status hearing judge found that while the financial and personal issues faced by counsel and the principal of the plaintiff evoked sympathy, those personal factors were not enough to justify a five year delay in prosecuting the action. In any event, if those problems were the reason for not proceeding, the plaintiff should have asked for an adjustment to the timetable set in January 2010. The status hearing judge concluded that there had been a "lack of any real progress in 5 years" beyond pleadings and a "complete disregard of the timetable imposed on January 19, 2010".

14 The status hearing judge observed that there was no alleged or demonstrated actual prejudice to the defendants. However, he noted that the limitation period for the claims had long expired and that adjudication of the claims, especially those against Neilson, would involve documents and events potentially going back more than 15 years. He found that although no actual prejudice had been demonstrated, he had "concerns as to whether a fair trial can be held on the issues raised in the action". The status hearing judge concluded that the action should be dismissed:

> There must be finality to claims. The Plaintiff has been given numerous chances to proceed

with the action. At some point, the court has to say the Plaintiff has had enough opportunities to move this action along. The Defendants have had to deal with these claims for over 5 years and shouldn't be forced to have this claim remain a contingent claim against them.

Issues

15 The overarching issue in this case is whether the order dismissing the action be set aside on the ground that the status hearing judge failed to apply the correct legal test or committed palpable and overriding errors by misapprehending evidence. The appeal raises several specific issues:

1. Did the status hearing judge commit palpable and overriding errors by misapprehending the evidence in relation to the number of previous status hearings and the history of the action?

2. Did the status hearing judge commit palpable and overriding errors by finding, without affidavit evidence, that the defendants believed that the plaintiff was not pursuing the action?

3. Did the status hearing judge err in dismissing the action for delay without evidence of actual prejudice?

Analysis

(a) Standard of Review

16 It is common ground that a decision to dismiss an action for delay at a status hearing is discretionary and entitled to deference on appeal. The decision may, however, be set aside if made on an erroneous legal principle or if infected by a palpable and overriding error of fact.

(b) Delay and Fairness in Civil Litigation

17 The civil justice system aims to resolve disputes fairly, on the merits and in a timely and efficient manner. The *Rules of Civil Procedure* provide that the rules are to be "liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits": rule 1.04(1).

18 Achieving that goal in cases involving dismissal for delay requires a careful balance of two fundamental principles. The first is that civil actions should, if possible, be decided on their merits and procedural rules should be interpreted accordingly. The second is that the procedural rules that aim to resolve disputes in a timely and efficient manner can only achieve their goal if they are respected and enforced.

19 Time lines prescribed by the *Rules of Civil Procedure* or imposed by judicial orders should be complied with. Failure to enforce rules and orders undermines public confidence in the capacity of the justice system to process disputes fairly and efficiently. On the other hand, procedural rules are the servants of justice not its master. We must allow some latitude for unexpected and unusual contingencies that make it difficult or impossible for a party to comply. We should strive to avoid a purely formalistic and mechanical application of time lines that would penalize parties for technical non-compliance and frustrate the fundamental goal of resolving disputes on their merits. As Laskin J.A. stated in *Finlay v. Van Paassen*, 2010 ONCA 204, 101 O.R. (3d) 390 (Ont. C.A.), at para. 14: "the Rules and procedural orders are construed in a way that advances the interests of justice, and ordinarily permits the parties to get to the real merits of their dispute."

20 The challenge posed in cases involving dismissal for delay is to find the right balance between, on the one hand, the need to ensure that the rules are enforced to ensure timely and efficient justice and, on the other, the need to ensure sufficient flexibility to allow parties able to provide a reasonable explanation for failing to comply with the rules to have their disputes decided on the merits.

21 With these general principles as background, I will now consider the specific grounds of appeal advanced by the plaintiff.

Issue 1. Number of Status Hearings and History of the Action

22 The plaintiff submits that the status hearing judge committed palpable and overriding errors by misapprehending the evidence in relation to the number of previous status hearings and the history of the action.

23 The status hearing judge stated that the matter had been "before this court a number of times prior to this date — one Status Notice and *5 Status Hearings*" and that he was entertaining "the *6th Status Hearing*" (emphasis in original). In fact, there had only been one prior status hearing and the other four scheduled hearings had all been adjourned. The plaintiff argues that it was an error to take into account the adjournments of the first status hearing and related delay as no timetable had yet been set and that period had been dealt with by the judge who conducted the January 2010 status hearing.

24 I am unable to accept this submission. Although the status hearing judge described the hearing he was conducting as "the 6th Status Hearing", it is clear from his review of the chronology of the action that he was under no misapprehension as to the number of status hearings that had actually been held.

25 I completely disagree with the contention that the plaintiff was somehow absolved for all prior delay by the order made at the January 2010 status hearing. That order, made despite over three years of delay, was properly described by the September 2011 status hearing judge as a "lifeline" that allowed the plaintiff to proceed on the basis of the timetable ordered. The plaintiff ignored the lifeline it had been given and failed to respect the timetable that had been set. Without repentance there can be no absolution. The plaintiff did not emerge from the January 2010 status hearing with a clean slate and it was open to the status hearing judge to consider the entire history of delay.

26 It is also submitted that the status hearing judge misapprehended the impact of the motion to add Toronto Hydro. I disagree. That motion was heard and decided in May 2009 and the amended endorsement issued in November 2009 was a minor correction that did not affect the substance of the matter. The plaintiff's failure to prosecute this action with the required degree of diligence cannot be explained by the motion to add Toronto Hydro.

Issue 2. Conduct of the Defendants

27 The plaintiff submits that the status hearing judge erred by finding that the defendants believed that the plaintiff was not pursuing the action as there was no affidavit evidence to that effect, only the oral submission of counsel at the hearing. It certainly would have been preferable to have had affidavit evidence on the point. However, in my view, in the circumstances of this case, it was open to the status hearing judge to infer from the dilatory action of the plaintiff that there was a factual foundation for counsel's submission. After five years of inaction on the part of the plaintiff, it was virtually inevitable that the defendants would assume that the claim was not being pursued. At the very least, without some action on the part of the plaintiff, the defendants would be disinclined to spend any time or money in preparing affidavits of documents or taking any other steps in anticipation of a trial that as time went by, became increasingly unlikely to happen.

28 The focus of the inquiry on a rule 48.14 status hearing is the conduct of the plaintiff and, as this court held in *Wellwood v. Ontario Provincial Police*, 2010 ONCA 386, 102 O.R. (3d) 555 (Ont. C.A.), at para. 48, "the party who commences the proceeding bears primary responsibility for its progress" and therefore "the initiating litigant generally suffers the consequences of a dilatory regard for the pace of litigation". See also *Hamilton (City) v. Svedas*

Koyanagi Architects Inc., 2010 ONCA 887, 104 O.R. (3d) 689 (Ont. C.A.), at paras. 27-28.

29 I agree that the conduct of a defendant may be relevant, especially where a plaintiff who tries to move an action along is faced with "some resistance" from the defendant, or tactics that are not "consistent with a willingness to see a relatively straightforward case proceed expeditiously": see *Bolohan v. Hull*, 2012 ONCA 121, [2012] O.J. No. 749 (Ont. C.A.), at para. 17.

30 In this case, however, the defendants did nothing to resist any attempt by the plaintiff to advance the action. They cannot be accused of "lying in the weeds" and hoping to gain a tactical advantage. Failing any initiative on the part of the plaintiff, to require the defendants to spend time and money to prepare for a case that, from all appearances, was dead on the vine would, in my view, be to impose an unnecessary and unreasonable burden.

Issue 3. Prejudice

31 The defendants did not allege that if the action were allowed to proceed, they would face actual prejudice of the kind caused by, for example, "the death of an important witness, the inability to locate a witness, the inability of a witness to recall [important] facts or the loss of important evidence, including documents": Paul M. Perell & John W. Morden, *The Law of Civil Procedure in Ontario* (Markham: LexisNexis, 2010), at p. 423.

32 Actual prejudice or the lack thereof is an important factor to consider in cases of dismissal for delay: *Hamilton (City)*, at para. 33. However, it is certainly not the law that an action cannot be dismissed for delay at a rule 48.14 status hearing without proof of actual prejudice. The status hearing judge applied the test as stated by this court in *Khan v. Sun Life Assurance Co. of Canada*, 2011 ONCA 650, [2011] O.J. No. 4590 (Ont. C.A.), at para. 1: "the appellant [plaintiff] bore the burden of demonstrating that there was an acceptable explanation for the involved litigation delay and that, if the action was allowed to proceed, the respondent [defendant] would suffer no non-compensable prejudice". The test is conjunctive, not disjunctive. Even if the plaintiff can provide a satisfactory explanation for the delay, the action will be dismissed if there would be prejudice to the defendant. And if the plaintiff is not able to provide a satisfactory explanation for the delay, it is still open to the judge to dismiss the action, even if there is no proof of actual prejudice to the defendant.

33 As I have noted, the goal of the civil justice system is ensure "the just, most expeditious and least expensive determination of every civil proceeding on its merits". Consideration of actual prejudice focuses on the just determination of the dispute on its merits. The absence of actual prejudice does not automatically or inevitably trump the values of timeliness and efficiency. At some point, a party who has failed to respect the rules designed to ensure timely

and efficient justice loses the right to have its dispute decided on the merits. If that were not the case, the rules and the time lines they impose would cease to have any meaning and any hope of ensuring timely and efficient justice would be seriously jeopardized.

34 Modern civil procedure recognizes the need to deal with unexplained delay and, through rules such as rule 48.14, provides for an active judicial role "to promote the timely resolution of disputes, to discourage delay in civil litigation and to give the courts a significant role in reducing delays": Todd Archibald, Gordon Killeen & James C. Morton, *Ontario Superior Court Practice* (Markham: LexisNexis Canada, 2011), at p. 1205. As judgments of this court and the Superior Court recognize, if an action could not be dismissed for delay unless there was proof of actual prejudice, time lines would become meaningless. Where a party fails to prosecute an action in a timely fashion, the court is entitled to exercise the powers conferred by the rules to dismiss actions absent an adequate explanation for the delay: *Riggitano v. Standard Life Assurance Co.*, [2009] O.J. No. 1997 (Ont. S.C.J.), at para. 45, aff'd 2010 ONCA 70, [2010] O.J. No. 292 (Ont. C.A.).

35 It is surely not too much to expect a party to either set a matter down for trial within two years of the close of pleadings or be able to offer a reasonable explanation for why that is not possible to do so. In this case, the plaintiff had no explanation for an initial lengthy period of inaction. Despite that unexplained delay, the plaintiff was permitted to proceed with the action, but again failed to take any meaningful step towards trial for another period of almost eighteen months. In these circumstances, the status hearing judge did not err by concluding that the time for any further indulgence had passed.

36 The balance to be struck in the circumstance of a case such as this was very well put by Glithero J. in *Riggitano*, at para. 45, a decision affirmed by this court:

> It is never pleasant to dismiss a plaintiff's action for delay. Nevertheless, Rule 48.14 clearly contemplates that two years following the filing of a statement of defence is viewed as being ample time to complete remaining steps and have a matter set down for trial, absent some satisfactory explanation. Where a contest arises, sub-rule (8) squarely puts the onus on [the] plaintiff to show cause why the action should not be dismissed for delay. Here more than five years, and hence more than twice the normal time period contemplated by the rule, has gone by and in my assessment the plaintiff has done very little to move the matter along. In my opinion, the materials do not disclose any satisfactory explanation for the delay. *If the common submission, as made here, to the effect that a dismissal would be unfair to the plaintiff is permitted to always trump the provision in the rules contemplating a reasonably timely procedure for the disposition of actions, then the rule would be effectively gutted.*
>
> [Emphasis added]

37 I also agree with and adopt the statement of D.K. Gray J. in *Broniek-Harren v. Osborne*, [2008] O.J. No. 1690 (Ont. S.C.J.), at paras. 28-29:

> The policy underlying the *Rules of Civil Procedure* is twofold: to ensure that cases that are not settled are tried on their merits; and to ensure that cases are processed, and heard, in an orderly way. A civilized society must ensure that a credible system of justice is in place, and the *Rules of Civil Procedure*, made pursuant to the *Courts of Justice Act*, reflect the scheme created by the Province for the orderly handling of civil cases.
>
> The *Rules* reflect a balance. The litigant does not have an untrammelled right to have his or her case heard. In order to be heard, a case must be processed in accordance with the *Rules*. By the same token, adherence to the *Rules* must not be slavish in all circumstances. They are, after all, designed to ensure that cases are heard. Throughout the *Rules*, the principle is reflected that strict compliance may be dispensed with where the interests of justice require it: see, for example, Rules 1.04(1), 2.01, 2.03, 3.02, and 26.01. The difficult issue, in any particular case, is to determine when non-compliance reaches the point that it can no longer be excused. *The Court, and society as a whole, have an interest in ensuring that the system remains viable. If the Rules can be ignored with impunity, they might as well not exist.*
>
> [Emphasis added.]

38 See also *Sepehr Industrial Mineral Exports Co. v. Alternative Marketing Bridge Enterprises Inc.* (2007), 86 O.R. (3d) 550 (Ont. S.C.J.), at para 21, Quinn J:

> Legal proceedings are not to be undertaken lightly. Plaintiffs have a responsibility to prosecute their actions diligently and in accordance with the Rules of Civil Procedure. Our legal system, sagging, as it is, under the weight of a heavy caseload, should not lightly tolerate anything short of that diligence.

39 These cases quite properly reflect and reinforce the strong public interest in promoting the timely resolution of disputes. “The notion that justice delayed is justice denied reaches back to the mists of time.... For centuries, those working with our legal system have recognized that unnecessary delay strikes against its core values and have done everything within their powers to combat it”: *Marché d’Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.*, 2007 ONCA 695, 87 O.R. (3d) 660 (Ont. C.A.), at para. 25, quoting *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 (S.C.C.), at para. 146. Excusing significant delay “risks undermining public confidence in the administration of justice”: *Marché*, at para. 32. The time lines the rules impose are relatively generous and there is a heavy price to be paid when they are not respected.

40 As Professor Stephen G.A. Pitel observed in "Revival After Dismissal for Delay: *Marche D'Alimentation Denis Theriault Ltee v. Giant Tiger Stores Ltd.*" (2008) 34 Adv. Q. 240: "...our system of civil justice is under almost constant scrutiny. One of the most fundamental concerns is that the process is far too complex, too expensive and takes too long." In his review of the civil justice system the Honourable Coulter Osborne, Q.C. observed that the related issues of cost and delay "continue to be cited nationally and provincially as formidable barriers that prevent average Canadians from accessing the civil justice system": Civil Justice Reform Project, *Summary of Findings & Recommendations* (Toronto: Ontario Ministry of the Attorney General, 2007), at p. 1. A system that tolerates unexplained delay will not attract public confidence.

41 The civil justice regime should deliver timely justice to both plaintiffs and defendants. Failure to enforce time lines frustrates the legitimate expectations of both those who claim and those who defend. Unless the basic ground rules of litigation — including time requirements — are enforced in a principled way, counsel cannot provide reliable advice and clients cannot plan their affairs in an orderly manner.

42 If flexibility is permitted to descend into toleration of laxness, fairness itself will be frustrated. As the status hearing judge recognized, even if there is no actual prejudice, allowing stale claims to proceed will often be unfair to the litigants. Disputes are more likely to be resolved fairly if they are resolved in a timely fashion and accordingly, the enforcement of time lines helps achieve the ultimate goal of fair resolution of disputes. Stale claims are more difficult to defend. As this court stated in *Wellwood*, at para. 72: "as the memories of witnesses fade over time, the passage of an inordinate length of time after a cause of action arises or after an applicable limitation period expires gives rise to trial fairness concerns. In my view, this is so even when timely notice of the claim has been provided."

43 The allegations made in the statement of claim in this case reach back many years, to a period earlier than the date of sale in 2005. In my view, it was open to the status hearing judge to find that as time went on, it would be more and more difficult to defend a claim that related to events that had transpired at least six years ago and that would be even more remote by the time a trial could be held. The more time that passes, the more difficult it is to defend the case. Memories fade and even if documents are not lost, their significance becomes shrouded.

44 Another harm that flows from delay, properly relied on by the status hearing judge, is that it leaves the litigant with the claim hanging over its head in a kind of perpetual limbo. Fairness requires allowing parties to plan their lives on the assumption that, barring exceptional or unusual circumstances, litigation time lines will be enforced. "Litigants are entitled to have their disputes resolved quickly so that they can get on with their lives" and "delay multiplies costs and breeds frustration and unfairness": *Marché d'Alimentation Denis Thériault Ltée*, at para. 25; see also *Hamilton (City)*, at para 21. In my view, it was entirely proper for the status hearing

judge to weigh in the balance the fact that the defendants would inevitably suffer some harm if, after more than five years and no significant movement by the plaintiff, they were forced to continue to face this contingent claim.

Conclusion

45 In my view, the reasons of the status hearing judge reveal no errors of fact or law that would justify this court's intervention. The discretionary decision of the status hearing judge attracts deference in this court. As his decision is consistent with the applicable legal principles I have identified and reveals no reversible errors of fact, I would dismiss the appeal with costs to 627 and Neilson fixed at $7,500 each, inclusive of disbursements and taxes.

***John Laskin J.A.*:**
I agree

***G.J. Epstein J.A.*:**
I agree

Appeal dismissed.

Tab 21

Most Negative Treatment: Distinguished
Most Recent Distinguished: Arrangement de MPECO Construction inc. | 2019 QCCS 297, 2019 CarswellQue 730, EYB 2019-306949, 67 C.B.R. (6th) 87 | (Que. Bktcy., Feb 4, 2019)

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

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

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

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

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

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

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust
Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings
Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie
Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite
Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à

la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but

Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la présance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

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United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 135 B.C.A.C. 96, 221 W.A.C. 96, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, 16 C.B.R. (4th) 141, [2000] 5 W.W.R. 178 (B.C. C.A.) — referred to

Cases considered by *Fish J.*:

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Cases considered by *Abella J.* (dissenting):

Canada (Attorney General) v. Canada (Public Service Staff Relations Board) (1977), [1977] 2 F.C. 663, 14 N.R. 257, 74 D.L.R. (3d) 307, 1977 CarswellNat 62, 1977 CarswellNat 62F (Fed. C.A.) — referred to

Doré c. Verdun (Municipalité) (1997), *(*sub nom. *Doré v. Verdun (City))* [1997] 2 S.C.R. 862, *(*sub nom. *Doré v. Verdun (Ville))* 215 N.R. 81, *(*sub nom. *Doré v. Verdun (City))* 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — referred to

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — considered

R. v. Tele-Mobile Co. (2008), 2008 CarswellOnt 1588, 2008 CarswellOnt 1589, 2008 SCC 12, *(*sub nom. *Tele-Mobile Co. v. Ontario)* 372 N.R. 157, 55 C.R. (6th) 1, *(*sub nom. *Ontario v. Tele-Mobile Co.)* 229 C.C.C. (3d) 417, *(*sub nom. *Tele-Mobile Co. v. Ontario)* 235 O.A.C. 369, *(*sub nom. *Tele-Mobile Co. v. Ontario)* [2008] 1 S.C.R. 305, *(*sub nom. *R. v. Tele-Mobile Company (Telus Mobility))* 92 O.R. (3d) 478 (note), *(*sub nom. *Ontario v. Tele-Mobile Co.)* 291 D.L.R. (4th) 193 (S.C.C.) — considered

Statutes considered by *Deschamps J.*:

Bank Act, S.C. 1991, c. 46
Generally — referred to

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

s. 67(2) — referred to

s. 67(3) — referred to

s. 81.1 [en. 1992, c. 27, s. 38(1)] — considered

s. 81.2 [en. 1992, c. 27, s. 38(1)] — considered

s. 86(1) — considered

s. 86(3) — referred to

Bankruptcy Act and to amend the Income Tax Act in consequence thereof, Act to amend the, S.C. 1992, c. 27
Generally — referred to

s. 39 — referred to

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12
s. 73 — referred to

s. 125 — referred to

s. 126 — referred to

Canada Pension Plan, R.S.C. 1985, c. C-8
Generally — referred to

s. 23(3) — referred to

s. 23(4) — referred to

Cités et villes, Loi sur les, L.R.Q., c. C-19
en général — referred to

Code civil du Québec, L.Q. 1991, c. 64
en général — referred to

art. 2930 — referred to

Companies' Creditors Arrangement Act, Act to Amend, S.C. 1952-53, c. 3
Generally — referred to

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36
Generally — referred to

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

s. 11 — considered

s. 11(1) — considered

s. 11(3) — referred to

s. 11(4) — referred to

s. 11(6) — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — referred to

s. 11.09 [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — referred to

s. 18.3 [en. 1997, c. 12, s. 125] — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 18.4 [en. 1997, c. 12, s. 125] — referred to

s. 18.4(1) [en. 1997, c. 12, s. 125] — considered

s. 18.4(3) [en. 1997, c. 12, s. 125] — considered

s. 20 — considered

s. 21 — considered

s. 37 — considered

s. 37(1) — referred to

Employment Insurance Act, S.C. 1996, c. 23
Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

s. 222(1) [en. 1990, c. 45, s. 12(1)] — referred to

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Fairness for the Self-Employed Act, S.C. 2009, c. 33
Generally — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
s. 227(4) — referred to

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — referred to

Interpretation Act, R.S.C. 1985, c. I-21
s. 44(f) — considered

Personal Property Security Act, S.A. 1988, c. P-4.05
Generally — referred to

Sales Tax and Excise Tax Amendments Act, 1999, S.C. 2000, c. 30
Generally — referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1
Generally — referred to

s. 69 — referred to

s. 128 — referred to

s. 131 — referred to

Statutes considered *Fish J.*:

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

s. 67(2) — considered

s. 67(3) — considered

Canada Pension Plan, R.S.C. 1985, c. C-8
Generally — referred to

s. 23 — considered

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

s. 11 — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Employment Insurance Act, S.C. 1996, c. 23
Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(1) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3)(a) [en. 1990, c. 45, s. 12(1)] — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — considered

Statutes considered *Abella J.* (dissenting):

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 — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Interpretation Act, R.S.C. 1985, c. I-21
s. 2(1)"enactment" — considered

s. 44(f) — considered

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11
Generally — referred to

***Deschamps J.*:**

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

1. Facts and Decisions of the Courts Below

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

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA.* However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA.* Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time

LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

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

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

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

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

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

2. Issues

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

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

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

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

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the

Bankruptcy and Insolvency Act)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

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

3.1 Purpose and Scope of Insolvency Law

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

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

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

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

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

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

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

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

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

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

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

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

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

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

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

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

3.2 GST Deemed Trust Under the CCAA

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

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

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

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax,

Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that

amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

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

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

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

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

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

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA's* override provision. Viewed in its entire

context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

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

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

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

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

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

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

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

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

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

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

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

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

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

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

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

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the

order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

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

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

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

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

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

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

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

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity

require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

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

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

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

3.4 Express Trust

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

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

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

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

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim

would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

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

4. Conclusion

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

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

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

I

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

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

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

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

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

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

II

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

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

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

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

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

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

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

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

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

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

the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

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

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

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

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

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

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

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

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as

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

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

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

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

III

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

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

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

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

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

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

> **222 (3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
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> (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> [T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

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

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

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

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

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

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

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

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

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

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share

Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

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

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

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

136 I would dismiss the appeal.

Appeal allowed.
Pourvoi accueilli.

Appendix

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

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

...

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

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

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

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

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

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

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

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

...

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

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

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

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

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

(i) the expiration of the order,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

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

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

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

...

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

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

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

...

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

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

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

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

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

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

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

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

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

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

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

...

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

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

(i) the expiry of the order,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> (a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or
>
> (b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

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

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

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

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

...

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

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

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

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

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

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

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

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

but it shall comprise

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

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

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

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

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

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

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

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

...

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

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

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection

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

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

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

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

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

Footnotes

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

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

Tab 22

2009 CarswellOnt 6169
Ontario Superior Court of Justice [Commercial List]

Fraser Papers Inc., Re

2009 CarswellOnt 6169, [2009] O.J. No. 4287, 181 A.C.W.S. (3d) 256

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

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO FRASER PAPERS INC., FPS CANADA INC., FRASER PAPERS HOLDINGS INC., FRASER TIMBER LTD., FRASER PAPERS LIMITED and FRASER N.H.LLC (collectively, the "Applicants" or "Fraser Papers")

Pepall J.

Judgment: September 17, 2009
Docket: CV-09-8241-OOCL

Counsel: M. Barrack, D.J. Miller for Applicants
R. Chadwick, C. Costa for Monitor
D. Wray, J. Kugler for Communications, Energy and Paper Workers Union of Canada
D. Wray, J. Kugler (Agent) for Pink Larkin
C. Sinclair for United Steelworkers
T. McRae, S. Levitt for Steering Committee of Fraser Papers' Salaried Retirees Committee
M.P. Gottlieb, S. Campbell for Committee for Salaried Employees and Retirees
M. Sims for Her Majesty the Queen in Right of the Province of New Brunswick as represented by the Minister of Business of New Brunswick
Chriss Burr for CIT Business Credit Canada Inc.
D. Chernos for Brookfield Asset Management Inc.

Subject: Insolvency; Civil Practice and Procedure

***Pepall J.*:**

Relief Requested

1 There are four motions before me that request the appointment of representatives and representative counsel for various groups of unrepresented current and former employees and other beneficiaries of the pension plans and other retirement and benefit plans of the Applicants ("Fraser Papers"). With the exception of the motion of the United Steel, Paper, Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union (the "USW"), all motions include a request that Fraser Papers pay the fees and disbursements of representative counsel.

2 The motions are brought by the following moving parties:

(a) the USW who seeks to represent its former members. It already represents its current members.

(b) the Communications Energy and Paperworkers Union of Canada (the "CEP") who also seeks to represent its former members. It too already represents its current members.

(c) the Steering Committee of Fraser Papers' Salaried Retirees Committee who request that Nelligan O'Brian Payne LLP and Shibley Righton LLP ("Nelligan/Shibley") be appointed to act for all non-unionized retirees and their successors.

(d) the Committee of Salaried Employees and Retirees who request that Davies Ward Phillips & Vineberg LLP ("Davies") be appointed to act for all unrepresented employees, be they active or retired, and their successors.

3 A third union, the CMAW, did not bring a motion but Mr. Wray, counsel for the CEP, acted as agent for CMAW's counsel, Pink Larkin on these motions. He advised that the CMAW will represent its current members but not its retirees who are approximately 25 in number.[1] These retirees therefore would only be encompassed by the Davies proposed retainer.

Discussion

4 The Applicants employ approximately 2,500 personnel. They are located in Canada and the U.S. A substantial majority is unionized. Of the 2,500, 1,729 employees participate in five defined benefit pension plans. In addition, 3,246 retirees receive benefits from these plans. Fraser Papers maintains certain other plans and benefits including supplementary employee retirement programmes ("SERPs").

5 On June 18, 2009, the Applicants obtained an Initial Order pursuant to the provisions of the *CCAA*. On July 13, 2009, the U.S. Bankruptcy Court for the District of Delaware designated these proceedings as foreign main proceedings pursuant to Chapter 15 of the U.S. Bankruptcy Code.

6 Fraser Papers is insolvent and is under significant financial pressure. Absent the DIP financing, a restructuring would be impossible. The Applicants have not generated positive cash flow from operations for three years. Their largest unsecured claims relate to the pension plans and the SERPs. Their accrued pension benefit obligations in these plans and the SERPs exceed the value of the plan assets by approximately USD $171.5 million as at December 31, 2008.

7 Representative counsel should be appointed in this case and I have jurisdiction to do so. Section 11 of the *CCAA* and the Rules of Civil Procedure provide the Court with broad jurisdiction in this regard. No one challenges either of these propositions. The employees and retirees not otherwise represented are a vulnerable group who require assistance in the restructuring process and it is beneficial that representative counsel be appointed. The balance of convenience favours the granting of such an order and it is in the interests of justice to do so. The real issues are who should be appointed and whether Fraser Papers should fund the proposed representation.

(A) USW and CEP Motions

8 Dealing firstly with the motions brought by the unions, the USW is the exclusive bargaining agent for the unionized employees of the Applicants working in Madawaska, Maine and Berlin- Gorham, New Hampshire. Personnel at these facilities participate in a defined benefit pension plan and a defined contribution pension plan. The U.S. law applicable to pension plans is the *Employee Retirement Income Security Act of 1974* ("ERISA")[2]. The evidence filed by the USW suggests that a labour organization that negotiated a pension plan has a role in legal proceedings involving termination of that plan. If voluntary, consent of the union is required and if involuntary, an order of the bankruptcy court under the appropriate provisions of U.S. bankruptcy law is necessary. The USW has extensive experience representing the rights of employees and retirees in these sorts of proceedings. It is also noteworthy that, although the collective agreements between the USW and the Applicants do not provide for retiree health and life insurance benefits, the U.S. Bankruptcy Code provides that a labour organization is deemed to be the authorized representative of retirees, surviving spouses, and dependents receiving benefits pursuant to its collective bargaining agreements, unless the union opts not to serve as the authorized representative or the bankruptcy court determines that different representation is appropriate.

9 In my view, the USW should be appointed as the representative for its former members who are retired subject to a retiree's ability to opt out of such representation should he or she so desire. The union already has a relationship with the USW retirees. It also has the means with which to communicate quickly with its members and former members. It is familiar

with the relevant collective agreements and plans and has experience and a presence in both Canada and the U.S. De facto, the USW is already the representative of the USW retirees pursuant to the law in the U.S. Lastly, the Monitor and the Applicants support the USW's request to be appointed as representative counsel for its former members. As mentioned, the USW does not seek funding.

10 Although CEP plays no role in Fraser Papers' U.S. operations, with that exception, for similar reasons and in the interests of consistency, the CEP should be appointed as the representative for its former members who are retirees subject to the aforementioned opt out provision. The Monitor and the Applicants are supportive of this position. Counsel for the CEP indicated that while it is unclear as a matter of law that the union is bound to represent former members in circumstances such as those facing Fraser Papers, the CEP would represent them with or without funding. Given Fraser Papers' insolvency, it seems to me that funding by the Applicants should only be provided for the benefit of those who otherwise would have no legal representation. The request for funding by CEP is refused.

(b) Nelligan/Shibley and Davies

11 Turning to the requests of the Steering Committee of Fraser Papers Salaried Retirees Committee which favours the appointment of Nelligan/Shibley and the Committee for Salaried Employees and Retirees which favours Davies, firstly commonality of interest should be considered. In *Nortel Networks Corp., Re*[3], Morawetz J. applied the Court of Appeal's decision in *Stelco Inc., Re*[4] and the decision of *Canadian Airlines Corp., Re*[5] to enumerate the following principles applicable to an assessment of commonality of interest:

> 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test.
>
> 2. The interests to be considered are the legal interests that a 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 interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the plan] 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.

12 Once commonality of interest has been established, other factors to be considered in the selection of representative counsel include: the proposed breadth of representation; evidence of a mandate to act; legal expertise; jurisdiction of practice; the need for facility in both official languages; and estimated costs.

13 Davies is proposing to represent all unrepresented employees, former employees and their successors. In my view, there is a commonality of interest amongst the members of this group. In essence, they engage unsecured obligations. Arguably those proposed to be represented by the unions could also be included, and indeed absent a change of position by the CMAW, former members of the CMAW will be. That said, for the reasons outlined above, I am satisfied in this case that it is desirable to have the unions act for their members and former members if so willing. Indeed, no one took an opposing position.

14 I am not persuaded that there is a need for separate representation as advocated by the Committee supporting the Nelligan/Shibley retainer. Appointing only Davies avoids excessive fragmentation and duplication and minimizes costs. In addition, no one will be excluded unless he or she so desires. Davies is also the only counsel whose retainer would extend to the CMAW retirees.

15 Davies has already received a broad mandate in that it has close to 700 retainers from employees in each facet of

Fraser Papers' operations and from all current and former employee groups. It has the necessary legal expertise and has offices in Toronto, Montreal and New York. It also has the necessary language capability.

16 In contrast, Nelligan/Shibley is only proposing to represent retirees. It has a mandate of approximately 211 retirees. Clearly it has the requisite legal and language expertise but does not have the benefit associated with having offices in as many relevant jurisdictions. One may reasonably conclude from the evidence before me that the proposed fee structure would be less than that advanced by Davies although the scope of the retainer is more limited. Davies' appointment is not diminished because initially they were identified by the Applicants as appropriate counsel unlike Nelligan/Shibley whose group grew organically to use its counsel's terminology. Nor am I persuaded that Davies will be enfeebled as a result of the composition of the Steering Committee or due to past unrelated retainers by Brookfield Asset Management Inc. The Monitor supports the appointment of Davies as do the Applicants and the DIP lenders.

17 In the event that a real as opposed to a hypothetical or speculative conflict arises at some point in the future, parties may seek directions from the Court. As with the unions, the order appointing Davies will allow anyone to opt out of the representation.

18 Unlike the unions, absent funding, Davies would not be expected to serve as representative counsel. Accordingly, funding is ordered to be provided by Fraser Papers. Again, the funding request is supported by the Monitor, the Applicants and the DIP lenders.

19 The objective of my order is to help those who are otherwise unrepresented but to do so in an efficient and cost effective manner and without imposing an undue burden on insolvent entities struggling to restructure. It seems to me that in the future, parties should make every effort to keep the costs associated with contested representation motions in insolvency proceedings to a minimum. In addition, as I indicated in open court, while a successful moving party may expect to recover a good portion of the legal fees associated with such a motion, there is an element of business development involved in these motions which in my view is a cost of doing business and should not be visited upon the insolvent Applicants. I will leave it to the Monitor to address what an appropriate reduction would be and this no doubt will be addressed very briefly in a subsequent Monitor's report.

Summary

20 In summary, the USW, CEP and Davies representation requests are granted. Only the Davies funding request is granted. The motion relating to Nelligan/ Shibley is dismissed. Counsel submitted proposed orders without prejudice to the Applicants to make submissions. Counsel should confer on the appropriate form of orders and then a representative may attend before me at a 9:30 appointment to have them approved and signed.

Footnotes

[1] This is contrary to the contents of paragraph 24 of the Monitor's 4th Report but, being more recent, I accept counsel's oral representation as being accurate.

[2] 29 U.S.C.

[3] (Ont. S.C.J. [Commercial List]).

[4] (2005), 15 C.B.R. (5th) 307 (Ont. C.A.)

[5] (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.).

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FTI CONSULTING CANADA INC. J. DOUGLAS CUNNINGHAM, Q.C. MORNEAU SHEPELL LTD. 1291079 ONTARIO LIMITED Plaintiffs	-and-	ESL INVESTMENTS INC *et al.* Defendants	Court File No.: CV-18-00611219-00CL Court File No. CV-18-00611214-00CL Court File No. CV-18-00611217-00CL Court File No. CV-19-617792-00CL

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