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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 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.

BOOK OF AUTHORITIES OF THE MONITOR
(Motion for a Restraining Order)
(returnable January 22, 2018)

January 16, 2018

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Arrangement relatif à Bloom Lake

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF: BLOOM LAKE GENERAL PARTNER LIMITED, QUINTO MINING CORPORATION, 8568391 CANADA LIMITED, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC., Petitioners, and THE BLOOM LAKE IRON ORE MINE, LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY LIMITED, WABUSH LAKE RAILWAY COMPANY LIMITED, Mises en cause, and MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON, SYNDICAT DES MÉTALLOS, SECTIONS LOCALES 6254 ET 6285, MORNEAU SHEPELL LTD, IN ITS CAPACITY ASREPLACEMENT PENSION PLAN ADMINISTRATOR, HER MAJESTY IN RIGHT OF NEWFOUNLAND, AND LABRADOR, AS REPRESENTED BY THE SUPERINTENDENT OF PENSIONS, THE ATTORNEY GENERAL OF CANADA, ACTING ON BEHALF OF THE OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS, RÉGIE DES RENTES DU QUÉBEC, VILLE DE SEPT-ÎLES, Mises en cause, and FTI CONSULTING CANADA INC., Monitor

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31 C.C.P.B. (2d) 216

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EYB 2017-275611

No.: 500-11-048114-157

Quebec Superior Court
District of Montréal

The Honourable Stephen W. Hamilton J.S.C.

Heard: December 20, 2016.
Judgment: January 30, 2017.

(92 paras.)

Private international law -- Conflict of jurisdictions -- Determination of competent authority -- Forum non conveniens -- Interest of justice -- Interest of the parties -- Law applicable to the dispute -- Institution of proceedings outside Québec impossible -- Evidence and procedure -- Motion for declinatory exception -- Burden of proof -- Because of the similarities between the N.L.P.B.A. and the federal and other provincial pension laws, the judge interpreting the N.L.P.B.A. will likely refer to decisions of the courts of other provinces interpreting their legislation or the federal P.B.S.A. -- The Québec Court should be in as good a position as the NL Court in that exercise -- Although the representatives of the salaried employees and retirees want the NL Court to interpret the N.L.P.B.A., more than half of the persons that they represent live in Québec -- Motion to refer issues to the Supreme Court of Newfoundland and Labrador dismissed.

In the matter of the plan of compromise or arrangement of Wabush Iron Co. Limited et al. (Wabush) the Court must decide on whether it should request the aid of the Supreme Court of Newfoundland and Labrador (NL Court) with respect to the scope and priority of the deemed trust and the lien created by the Newfoundland and Labrador Pension Benefit Act (N.L.P.B.A.), and whether the deemed trust and the lien extend to assets located outside of Newfoundland and Labrador. Wabush Mines operated an iron ore mine and processing facility located in Newfoundland and Labrador and a port facility and a pellet production facility in Québec. The operations had been discontinued and the employees terminated or laid off prior to the filing of the Companies' Creditors Arrangement Act (C.C.A.A.) motion. The Wabush C.C.A.A. Parties had two pension plans for their employees which include defined benefits. Wabush Mines was the administrator of both plans. The majority of the employees covered by the plans reported for work in Newfoundland and Labrador while some reported for work in Québec. According to the Monitor, the total amounts owing were approximately $28.7 million to the Salaried Plan and $34.4 million to the Union Plan. The arguments put forward in support of the referral of the issues to the NL Court is that the courts in Newfoundland and Labrador possess far greater expertise in interpreting the N.L.P.B.A. than does the courts in Québec, the province of Newfoundland and Labrador is closely connected to the dispute, and there will be increased costs and delays if the Québec Court interprets the N.L.P.B.A.

HELD: Motion dismissed. Because of the similarities between the N.L.P.B.A. and the federal and other provincial pension laws, the judge interpreting the N.L.P.B.A. will likely refer to decisions of the courts of other provinces interpreting their legislation or the federal Pension Benefits Standards Act (P.B.S.A.). The Québec Court should be in as good a position as the NL Court in that exercise. There is a close interplay between the N.L.P.B.A. and the C.C.A.A. In that sense, there may not even be a need to deal with the interpretation of the N.L.P.B.A. The Court will not refer issues of Québec law or federal law to the NL Court, and if those issues are too closely interrelated to the N.L.P.B.A. issues, or if in the interests of simplicity and expediency they should all be decided by the same court, then the solution is not to refer any issues to the NL Court. The bulk of the assets on which the deemed trust or the lien created by the N.L.P.B.A. may apply are the proceeds of the sale of assets in Québec. On balance, the legal considerations do not favour referring the issues to the NL Court. This is not a matter of purely local concern in Newfoundland and Labrador. Although the representatives of the salaried employees and retirees want the NL Court to interpret the N.L.P.B.A., more than half of the persons that they represent live in Québec. The Court can take judicial notice of the law of another province.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 187(7)

Civil Code of Quebec, art. 2809, arts. 3083-3133, art. 3135

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 17

Employment Pension Plans Act, S.A. 2012, c. E-8.1, s. 58, s. 60

Judicature Act, R.S.N.L. 1990, c. J-4, s. 13

Miners Lien Act, R.S.Y. 2002, c. 151

Pension Benefit Act, S.N.L. 1996, c. P-40.1, s. 32

Pension Benefits Act, 1992, S.S. 1992, c P-6.001, s. 43

Pension Benefits Act, C.C.S.M., c. P32, s. 28

Pension Benefits Act, S.N.B. 1987, c P-5.1, s. 51

Pension Benefits Act, S.N.S. 2011, c. 41, s. 80

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 57

Pension Benefits Standards Act, R.S.C. 1985 (2nd Supp.), c. 32, s. 8(1), s. 8(2)

Pension Benefits Standards Act, S.B.C. 2012, c. 30, s. 58

Supplemental Pension Plans Act, CQLR, c R-15.1, s. 49

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Ronald A. Pink, PINK LARKIN, For the mise en cause Morneau Shepell Ltd, in its capacity as replacement pension plan administrator.

Doug Mitchell, Edward Béchard-Torres, IRVING MITCHELL KALICHMAN, For the mise en cause Her Majesty in Right of Newfoundland and Labrador, as represented by the Superintendent of Pensions.

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Sophie Vaillancourt, Roberto Clocchiatti, RETRAITE QUÉBEC, For the mise en cause Régie des rentes du Québec.

Martin Roy, STEIN MONAST, For the mise en cause Ville de Sept-Îles.

JUDGMENT

INTRODUCTION

1 The debtors have filed proceedings under the *Companies' Creditors Arrangement Act* ("CCAA").[1] They owe substantial liabilities under two pension plans, including special payments, catch-up special payments and wind-up deficiencies. The Monitor has filed a motion for directions with respect to the priority of the various components of the pension claims.

2 A preliminary issue has arisen as to whether the Court should request the aid of the Supreme Court of Newfoundland and Labrador (the "NL Court") with respect to the scope and priority of the deemed trust and other security created by the Newfoundland and Labrador *Pension Benefit Act* ("NLPBA"),[2] which regulates in part the pension plans.

CONTEXT

3 On May 19, 2015, the Petitioners Wabush Iron Co. Limited and Wabush Resources Inc. and the Mises-en-cause Wabush Mines (a joint venture of Wabush Iron and Wabush Resources), Arnaud Railway Company and Wabush Lake Railway Company Limited (together the "Wabush CCAA Parties") filed a motion for the issuance of an initial order under the CCAA, which was granted the following day by the Court.

4 Prior to the filing of the motion, Wabush Mines operated (1) the iron ore mine and processing facility located near the Town of Wabush and Labrador City, Newfoundland and Labrador, and (2) the port facilities and a pellet production facility at Pointe-Noire, Québec. Arnaud Railway and Wabush Lake Railway are both federally regulated railways that transported iron ore concentrate from the Wabush mine to the Pointe-Noire port. The operations had been discontinued and the employees terminated or laid off prior to the filing of the CCAA motion.

5 The Wabush CCAA Parties have two pension plans for their employees which include defined benefits:

* A hybrid pension plan for salaried employees at the Wabush mine and the Pointe-Noire port hired before January 1, 2013, known as the Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company (the "Salaried Plan"); and

* A pension plan for unionized hourly employees at the Wabush mine and Pointe-Noire port, known as the Pension Plan for Bargaining Unit Employees of Wabush Mines, Cliffs Mining Company, Managing Agent, Arnaud Railway Company and Wabush Lake Railway Company (the "Union Plan").

6 Wabush Mines was the administrator of both plans.

7 The majority of the employees covered by the plans reported for work in Newfoundland and Labrador while some reported for work in Québec. Moreover, some of the employees covered by the Union Plan worked for Arnaud Railway, which is a federally regulated railway. The result is that the Salaried Plan is governed by the NLPBA, while the Union Plan is governed by both the NLPBA and the federal *Pension Benefits Standards Act* ("PBSA").[3] Further, the Union suggests that the Québec *Supplemental Pension Plans Act* ("SPPA")[4] might be applicable to employees or retirees who reported for work in Québec. Both plans are subject to regulatory oversight by the provincial regulator in Newfoundland and Labrador, the Superintendent of Pensions (the "NL Superintendent"), while the Union Plan is also subject to regulatory oversight by the federal pension regulator, the Office of the Superintendent of Financial Institutions ("OSFI"). The Québec regulator, Retraite Québec, might also have a role to play.

8 On June 26, 2015, in the context of approving the interim financing of the debtors, the Court ordered the suspension of payment by the Wabush CCAA Parties of the monthly amortization payments and the annual lump sum "catch-up" payments coming due under the plans, and confirmed the priority of the Interim Lender Charge over the deemed trusts with respect to the pension liabilities. The Court also ordered the suspension of payment of other post-retirement benefits, including life insurance, health care and a supplemental retirement arrangement plan.[5]

9 On December 16, 2015, the NL Superintendent terminated both plans effective immediately on the basis that the plans failed to meet the solvency requirements under the regulations, the employer has discontinued all of its business operations and it was highly unlikely that any potential buyer of the assets would agree to assume the assets and liabilities of the plans.[6] On the same date, OSFI terminated the Union Plan effective immediately for the same reasons.[7]

10 Both the NL Superintendent and OSFI reminded the Wabush CCAA Parties of the employer's obligation upon termination of the plan to pay into the pension fund all amounts that would be required to meet the solvency requirements and the amount necessary to fund the benefits under the plan. They also referred to the rules with respect to deemed trusts.[8]

11 On January 26, 2016, the salaried retirees received a letter from Wabush Mines notifying them that the NL Superintendent had directed Wabush Mines to reduce the amount of monthly pension benefits of the members by 25%.[9] Retirees under the Union Plan had their benefits reduced by 21% on March 1, 2016.[10]

12 On March 30, 2016, the NL Superintendent and OSFI appointed Morneau Shepell Ltd as administrator for the plans.[11]

13 The Wabush CCAA Parties paid the monthly normal cost payments for both plans up to the termination of the plans on December 16, 2015. As a result, the monthly normal cost payments for the Union Plan were fully paid as of December 16, 2015.[12] The monthly normal cost payments for the Salaried Plan had been overpaid in the amount of $169,961 as of December 16, 2015.[13]

14 However, the Wabush CCAA Parties ceased making the special payments in June 2015 pursuant to the order issued by the Court, with the result that unpaid special payments as of December 16, 2015 total $2,185,752 for the Salaried Plan[14] and $3,146,696 for the Union Plan.[15]

15 Further, the Wabush CCAA Parties did not make the lump sum "catch-up" special payments that came due after June 2015. The amount payable is now calculated to be $3,525,125.[16] These amounts became known with certainty only when the actuarial report was completed and filed in July 2015, but some of these amounts may relate to the pre-filing period.

16 Finally, the plans are underfunded. The Plan Administrator estimates the wind-up deficits as at December 16, 2015 to be approximately $26.7 million for the Salaried Plan and approximately $27.7 million for the Union Plan.

17 As a result, according to the Monitor, the total amounts owing are approximately $28.7 million to the Salaried Plan and $34.4 million to the Union Plan.

18 The Plan Administrator filed a proof of claim in respect of the Salaried Plan that includes a secured claim in the amount of $24 million and a restructuring claim in the amount of $1,932,940,[17] and a proof of claim with respect to the Union Plan that includes a secured claim in the amount of $29 million and a restructuring claim in the amount of $6,059,238.[18]

19 The differences in the numbers are not important at this stage. It is sufficient to note that there are very large claims and that the Plan Administrator claims the status of a secured creditor with respect to a substantial part of its claims.

20 It is also important to note that the Wabush CCAA Parties held assets both in Newfoundland and Labrador and in Québec. Many of the Québec assets have been sold and have generated substantial proceeds currently held by the Monitor.

21 The Monitor is now working through the claims procedure. In that context, the Monitor applies to the Court for an order declaring that:

a) normal costs and special payments outstanding as at the date of the Wabush Initial Order are subject to a limited deemed trust;

b) normal costs and special payments payable after the date of the Wabush Initial Order, including additional special payments and catch up payments established on the basis of actuarial reports issued after the Wabush Initial Order, constitute unsecured claims;

c) the wind-up deficiencies constitute unsecured claims; and

d) any deemed trust created pursuant to the NLPBA may only charge property in Newfoundland and Labrador.

22 Those issues are not yet before the Court. A preliminary issue has arisen as to whether the Court should request the aid of the NL Court with respect to the scope and priority of the deemed trust and the lien created by the NLPBA and whether the deemed trust and the lien extend to assets located outside of Newfoundland and Labrador.

POSITION OF THE PARTIES

23 All parties agree that (1) the Court has jurisdiction to deal with all of the issues, and (2) the Court has the discretion to request the aid of the NL Court.

24 Three parties suggest that the Court should exercise that discretion and request the aid of the NL Court:

* The Plan Administrator;

* The representatives of the salaried employees and retirees; and

* The NL Superintendent.

25 The representatives of the salaried employees and retirees have proposed that the following questions should be resolved by the NL Court:

1. The Supreme Court of Canada has confirmed in *Indalex*, [2013] 1 S.C.R. 271, that provincial laws apply in CCAA proceedings, subject only to the doctrine of paramountcy. Assuming there is no issue of paramountcy, what is the scope of section 32 in the NPBA [NLPBA] deemed trusts in respect of:

a) unpaid current service costs;

b) unpaid special payments; and,

c) unpaid wind-up liability.

2. The Salaried Plan is registered in Newfoundland and regulated by the NPBA.

a) (i) Does the PBSA deemed trust also apply to those members of the Salaried Plan who worked on the railway (i.e., a federal undertaking)?

(ii) If yes, is there a conflict with the NPBA and PBSA if so, how is the conflict resolved?

b) (i) Does the SPPA also apply to those members of the Salaried Plan who reported for work in Québec?

(ii) If yes, is there a conflict with the NPBA and SPPA and if so, how is the conflict resolved?

(iii) Do the Quebec SPPA deemed trusts also apply to Québec Salaried Plan members?

3. Is the NPBA lien and charge in favour of the pension plan administrator in section 32(4) of the NPBA a valid secured claim in favour of the plan administrator? If yes, what amounts does this secured claim encompass?

26 Three other parties suggest that the Court should not transfer any issues to the NL Court and should decide all of the issues:

* The Monitor;

* The Syndicat des métallos, sections locales 6254 et 6285; and

* The Ville de Sept-Îles.

27 The Ville de Sept-Îles argues that the request to transfer should be dismissed because it is too late.

28 Finally, two parties do not take a position on the request to transfer:

* The Attorney--General of Canada, acting on behalf of OSFI; and

* Retraite Québec.

ANALYSIS

1. The jurisdiction of the CCAA Court

29 In principle, all issues relating to a debtor's insolvency are decided before a single court.[19] This rule is based on the "public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse."[20] This public interest favours a "single control" of insolvency proceedings by one court as opposed to their fragmentation among several courts.[21]

30 The Supreme Court in *Sam Lévy* concluded as follows with respect to the relevant test:

> 76 In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or "single control" (*Stewart, 53 S.C.R. 337, supra*, at p. 349) for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions. Parliament was of the view that a substantial connection sufficient to ground bankruptcy proceedings in a particular district or division is provided by proof of facts within the statutory definition of "locality of a debtor" in s. 2(1).

> The trustee in that locality is mandated to "recuperate" the assets, and related proceedings are to be controlled by the bankruptcy court of that jurisdiction. The Act is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors.[22]
>
> (Emphasis added)

31 Although the *Sam Lévy* case was decided in the context of the *Bankruptcy and Insolvency Act* ("BIA"),[23] the same principles apply in the context of the other insolvency legislation, including the CCAA.[24] The CCAA court has jurisdiction to deal with all of the issues that arise in the context of the CCAA proceedings.[25] The stay of proceedings under the CCAA gives effect to this principle by preventing creditors from bringing proceedings outside the CCAA proceedings without the authorization of the CCAA court.

32 There are clear efficiencies to having a single court deal with all of the issues in a single judgment.

33 The general rule is therefore that the Court should rule on all issues that arise in the context of these insolvency proceedings.

2. The discretion to ask for the assistance of another court

34 There are however situations where another court can deal more efficiently with specific issues. The CCAA Court has jurisdiction to ask for the assistance of another court under Section 17 CCAA:

> **17** All courts that have jurisdiction under this Act and the officers of those courts shall act in aid of and be auxiliary to each other in all matters provided for in this Act, and an order of a court seeking aid with a request to another court shall be deemed sufficient to enable the latter court to exercise in regard to the matters directed by the order such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within their respective jurisdictions.

35 The representative of the salaried employees and retirees also pleaded the notion of *forum non conveniens* under the Civil Code:

> **3135.** Even though a Québec authority has jurisdiction to hear a dispute, it may, exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another State are in a better position to decide the dispute.

36 The Supreme Court held in *Sam Lévy*[26] that Article 3135 C.C.Q. does not apply in bankruptcy matters because of Section 187(7) BIA, which provides:

> **187 (7)** The court, on satisfactory proof that the affairs of the bankrupt can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may by order transfer any proceedings under this Act that are pending before it to another bankruptcy district or division.

37 While Section 17 CCAA is not as explicit, the Court is satisfied that it is not necessary or appropriate to refer to Article 3135 C.C.Q. in the present context. The CCAA court is not being asked to decline jurisdiction, but rather it is being asked to seek the assistance of another court.

38 The Court is therefore satisfied that, notwithstanding the general rule that it should rule on all issues that arise in the context of these insolvency proceedings, it can seek the assistance of another court. It is a discretionary decision of this Court, based on factors such as cost, expense, risk of contradictory judgments, expertise, etc.

3. Specific grounds

39 The arguments put forward in support of the referral of the issues to the NL Court can be summarized as follows:

a) Legal considerations:

* These are complex and important issues of provincial law;

* The courts in Newfoundland and Labrador possess far greater expertise in interpreting the NLPBA than does the courts in Québec, although these specific questions have not yet been considered by any court in Newfoundland and Labrador;

* The interpretation of the NLPBA is a question of the intention of the legislator in Newfoundland and Labrador, and the NL Court is better situated to determine this intention;

b) Factual considerations:

* It is a question of purely local concern and it may significantly impact a large number of residents of Newfoundland and Labrador;

* The province of Newfoundland and Labrador is closely connected to the dispute: a majority of the employees reported for work in the province and the Wabush CCAA Parties maintained significant business operations in the province;

* If justice is to be done and be seen to be done it is important that consequential decisions on provincial legislation be made by the courts of that province;

* The representatives of the salaried employees and retirees want the NL Court to interpret the NLPBA;

c) Practical considerations:

* The law of another province is treated as a question of fact in Québec, with the result that the conclusion on a matter of foreign law is not binding on subsequent courts and can only be overturned in the presence of a palpable and overriding error;

* It might be difficult to prove the law of Newfoundland and Labrador in a Québec court given the lack of jurisprudence on the specific issues;

* There will be increased costs if the Québec Court interprets the NLPBA because of the need to retain experts to provide legal opinions;

* There is no reason to believe that fragmenting the proceedings will result in additional delay;

* The judgment to be rendered will be a precedent and only a decision of the courts of Newfoundland and Labrador would be an authoritative precedent;

* Other persons or parties may wish to intervene on the issue of the scope of the Section 32 NLPBA deemed trusts, which would be more practical in the NL Court.

40 These arguments do not convince the Court that this is an appropriate case to refer the issues to the NL Court.

a) Legal considerations

41 This is the key argument put forward by the parties suggesting that the NLPBA issues be referred to the NL Court: the issues relate to the NLPBA, and the NL Court is best qualified to interpret the NLPBA.

42 The Court accepts as a starting point that the NLPBA applies in the present matter: the pension plans are regulated by the NL Superintendent in accordance with the NLPBA (although OSFI also regulates the Union Plan in accordance with the PBSA) and the plans expressly provide that they are interpreted in accordance with the NLPBA.

43 The Court also accepts the obvious proposition that the NL Court is more qualified to deal with an issue of Newfoundland and Labrador law than the courts of Québec, particularly since Newfoundland and Labrador is a common law jurisdiction and Québec is a civil law jurisdiction.

44 However, that does not mean that the Court will automatically refer every issue governed by the law of another jurisdiction to the courts of that other jurisdiction.

45 First, there are rules in the Civil Code with respect to how Québec courts deal with issues governed by foreign law. Articles 3083 to 3133 C.C.Q. set out the rules to determine which law is applicable to a dispute before the Québec courts, and Article 2809 C.C.Q. sets out how the foreign law is proven before the Québec courts.

46 Further, pursuant to these rules, Québec courts regularly hear matters governed by foreign law. The Court of Appeal recently held that the fact that a dispute is governed by foreign law does not have much weight in a *forum non conveniens* analysis:

> [98] Si on revoie les considérations du Juge, portant sur dix points, pour conclure que le for géorgien est préférable, deux aspects principaux en ressortent, soit les coûts et la loi applicable.
>
> [99] Quant à cette dernière considération, elle n'est pas d'un grand poids, à mon avis. Parce que le débat porte sur les faits plutôt que sur le droit. Parce que la *common law* est tout de même familière aux tribunaux québécois. Parce que faire la preuve de la loi d'un État américain n'est pas un grand défi, c'est même chose courante.
>
> [100] Et surtout, parce que le critère de la loi applicable ne constitue pas en soi un facteur important. Dans tout litige international, les conflits de lois sont l'ordinaire et non l'exception.[27]

47 In other words, the mere fact that a dispute is governed by foreign law is not a good reason to send the case to the foreign jurisdiction. This principle was applied in a CCAA context in the *MMA* case.[28]

48 There are examples in the insolvency context of the court with jurisdiction over the insolvency declining to send an issue governed by foreign law to the foreign court. In *Sam Lévy*, the Supreme Court declined to send an insolvency matter to British Columbia simply because there was a choice of B.C. law, stating, "The Quebec courts are perfectly able to apply the law of British Columbia."[29]

49 In *Lawrence Home Fashions Inc./Linge de maison Lawrence inc. (Syndic de)*, Justice Schrager, then of this Court, stated :

> [18] In any event, should equitable set-off under Ontario law become relevant to the case, Québec judges sitting in such matters, on the presentation of the appropriate evidence, are readily capable of dealing with foreign law issues. Indeed, this is a frequent occurrence particularly in insolvency matters.[30]

50 The Ontario courts rejected similar arguments in *Essar Algoma*:

> [80] Ontario courts can and do often apply foreign law. In this case I do not consider the fact that the law to be applied is Ohio law much of a factor, if any.[31]

51 The Monitor submitted cases in which Québec courts have interpreted different provisions of the pension laws of other provinces.[32] The Court also notes that it dealt to a more limited extent with the deemed trust under the NLPBA in its decision dated June 26, 2015.

52 There are nevertheless circumstances where the CCAA court has referred legal issues to the courts of another province. The *Curragh*[33] and *Yukon Zinc*[34] judgments were cited as examples of such cases. However, in both cases, the legal issues related to the Yukon *Miners Lien Act*.[35] Justice Farley in *Curragh* wrote :

> This legislation and its concept of the lien affecting the output of the mine or mining claim is apparently unique to the Yukon Territory.[36]

53 Moreover, both cases involved real rights on property in Yukon.

54 The parties also pointed to *Timminco* as precedent authority directly on point supporting the transfer of a pension issue by the CCAA court to the jurisdiction where the pension plan is registered and has been administered.[37] However, *Timminco* is not a precedent in that the parties in that case consented to the referral of the issue and Justice Morawetz simply gave effect to their consent.

55 Without concluding that the Court would only refer a legal issue if the foreign law at issue is unique, the Court concludes that the arguments favouring the referral of a legal issue are stronger when the foreign law is unique.

56 It is therefore important to examine the issues that might be referred to the NL Court and the uniqueness of the NLPBA provisions that are at issue in the present matter.

57 The representatives of the salaried employees and retirees identify the relevant questions as being the scope of the deemed trust and of the lien and charge under Section 32 NLPBA, as well as the interaction between the NLPBA and the federal and Québec statutes.

58 Section 32 NLPBA provides:

> **32.** (1) An employer or a participating employer in a multi-employer plan shall ensure, with respect to a pension plan, that
>
> (a) the money in the pension fund;
>
> (b) an amount equal to the aggregate of
>
> (i) the normal actuarial cost, and
>
> (ii) any special payments prescribed by the regulations, that have accrued to date; and
>
> (c) all
>
> (i) amounts deducted by the employer from the member's remuneration, and
>
> (ii) other amounts due under the plan from the employer that have not been remitted to the pension fund
>
> are kept separate and apart from the employer's own money, and shall be considered to hold the amounts referred to in paragraphs (a) to (c) in trust for members, former members, and other persons with an entitlement under the plan.

(2) In the event of a liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that under subsection (1) is considered to be held in trust shall be considered to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own money or from the assets of the estate.

(3) Where a pension plan is terminated in whole or in part, an employer who is required to pay contributions to the pension fund shall hold in trust for the member or former member or other person with an entitlement under the plan an amount of money equal to employer contributions due under the plan to the date of termination.

(4) An administrator of a pension plan has a lien and charge on the assets of the employer in an amount equal to the amount required to be held in trust under subsections (1) and (3).

59 The first point is that there is nothing particularly unique about Section 32 NLPBA.

60 There is a very similar deemed trust provision in Section 8(1) and (2) PBSA:

> **8 (1)** An employer shall ensure, with respect to its pension plan, that the following amounts are kept separate and apart from the employer's own moneys, and the employer is deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits under the plan:
>
> **(a)** the moneys in the pension fund,
>
> **(b)** an amount equal to the aggregate of the following payments that have accrued to date:
>
> **(i)** the prescribed payments, and
>
> **(ii)** the payments that are required to be made under a workout agreement; and
>
> **(c)** all of the following amounts that have not been remitted to the pension fund:
>
> **(i)** amounts deducted by the employer from members' remuneration, and
>
> **(ii)** other amounts due to the pension fund from the employer, including any amounts that are required to be paid under subsection 9.14(2) or 29(6).

> **(2)** In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

61 In Québec, the SPPA provides :

> **49.** Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property.

62 There are similar deemed trusts and/or liens in every Canadian province outside Québec except Prince Edward Island: Ontario,[38] British Columbia,[39] Alberta,[40] Saskatchewan,[41] Manitoba,[42] Nova Scotia[43] and New Brunswick.[44]

63 The second point is that there is no Newfoundland and Labrador jurisprudence interpreting the relevant provisions of the NLPBA. The NL Superintendent pleaded that "the courts of Newfoundland & Labrador possess far greater expertise in interpreting the *PBA* [NLPBA] than does the Superior Court of Québec." While this is undoubtedly true with respect to the NLPBA as a whole, it is not true with respect to Section 32 NLPBA. In an earlier ruling also issued in the *Yukon Zinc* matter, Justice Fitzpatrick of the B.C. Supreme Court refused to decline jurisdiction and refer a matter involving the Yukon *Miners Lien Act* to the courts of Yukon and one of the factors that went against referring the matter to the Yukon court was the lack of jurisprudence in the Yukon court.[45]

64 Moreover, in this case, because of the similarities between the NLPBA and the federal and other provincial pension laws, the judge interpreting the NLPBA will likely refer to decisions of the courts of other provinces interpreting their legislation or the federal PBSA.

65 The Québec Court should be in as good a position as the NL Court in that exercise.

66 Finally, as is typical in these cases, there is a close interplay between the NLPBA and the CCAA. The first question proposed by the representatives of the salaried employees and retirees is: "Assuming there is no issue of paramountcy, what is the scope of section 32 in the NPBA [NLPBA] deemed trusts". The scope of the NLPBA is not relevant if the NLPBA does not apply because of a conflict with the CCAA and federal paramountcy. In that sense, there may not even be a need to deal with the interpretation of the NLPBA.

67 Moreover, there are issues in this case with the federal PBSA and the Québec SPPA. The representatives of the salaried employees and retirees suggest that the following questions are relevant:

> 2. The Salaried Plan is registered in Newfoundland and regulated by the NPBA.
>
> a) (i) Does the PBSA deemed trust also apply to those members of the Salaried Plan who worked on the railway (i.e., a federal undertaking)?

(ii) If yes, is there a conflict with the NPBA and PBSA if so, how is the conflict resolved?

b) (i) Does the SPPA also apply to those members of the Salaried Plan who reported for work in Québec?

(ii) If yes, is there a conflict with the NPBA and SPPA and if so, how is the conflict resolved?

(iii) Do the Quebec SPPA deemed trusts also apply to Québec Salaried Plan members?

68 The representatives of the salaried employees and retirees and the NL Superintendent suggest that, in the interests of simplicity and expediency, all of these questions should be referred to the NL Court.

69 The Court has great difficulty with this suggestion. On what basis should the Court conclude that the NL Court is in a better position to decide whether the Québec SPPA and deemed trust apply to employees who reported for work in Québec (question 2(b)(i) and (iii)) and how the conflict between the NLPBA and the SPPA should be resolved (question 2(b)(ii))? The first are pure questions of Québec law, and the last is a question where the laws of Québec and of Newfoundland and Labrador have equal application. There are similar questions with respect to the federal PBSA (question 2(c)), which the Court is in as good a position to decide as the NL Court.

70 The Court will not refer issues of Québec law or federal law to the NL Court, and if those issues are too closely interrelated to the NLPBA issues, or if in the interests of simplicity and expediency they should all be decided by the same court, then the solution is not to refer any issues to the NL Court.

71 In the earlier *Yukon Zinc* ruling where Justice Fitzpatrick refused to refer the matter to the courts of Yukon, she found that the issues related to the interrelationship between the Yukon *Miners Lien Act* and the rights asserted by others under B.C. law, in relation to assets the majority of which were located in British Columbia:

> [89] As for the law to be applied to the various issues, it is clear that whatever forum is used to resolve these issues, there will be a blend of both British Columbian contract law and Yukon miner's lien law. The majority of the concentrate is located in British Columbia and was in this Province well before the 2015 Procon Lien was registered. Further, the contract rights are to be decided in accordance with British Columbian law, particularly as to if, and if so, when, title to the concentrate passed from Yukon Zinc to Transamine.
>
> [90] This is not akin to the situation discussed in *Ecco Heating Products Ltd. v. J.K. Campbell & Associates Ltd.*, 1990 CanLII 1631 (BC CA), (1990) 48 B.C.L.R. (2d) 36 (C.A.), where the major issue arose under builder's lien legislation in British Columbia and where the court referred to the "extensive existing relevant jurisprudence" in British Columbia: at 43-44. It is common

> ground here that there is no case law on the issues of scope and priority under the *MLA* that arise here, let alone relevant Yukon jurisprudence.
>
> [91] It is quite apparent that some issues arise under the*MLA*and, in particular, issues relating to Procon's rights in relation to the concentrate remaining in Yukon which is claimed by Transamine under British Columbian law. Transamine argues that this Court can take judicial notice of the *MLA*: see *Evidence Act*, R.S.B.C. 1996, c. 124, s. 24(2)(e). In any event, Procon has fully researched the issues as they arise under the *MLA* and made submissions on them. To turn the tables on Procon, if I were to decline jurisdiction in favour of the Yukon courts, there equally would be issues as to the Yukon court interpreting and applying British Columbian law on the contract issues.
>
> [92] It would be impossible in the circumstances to bifurcate the issues based on the applicable law. Even if bifurcation was available, it would be neither a practical nor an efficient strategy in resolving the issues between Yukon Zinc, Procon and Transamine.
>
> (Emphasis added)

72 In the present matter, the bulk of the assets on which the deemed trust or the lien created by the NLPBA may apply are the proceeds of the sale of assets in Québec.

73 On balance, the legal considerations do not favour referring the issues to the NL Court.

b) Factual considerations

74 The parties suggesting that the NLPBA issues be referred to the NL Court also argue that these are essentially local issues that should be decided by the localcourt.

75 It is clear that there are significant factual links between these issues and the province of Newfoundland and Labrador.

76 In particular, the Wabush mine is located in Newfoundland and Labrador and most of the employees reported to that mine. As a result, many of the retirees are currently resident in Newfoundland and Labrador. The representatives of the salaried employees and retirees want the NL Court to interpret the NLPBA.

77 However, there are equally strong factual links to the province of Québec: the Pointe-Noire facility is in Québec and most of the railway joining the Wabush mine and the Pointe-Noire facility is in Québec. There are almost as many employees and retirees in Québec:

	Salaried Plan	Union Plan
Newfoundland and Labrador	313	1,005
Québec	329	661
Other	14	66[46]

[Editor's Note: Note[46] is included in the image above]

78 As a result, this is not a matter of purely local concern in Newfoundland and Labrador.

79 Although the representatives of the salaried employees and retirees want the NL Court to interpret the NLPBA, more than half of the persons that they represent live in Québec.

80 It is also worth noting that the Union, which represents more employees and retirees, asks that the case remain in Québec, even though most of their members reside in Newfoundland and Labrador.

c) Practical considerations

81 The parties suggesting that the NLPBA issues be referred to the NL Court argue that the law of Newfoundland and Labrador is in principle a question of fact in a Québec court which is proven with expert witnesses. They argue that this has a series of somewhat inconsistent consequences:

* The parties will have to hire experts, which is costly and time consuming;

* It will be difficult to find experts because these questions have never been litigated before;

* If there is an appeal, the interpretation of the NLPBA will be treated as a question of fact and therefore only subject to be overturned if there is a palpable and overriding error.

82 This seems to exaggerate the difficulty. The Court can take judicial notice of the law of another province.[47] This is particularly true when it is an issue of interpreting a statute.[48] In this case, where the parties plead that it will be difficult to find an expert, it seems unlikely that the Court would require expert evidence. This is particularly so when the provisions of the NLPBA which are at issue are similar to the provisions of the federal PBSA with respect to which expert evidence is not admissible. If there is no expert evidence to be offered, then there is no expense. A finding of fact with respect to expert evidence may attract the higher standard for appellate review of a palpable and overriding error.[49] This does not mean that every ruling on an issue of foreign law

attracts the same standard. If the judge decides the interpretation of the NLPBA without considering the credibility of expert witnesses, then there is no reason for the Court of Appeal to apply the higher standard for appellate review.

83 In terms of cost, it is difficult to see how the cost of continuing the proceedings in Québec will be higher than the cost of hiring attorneys in Newfoundland and Labrador and debating part of the issues there. The Union and Sept-Îles argued that it would be more expensive for them to argue the issues in Newfoundland and Labrador, and they added that they pay their own costs, unlike the representatives of the salaried employees and retirees and the Plan Administrator.

84 Another issue is the delays that the referral might create.

85 Sept-Îles bases its argument that it is too late now to raise the issue of a transfer on the fact that the Court already dealt with some of these issues 18 months ago. The representatives of the salaried employees and retirees plead that they raised the issue of a possible transfer of issues to the NL Court at the hearing of the motion for approval of the Claims Procedure Order on November 16, 2015.

86 The Court will not dismiss the issue for lateness. However, it is relevant that the issue is being debated now as opposed to 18 months ago. If the issue had been debated at that time, the Court might have been less concerned about the possible delays that would result from referring the issues to the NL Court.

87 The parties suggesting that the NLPBA issues be referred to the NL Court plead that there is no reason to believe that fragmenting the proceedings will result in additional delay. They do not however offer the Court any concrete indication of how quickly the case could proceed through the NL Court and any appeal.

88 The Court is concerned by the possible delay. The parties pointed to *Timminco*, where the CCAA Court transferred a pension issue to the Québec Superior Court, as an example of how these referrals should work. In that case, the parties consented to refer the Québec pension aspects of the CCAA file that was being litigated in Ontario to a Québec court. Even in those circumstances, the delay between the referral (October 18, 2012)[50] and the final judgment of the Québec court (January 24, 2014)[51] was over 15 months.

89 Finally, the Court does not consider the question of whether its decision will or will not be treated as a precedent to be a relevant consideration. Similarly, the Court does not consider the possibility of intervenants to be relevant. The Court's focus is on resolving the difficulties of the parties appearing before it. If the government of Newfoundland and Labrador wishes to obtain a judgment from the courts of the province on the interpretation of the NLPBA, it can refer a matter to the Court of Appeal of Newfoundland and Labrador.[52]

CONCLUSION

90 For all of the foregoing reasons, the Court concludes that it is not appropriate in the present circumstances to refer the proposed questions to the NL Court.

FOR THESE REASONS, THE COURT:

91 **DECIDES** that it has jurisdiction to deal with the issues related to the interpretation of the Newfoundland and Labrador *Pension Benefits Act* in the context of the present proceedings under

the *Companies' Creditors Arrangement Act* and that it will not refer those issues to the Supreme Court of Newfoundland and Labrador;

92 THE WHOLE WITHOUT JUDICIAL COSTS.

THE HONOURABLE STEPHEN W. HAMILTON J.S.C.

1 R.S.C. 1985, c. C-36.

2 S.N.L. 1996, c. P-40.1.

3 R.S.C. 1985 (2nd Supp.), c. 32.

4 CQLR, c R-15.1, s. 49.

5 2015 QCCS 3064; motion for leave to appeal dismissed, 2015 QCCA 1351.

6 Exhibit R-13.

7 Exhibit R-14.

8 Exhibits R-13 and R-14.

9 Exhibit RESP-7.

10 Affidavit of Terence Watt, sworn December 14, 2016, par. 19.

11 Exhibit R-15.

12 There is a debate as to whether the Wabush CCAA Parties were required to pay the full monthly payment for December or only a pro-rated portion. The amount at issue for the period from December 17 to 31, 2015 is $21,462.

13 Exhibit R-16.

14 Exhibit R-16.

15 Exhibit R-17.

16 Exhibit R-17.

17 Exhibit R-18.

18 Exhibit R-19.

19 *Sam Lévy & Associés Inc.* v. *Azco Mining Inc.*, 2001 SCC 92, par. 25-28.

20 *Ibid*, par. 27.

21 *Ibid*, par. 64.

22 *Ibid*, par. 76.

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

24 *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC 60, par. 22; *Newfoundland and Labrador* v. *AbitibiBowater Inc.*, 2012 SCC 67, par. 21; *Montreal, Maine & Atlantic Canada Co./Montréal, Maine & Atlantique Canada Cie (Arrangement relatif à)*, 2013 QCCS 5194, par. 24-25; *Re Nortel Networks Corporation et al*, 2015 ONSC 1354, par. 24; *Re Essar Steel Algoma Inc.*, 2016 ONSC 595, par. 29-30, judgment of Court of Appeal ordering (i) Cliffs to seek leave to appeal the Order, (ii) the hearing of the leave to appeal motion be expedited, and (iii) the issuance of a stay pending the disposition of the leave to appeal motion, 2016 ONCA 138.

25 Section 16 CCAA provides that the orders of the CCAA court are enforced across Canada.

26 *Supra* note 19, par. 62.

27 *Stormbreaker Marketing and Productions Inc.* c. *Weinstock*, 2013 QCCA 269, par. 98-100.

28 *MMA, supra* note 24, par. 20.

29 *Sam Lévy, supra* note 19, par. 61.

30 2013 QCCS 3015, par. 18.

31 *Supra* note 24, par. 80. See also *Nortel Networks, supra* note 24, par. 29.

32 *Emerson Électrique du Canada ltée* c. *Chatigny*, 2013 QCCA 163; *Bourdon* c. *Stelco inc.*, 2004 CanLII 13895 (QC CA).

33 *Canada (Minister of Indian Affairs and Northern Development)* v. *Curragh Inc.*, [1994] O.J. No. 953 (Gen. Div.)

34 *Yukon Zinc Corp. (Re)*, 2015 BCSC 1961.

35 R.S.Y. 2002, c. 151.

36 *Supra* note 33, par. 11. See also *Yukon Zinc, supra* note 34, par. 47 and 57.

37 *Timminco Limited (Re)*, 2012 ONSC 5959.

38 Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8, s. 57.

39 British Columbia *Pension Benefits Standards Act*, S.B.C. 2012, c. 30, s. 58

40 Alberta *Employment Pension Plans Act*, S.A. 2012, c. E-8.1, s. 58 and 60.

41 Saskatchewan *Pension Benefits Act, 1992*, S.S. 1992, c P-6.001, s. 43

42 Manitoba *Pension Benefits Act*, C.C.S.M., c. P32, s. 28.

43 Nova Scotia *Pension Benefits Act*, S.N.S. 2011, c. 41, s. 80.

44 New Brunswick *Pension Benefits Act*, S.N.B. 1987, c P-5.1, s. 51.

45 *Yukon Zinc Corporation (Re)*, 2015 BCSC 836, par. 90.

46 Watt Affidavit, par. 16.

47 Article 2809 C.C.Q.

48 *Constructions Beauce-Atlas inc.* c. *Pomerleau inc.*, 2013 QCCS 4077, par. 14.

49 *Canada (Minister of Citizenship and Immigration)* v. *Asini*, 2001 FCA 311, par. 26.

50 *Supra* note 37.

51 2014 QCCS 174.

52 *Judicature Act*, R.S.N.L. 1990, c. J-4, Section 13.

1974 CarswellOnt 894
Ontario Supreme Court [High Court of Justice]

Canada Metal Co. v. Canadian Broadcasting Corp.

1974 CarswellOnt 894, [1974] O.J. No. 1999, 19 C.C.C. (2d) 218, 48 D.L.R. (3d) 641, 4 O.R. (2d) 585

Canada Metal Co. Ltd. et al. v. Canadian Broadcasting Corp. et al. (No. 2)

O'Leary, J.

Judgment: April 16, 1974
Docket: None given.

Proceedings: Varied, (1975), 8 O.R. (2d) 375, 23 C.C.C. (2d) 445, 59 D.L.R. (3d) 430 (Ont. C.A.); Affirmed, 11 O.R. (2d) 167, 29 C.C.C. (2d) 325, 65 D.L.R. (3d) 231, 1975 CarswellOnt 810 (Ont. C.A.)

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E.A. Bowie, for defendants, Mark Starowicz and E.L. Hallman
J.M. Banfill, for James L. Cooper and Graham Fraser
Walter Fox, for Gary Perly

Subject: Criminal

***O'Leary, J.*:**

1 This is an application by the plaintiffs for an order committing the defendants Mark Starowicz and Max Allen to jail for breach of the injunction granted herein by Mr. Justice Wilson, on January 29, 1974, and committing E. L. Hallman, Gary Perly, Graham Fraser and James L. Cooper to jail for acting in contravention of the said injunction.

2 On January 29, 1974, the plaintiffs, which operate secondary lead smelters in the City of Toronto, fearing because of an article that appeared on that day in the Globe and Mail, that they were about to be libelled [1] in a radio documentary entitled "Dying of Lead", to be broadcast commencing in Ontario at 7:00 p.m. that evening, applied for and obtained from Mr. Justice Wilson an *ex parte* injunction which restrained the defendants from alleging or implying that the plaintiffs had bought misleadingly favourable medical evidence and had concealed material evidence from medical experts and from misstating the amounts the plaintiffs are spending to install pollution control systems.

3 The article which appeared on January 29, 1974, in the Globe and Mail, and which prompted the plaintiffs to apply for the injunction, read in part as follows:

> **Special on Lead Poisoning Fine Investigative Journalism**
>
> ***By Blair Kirby***
>
> Tonight at 7, CBC Radio's As It Happens does a one-hour special on lead poisoning which, at least on the basis of reading a transcript, seems to be a definitive and terrifying show — and investigative journalism at its best.
>
> The program was sparked by the controversy over lead emissions and illness around two Toronto smelters. It includes claims that medical experts can be bought to give evidence that favors lead companies and plays down the danger. A doctor from Cleveland says that doctors who minimize the significance of high lead emmissions are hired by the firms to say so.

> The program also condemns the provincial government's air management branch for its persistent refusal to order cleanup of lead emissions. Provincial officials were even involved, the program says, in attempts to discredit the work done by Dr. David Parkinson of the Hospital for Sick Children, who found high lead levels in youngsters.
>
> Doctors on the program claim that excessive lead levels can turn children into vegetables. One doctor says "all they escape is death" — and some do die. The cost of each child turned into a vegetable — just the financial cost and not including emotional torture — was set at $5,000.
>
> The cost of pollution controls at one of the Toronto lead smelters is estimated at $60,000.
>
> A doctor whose evidence helped to get a court to allow a smelter to stay in operation despite apparent lead poisoning in three nearby residents admits on the program that evidence that might have made her change her stand was concealed from her.
>
> These are just the high points of a detailed program which, as far as I know, is the most thorough investigation to date of the lead contamination issue. As It Happens has established a reputation for high-quality radio journalism, but this may be its best yet.

4 The application for the injunction was made *ex parte* before Mr. Justice Wilson at approximately 5:15 p.m. on January 29, 1974. At approximately 6:00 p.m., Mr. Justice Wilson granted an injunction endorsing his order on the back of the notice of motion. That endorsement reads as follows:

> Ex parte injunction granted to plaintiffs restraining defendants, and each of them from alleging or implying by broadcasting on television or otherwise publicizing that the plaintiffs and/or either of them, have bought misleadingly favourable medical evidence and concealed material evidence from medical experts, and from misstating the amounts the plaintiffs are spending to install pollution control systems.

5 At approximately 6:20 p.m., John J. Prince, a law student at the law firm of Thomson, Rogers, solicitors for the plaintiffs, telephoned the office of the Canadian Broadcasting Corporation at 354 Jarvis St. in Toronto, and spoke to the defendant Mark Starowicz and advised him as to the general nature of the order that had been made by Wilson, J., and that shortly a copy of the notice of motion endorsed by Wilson, J., would be served on him.

6 Mr. Starowicz transferred Mr. Prince to Mr. George Flak, a solicitor employed by the Canadian Broadcasting Corporation, who was at the studio at the time, and Mr. Prince gave the same advice to Mr. Flak.

7 At approximately 6:40 p.m., Mr. Warren Mueller, a solicitor from the firm of Thomson, Rogers, telephoned Mr. Flak and read to him the words Wilson, J., had endorsed on the notice of motion. At 6:45 p.m., a copy of the notice of motion, bearing the endorsement of Wilson, J., was served on Mr. Flak at the Canadian Broadcasting Corporation premises.

8 Commencing somewhat after 6:30 p.m. (and it is to be noted that his work was interrupted thereafter by the telephone conversation with Mr. Mueller and by the attendance of Mr. Prince, who served the copy of the notice of motion on him), Mr. Flak began to read the script of the documentary "Dying of Lead", looking for statements which might offend the injunction of Wilson, J.

9 The reviewing of the said script by Mr. Flak was done in conjunction with Mark Starowicz, the executive producer of the radio programme "As It Happens", and Max Allen, the story editor of the documentary "Dying of Lead", which was to be broadcast on the "As It Happens" programme. According to the affidavit of Mr. Flak, as soon as Mr. Prince left he resumed his consultation with the producers and advised them in editing the script so that the broadcast beginning at 7:00 p.m. would not violate the terms of the injunction.

10 According to the affidavit of Mark Starowicz, he, as executive producer of the programme "As It Happens" had the authority to and did delete after consulting with Mr. Allen and Mr. Flak, those portions which it was considered might violate the terms of the injunction. Mr. Allen stated in his affidavit:

> 3. At approximately 6:45, when Mr. Flak was able to read the injunction to me it was first clear to me what areas the injunction covered, and along with Mr. Flak I reviewed the script, and we indicated to Mr. Starowicz the two portions of the script which we felt should be deleted to comply with the terms of the injunction. These were the two portions which were in fact deleted by him in the broadcast as it was transmitted to listeners in Ontario and subsequently west of Ontario.
>
> 4. The statement made by Harry Brown in the middle of page 17 of the transcript "one of the plants says that the cost of a clean-up runs about $60,000.00, and they seem to think that this is quite a lot." was not deleted because the plant referred to in it is not owned or operated by either of the Plaintiffs.

11 While the documentary was not to be broadcast in Ontario until 7:03 p.m., the entire programme was broadcast in the Maritime Provinces between 6:00 p.m. and 7:00 p.m. Eastern Standard Time. It is not suggested by the plaintiffs that any portion of the programme broadcast to the Maritimes, after the point in time when the defendants could have stopped the broadcast, offends the injunction. Those portions of the broadcast alleged to contravene the injunction are in the first half of it.

12 The documentary with certain deletions and insertions was broadcast in Ontario from 7:03 p.m. to 8:00 p.m. and thereafter was broadcast in the same form to Western Canada. Those portions of the script of the documentary as actually broadcast to Ontario and Western Canada that are especially relevant on this application are as follows:

> **Dying of Lead**
>
> *Harry Brown*: This machine in a Boston laboratory is analyzing blood samples. The blood has been sent from Toronto, where some 3,000 people have been tested. The reason: lead poisoning.
>
> Right now, in North America, at least a quarter of a million children risk brain damage, mental retardation, and death ... from lead poisoning.
>
> Each year hundreds of thousands of tons of poisonous lead gets into the air and into our food.
>
> All this could be prevented.
>
> From C.B.C. Toronto, "As It Happens" presents a special programme, broadcast simultaneously in the United States. This is: *Dying of Lead*.
>
> *Barbara Frum*: In Boston, Dr. Herbert Needleman, at the Children's Hospital Medical Centre...
>
> *Dr. Needleman*: The symptoms of lead poisoning are so vague that many cases of lead poisoning are never picked up. So I, and a number of other people working in the field, are convinced that this is a major health disaster.
>
> *Harry Brown*: In Toronto, Les Cole lives near the Canada Metal lead plant. Canada Metal for years has been polluting its neighbourhood with lead. Les Cole's five-year-old son was hospitalized last month.
>
> *Mr. Cole*: If somebody hadn't come along and asked us about having the children done for the lead test, we wouldn't have known anything about it. His reading was high enough that they took him into the hospital. If nothing had been done, what would it ... how would it affect him later? I mean, if it's left for a couple of years it might have ended up with somebody that's retarded, and that's, you know, that's the worst part of it.
>
> *Barbara Frum*: In Ottawa, Dr. A. B. Morrison is head of the federal government's Health Protection Branch...

Dr. Morrison: Lead is widely recognized by public health authorities as one of the most dangerous elements to which man is exposed. And that is indicated by the wide range of toxic effects that are associated with lead poisoning. They include things like colic, anemia, convulsions, irritability, blindness, muscular incoordination, sterility, stillbirths, mental retardation, miscarriage — just a tremendously broad range of toxic effects. Some of them, of course, extremely bad.

Harry Brown: The poisonous effects of lead have been known for centuries. The mystery is: Why do we go on pouring it into our environment? Why are industries allowed to continue polluting our air with lead? Why is there still lead in gasoline? And in our food? How close are we, in fact, to a massive epidemic of lead poisoming

. . . . .

This is a lead smelter. In Canada each year we mine about four billion pounds of lead. It's processed first in primary smelters like the ones in Trail, B.C., and Bathurst, New Brunswick, for example — and then it's used in paint, or gasoline, or electric batteries. After the batteries are dead, the lead can be taken out and used again. And that's what secondary smelters do. They melt down the batteries and recover the lead.

Barbara Frum: In Toronto there are two secondary smelters which have caused people who live around them a good deal of trouble. Walter Lachocki lives near the plant owned by Toronto Refiners and Smelters. The dirt and dust which comes down on Mr. Lachocki's house contains an amount of lead about 140 times as high as anywhere else in the city...

Mr. Lachocki: I didn't suspect anything was really wrong as far as the high content of lead went in the dust ... Dr. Fitch came down from Air Management and he asked if we'd mind having our blood samples taken for high content of lead. At the time, I didn't really know what was what. While Dr. Fitch was here I told him I was concerned about the drums of arsenic that they had in the yard — they're piled up, 200 pound drums all along here — and I said I was concerned about that. And his answer to me was that he wouldn't be too concerned about the arsenic, because he'd sooner be poisoned by arsenic than lead. So at that time I got ... I sort of started worrying.

He took our lead levels, and in a few weeks' time he said, "Well, they're sort of high. We'll be around in six months' time; they should go down." And of course Air Management all along still wouldn't admit that anything was wrong. And even to this day they don't admit anything was wrong. Their idea of an immediate health hazard seems to be that if you bring them a corpse, then they might do something. But even then, when we had a meeting with Dr. Fitch, later, when there was a group of doctors at the Hospital for Sick Children, and I inquired that I was concerned that there were five cases of lead poisoning on this street already, and I was concerned — well, his answer to that was that he could bring experts in to prove that there was no such thing as lead poisoning on the block. So I thought, good grief, if that's his attitude, you know, this is a pretty unsafe outfit to deal with.

I just can't believe that an operation like that, where they claim to spend $7 million on air quality control, where they can't replace Air Management with a parrot. For a hundred dollars. And all it would say is "There's no pollution, no pollution." Why the hell are we paying these guys such big salaries, when a parrot could do the same damn work. And a lot cheaper. We'd be saving well over $7 million a year.

Harry Brown: Morris Kaufman is president of Toronto Refiners and Smelters...

Mr. Kaufman: I don't feel that we have been offending in any way, shape, or form. And if I did, I think that we would have shut the plant down years ago.

Barbara Frum: The problem at Toronto Refiners is an old one, yet it has proved very difficult to bring it to public attention. One man who has tried is Dr. David Parkinson, chief of the Metabolic Ward at the Hospital for Sick Children in Toronto. But just listen to what happened to Dr. Parkinson.

Harry Brown: In February 1973 a public meeting was held to plan lead testing in the area of Toronto Refiners. Officials from the provincial Departments of Health and the Environment were there, and they tried to tell the residents that Dr. Parkinson didn't even know what lead poisoning was.

Barbara Frum: Back in 1965, a four-year-old girl from the Toronto Refiners neighbourhood was brought into the hospital in a coma. She was critically lead poisoned. Her three brothers and a neighbour child were also treated. The little girl was badly damaged and spent the rest of her life in a mental institution.

Harry Brown: The provincial officials claimed that these weren't lead poisoning cases at all. They tried to tell the neighbourhood residents that Dr. Parkinson was incompetent.

Barbara Frum: Next, the Director of Public Health for Ontario met an official of the Hospital for Sick Children and complained about Dr. Parkinson. We went to Dr. Parkinson's office to ask him why...

Dr. Parkinson: Well, his concern was two-fold. First of all, he was concerned that I was unnecessarily stirring up emotions and fear in the community, and secondly, that I was, you know, incompetent. That I didn't know how to make diagnoses of lead poisoning and therefore I had no grounds for making any comments about the problem of lead exposure.

Harry Brown: What makes this situation particularly troubling is that the Ministry of Health eventually had to admit that these cases *were* lead poisoning. The question is, why did they try to shut Dr. Parkinson up?

. . . . .

In the studio with us for this evening's programme is Dr. Samuel Epstein, professor of Environmental Health, at Case Western Reserve University School of Medicine in Cleveland. Dr. Epstein is a specialist in pathology and toxicology, the author of more than 130 scientific papers and books, and for the past ten years has been Chairman of the Air Pollution Control Association's Committee on Biological Effects.

Barbara Frum: On the line from Washington is Dr. Jane Lin-Fu of the United States Public Health Service. Dr. Lin-Fu is perhaps the world's leading authority on lead poisoning in children.

Harry Brown: Dr. Lin-Fu, how do you know when somebody has lead poisoning?

Dr. Lin-Fu: The criteria for lead poisoning are far from uniform, and what one might consider lead poisoning, another might not. Basically, the symptoms of lead poisoning are extremely non-specific. There is nothing specific about them. Given a very young child — a two-year-old — I think this is very difficult ... and I personally feel that this accounts for the unduly delayed diagnosis in many children. For the simple reason that many times children reach a fairly severe stage of lead poisoning before they are recognized.

Harry Brown: Thank you, Dr. Lin-Fu. Now, as far as adults are concerned, Dr. Epstein?

Dr. Epstein: The major source of lead poisoning in adults is in the occupational circumstance, particularly men working in factories and in plants handling and processing lead, either primary or secondary smelting. And the major route of exposure is inhalation, which is indeed also a very important route of exposure to lead in children.

Harry Brown: Dr. Lin-Fu, can lead poisoning — or even low-level lead intoxication — be treated?

Dr. Lin-Fu: Well, this is a debatable question. Until one recognizes and agrees that there is toxicity at a low level of exposure — clinicians who do not recognize the problem will be very reluctant and unwilling to treat children. It all depends on where you define toxicity.

Harry Brown: Are there any long-lasting effects if somebody has lead poisoning but then is treated for it?

Dr. Lin-Fu: It all depends on how early you get a child. The child who is treated early may — and I use the word "may", which means: not necessarily — may escape long-lasting effects. But many children end up, even with therapy — well, all they escape is death. Now, not everybody ends up crying. But many of them do end up with very severe lead poisoning.

There's one point I must emphasize. This is a preventable illness. (It takes them quite a while to get to toxic levels, and if we would detect these children early — find them at an early stage — you can terminate the exposure, and treat them if necessary, and prevent a very, very unpleasant sequella.)

Harry Brown: Dr. Lin-Fu, thank you very much for participating with us.

Dr. Lin-Fu: You're welcome.

. . . . .

Harry Brown: Across town from Toronto Refiners, lead rains down on the neighbours of the Canada Metal plant, too. So far, 11 children from the area have been hospitalized. Dallard Runge works for the residents' association.

Barbara Frum: Where is the lead coming from? Is it from the smelters?

Mr. Runge: Oh, most definitely. It's coming from Canada Metal. A range of studies have been done by the University of Toronto and by the Ministry of the Environment itself. And it's clear — even in the Ministry's own reports, that the staff believes that is is coming from Canada Metal.

Barbara Frum: Is there a hazard to public health around that plant, do you believe?

Mr. Runge: There is no question of it. There's a hazard to health.

Barbara Frum: And who's to blame for it?

Mr. Runge: Canada Metal. And, and really you know, the provincial government, because the provincial government has known about it for a long time, and they clearly don't enforce the standards. One could be suspicious, you know: There's a five thousand dollar fine for each day that they are in excess of the standards, but that's never been levied on them.

Barbara Frum: Mr. Runge, thank you very much.

Mr. Runge: Thank you.

Mrs. Cole: Canada Metal just don't care. They won't even ... they don't even try to clean the place up.

Mr. Cole: The worst part of it is the government apparently has known about this for so long.

Mrs. Cole: It doesn't matter if they clean up the joint now or not, because everything around is infected with lead. And there's no way that we can afford to move. And nobody wants to buy our house anyways, with all this lead pollution going on. So, you know, either get rid of them ... or, I, I'd blow the place up if it was me.

Mr. Cole: I don't know, I wouldn't like to see the place close up just for the fact of closing it and putting all the fellows out of work. I mean, I'm a working man myself. I know what it would be like for them, but really they can clean it up, I mean...

Mrs. Cole: Yeah, well it's not the employees...

Mr. Cole: Yeah, well, why put them out of work?

Mrs. Cole: It's not the employees, you know, it's the top guys.

This here is a residential area. Over there it's commercial. I mean, they're supposed to be there, and we're supposed to be here. It's just that, it just happens that their dirty stuff is blowing our way.

You know with Debbie, her, you know, she puts everything in her mouth. And I mean everything, no matter what it is. And so if she goes outside, you know, she's going to be into something, she's going to probably eat the dirt, if I know her. See, with Jeff, he's hardly been out at all this winter.

Mr. Cole: Before that he was out every day.

Mrs. Cole: Before that he was out all the time. But since we've been keeping him in, his count's down a bit. But you can't keep the kid in the house all his life.

Mr. Cole: They take the children into the hospital, they treat them, cure them, send them back out, right back into it again. They're going to have to do something. I mean, we can't keep sending him back to the hospital every year or two.

Mrs. Cole: So what can you do? The only thing you do is wait and see what Canada Metal is going to do.

Mr. Cole: You know, there's not much I can do. I can't fight the company, I don't have enough money. The government, I think, is the one that is going to have to do something about it for the people in the area. I think they should have done something a long time ago.

Mrs. Nelson: We felt that the problem had been known to Air Management for some time, but there hadn't been sufficient action, and there wasn't proper protection for people in the neighbourhood. And, of course, since then we've found out that there isn't proper protection of the workers either.

Harry Brown: Fiona Nelson is Chairman of the Toronto Board of Education...

Mrs. Nelson: I have been the Board's representative on the Board of Health this year, and our original concern was primarily for the children in the two schools, which are adjacent to these two factories. But we are also concerned about the general environment that the children live in as well as the school environment. And repeated requests by the Board of Health for cooperation from Air Management and for information had not met with much action. And when the Board of Education tried to do the same sorts of things, they didn't get very far either.

We really felt that if the Air Management Branch was no more responsive to the problem than that, then perhaps someone needed to give them a good looking over.

Barbara Frum: And so the Board of Education has asked for a provincial Royal Commission inquiry into the Air Management Branch.

Harry Brown: The Canada Metal Company is owned jointly by a huge American firm, National Lead, and by Cominco, a subsidiary of Canadian Pacific.

At one point, Cominco's vice president paid a call on the vice chairman for the Hospital for Sick Children, to question the "propriety" of Dr. Parkinson's interest in this issue. Dr. Parkinson thought this was rather, to quote him, "crass." But after all, the provincial Ministry of Health had already tried the same thing.

Barbara Frum: Meanwhile, the companies have tried to defend themselves by calling in experts to testify that the lead poisoning is not their responsibility. Ian Outerbridge, of the prestigious Toronto law firm of Thomson, Rogers represents both companies...

Mr. Outerbridge: Nobody wants to hear the truth. We originally brought over the best expert we could find in Canada and he was tossed out by the Board of Health because he was working for the Ethyl Corporation.

We then brought in a pediatrician from Chicago, Dr. Henrietta Sachs. And for some reason, she was biased, she was from the United States.

There had to be an expert in this country. Well, there wasn't, so we brought in the best man in the world, a Dr. Barltrop from England, and he was regarded as a whitewash. I don't think really people want to hear the truth.

Harry Brown: The truth. Well, let's see. On October 26th, the Ontario Ministry of the Environment issued a stop-work order against Canada Metal, on the basis of a laboratory report of high lead levels in the blood of three neighbourhood residents. Four days later the stop-work order was set aside by a judge who had listened to Dr. Henrietta Sachs — the Dr. Sachs just referred to — who was brought to Toronto by the company to testify. Well, Dr. Sachs testified that the plant just couldn't be guilty.

Barbara Frum: The Ministry of the Environment didn't call any experts to testify for its side at all. And in fact, didn't even show Dr. Sachs its own data on the case.

Harry Brown: The day after the court hearing we called Dr. Sachs in Chicago, and told her about the data which *we'd* had for some time.

1. — electronic tone —

HARRY BROWN: We are interrupting this broadcast. As it Happens has just been served, while in the process of transmitting this documentary, with an injunction from the Ontario Supreme Court against broadcasting portions of it any further. The injunction was sought by Canada Metal Company Limited and Toronto Refiners and Smelters Company Limited and was granted this evening by Mr. Justice Wilson of the Ontario Supreme Court. Therefore, we are legally prevented from proceeding with parts of the documentary entitled "Dying of Lead". Here is the text of the injunction as handed to the Corporation moments ago:

> In the Supreme Court of Ontario between the Canada Metal Company Limited and Toronto Refiners and Smelters Company Limited, Plaintiffs, and Canadian Broadcasting Corporation, Mark Starowicz and Max Allen, Defendants. Notice of Motion. Take notice that this Court will be moved on behalf of the Plaintiffs at Osgoode Hall in the City of Toronto on Tuesday, the 29th of January, 1974, at such time as may by the Court be appointed, for an interim order effective for a period of ten days from its date restraining the Defendants and their officers, servants, employees and agents and to any other person with knowledge of such other from broadcasting or otherwise disseminating and from advertising or otherwise publicizing a one hour special programme prepared with respect to lead poisoning and in particular those aspects thereof alleging or implying that the Plaintiffs have bought misleading favourable medical evidence and have concealed material evidence from medical experts or for such other order as may seem just, and take notice that in support of such application will be read the affidavits of Michael Siegal and Carleton Smith, filed, and such further and other material as Counsel may advise. Dated at Toronto, this 29th day of January, 1974.

As It Happens is complying with the terms of the injunction and is at this moment excising portions of the documentary. Later excisions will be indicated by the sound of electronic tone. Attorneys for the Canadian Broadcasting Corporation will move tomorrow to dissolve the injunction against the programme. We resume with the documentary that has now had portions cut out.

— tone for approx. 30 seconds —

**** Injunction deletion ends***

Barbara Frum: The Ministry of the Environment has never contacted Dr. Sachs with their data. They have never asked her opinion of it. They have no plans to take Canada Metal to court again. They have no plans for another stop-work order.

Harry Brown: The other expert brought in by the lawyers was Dr. Donald Barltrop of London, England.

Dr. Barltrop: Just saying that someone living near to the industry has a high blood level, begs the question of where the lead came from and what the mode of transmission was. What do we mean by the term "environmental lead poisoning"? I think we must be very careful before taking an isolated set of samples in relation to the particular plant and necessarily attributing the values obtained to the activities of that plant. It may be that they are related, it may be they are not.

Harry Brown: Dr. Epstein, what has been your experience with the use of experts in cases like this?

2. — tone for approx. five seconds —

Harry Brown: This is the second excision made in our As It Happens documentary "Dying of Lead" as a result of the Injunction served against As It Happens by Mr. Justice Wilson of the Ontario Supreme Court when the injunction was sought by the Canada Metal Company Limited and Toronto Refiners and Smelters Company Limited. We will continue in just a few seconds with the documentary which has still had portions cut out.

— tone for approx. 35 seconds. —

**** Injunction deletion ends***

You have, I'm sure, witnessed the phenomenon of the growth of the public interest movement in the States, and to a lesser extent in this country. The public interest movement is an expression of gross disillusionment of the public, and of Congress, with the so-called "expert", the man who is paid to say something for his own personal gain or profit, or for the gain or profit of the industry to which he belongs. And the emphasis is always to maximize the profit, even if it means maximal risk and minimum benefit to the public and to the consumer.

Barbara Frum: Dr. Herbert Needleman, in Boston...

Dr. Needleman: In many of these decisions it seems that when the cost-benefit analysis is made, the costs are given to the consumer and the benefits go to the large industry.

In many of the panels that one meets, in which the toxicity of lead or other things are discussed, you can pretty much slice the way the investigators line up, according to whether they come from industry or from the public health sector. And I just think that there is something wrong with that.

Harry Brown: What are the costs of lead pollution, Dr. Epstein?

There was recently a study done by Oberle that was published in *Science*, in 1969, which did an analysis on the cost to society of one child with severe brain damage from lead poisoning.

As far as I can recall, Oberle's figures were something like this. The cost to society based on remedial and custodial care alone, for one child with brain injury from lead poisoning, is $250,000. That's excluding deprivation of earnings; that's purely for remedial and custodial care, excluding deprivation of earnings. So, if you want to include the deprivation of earnings, you are in the half-million dollar category. A half-million dollars for one child.

Harry Brown: One of the plants says that the cost of a clean-up runs about $60,000, and they seem to think that this is quite a lot.

> *Dr. Epstein*: It's difficult to cope with one's moral indignation when one hears figures of that kind. I have mentioned to you that apart from the tragedy of a disrupted life, and apart from a family tragedy of somebody's being converted into a vegetable, the cost which you and I as taxpayers in our respective countries have to bear, for one child with lead poisoning, may be in the region of half a million dollars.
>
> Now, why should you and I bear this economic burden, for the economic advantage of an industry that is not prepared to accept the financial or moral responsibility of its own actions?
>
> *Barbara Frum*: Toronto City Council has also demanded a Royal Commission inquiry into the situation. This is Councilman Dan Heap...
>
> *Councilman Heap*: City Council has been struggling all year, and the Board of Health has been struggling all year, with the fact that we can't get action on control of lead pollution at these two smelters. It is apparent that the Air Management Branch is just not doing the job that it is set up to do.
>
> So we called a special meeting of Council to hear what everybody had to say, and about 15 different deputations came from about 15 different neighbourhoods. And they all had the same story, that Air Management just wasn't trying.
>
> In one case, they pushed Air Management to the point of taking Pilkington Glass to court for air pollution, and the day before the court case the two inspectors who were into the case went away on vacation, so Air Management lost the case through failing to present any evidence whatsoever.
>
> That's essentially what happened to us at Canada Metals.
>
> So after hearing the deputations, there was almost no debate in Council, and the Council voted unanimously to ask the Lieutenant Governor to appoint a Royal Commission to inquire into Air Management.
>
> *Harry Brown*: In downtown Toronto the air and soil are polluted with lead, workers are poisoned, and children risk irreparable harm. Why does this situation go on?
>
> Toronto City Council and the Toronto Board of Education have called for a Royal Commission to investigate the Air Management Branch of the Ontario Ministry of the Environment. But, in addition to that, why has there been no investigation of the Ontario Ministry of Health?

13 I have marked with a line on the right side, those portions of the script which warrant the closest examination in connection with the alleged violation of the order of Wilson, J.

14 Eugene Hallman, the vice-president and general manager, English Services Division, of the Canadian Broadcasting Corporation, first learned of the injunction when he heard on his radio at home the announcement made by Mr. Harry Brown in substitution for the first deleted portion of the documentary. Shortly thereafter, at about 7:30 p.m., Mark Starowicz telephoned him to inform him that deletions had been made from the programme to comply with the injunction.

15 Mr. Hallman gave evidence that in any matter involving a point of law, the Canadian Broadcasting Corporation seeks the advice of counsel and that he inquired of Mr. Starowicz when he called and was assured that counsel had been consulted.

16 Mr. Flak himself called Mr. Hallman between 8:00 p.m. and 8:30 p.m. and indicated to Mr. Hallman that he had and would take appropriate action to see to it that the Canadian Broadcasting Corporation complied with the intent and purpose of the injunction. Mr. Flak indicated he had already been into the radio news-room and that he intended to visit the television news-room and Mr. Hallman understood him to mean that he would review and edit the copy in

such a way as to abide by the injunction. Mr. Flak had the authority and duty to advise as to whether a story to be run was suitable, and Mr. Hallman said it was expected that his advice on the point would be accepted by the duty editor.

17 Later the same evening a story which the plaintiffs allege violated the injunction was read on the Canadian Broadcasting Corporation's National Television News after 11:00 p.m. The text of that story is as follows:

> **National: January 29/74**
>
> ANNOUNCER: The CBC was forced to censor part of a radio documentary tonight — because of a court injunction. It was served while the program was on the air. The ex-parte injunction, issued by a Justice of the Ontario Supreme Court, names the CBC and two producers of the program "As It Happens". It prohibits them from saying that two Toronto lead smelters — in the words of the injunction — "bought misleadingly favourable medical evidence and concealed material evidence from medical experts and from misstating the amount the plaintiffs are spending to install pollution control systems." That's what the *injunction* said the CBC musn't say.
>
> The program dealt with a controversy over lead poisoning of people living near the two smelters in Toronto. The firms involved are the Canada Metal Company Limited, and Toronto Refiners and Smelters Limited. The CBC says it will move tomorrow to have the injunction lifted. The entire program was heard in the Maritimes, because it was broadcast there before the injunction was served.

18 Neither Mark Starowicz, Max Allen, nor Mr. Hallman knew in advance, nor had reason to believe that the story in that form would be carried on the National News.

19 On the morning of January 30, 1974, at 10:40 a.m., Mr. Hallman sent to senior executives of the Canadian Broadcasting Corporation and to all regional directors and public relations officials, a telegram for the purpose of ensuring that the terms of the injunction would be followed. The telegram was as follows:

> WUD U TAKE STEPS TO INSURE THAT THE INTENT OF THE INJUNCTION SERVED YESTERDAY AGAINST THE CORPORATION WITH RESPECT TO THE PGM AS IT HAPPENS IN WHICH WE HAVE BEEN ENJOINED NOT TO PUBLISH MATERIAL WHICH WOULD CONCEIVABLY DAMAGE THE 2 COMPANIES, CANADA METAL AND TORONTO REFINERIES, IS RESPECTED IN ALL OF OUR PRGMS BOTH RADIO AND TV, AND IN THE RELEASE OF PGM TRANSCRIPTS. THE SCOPE OF THE INJUNCTION WUD APPEAR TO AFFECT ALL BDCSTS AT THIS TIME. STAFF SHUD MAKE NO STATEMENT TO THE PRESS. THE CORPRN IS NOW PROCEEDING TO EXAMINE HOW TO HAVE THE INJUNCTION RAISED BUT A FINAL DECISION ON THE MODE OF APPROACH HAS NOT YET BEEN TAKEN.
>
> WILL KEEP YOU INFORMED
>
> "E. S. HALLMAN"

20 On Wednesday, January 30, 1974, the Globe and Mail carried as its lead news story on p. 1, and continued on p. 2, a story relating to the injunction. The plaintiffs allege that portions of that story violate the injunction. The president and publisher of the Globe and Mail is the respondent, James L. Cooper. The author of the news article in the said newspaper, was the respondent, Graham Fraser. The following are the pertinent portions of the said news story:

> **Bleeps on a Lead Pollution Story**
>
> ***Injunction Forces CBC to Censor Show on Air***
>
> *By Graham Fraser*

The Canadian Broadcasting Corp. was served with an injunction during a radio broadcast last night, cutting out portions of an hourlong documentary on lead pollution.

The ex-parte injunction, effective for 10 days, signed by Mr. Justice John Wilson of the Supreme Court of Ontario was granted to two lead smelting companies in Toronto, Canada Metal Co. Ltd. and Toronto Refiners and Smelters Ltd.

The injunction was served against the CBC, Mark Starowicz and Max Allen. Mr. Starowicz is the executive producer of the program As It Happens and Mr. Allen researched and produced the documentary, entitled Dying of Lead.

The injunction prohibits the defendants from publicizing that the lead smelters had "bought misleadingly favourable medical evidence and concealed material evidence from medical experts and from misstating the amount the plaintiffs are spending to install pollution control systems."

The program had almost reached the end of its broadcast to the Maritimes at 6:45 p.m. EST when John Prince, an articling student at the legal firm of Thomson, Rogers arrived at the door of Studio F in the CBC-Radio building on Jarvis Street with the words, "We've got something for you."

He then presented the injunction which was ex parte, in the interest of one side only, to Mr. Starowicz.

After a quick conference with CBC counsel George Flak, the producers decided to delete two portions of the documentary affected by the injunction.

All of the program was heard in the Maritimes.

Thirteen minutes after the start of the broadcasting to Ontario and Quebec it was interrupted. Announcer Harry Brown read the injunction over the air during the blackout of the first affected portion of the program. During the second affected portion an electronic sound blacked out the comments.

The first deletion, lasting about one minute and thirty seconds, blacked out an interview with Henrietta Sachs.

Dr. Sachs was brought to Toronto by Canada Metal and testified in court on Oct. 12 that "it would be impossible, to assume that Canada Metal was the source of lead contamination in the neighbourhood."

However, in an interview with the CBC, she said that she had not seen reports by the air management branch which related the amount of lead pollution found in the air over a four-year period.

She said that if she had seen the studies, "it might have made some difference" in her testimony.

The second deletion was of part of an interview with Samuel Epstein, professor of Environmental Health at Case Western Reserve University School of Medicine in Cleveland. He said in part that on the basis of his experience in the United States, he concluded that it was possible for industry to "buy the data" it wanted "to substantiate any viewpoint."

"We are going to move tomorrow to dissolve the injunction," Mr. Flak said in an interview.

Mr. Starowicz said he thought the interruption of a documentary in the middle of broadcasting was unprecedented.

After describing the electronic bleep decided upon to black out the second affected part of the program he grinned and said: "You've sort of got to wing this on-air censorship. We don't do it very often."

Mr. Starowicz said that if the CBC is successful in getting the injunction dissolved by the Supreme Court of Ontario, he would be rebroadcasting all or part of the documentary.

"Either we will run the entire documentary, or run a shorter version," he said. "But we will definitely run the material we were forced to blot out today if the court dissolves the injunction."

21 On behalf of the respondents Fraser and Cooper there was filed an affidavit of Clark Davey, the managing editor of the Globe and Mail. That affidavit is to the effect that the responsibility at the Globe and Mail of seeing to it that material is not published that could constitute a contempt of Court, lies with Mr. Davey, and the editors report to him. Mr. Davey deposed that he was consulted by the editors during the process of editing the story written by Graham Fraser and the impression is left that he approved of the story as it appeared in the newspaper.

22 The grounds for the request to commit the respondent Gary Perly to jail were that he was the national chairman of the Canadian Liberation Movement, which body it was alleged issued a news bulletin which violated the injunction. After hearing argument on the point I dismissed this application so far as Gary Perly is concerned because there was insufficient evidence to establish that Gary Perly was the national chairman of the Canadian Liberation Movement, or that he had anything to do with the news bulletin, the creation and distribution of which it is alleged contravened the injunction.

23 Nevertheless, the news bulletin was scandalous in its reference to the Court declaring that the C.P.R. runs the Courts and that the Court was acting under orders from the plaintiffs. The news bulletin was likewise in contempt of the injunction of Wilson, J., making some of the allegations the injunction said were not to be made. From remarks made in argument by his counsel, and from remarks made by Mr. Perly while cross-examining on certain affidavits, there was raised a strong suspicion that Gary Perly was indeed involved in some way with the production of the offensive news bulletin.

24 I afforded Mr. Perly an opportunity to dispel such suspicion by filing an affidavit, on which affidavit he would be subject to cross-examination to the effect that he had nothing to do with the creation or publication of the news bulletin, and that he was not on January 29, 1974, nor has since then been the national chairman or any other officer of the Canadian Liberation Movement. Mr. Perly did not take advantage of this opportunity. I therefore denied Mr. Perly any costs of this application.

25 Further, I awarded costs to the applicants against Gary Perly on a party-and-party basis, such costs to be restricted, however, to 80% of the costs related to the cross-examinations conducted by Gary Perly on several affidavits filed by the plaintiffs. The basis for this award of costs was that at least that percentage of time on those examinations was devoted to an attempt by Gary Perly to show, either that the injunction of Wilson, J., was obtained by the applicants failing to make full disclosure of the facts to him, or that the injunction was persisted in by the applicants after they knew facts existed on which the injunction should have been dissolved; neither of which contentions I found had or have any validity.

26 The defendant Perly alleged improper conduct against the plaintiffs and Ian Outerbridge, Q.C., their counsel. Several times he indicated he was alleging fraud of the kind referred to in *Herman v. Klig et al.*, [1938] O.W.N. 270, [1938] 3 D.L.R. 755*n*, and he sought permission to examine Mr. Outerbridge as a witness in support of his allegation. While Gary Perly referred to fraud of the type dealt with in *Herman v. Klig et al.*, the word "fraud" is not even mentioned in that decision. The Master dismissed Mr. Perly's application to examine the solicitor, and on appeal to me I dismissed the appeal taken from the Master's decision on the basis that there was no suspicion that Mr. Outerbridge or his firm withheld any information.

27 When Mr. Perly turned over his defence to Mr. Fox, solicitor, Mr. Fox indicated he would not pursue the position that Mr. Perly had taken that the injunction had been obtained by the plaintiffs withholding relevant information from Wilson, J.

28 After the application against Mr. Perly was dismissed, Mr. Fox did, however, submit there was merit to the position that the injunction had been persisted in when the plaintiffs were aware the evidence no longer justified it.

29 I could find no merit to the allegations of impropriety made against the plaintiffs and their counsel and I therefore penalized Mr. Perly for having made them and having wasted so much time in pursuing them, by ordering him to pay 80% of the costs of the cross-examinations on a party-and-party basis, and to pay Mr. Outerbridge's costs on a solicitor-and-client basis.

30 The following general principles relating to injunctions must be kept in mind:

(1) "An order for an injunction must be implicitly observed and every diligence must be exercised to observe it to the letter": Halsbury's Laws of England, 3rd ed., vol. 21, p. 433, para. 915.

(2) The respondents were obliged to obey not only the letter, but also the spirit of the injunction: *Grand Junction Canal Co. v. Dimes* (1849), 17 Sim. 38, 60 E.R. 1041; Halsbury's Laws of England, *ibid.*, p. 434, para. 919; *Attorney-General v. Great Northern R. Co.* (1850), 4 De G. & Sm. 75, 64 E.R. 741.

(3) Knowledge of the existence of an injunction is sufficient to obligate persons to obey it, and the order need not have been issued and entered in order to bind persons having knowledge of it: Halsbury's Laws of England, *ibid.*, p. 433, para. 914.

(4) Persons who are not parties to an action and who are, therefore, not named as being bound by the injunction, still must abide by it if they know of the substance or nature of the injunction and it is not necessary that the words "person or persons having notice of this order" be contained in the terms of the injunction in order for it to bind them: *Re Tilco Plastics Ltd. v. Skurjat et al.; A.-G. Ont. v. Clark et al.*, [1966] 2 O.R. 547, [1967] 1 C.C.C. 131, 57 D.L.R. (2d) 596; affirmed [1967] 1 O.R. 609*n*, [1967] 2 C.C.C. 196*n*, 61 D.L.R. (2d) 664*n*.

31 I am not dealing with an application to enforce a Court order but rather an application to punish two of the parties to this action for an alleged breach by them of the injunction, and to punish four other persons not parties for having allegedly conducted themselves so as to obstruct the course of justice by treating the injunction with contempt by acting in contravention of it. The proceedings before me are criminal or *quasi*-criminal in nature and I must, therefore, be satisfied that the misconduct alleged against the respondents has been established beyond a reasonable doubt: *General Printers Ltd. v. Thomson et al.*, [1965] 1 O.R. 81, 46 D.L.R. (2d) 697, *per* Haines, J., at pp. 82-3 O.R., pp. 698-9 D.L.R.: "Proceedings of this nature are of a *quasi*-criminal nature and must be proven with the strictness of a criminal charge." In *Re Bramblevale Ltd.*, [1970] Ch. 128, *per* Lord Denning, M.R., at p. 137:

A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt.

32 I have already indicated that there was insufficient evidence to establish the alleged misconduct against the respondent Gary Perly, so hereafter he is excluded from my remarks.

33 The applicants have submitted that where a corporation violates an injunction, the directors and officers of the corporation can be held in contempt of Court and can be attached or otherwise punished for the contempt, without any proof that the particular directors or officers proceeded against did or failed to do anything that was responsible for the said violation. I am unable to agree with that submission. I am not saying that before an officer or director can be committed for a contempt committed by the corporation that it must be shown that the officer aided or abetted the contempt. It may well be that the director or officer could be held in contempt, even though his role in the matter was purely passive: see *Biba Ltd. v. Stratford Investments Ltd.*, [1972] 3 All E.R. 1041, and *Glazer v. Union Contractors Ltd. and Thornton* (1961), 129 C.C.C. 150, 26 D.L.R. (2d) 349. Further, the violation of the injunction may give rise in some cases to a presumption that the director or officer did or failed to do something that caused the breach, and may put that officer or director on his defence. Where, however, it is clear on the evidence that the director or officer did all he could to ensure that the injunction would be abided by and, where the breach occurred without fault on the part of the director or officer, then I am unable to see how that director or officer can be punished for contempt of Court.

34 I note once again that this is not an application to force the respondents to do something — it is solely an application to punish. If it were an application to force a corporation to abide by a Court order, then of course the director or officer might be directed under penalty to see to it that the corporation did what the order required it to do.

35 I should also point out that a breach of an injunction is not excused because the person committing it had no direct intention to disobey the order: see *McDonald v. Lancaster Separate School Trustees* (1916), 35 O.L.R. 614, 29 D.L.R. 731, *per* Masten, J., at p. 625 O.L.R., p. 741 D.L.R.:

> In *Stancomb v. Trowbridge Urban District Council*, [1910] 2 Ch. 190, Warrington, J., discussing the meaning of "wilful disobedience," says (p. 194): "In my judgment, if a person or a corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction, and is liable for process for contempt, if he or it in fact does the act, and it is no answer to say that the act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order." And he relies upon a similar view expressed by Chitty, J., in *Attorney-General v. Walthamstow Urban District Council* (1895), 11 Times L.R. 533.

36 Neither is it a defence to contempt proceedings that the things done were done reasonably and despite all due care and attention, in the belief based on legal advice that they were not breaches: *Re Tyre Manufacturers' Agreement*, [1966] 2 All E.R. 849 at p. 862.

37 I now return to the evidence to see whether the injunction of Wilson, J., was breached and if so, by whom. I deal firstly with the script of "Dying of Lead".

38 The programme makes the allegations or leaves the innuendo that:

> 3,000 blood samples have been taken from people in Toronto suffering from lead poisoning and have been sent to Boston for analysing; in North America one-quarter of a million children risk brain damage, mental retardation and death from lead poisoning; thousands of tons of poisonous lead gets into our own food yearly and all this could be prevented; Les Cole lives near Canada Metal, which for years has been polluting its neighbourhood with lead, and his five-year-old son was hospitalized last month with lead poisoning caused by the pollution; we may be close to a massive epidemic of lead poisoning; the lead smelters of the plaintiffs in Toronto have caused the people around them a good deal of trouble, for example, Toronto Refiners dumps dirt and dust on its neighbourhood, which dust and dirt contains an amount of lead 140 times as high as elsewhere in the city; yet Air Management will not admit that there is anything wrong with that; the only kind of health hazard that will move Air Management is one that produces a corpse; there have been five cases of lead poisoning on one street near Toronto Refiners, and yet a doctor from Air Management says there has not been a lead poisoning on that street; the president of Toronto Refiners states it has not been offending in any way, yet the problem of Toronto Refiners is an old one, it is just difficult to get anything done about it; Dr. Parkinson, of Sick Children's Hospital, tried to bring the problem to the attention of the public, and the provincial Department of Health said Dr. Parkinson did not know what lead poisoning was; in 1965, a four-year-old girl was lead poisoned by the pollution from Toronto Refiners, and was brought to hospital in a coma and she spent the rest of her life in a mental institution; her three brothers and a neighbour's child were also treated for lead poisoning caused by Toronto Refiners; yet the provincial officials claimed they were not lead poisoning cases — and tried to tell residents of the area that Dr. Parkinson was incompetent; in fact, a Director of Public Health for Ontario complained about Dr. Parkinson to an official at the Sick Children's Hospital, saying that he was unnecessarily stirring up emotions and fear in the community and that he was incompetent and did not know how to make a diagnosis of lead poisoning, and yet eventually the Ministry of Health had to admit these were cases of lead poisoning, so obviously they had an improper purpose in trying to shut Dr. Parkinson up. Dr. Epstein, a man of the highest qualifications in this field, states that the major cause of lead poisoning in adults is from working in lead processing plants and that the route of exposure to the lead is inhaling it and inhaling lead is also a very important route to lead poisoning in children; lead also rains down on the neighbours of Canada Metal and 11 children from the area have been hospitalized with lead poisoning; yet the provincial Government will not

force Canada Metal to stop this lead pollution, "*Canada Metal just don't care, they don't even try to clean the place up. Canada Metal could clean it up*"; their dirty stuff is blowing onto the premises of the residents of the area; by keeping their son Jeff inside the house the Coles have lowered his lead poisoning; children from the area are taken into hospital with lead poisoning, they are treated and cured in hospital, they are sent back to their homes, and right away they are poisoned again and every year or two the children have to be returned to hospital; the people in the area do not have enough money to fight the smelters; the Government should, but has not done anything about it; there is not proper protection for the neighbours nor for the workers in the smelters; the vice-president of one of the companies that owns Canada Metal called on the Sick Children's Hospital and questioned the propriety of Dr. Parkinson's interest in the matter; *the companies have tried to defend themselves by calling in experts to testify that the lead poisoning is not their responsibility. Two experts, Dr. Sachs from Chicago, and Dr. Barltrop from England were brought in, but did they speak the truth? Canada Metal got a stop work order of the Ministry of the Environment set aside, when Dr. Sachs testified before a judge that the plant just couldn't be guilty of causing high lead levels in the blood of neighbourhood residents; but the Ministry of the Environment did not call any experts to testify on its side and did not even show Dr. Sachs the data it had on the case; we telephoned Dr. Sachs the day after she appeared in Court and told her about the data we'd had for some time; we are interrupting this broadcast because we have been served with an injunction obtained by Canada Metal and Toronto Refiners which legally prevents us from proceeding with parts of the documentary; the injunction says we are restrained from broadcasting those aspects of the programme alleging or implying that the plaintiffs bought misleading medical evidence and have concealed material evidence from medical experts. Our Attorneys will move tomorrow to dissolve the injunction.; the Ministry of the Environment have never asked Dr. Sachs her opinion about their data and they don't intend to issue another work order or take Canada Metal to Court again; Dr. Barltrop says you can't just say that because someone living near the industry has a high blood level of lead that the industry caused it. Dr. Epstein is then asked what his experience has been with the use of experts in cases like this*?

39 *Harry Brown* — "*this is the second excision as a result of the injunction*".

40 *Dr. Epstein* — "*The public, and Congress, is grossly disillusioned with the so-called 'expert' the man who is paid to say something for his own personal gain or profit, or for the gain or profit of the industry to which he belongs. And the emphasis is always to maximize the profit, even if it means maximal risk and minimum benefit to the public and to the consumer.*"

41 *Dr. Needleman:* "*On the panels in which lead toxicity is discussed, you can pretty much slice the way the investigators line up, according to whether they come from industry or from the public health sector. And I just think that there is something wrong with that. Dr. Epstein says the cost to society of lead pollution for remedial and custodial care alone, for one child with brain injury from lead poisoning is $250,000.00 and if you include deprivation of earnings it is half-a-million dollars for one child.*"

42 *Harry Brown:* "*Yet one of the plants says that the cost of a clean-up runs about $60,000.00, and they seem to think that this is quite a lot.*"

43 *Dr. Epstein:* "*Why should you and I bear this economic burden of half-a-million a child for the economic advantage of an industry that is not prepared to accept the financial or moral responsibility of its own actions.*"

44 I am satisfied beyond a reasonable doubt that in the programme as run and in particular in those portions of it I have italicized there is a violation of the injunction of Wilson, J., and a violation in respect to each of the three statements the injunction forbad.

45 The script either alleges or invites the listener to conclude that the two experts were bought to give evidence favourable to the plaintiffs that persons acting in concert with and on the side of the plaintiffs did not reveal all the medical information they had to Dr. Sachs before obtaining her opinion, and that it would cost only $60,000 to control the lead pollution problem caused by one of the two companies and that company is not even prepared to spend that much.

46 According to the affidavit of Michael Siegal, p. 4, para. 10 thereof, Toronto Refiners and Smelters Limited was on January 29, 1974, in the final stages of installing a pollution control system at a cost to it in excess of $150,000. The affidavit dated the same date of Carleton Smith indicates on p. 4, para. 11 thereof that Canada Metal Company Limited was then in the final stages of installing a pollution control system at a cost to it in excess of $300,000.

47 The suggestion made in the programme as to the cost of a "clean-up" is then absolutely false, and in direct violation of the injunction which forbad the defendants from mis-stating the amounts the plaintiffs are spending to install pollution control systems.

48 The only excuse given for this mis-statement appears in the affidavit of Mr. Allen, who deposes that the words "one of the plants says that the cost of a clean-up runs about $60,000.00, and they seem to think that this is quite a lot" were not deleted because the plant referred to in those words is not owned nor operated by either of the plaintiffs.

49 We have then the insertion into the programme of words that do not relate to the plaintiffs, in such a fashion that a listener would think they do refer to the plaintiffs and that they reflect a callous attitude on the part of the plaintiffs.

50 I am satisfied that both of the defendants, Mark Starowicz and Max Allen, are responsible for this breach of the injunction.

51 The first mistake they made was attempting to edit the script in the few minutes that were available to them between the time they learned of the injunction and the time that the programme was to go on the air. If they had given the injunction the respect it deserved, if they had decided to scrupulously obey the order as it was their duty to do, they would have postponed the entire programme until they had had an opportunity to carefully examine the script and until they had removed any portion of it that violated the order.

52 Max Allen acknowledges in his affidavit that he, along with Mr. Flak, assumed the responsibility of pointing out to Mark Starowicz the portions of the script which should be deleted. He should have, but failed, to recommend that other portions be deleted as well.

53 As story editor of the documentary he was responsible for putting the script together. An injunction having been granted, he had an obligation to make all reasonable attempts to see to it that the programme, which had been put together by him, did not violate the injunction. In fact, he made no attempt to remove any portions of the script other than the two portions mentioned. Max Allen is responsible then for the breach of the injunction for two reasons:

(a) He failed to make reasonable efforts to remove all the portions of the script that violated the order, and

(b) by not advising further editing of the script, he in effect recommended the publication of those portions of the original script that actually were used on the programme.

54 Mark Starowicz indicates in his affidavit that he, as executive producer of the programme "As It Happens", had the authority to delete portions of the programme. He in effect accepts responsibility for the wording of the programme as it actually was broadcast. He should have given those advising him (Allen and Flak) and he should have given himself more time to study the script before putting the programme on the air. Too much of the original script was left in, and he aggravated the problem by having read the notice of motion in the place of a portion of the script that was deleted.

55 The effect of the reading of the notice of motion during the gap left by the first deletion was to say to the listener, "but for the injunction the participants in the programme would be saying these things — that the plaintiffs have bought misleadingly favourable medical evidence and have concealed material evidence". The script leading up to and following the gap is meant to be and is an argument or allegation that the plaintiffs did just that. The notice of motion takes the place of the script that the first gap omitted and completes the argument or allegation almost as effectively as if the first deleted portion had never been removed. Even if the notice of motion had not been read in place of the deletion, the programme would still, however, have violated the injunction.

56 Eugene Hallman did not become aware of the injunction until it was too late for him to prevent the breach of it which occurred in the "Dying of Lead" programme. Mr. Hallman could only be guilty of knowingly acting in contravention of the injunction if the National Television News story on the injunction contained a violation of the injunction and if he did not do all he reasonably could to prevent such breach from occurring. I find it unnecessary to decide whether the National News story violated the injunction because even if it did, it was through no failure on the part of Mr. Hallman to fulfil his duty to attempt to prevent such a breach. After becoming aware of the injunction, Mr. Hallman spoke to Mr. Flak, who, as legal officer had the task of seeing to it that the injunction was obeyed and Mr. Hallman was in effect assured that Mr. Flak would edit the script to be used on "The National" so as to see to it that the injunction would not be violated. It was argued by the applicants that upon learning of the injunction, Mr. Hallman should have sent out immediately the telegram he sent out the next day warning that the injunction was to be strictly obeyed. I fail to see, however, how that telegram would have had more effect in commanding compliance with the injunction than the attendance at the television news room of the legal adviser who was to have gone there to personally see to it that the injunction would be obeyed. Accordingly, the application is dismissed so far as Eugene Hallman is concerned.

57 I turn now to the news story that appeared in the Globe and Mail on January 30, 1974. The injunction directed that the defendants were restrained from alleging or implying certain things about the plaintiffs. The news story in the Globe and Mail said that the injunction prohibits the defendants "from publicizing that the lead smelters had bought misleadingly favourable medical evidence and concealed material evidence from medical experts". By describing the content of the injunction in those words the story does not convey that the defendants are prohibited from "alleging or implying", but rather from "making public", certain facts, namely, that the defendants bought and concealed medical evidence.

58 I would not, however, find a contravention of the injunction in those words just referred to in which the Globe and Mail described the effect of the injunction.

59 Unfortunately, however, the news story itself went on to relate the statements which, according to the news story, the defendants were not to "publicize".

60 The news story stated that Dr. Sachs, who was brought to testify by Canada Metal, said that she had not seen reports by the Air Management branch which related the amount of lead pollution in the air; and that Dr. Epstein stated it was possible to buy the data to substantiate any viewpoint.

61 It is to be noted that the Globe and Mail news story printed information from the two portions of the script of "Dying of Lead" that the Canadian Broadcasting Corporation had deleted.

62 In my view, the newspaper story does allege or imply that the plaintiffs bought misleadingly favourable medical evidence and concealed material evidence from medical experts. One reading the news story would immediately conclude that Dr. Epstein was referring to the favourable evidence Dr. Sachs had given when he used the words: "it was possible for industry to buy the data it wanted to substantiate any view-point". The reader would likewise conclude the industry he was referring to was the plaintiffs' industry.

63 The fact Dr. Sachs was not shown the reports of the Air Management branch would indicate to the reader available evidence was kept from her and so far as the story goes no one else but the plaintiffs would have the obligation to show that material to her.

64 According to the affidavit of one Clark Davey, the managing editor of the Globe and Mail, Graham Fraser is the reporter who filed the story on the injunction. Mr. Fraser was assigned the task of writing about the injunction and was under an obligation to see to it that his story did not contravene it. There is no excuse for composing a story that infringed the injunction. It certainly is no defence for him to say that he left it up to the editor to censor his story. If in fact he did leave it to the editors to censor his story, then he would have to bear the consequences if they failed to edit it so as to comply with the injunction.

65 Mr. Davey says in his affidavit that "It is my responsibility and the responsibility of the editors who report to me to edit stories filed by reporters." That statement indicates that others besides Mr. Fraser may also bear the responsibility for the infringement of the injunction, but it in no way relieves Mr. Fraser of responsibility.

66 The affidavit of Mr. Davey does indicate, however, that there is at the Globe and Mail an established system designed to prevent a contempt of Court from occurring. The fact such a system is in operation would seem to relieve the publisher, James L. Cooper, from responsibility for the contravention, at least so long as he was unaware that the designed system was defective. In this case, other than relying on the established system, there was nothing Mr. Cooper could do to prevent a contravention of the injunction, as there is no evidence Mr. Cooper knew of the existence of the injunction before his newspaper had violated it.

67 Accordingly, this application is dismissed so far as James L. Cooper is concerned.

68 So that it will be obvious I did not ignore the point I mention that counsel for Mark Starowicz and Max Allen submitted that the affidavits which established the amounts the plaintiffs are spending on pollution control systems should not be used on the application because they were not served with the notice of motion. It was clear, however, that long before the application was argued before me that counsel for those parties had copies of those affidavits. Further, the deponents of those affidavits were cross-examined thereon by Gary Perly and counsel for Starowicz and Allen attended on the said cross-examinations.

69 It is my view that any irregularity that may have existed in regard to service of those affidavits was waived by counsel for Starowicz and Allen attending on the cross-examinations. In any event, I am satisfied that Starowicz and Allen were not prejudiced by the alleged irregularity and were fully aware of the complaint made against them and of the case they had to meet long before the application was heard.

70 It remains for me to determine what the punishment should be. In considering penalty, I bear in mind that those working in the news media have the same strict obligation to abide by Court orders as has any other citizen. To allow Court orders to be disobeyed would be to tread the road toward anarchy. If orders of the Court can be treated with disrespect, the whole administration of justice is brought into scorn. Daily, thousands of Canadians resort to our Courts for relief against the wrongful acts of others. If the remedies that the Courts grant to correct those wrongs can be ignored, then there will be nothing left but for each person to take the law into his own hands. Loss of respect for the Courts will quickly result in the destruction of our society.

71 On the other hand, the breach of the injunction by the defendants Starowicz and Allen and the contravention of the injunction by Graham Fraser were not planned deliberate attempts to depreciate the administration of justice. There is no suggestion that they acted in deliberate defiance of the Court order. In fact, so far as Starowicz and Allen are concerned, even as they were committing a breach of the injunction they indicated they were attempting to comply with it.

72 During his submissions, counsel for Graham Fraser stated that in case the Court should find a contempt on the part of his client then he was tendering on behalf of his client and on his instructions a sincere apology to the Court for his conduct. Counsel for Mr. Allen and Mr. Starowicz indicated their clients likewise were prepared to tender such apology should they be found in contempt. Both Mr. Starowicz and Mr. Allen deposed in their affidavits that they have every respect for the orders of the Court. In the light of these statements, I am content that no disrespect to the Court was intended, and I accept on the Court's behalf the apologies that have been offered by Graham Fraser, Max Allen and Mark Starowicz.

73 In assessing penalty, I take into account what I consider to be the sincere apologies by or on behalf of each of them. I consider Allen and Starowicz, because they were responsible for the offensive material coming into existence, as being more culpable than Graham Fraser.

74 I therefore impose fines in the amount of $700 each on Max Allen and Mark Starowicz and of $350 on Graham Fraser. Payment of these fines is, however, suspended for a period of four months, and if within that period a defendant pays to the plaintiffs that portion of the costs of the application hereinafter assessed against him, then the fine levied against that defendant is perpetually stayed.

75 The application so far as Mr. Cooper and Mr. Hallman is concerned is dismissed without costs. While I do not attach any blame against either of them personally, the injunction was infringed by employees of corporations they help to control and each of them was represented by a counsel who also represented one of those I have found did contravene the injunction. I have already indicated the disposition I made of costs so far as Gary Perly is concerned.

76 I order each of Allen, Starowicz and Fraser to pay to the plaintiffs one-sixth of the plaintiffs' costs of this application, such costs to be taxed on a solicitor-client basis. In regard to that portion of the plaintiffs' costs that are related to the cross-examinations on the affidavits, the plaintiffs' costs are to be confined to 20% of such costs.

77 *Application granted in part with costs.*

Footnotes

1 "Defamatory words in a broadcast shall be deemed to be published and constitute libel.": The *Libel and Slander Act*, R.S.O. 1970, c. 243.

Case Name:

Canadian Airlines Corp. (Re)

IN THE MATTER OF Canadian Airlines Corporation and Canadian Airlines International Ltd.
Between
The Bank of Nova Scotia Trust Company of New York, As Trustee for the Holders of Senior Secured Notes and Montreal Trust Company of Canada, As Collateral Agent for the Holders of Senior Secured Notes, Plaintiffs, and
Canadian Airlines Corporation, Canadian Airlines International Ltd., Canadian Regional Airlines Ltd., Canadian Regional Airlines (1998) Ltd. and Canadian Airlines Fuel Corporation Inc., defendants

[2000] A.J. No. 1692

19 C.B.R. (4th) 1

2000 CanLII 28202

Docket: 0001-05071, 0001-05044

Alberta Court of Queen's Bench
Judicial District of Calgary

Paperny J.

Oral Judgment: May 4, 2000.

(41 paras.)

Application by holders of senior secured notes in corporation for order lifting stay of proceedings against them in Companies' Creditors Arrangement Act proceeding to allow for appointment of receiver and manager over assets and property charged in their favour and for order appointing court officer with exclusive right to negotiate sale of assets or shares of corporation's subsidiary.

Counsel:

G. Morawetz, A.J. McConnell and R.N. Billington, for Bank of Nova Scotia Trust Co. of New York and Montreal Trust Co. of Canada.

A.L. Friend, Q. C., and H.M. Kay, Q. C., for Canadian Airlines.

S. Dunphy, for Air Canada and 853350 Alberta Ltd.

R. Anderson, Q.C., for Loyalty Group.

H. Gorman, for ABN AMRO Bank N.V.

P. McCarthy, for Monitor - Price Waterhouse Cooper.

D. Haigh, Q.C, and D. Nishimura, for Unsecured noteholders - Resurgence Asset Management.

C.J. Shaw, for Airline Pilots Association International.

G. Wells, for NavCanada.

D. Hardy, for Royal Bank of Canada.

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1 **PAPERNY J.** (orally):-- Montreal Trust Company of Canada, Collateral Agent for the holders of the Senior Secured Notes, and the Bank of Nova Scotia Trust Company of New York, Trustee for the holders of the Senior Secured Notes, apply for the following relief:

1. In the CCAA proceeding (Action No. 0001-05071) an order lifting the stay of proceedings against them contained in the orders of this court dated March 24, 2000 and April 19, 2000 to allow for the court-ordered appointment of Ernst & Young Inc. as receiver and manager over the assets and property charged in favour of the Senior Secured Noteholders; and
2. In Action No. 0001-05044, an order appointing Ernst & Young Inc. as a court officer with the exclusive right to negotiate the sale of the assets or shares of Canadian Regional Airlines (1998) Ltd.

2 Canadian Airlines Corporation ("CAC") is a Canadian based holding company which, through its majority owned subsidiary Canadian Airlines International Ltd. ("CAC") provides domestic, U.S.-Canada transborder and international jet air transportation services. CAC also provides regional transportation through its subsidiary Canadian Regional Airlines (1998) Ltd. ("Canadian Regional"). Canadian Regional is not an applicant under the CCAA proceedings.

3 The Senior Secured Notes were issued under an Indenture dated April 24, 1998 between CAC and the Trustee. The principal face amount is $175 million U.S. As well, there is interest outstanding. The Senior Secured Notes are directly and indirectly secured by a diverse package of assets and property of the CCAA applicants, including spare engines, rotables, repairables, hangar leases and ground equipment. The security comprises the key operational assets of CAC and CAIL. The security also includes the outstanding shares of Canadian Regional and the $56 million intercompany indebtedness owed by Canadian Regional to CAIL.

4 Under the terms of the Indenture, CAC is required to make an offer to purchase the Senior Secured Notes where there is a "change of control" of CAC. It is submitted by the Senior Secured

Noteholders that Air Canada indirectly acquired control of CAC on January 4, 2000 resulting in a change of control. Under the Indenture, CAC is then required to purchase the notes at 101 percent of the outstanding principal, interest and costs. CAC did not do so. According to the Trustee, an Event of Default occurred, and on March 6, 2000 the Trustee delivered Notices of Intention to Enforce Security under the Bankruptcy and Insolvency Act.

5 On March 24, 2000, the Senior Secured Noteholders commenced Action No. 0001-05044 and brought an application for the appointment of a receiver over their collateral. On the same day, CAC and CAIL were granted CCAA protection and the Senior Secured Noteholders adjourned their application for a receiver. However, the Senior Secured Noteholders made further application that day for orders that Ernst & Young be appointed monitor over their security and for weekly payments from CAC and CAIL of $500,000 U.S. These applications were dismissed.

6 The CCAA Plan filed on April 25, 2000, proposes that the Senior Secured Noteholders constitute a separate class and offers them two alternatives:

1. To accept repayment of less than the outstanding amount; or
2. To be unaffected by the CCAA Plan and realize on their security.

7 On April 26th, 2000, the Senior Secured Noteholders met and unanimously rejected the first option. They passed a resolution to take steps to realize on the security.

8 The Senior Secured Noteholders argue that the time has come to permit them to realize on their security. They have already rejected the Plan and see no utility in waiting to vote in this regard on May 26th, 2000, the date set by this court.

9 The Senior Secured Noteholders submit that since the CCAA proceedings began five weeks ago, the following has occurred:

-interest has continued to accrue at approximately $2 million U.S. per month;

-the security has decreased in value by approximately $6 million Canadian;

-the Collateral Agent and the Trustee have incurred substantial costs;

-no amounts have been paid for the continued use of the collateral, which is key to the operations of CAIL;

-no outstanding accrued interest has been paid; and-they are the only secured creditor not getting paid.

10 The Senior Secured Noteholders emphasize that one of the end results of the Plan is a transfer of CAIL's assets to Air Canada. The Senior Secured Noteholders assert that the Plan is sponsored by this very solvent proponent, who is in a position to pay them in full. They are argue that Air Canada has made an economic decision not to do so and instead is using the CCAA to achieve its own objectives at their expense, an inappropriate use of the Act.

11 The Senior Secured Noteholders suggest that the Plan will not be impacted if they are permitted to realize on their security now instead of after a formal rejection of the Plan at the court

scheduled vote on May 26, 2000. The Senior Secured Noteholders argue that for all of the preceding reasons lifting the stay would be in accordance with the spirit and intent of the CCAA.

12 The CCAA is remedial legislation which should be given a large and liberal interpretation: See, for example, Citibank Canada v. Chase Manhattan Bank of Canada (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.). It is intended to permit the court to make orders which will effectively maintain the status quo for a period while the struggling company attempts to develop a plan to compromise its debts and ultimately continue operations for the benefit of both the company and its creditors: See for example, Meridian Development Inc. v. Toronto Dominion Bank (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), and Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311 (B.C.C.A.).

13 This aim is facilitated by the power to stay proceedings provided by Section 11 of the Act. The stay power is the key element of the CCAA process.

14 The granting of a stay under Section 11 is discretionary. On the debtor's initial application, the court may order a stay at its discretion for a period not to exceed 30 days. The burden of proof to obtain a stay extension under Section 11(4) is on the debtor. The debtor must satisfy the court that circumstances exist that make the request for a stay extension appropriate and that the debtor has acted, and is acting, in good faith and with due diligence. CAC and CAIL discharged this burden on April 19, 2000. However, unlike under the Bankruptcy and Insolvency Act, there is no statutory test under the CCAA to guide the court in lifting a stay against a certain creditor.

15 In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in Re Pacific National Lease Holding Corp. (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]):

> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.

16 Also see Blair J.'s decision in Campeau v. Olympia & York Developments Ltd. (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.), for another example of the balancing approach.

17 As noted above, the stay power is to be used to preserve the status quo among the creditors of the insolvent company. Huddart J., as she then was, commented on the status quo in Re Alberta-Pacific Terminals Ltd (1991), 8 C.B.R. (3d) 99 (B.C.S.C.). She stated:

> The status quo is not always easy to find... Nor is it always easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It

is the company and all the interests its demise would affect that must be considered.

18 Further commentary on the status quo is contained in Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 80 C.B.R. (N.S.) 98 (B.C.S.C.). Thackray J. comments that the maintenance of the status quo does not mean that every detail of the status quo must survive. Rather, it means that the debtor will be able to stay in business and will have breathing space to develop a proposal to remain viable.

19 Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court of Appeal in Re Pacific National Lease Holding Corp. (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]):

(1) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and court.
(2) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees.
(3) During the stay period, the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
(4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
(5) The status quo does not mean preservation of the relative pre-stay debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, the preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.
(6) The court has a broad discretion to apply these principles to the facts of the particular case.

20 At pages 342 and 343 of this text, Canadian Commercial Reorganization:

Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:

1. When the plan is likely to fail;
2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);
4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

21 I now turn to the particular circumstances of the applications before me.

22 I would firstly address the matter of the Senior Secured Noteholders' current rejection of the compromise put forward under the Plan. Although they are in a separate class under CAC's Plan and can control the vote as it affects their interest, they are not in a position to vote down the Plan in its entirety. However, the Senior Secured Noteholders submit that where a plan offers two options to a class of creditors and the class has selected which option it wants, there is no purpose to be served in delaying that class from proceeding with its chosen course of action. They rely on the Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101 (Oat. CA.) at 115, as just one of several cases supporting this proposition. Re Philip's Manufacturing Ltd. (1992), 9 C.B.R. (3d) 25 (B.C.C.A.) at pp. 27-28, leave to appeal to S.C.C. refused (1992), 15 C.B.R. (3d) 57 (note) (S.C.C.), would suggest that the burden is on the Senior Secured Noteholders to establish that the Plan is "doomed to fail". To the extent that Nova Metal and Philip's Manufacturing articulate different tests to meet in this context, the application of either would not favour the Senior Secured Noteholders.

23 The evidence before me suggests that progress may still be made in the negotiations with the representatives of the Senior Secured Noteholders and that it would be premature to conclude that any further discussions would be unsuccessful. The parties are continuing to explore revisions and alternative proposals which would satisfy the Senior Secured Noteholders.

24 Mr. Carty's affidavit sworn May 1, 2000, in response to these applications states his belief that these efforts are being made in good faith and that, if allowed to continue, there is a real prospect for an acceptable proposal to be made at or before the creditors' meeting on May 26, 2000. Ms. Allen's affidavit does not contain any assertion that negotiations will cease. Despite the emphatic suggestion of the Senior Secured Noteholders' counsel that negotiations would be "one way", realistically I do not believe that there is no hope of the Senior Secured Noteholders coming to an acceptable compromise.

25 Further, there is no evidence before me that would indicate the Plan is "doomed to fail". The evidence does disclose that CAC and CAIL have already achieved significant compromises with creditors and continue to work swiftly and diligently to achieve further progress in this regard. This is reflected in the affidavits of Mr. Carty and the reports from the Monitor.

26 In any case, there is a fundamental problem in the application of the Senior Secured Noteholders to have a receiver appointed in respect of their security which the certainty of a "no" vote at this time does not vitiate: It disregards the interests of the other stakeholders involved in the process. These include other secured creditors, unsecured creditors, employees, shareholders and the flying public. It is not insignificant that the debtor companies serve an important national need in the operation of a national and international airline which employs tens of thousands of employees. As previously noted, these are all constituents the court must consider in making orders under the CCAA proceeding.

27 Paragraph 11 of Mr. Carty's May 1, 2000 affidavit states as follows:

> In my opinion, the continuation of the stay of proceedings to allow the restructuring process to continue will be of benefit to all stakeholders including the holders of the Senior Secured Notes. A termination of the stay proceedings as regards the security of the holders of the Senior Secured Notes would immediately deprive CAIL of assets which are critical to its operational integrity and would result in grave disruption of CAIL's operations and could lead to the cessation of operations. This would result in the destruction of value for all stakeholders, including the holders of the Senior Secured Notes. Furthermore, if CAIL ceased to operate, it is doubtful that Canadian Re-gional Airlines (1998) Ltd. ("CRAL98"), whose shares form a significant part of the security package of the holders of the Senior Secured Notes, would be in a position to continue operating and there would be a very real possibility that the equity of CAIL and CRAL, valued at approximately $115 million for the purposes of the issuance of the Senior Secured Notes in 1998, would be largely lost. Further, if such seizure caused CAIL to cease operations, the market for the assets and equipment which are subject to the security of the holders of the Senior Secured Notes could well be adversely affected, in that it could either lengthen the time necessary to realize on these assets or reduce realization values.

28 The alternative to this Plan proceeding is addressed in the Monitor's reports to the court. For example, in Paragraph 8 of the Monitor's third report to the court states:

> The Monitor believes the if the Plan is not approved and implemented, CAIL will not be able to continue as a going concern. In that case, the only foreseeable alternative would be a liquidation of CAIL's assets by a receiver and manager and/or by a trustee. Under the Plan, CAIL's obligations to parties it considers to be essential in order to continue operations, including employees, customers, travel agents, fuel, maintenance, catering and equipment suppliers, and airport authorities, are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights, statutory priorities or other legal protection, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if CAIL were to cease operation as a going concern and be forced into liquidation would he in excess of $1.1 billion.

29 This evidence is uncontradicted and flies in the face of the Senior Secured Noteholders' assertion that realizing on their collateral at this point in time will not affect the Plan. Although, as the Senior Secured Noteholders heavily emphasized the Plan does contemplate a "no" vote by the Senior Secured Noteholders, the removal of their security will follow that vote. 9.8(c) of the Plan states that:

> If the Required Majority of Affected Secured Noteholders fails to approve the Plan, arrangements in form and substance satisfactory to the Applicants will have been made with the Affected Secured Noteholders or with a re-ceiver appointed over the assets comprising the Senior Notes Security, which arrangements provide for the transitional use by [CALL], and subsequent sale, of the assets comprising the Senior Notes Security.

30 On the other side of the scale, the evidence of the Senior Secured Noteholders is that the value of their security is well in excess of what they are owed. Paragraph 15(a) of the Monitor's third report to the court values the collateral at $445 million. The evidence suggests that they are not the only secured creditor going unpaid. CAIL is asking that they be permitted to continue the restructuring process and their good faith efforts to attempt to reach an acceptable proposal with the Senior Secured Noteholders until the date of the creditors meeting, which is in three weeks. The Senior Secured Noteholders have not established that they will suffer any material prejudice in the intervening period.

31 The appointment of a receiver at this time would negate the effect of the order staying proceedings and thwart the purposes of the CCAA.

32 Accordingly, I am dismissing the application, with leave to reapply in the event that the Senior Secured Noteholders vote to reject the Plan on May 26, 2000.

33 An alternative to receivership raised by the Senior Secured Noteholders was interim payment for use of the security. The Monitor's third report makes it clear that the debtor's cash flow forecasts would not permit such payments.

34 The Senior Secured Noteholders suggested Air Canada could make the payments and, indeed, that Air Canada should pay out the debt owed to them by CAC. It is my view that, in the absence of abuse of the CCAA process, simply having a solvent entity financially supporting a plan with a view to ultimately obtaining an economic benefit for itself does not dictate that that entity should be required to pay creditors in full as requested. In my view, the evidence before me at this time does not suggest that the CCAA process is being improperly used. Rather, the evidence demonstrates these proceedings to be in furtherance of the objectives of the CCAA.

35 With respect to the application to sell shares or assets of Canadian Regional, this application raises a distinct issue in that Canadian Regional is not one of the debtor companies. In my view, Paragraph 5(a) of Chief Justice Moore's March 24, 2000 order encompasses marketing the shares or assets of Canadian Regional. That paragraph stays, inter alia:

> ...any and all proceedings ... against or in respect of ... any of the Petitioners' property ... whether held by the Petitioners directly or indirectly, as principal or nominee, beneficially or otherwise...

36 As noted above, Canadian Regional is CAC's subsidiary, and its shares and assets are the "property" of CAC and marketing of these would constitute a "proceeding ... in respect of ... the Petitioners' property" within the meaning of Paragraph 5(a) and Section 11 of the CCAA.

37 If I am incorrect in my interpretation of Paragraph 5(a), I rely on the inherent jurisdiction of the court in these proceedings.

38 As noted above, the CCAA is to be afforded a large and liberal interpretation. Two of the landmark decisions in this regard hail from Alberta: Meridian Development Mc. v. Toronto Dominion Bank, supra, and Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (NS.) 20 (Alta. Q.B.). At least one court has also recognized an inherent jurisdiction in relation to the CCAA in order to grant stays in relation to proceedings against third parties: Re Woodward's Ltd. (1993), 17 C.B.R. (3d) 236 (B.C.S.C.). Tysoe J. urged that although this power should be used cautiously, a prerequisite to its use should not be an inability to otherwise complete

the reorganization. Rather, what must be shown is that the exercise of the inherent jurisdiction is important to the reorganization process. The test described by Tysoe J. is consistent with the critical balancing that must occur in CCAA proceedings. He states:

> In deciding whether to exercise its inherent jurisdiction, the court should weigh the interests of the insolvent company against the interests of parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the court that it should not exercise its discretion under Section 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

39 The balancing that I have described above in the context of the receivership application equally applies to this application. While the threshold of prejudice is lower, the Senior Secured Noteholders still fail to meet it. I cannot see that it is important to the CCAA proceedings that the Senior Secured Noteholders get started on marketing Canadian Regional. Instead, it would be disruptive and en-danger the CCAA proceedings which, on the evidence before me, have progressed swiftly and in good faith.

40 The application in Action No. 0001-05044 is dismissed, also with leave to reapply after the vote on May 26, 2000.

41 I appreciate that the Senior Secured Noteholders will be disappointed and likely frustrated with the outcome of these applications. I would emphasize that on the evidence before me their rights are being postponed and not eradicated. Any hardship they experience at this time must yield to the greater hardship that the debtor companies and the other constituents would suffer were the stay to be lifted at this time.

PAPERNY J.

Case Name:

Canwest Global Communications Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Canwest Global Communications Corp. and other Applicants

[2011] O.J. No. 1590

2011 ONSC 2215

75 C.B.R. (5th) 156

200 A.C.W.S. (3d) 1023

2011 CarswellOnt 2392

Court File No. CV-09-8396-00CL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

April 7, 2011.

(44 paras.)

Counsel:

Douglas J. Wray and Jesse B. Kugler, counsel for the Applicant Communications, Energy and Paperworkers Union of Canada ("CEP").

David Byers and Maria Konyukhova, counsel for the Monitor.

REASONS FOR DECISION

S.E. PEPALL J.:--

Introduction

1 The Communications, Energy and Paperworkers Union of Canada ("CEP") requests an order lifting the stay of proceedings in respect of certain grievances and directing that they be adjudicated in accordance with the provisions of the applicable collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the subject claim to be adjudicated in accordance with the provisions of the collective agreement.

Background Facts

2 On October 6, 2009, the CMI Entities obtained an initial order pursuant to the *CCAA* staying all proceedings and claims against them. Specifically, paragraphs 15 and 16 of that order stated:

> **NO PROCEEDINGS AGAINST THE CMI ENTITIES OR THE CMI PROPERTY**
>
> 15. **THIS COURT ORDERS** that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.
>
> **NO EXERCISE OF RIGHTS OR REMEDIES**
>
> 16. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to

> health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of claim for lien.

3 On October 14, 2009, as part of the CCAA proceedings, I granted a claims procedure order which established a claims procedure for the identification and quantification of claims against the CMI Entities. In that order, "Claim" is defined as any right or claim of any Person against one or more of the CMI Entities in existence on the Filing Date[1] (a "Prefiling Claim") and any right or claim of any Person against one or more of the CMI Entities arising out of the restructuring on or after the Filing Date (a "Restructuring Claim"). Claims arising prior to certain dates had to be asserted within the claims procedure failing which they were forever extinguished and barred. Pursuant to the claims procedure order, subject to the discretion of the Court, claims of any person against one or more of the CMI Entities were to be determined by a claims officer who would determine the validity and amount of the disputed claim in accordance with the claims procedure order. The Honourable Ed Saunders, The Honourable Jack Ground and The Honourable Coulter Osborne were appointed as claims officers. Other persons could also be appointed by court order or on consent of the CMI Entities and the Monitor. This order was unopposed. It was amended on November 30, 2009 and again the motion was unopposed. As at October 29, 2010, over 1,800 claims asserted against the CMI Entities had been finally resolved in accordance with and pursuant to the claims procedure order.

4 On October 27, 2010, CEP was authorized to represent its current and former union members including pensioners employed or formerly employed by the CMI Entities to the extent, if any, that it was necessary to do so.

5 On the date of the initial order, CEP had a number of outstanding grievances. CEP filed claims pursuant to the claims procedure order in respect of those grievances. The claim that is the subject matter of this motion is the only claim filed by CEP that has not been resolved and therefore is the only claim filed by CEP that requires adjudication. There is at least one other claim in Western Canada that may require adjudication.

6 John Bradley had been employed for 20 years by Global Television, a division of Canwest Television Limited Partnership ("CTLP"), one of the CMI Entities. Mr. Bradley is a member of CEP. On February 24, 2010, CTLP suspended Mr. Bradley for alleged misconduct. On March 8, 2010, CEP filed a grievance relating to his suspension under the applicable collective agreement. On March 25, 2010, CTLP terminated his employment. On March 26, 2010, CEP filed a grievance requesting full redress for Mr. Bradley's termination. This would include reinstatement to his employment. On June 23, 2010 a restructuring period claim was filed with respect to the Bradley grievances on the following basis:

> The Union has filed this claim in order to preserve its rights. Filing this claim is without prejudice to the Union's ability to pursue all other remedies at its disposal to enforce its rights, including any other statutory remedies available. Notwithstanding that the Union has filed the present claim, the Union does not agree that this claim is subject to compromise pursuant [to the CCAA][2]. The Union reserves its right to make further submissions in this regard.

7 In spite of the parties' good faith attempts to resolve the Bradley grievances and the Bradley claim, no resolution was achieved.

8 The Plan was sanctioned on July 28, 2010 and implemented on October 27, 2010. At that time, all of the operating assets of the CMI Entities were transferred to the Plan Sponsor and the CMI Entities ceased operations. The CTLP stay was also terminated. The stay with respect to the Remaining CMI Entities (as that term is defined in the Plan) was extended until May 5, 2011. Pursuant to an order dated September 27, 2010, following the Plan implementation date the Monitor shall be:

> (a) empowered and authorized to exercise all of the rights and powers of the CMI Entities under the Claims Procedure Order, including, without limitation, revise, reject, accept, settle and/or refer for adjudication Claims (as defined in the Claims Procedure Order) all without (i) seeking or obtaining the consent of the CMI Entities, the Chief Restructuring Advisor or any other person, and (ii) consulting with the Chief Restructuring Advisor in the CMI Entities; and
>
> (b) take such further steps and seek such amendments to the Claims Procedure Order or additional orders as the Monitor considers necessary or appropriate in order to fully determine, resolve or deal with any Claims.

9 The Monitor has taken the position that if the Bradley matter is not resolved, the claim should be referred to a claims officer for determination. It is conceded that a claims officer would have no jurisdiction to reinstate Mr. Bradley to his employment.

10 CEP now requests an order lifting the stay of proceedings in respect of the Bradley grievances and directing that they be adjudicated in accordance with the provisions of the collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the Bradley claim to be adjudicated in accordance with the provisions of the collective agreement.

11 For the purposes of this motion and as is obvious from the motion seeking to lift the stay, both CEP and the Monitor agree that the stay did catch the Bradley claim and that it is encompassed by the definition of claim found in the claims procedure order.

12 Since the commencement of the *CCAA* proceedings, CEP has only sought to lift the stay in respect of one other claim, that being a claim relating to a grievance filed by CEP on behalf of Vicky Anderson. The CMI Entities consented to lifting the stay in respect of Ms. Anderson's claim because at the date of the initial order, there had already been eight days of hearing before an arbitrator, all evidence had already been called, and only one further date was scheduled for final argument. Ultimately, the arbitrator ordered that Ms. Anderson be reinstated but made no order for compensation.

13 Pursuant to Article 12.3 of the applicable collective agreement, discharge grievances are to be heard by a single arbitrator. All other grievances are to be heard by a three person Board of Arbitration unless the parties consent to submit the grievance to a single arbitrator. The single arbitrator is to be selected within 10 days of the notice of referral to arbitration from a list of 5 people drawn by lot. An award is to be given within 30 days of the conclusion of the hearing. The list of arbitrators was negotiated and included in the collective agreement. The arbitrator has the power to reinstate with or without compensation.

14 The evidence before me suggests that adjudications of grievances under collective agreements are typically much more costly and time consuming than adjudications before a claims officer as the latter may determine claims in a summary manner and there is more control over scheduling. The

Monitor takes the position that additional cost and delay would arise if the claims were adjudicated pursuant to the terms of the collective agreement rather than pursuant to the terms of the claims procedure order.

Issues

15 Both parties agree that the following two issues are to be considered:

(a) Should this court lift the stay of proceedings in respect of the Bradley grievances and direct that the Bradley grievances be adjudicated in accordance with the provisions of the collective agreement?
(b) Should this court amend the claims procedure order so as to permit the Bradley claim to be adjudicated in accordance with the provisions of the collective agreement?

Positions of the Parties

16 In brief, dealing firstly with the stay, CEP submits that the balance of convenience favours pursuit of the grievances through arbitration. CEP is seeking to compel the employer to comply with fundamental obligations that flow from the collective agreement. This includes the appointment of an arbitrator on consent who has jurisdiction to award reinstatement if he or she determines that there was no just cause to terminate Mr. Bradley's employment. Requiring that the claim and the grievances be adjudicated in a manner that is inconsistent with the collective agreement would have the effect of depriving the griever of some of the most fundamental rights under a collective agreement. Furthermore, permitting the grievances to proceed to arbitration would prejudice no one.

17 Alternatively, CEP submits that the claims procedure order ought to be amended. It is in conflict with the terms of the collective agreement. Pursuant to section 33 of the *CCAA*, the collective agreement remains in force during the *CCAA* proceedings. The claims procedure order must comply with the express requirements of the *CCAA*. Lastly, orders issued under the *CCAA* should not infringe upon the right to engage in associational activities which are protected by the *Charter of Rights and Freedoms*.

18 The Monitor opposes the relief requested. On the issue of the lifting of the stay, it submits that the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. The stay of proceedings permits the *CCAA* to accomplish its legislative purpose and in particular enables continuance of the company seeking *CCAA* protection.

19 The lifting of a stay is discretionary. Mr. Bradley is no more prejudiced than any other creditor and the claims procedure established under the order has been uniformly applied. The claims officer has the power to recognize Mr. Bradley's right to reinstatement and monetize that right. The efficacy of *CCAA* proceedings would be undermined if a debtor company was forced to participate in an arbitration outside the *CCAA* proceedings. This would place the resources of an insolvent *CCAA* debtor under strain. The Monitor submits that CEP has not satisfied the onus to demonstrate that the lifting of the stay is appropriate in this case.

20 As for the second issue, the Monitor submits that the claims procedure order should not be amended. Courts regularly affect employee rights arising from collective agreements during *CCAA*

proceedings and recent amendments to the *CCAA* do not change the existing case law in this regard. Furthermore, amending the claims procedure order would undermine the purpose of the *CCAA*. Lastly, relying on the Supreme Court of Canada's statements in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*[3], the claims procedure order does not interfere with freedom of association.

21 Following argument, I requested additional brief written submissions on certain issues and in particular, to what employment Mr. Bradley would be reinstated if so ordered. I have now received those submissions from both parties.

Discussion

1. Stay of Proceedings

22 The purpose of the *CCAA* has frequently been described but bears repetition. In *Lehndorff General Partner Limited*[4], Farley J. stated:

> The *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both.

23 The stay provisions in the *CCAA* are discretionary and very broad. Section 11.02 provides that:

> (1) A court may, on an initial application in respect of the debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding Up and Restructuring Act;
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an *Act* referred to in paragraph (1)(a);
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

24 As the Court of Appeal noted in *Nortel Networks Corp.*[5], the discretion provided in section 11 is the engine that drives this broad and flexible statutory scheme. The stay of proceedings in section 11 should be broadly construed to accomplish the legislative purpose of the *CCAA* and in particular

to enable continuance of the company seeking *CCAA* protection: *Lehndorff General Partner Limited* [6].

25 Section 11 provides an insolvent company with breathing room and by doing so, preserves the status quo to assist the company in its restructuring or arrangement and prevents any particular stakeholder from obtaining an advantage over other stakeholders during the restructuring process. It is anticipated that one or more creditors may be prejudiced in favour of the collective whole. As stated in *Lendorff General Partner Limited* [7]*:*

> The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the *CCAA* because this effect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the *CCAA* must be for the debtor and all of the creditors.

26 In *Canwest Global Communications Corp.*[8], I had occasion to address the issue of lifting a stay in a *CCAA* proceeding. I referred to situations in which a court had lifted a stay as described by Paperny J. (as she then was) in *Re Canadian Airlines Corp.*[9] and by Professor McLaren in his book, "*Canadian Commercial Reorganization: Preventing Bankruptcy"*[10]. They included where:

a) a plan is likely to fail;
b) the applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
c) the applicant shows necessity for payment;
d) the applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
e) it is necessary to permit the applicant to take steps to protect a right that could be lost by the passage of time;
f) after the lapse of a significant period, the insolvent debtor is no closer to a proposal than at the commencement of the stay period;
g) there is a real risk that a creditor's loan will become unsecured during the stay period;
h) it is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period;
i) it is in the interests of justice to do so.

27 The lifting of a stay is discretionary. As I wrote in *Canwest Global Communications Corp.*[11]:

> There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy", an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68. That decision

> also indicated that the judge should consider the good faith and due diligence of the debtor company.

28 There appears to be no real issue that the grievances are caught by the stay of proceedings. In *Luscar Ltd. v. Smoky River Coal Limited*[12], the issue was whether a judge had the discretion under the *CCAA* to establish a procedure for resolving a dispute between parties who had previously agreed by contract to arbitrate their disputes. The question before the court was whether the dispute should be resolved as part of the supervised reorganization of the company under the *CCAA* or whether the court should stay the proceedings while the dispute was resolved by an arbitrator. The presiding judge was of the view that the dispute should be resolved as expeditiously as possible under the *CCAA* proceedings. The Alberta Court of Appeal upheld the decision stating:

> The above jurisprudence persuades me that "proceedings" in section 11 includes the proposed arbitration under the B.C. *Arbitration Act.* The Appellants assert that arbitration is expeditious. That is often, but not always, the case. Arbitration awards can be appealed. Indeed, this is contemplated by section 15(5) of the *Rules*. Arbitration awards, moreover, can be subject to judicial review, further lengthening and complicating the decision making process. Thus, the efficacy of *CCAA* proceedings (many of which are time sensitive) could be seriously undermined if a debtor company was forced to participate in an extra-*CCAA* arbitration. For these reasons, having taken into account the nature and purpose of the *CCAA*, I conclude that, in appropriate cases, arbitration is a "proceeding" that can be stayed under section 11 of the *CCAA*.[13]

29 I do recognize that the *Luscar* decision did not involve a collective agreement but an agreement to arbitrate. That said, the principles described also apply to an arbitration pursuant to the terms of a collective agreement.

30 In considering balance of convenience, CEP's primary concerns are that the claims procedure order does not accord with the rights and obligations contained in the collective agreement. Firstly, a claims officer is the adjudicator rather than an arbitrator chosen pursuant to the terms of the collective agreement and secondly, reinstatement is not an available remedy before a claims officer. Thirdly, an arbitration imports rules of natural justice and procedural fairness whereas the claims procedure is summary in nature.

31 The claims officers who were identified in the claims procedure order are all former respected and experienced judges who are well suited and capable of addressing the issues arising from the Bradley claim. Furthermore, had this been a real issue, CEP could have raised it earlier and identified another claims officer for inclusion in the claims procedure order. Indeed, an additional claims officer still could be appointed but no such request was ever advanced by CEP.

32 Should the claims officer find that CTLP did not have just cause to terminate Mr. Bradley's employment, he can recognize Mr. Bradley's right to reinstatement by monetizing that right. This was done for a multitude of other claims in the *CCAA* proceedings including claims filed by CEP on behalf of other members. I note that Mr. Bradley would not be receiving treatment different from that of any other creditor participating in the claims process.

33 The claims process is summary in nature for a reason. It reduces delay, streamlines the process, and reduces expense and in so doing promotes the objectives of *CCAA*. Indeed, if

grievances were to customarily proceed to arbitration, potential exists to significantly undermine the *CCAA* proceedings. Arbitration of all claims arising from collective agreements would place the already stretched resources of insolvent *CCAA* debtors under significant additional strain and could divert resources away from the restructuring. It is my view that generally speaking, grievances should be adjudicated along with other claims pursuant to the provisions of a claims procedure order within the context of the CCAA proceedings.

34 That said, it seems to me that this case is unique. While the claims procedure order and the meeting order of June 23, 2010 provide that all claims against CTLP and others arising prior to certain dates must be asserted within the claims procedure failing which they are forever extinguished and barred, the stay relating to CTPL was terminated on October 27, 2010. CTLP has emerged from CCAA protection and is currently operating in the normal course having changed its name to Shaw Television Limited Partnership ("STLP"). If the grievance relating to Mr. Bradley's termination is successful, he could be reinstated to his employment at STLP. The position of CEP, Mr. Bradley and the Monitor is that reinstatement, if ordered, would be to STLP. Counsel for CEP advised the court that notice of the motion was given to STLP and that a representative was present in court for the argument of the motion although did not appear on the record. The Monitor has also confirmed that Shaw Communications Inc., the parent of STLP, was aware of the motion and its counsel has confirmed its understanding that any reinstatement of Mr. Bradley, if ordered, would be to STLP.

35 As mentioned, Mr. Bradley was a 20 year employee. While I do not consider the identity of the arbitrator and the natural justice arguments of CEP to be persuasive, given the stage of the CCAA proceedings, the fact that the stay relating to CTLP has been lifted, and Mr. Bradley's employment tenure, I am persuaded that he ought to be given the opportunity to pursue his claim for reinstatement rather than being compelled to have that entitlement monetized by a claims officer if so ordered. Counsel for the Monitor has confirmed that the timing of the distributions would not appear to be affected by the outcome of this motion. No meaningful prejudice would ensue to any stakeholder. It seems to me that the balance of convenience and the interests of justice favour lifting the stay to permit the grievances to proceed through arbitration rather than before the claims procedure officer. Therefore, CEP's motion to lift the stay is granted and the Bradley grievances may be adjudicated in accordance with the terms of the collective agreement.

2. Amendment of the Claims Procedure Order

36 In light of my decision on the stay, it is not strictly necessary to consider whether the claims procedure order should be amended as requested by CEP as alternative relief. As this issue was argued, however, I will address it.

37 Section 33 of *CCAA* was added to the statute in September, 2009. The relevant sub-sections now provide:

> 33(1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

> 33(8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.

38 Justice Mongeon of the Québec Superior Court had occasion to address the effect of section 33 of the *CCAA* in *White Birch Paper Holding Company*[14]. He stated that the fact that a collective agreement remains in force under a *CCAA* proceeding does not have the effect of "excluding the entire collective labour relations process from the application of the *CCAA*."[15] He went on to write that:

> It would be tantamount to paralyzing the employer with respect to reducing its costs by any means at all, and to providing the union with a veto with regard to the restructuring process.[16]

39 In *Canwest Global Communications Corp.*[17], I wrote that section 33 of the *CCAA* "maintains the terms and obligations contained in the collective agreement but does not alter priorities or status."[18] In that case when dealing with the issue of immediate payment of severance payments, I wrote:

> There are certain provisions in the amendments that expressly mandate certain employee related payments. In those instances, section 6(5) dealing with a sanction of a plan and section 36 dealing with a sale outside the ordinary course of business being two such examples, Parliament specifically dealt with certain employee claims. If Parliament had intended to make such a significant amendment whereby severance and termination payments (and all other payments under a collective agreement) would take priority over secured creditors, it would have done so expressly.[19]

40 I agree with the Monitor's position that if Parliament had intended to carve grievances out of the claims process, it would have done so expressly. To do so, however, would have undermined the purpose of the *CCAA* and in particular, the claims process which is designed to streamline the resolution of the multitude of claims against an insolvent debtor in the most time sensitive and cost efficient manner. It is hard to imagine that it was Parliament's intention that grievances under collective agreements be excluded from the reach of the stay provisions of section 11 of the *CCAA* or the ancillary claims process. In my view, such a result would seriously undermine the objectives of the *Act*.

41 Furthermore, I note that over 1,800 claims have been processed and dealt with by way of the claims procedure order, many of them involving claims filed by CEP on behalf of its members. CEP was provided with notice of the motion wherein the claims procedure order and the claims officers were approved. CEP did not raise any objection to the claims procedure order, the claims officers or the inclusion of grievances in the claims procedure at the time that the order was granted. The claims procedure order was not an order made without notice and none of the prerequisites to variation of an order has been met. Had I not lifted the stay, I would not have amended the claims procedure order as requested by CEP.

42 CEP's last argument is that the claims procedure order interferes with Mr. Bradley's freedoms under the Canadian *Charter of Rights and Freedoms*. In this regard I make the following observations. Firstly, this argument was not advanced when the claims procedure order was granted.

Secondly, CEP is not challenging the validity of any section of the *CCAA*. Thirdly, nothing in the statute or the claims procedure inhibits the ability to collectively bargain. In *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*[20], the Supreme Court of Canada stated:

> We conclude that section 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute or guarantee access to any particularly statutory regime. ...
>
> In our view, it is entirely possible to protect the "procedure" known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process.[21]

43 In my view, nothing in the claims procedure or the *CCAA* impacts the procedure known as collective bargaining.

Conclusion

44 Under the circumstances, the request to lift the stay as requested by CEP is granted. Had it been necessary to do so, I would have dismissed the alternative relief requested.

S.E. PEPALL J.

1 The Filing Date was October 6, 2009, the date of the initial order.

2 The words in brackets were omitted but presumably this was the intention.

3 [2007] S.C.J. No. 27.

4 (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.) at para. 6.

5 [2009] O.J. No. 4967 at para. 33.

6 *Supra,* note 4 at para. 10.

7 *Ibid,* at para. 6.

8 [2009] O.J. No. 5379.

9 (2000) 19 C.B.R. (4th) 1.

10 (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

11 *Supra*, note 8 at para. 32.

12 [1999] A.J. No. 676.

13 *Ibid*, at para. 33.

14 2010, Q.C.C.S. 2590.

15 *Ibid*, at para. 31.

16 *Ibid*, at para. 35.

17 [2010] O.J. No. 2544.

18 *Ibid*, at para. 32.

19 *Ibid*, at para. 33.

20 *Supra*, note 3.

21 *Ibid*, at paras. 19 and 29.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Bauscher-Grant Farms Inc. v. Lake Diefenbaker Potato Corp. | 1998 CarswellSask 335, 167 Sask. R. 14, [1998] S.J. No. 344, 80 A.C.W.S. (3d) 62, [1998] 8 W.W.R. 751 | (Sask. Q.B., May 11, 1998)

1993 CarswellOnt 183
Ontario Court of Justice (General Division — Commercial List)

Lehndorff General Partner Ltd., Re

1993 CarswellOnt 183, [1993] O.J. No. 14, 17 C.B.R. (3d) 24, 37 A.C.W.S. (3d) 847, 9 B.L.R. (2d) 275

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re Courts of Justice Act, R.S.O. 1990, c. C-43; Re plan of compromise in respect of LEHNDORFF GENERAL PARTNER LTD. (in its own capacity and in its capacity as general partner of LEHNDORFF UNITED PROPERTIES (CANADA), LEHNDORFF PROPERTIES (CANADA) and LEHNDORFF PROPERTIES (CANADA) II) and in respect of certain of their nominees LEHNDORFF UNITED PROPERTIES (CANADA) LTD., LEHNDORFF CANADIAN HOLDINGS LTD., LEHNDORFF CANADIAN HOLDINGS II LTD., BAYTEMP PROPERTIES LIMITED and 102 BLOOR STREET WEST LIMITED and in respect of THG LEHNDORFF VERMÖGENSVERWALTUNG GmbH (in its capacity as limited partner of LEHNDORFF UNITED PROPERTIES (CANADA))

Farley J.

Heard: December 24, 1992
Judgment: January 6, 1993
Docket: Doc. B366/92

Counsel: *Alfred Apps, Robert Harrison* and *Melissa J. Kennedy* , for applicants.
L. Crozier , for Royal Bank of Canada.
R.C. Heintzman , for Bank of Montreal.
J. Hodgson, Susan Lundy and *James Hilton* , for Canada Trustco Mortgage Corporation.
Jay Schwartz , for Citibank Canada.
Stephen Golick , for Peat Marwick Thorne* Inc., proposed monitor.
John Teolis , for Fuji Bank Canada.
Robert Thorton , for certain of the advisory boards.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — Stay of proceedings

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Stay of proceedings — Stay being granted even where it would affect non-applicants that were not companies within meaning of Act — Business operations of applicants and non-applicants being so intertwined as to make stay appropriate.

The applicant companies were involved in property development and management and sought the protection of the *Companies' Creditors Arrangement Act* ("CCAA") in order that they could present a plan of compromise. They also sought a stay of all proceedings against the individual company applicants either in their own capacities or because of their interest in a larger group of companies. Each of the applicant companies was insolvent and had outstanding debentures issued under trust deeds. They proposed a plan of compromise among themselves and the holders of the debentures as well as those others of their secured and unsecured creditors deemed appropriate in the circumstances.

A question arose as to whether the court had the power to grant a stay of proceedings against non-applicants that were not companies and, therefore, not within the express provisions of the CCAA.

Held:

The application was allowed.

It was appropriate, given the significant financial intertwining of the applicant companies, that a consolidated plan be approved. Further, each of the applicant companies had a realistic possibility of being able to continue operating even though each was currently unable to meet all of its expenses. This was precisely the sort of situation in which all of the creditors would likely benefit from the application of the CCAA and in which it was appropriate to grant an order staying proceedings.

The inherent power of the court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Clearly, the court had the jurisdiction to grant a stay in respect of any of the applicants that were companies fitting the criteria in the CCAA. However, the stay requested also involved limited partnerships where (1) the applicant companies acted on behalf of the limited partnerships, or (2) the stay would be effective against any proceedings taken by any party against the property assets and undertakings of the limited partnerships in which they held a direct interest. The business operations of the applicant companies were so intertwined with the limited partnerships that it would be impossible for a stay to be granted to the applicant companies that would affect their business without affecting the undivided interest of the limited partnerships in the business. As a result, it was just and reasonable to supplement s. 11 and grant the stay.

While the provisions of the CCAA allow for a cramdown of a creditor's claim, as well as the interest of any other person, anyone wishing to start or continue proceedings against the applicant companies could use the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain the stay. In such a motion, the onus would be on the applicant companies to show that it was appropriate in the circumstances to continue the stay.

Application under Companies' Creditors Arrangement Act to file consolidated plan of compromise and for stay of proceedings.

***Farley J.*:**

1 These are my written reasons relating to the relief granted the applicants on December 24, 1992 pursuant to their application under the *Companies' Creditors Arrangement Act* , R.S.C. 1985, c. C-36 ("CCAA") and the *Courts of Justice Act* , R.S.O. 1990, c. C.43 ("CJA"). The relief sought was as follows:

> (a) short service of the notice of application;
>
> (b) a declaration that the applicants were companies to which the CCAA applies;
>
> (c) authorization for the applicants to file a consolidated plan of compromise;
>
> (d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the consolidated plan of compromise;
>
> (e) a stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered titleholder to certain of their assets as bare trustee and nominee; and
>
> (f) certain other ancillary relief.

2 The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a number of other property developers and managers which have also sought protection under the CCAA in recent years. The applicants are insolvent; they each have outstanding debentures issues under trust deeds; and they propose a plan of compromise among themselves and the holders of these debentures as well as those others of their secured and unsecured creditors as they deemed appropriate in the circumstances. Each applicant except THG Lehndorff Vermögensverwaltung GmbH ("GmbH") is an Ontario corporation. GmbH is a company incorporated under the laws of Germany. Each of the applicants has assets or does business in Canada. Therefore each is a "company" within the definition of s. 2 of the CCAA. The applicant Lehndorff General Partner Ltd. ("General Partner Company") is the sole general partner of the Limited Partnerships. The General Partner Company has sole control over the property and businesses of the Limited Partnerships. All major decisions concerning the applicants (and the Limited Partnerships) are made by management operating out of the Lehndorff Toronto Office. The applicants aside from the General Partner Company have as their sole purpose the holding of title to properties as bare trustee or nominee on behalf of the Limited Partnerships. LUPC is a limited partnership registered under the *Limited Partnership Act* , R.S.O. 1990, c. L.16 ("Ontario LPA"). LPC and LPC II are limited partnerships registered under Part 2 of the *Partnership Act* , R.S.A. 1980, c. P-2

(”Alberta PA”) and each is registered in Ontario as an extra provincial limited partnership. LUPC has over 2,000 beneficial limited partners, LPC over 500 and LPC II over 250, most of whom are residents of Germany. As at March 31, 1992 LUPC had outstanding indebtedness of approximately $370 million, LPC $45 million and LPC II $7 million. Not all of the members of the Group are making an application under the CCAA. Taken together the Group’s indebtedness as to Canadian matters (including that of the applicants) was approximately $543 million. In the summer of 1992 various creditors (Canada Trustco Mortgage Company, Bank of Montreal, Royal Bank of Canada, Canadian Imperial Bank of Commerce and the Bank of Tokyo Canada) made demands for repayment of their loans. On November 6, 1992 Funtanua Investments Limited, a minor secured lendor also made a demand. An interim standstill agreement was worked out following a meeting of July 7, 1992. In conjunction with Peat Marwick Thorne Inc. which has been acting as an informal monitor to date and Fasken Campbell Godfrey the applicants have held multiple meetings with their senior secured creditors over the past half year and worked on a restructuring plan. The business affairs of the applicants (and the Limited Partnerships) are significantly intertwined as there are multiple instances of intercorporate debt, cross-default provisions and guarantees and they operated a centralized cash management system.

3 This process has now evolved to a point where management has developed a consolidated restructuring plan which plan addresses the following issues:

(a) The compromise of existing conventional, term and operating indebtedness, both secured and unsecured.

(b) The restructuring of existing project financing commitments.

(c) New financing, by way of equity or subordinated debt.

(d) Elimination or reduction of certain overhead.

(e) Viability of existing businesses of entities in the Lehndorff Group.

(f) Restructuring of income flows from the limited partnerships.

(g) Disposition of further real property assets aside from those disposed of earlier in the process.

(h) Consolidation of entities in the Group; and

(i) Rationalization of the existing debt and security structure in the continuing entities in the Group.

Formal meetings of the beneficial limited partners of the Limited Partnerships are scheduled for January 20 and 21, 1993 in Germany and an information circular has been prepared and at the time of hearing was being translated into German. This application was brought on for hearing at this time for two general reasons: (a) it had now ripened to the stage of proceeding with what had been distilled out of the strategic and consultative meetings; and (b) there were creditors other than senior secured lenders who were in a position to enforce their rights against assets of some of the applicants (and Limited Partnerships) which if such enforcement did take place would result in an undermining of the overall plan. Notice of this hearing was given to various creditors: Barclays Bank of Canada, Barclays Bank PLC, Bank of Montreal, Citibank Canada, Canada Trustco Mortgage Corporation, Royal Trust

Corporation of Canada, Royal Bank of Canada, the Bank of Tokyo Canada, Funtauna Investments Limited, Canadian Imperial Bank of Commerce, Fuji Bank Canada and First City Trust Company. In this respect the applicants have recognized that although the initial application under the CCAA may be made on an ex parte basis (s. 11 of the CCAA; *Re Langley's Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) ; *Re Keppoch Development Ltd.* (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) . The court will be concerned when major creditors have not been alerted even in the most minimal fashion (*Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

4 "Instant" debentures are now well recognized and respected by the courts: see *Re United Maritime Fishermen Co-operative* (1988), 67 C.B.R. (N.S.) 44 (N.B. Q.B.) , at pp. 55-56, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.) , reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 (N.B. C.A.) , at pp. 165-166; *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) at pp. 250-251; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v. Comiskey*) (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); *Ultracare Management Inc. v. Zevenberger (Trustee of)* (sub nom. *Ultracare Management Inc. v. Gammon*) (1990), 1 O.R. (3d) 321 (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

5 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659 at p. 661, 16 C.B.R. 1, [1934] 4 D.L.R. 75 ; *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.) at pp. 219-220; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Q.B.) , at pp. 12-13 (C.B.R.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.) , at pp. 310-311, affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.) .; *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra, at p. 307 (O.R.); *Fine's Flowers v. Fine's Flowers (Creditors of)* (1992), 7 O.R. (3d) 193 (Gen. Div.) , at p. 199 and "Reorganizations Under The Companies' Creditors Arrangement Act", Stanley E. Edwards (1947) 25 Can. Bar Rev. 587 at p. 592.

6 The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. see *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra at pp. 297 and 316; *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)* , supra, at p. 328 and p. 330. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.) , at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252.

7 One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. Unlike the *Bankruptcy Act* , R.S.C. 1985, c. B-3, before the amendments effective November 30, 1992 to transform it into the *Bankruptcy and Insolvency Act* ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the BIA will be generally smaller and have a less complicated structure. Reorganization may include partial liquidation where it is intended as part of the process of a return to long term viability and profitability. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 318 and *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.) at pp. 245, reversed on other grounds at (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.) . It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Re Associated Investors of Canada Ltd.* , supra, at p. 318; *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) at pp. 187-188 (C.B.R.).

8 It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of compromise and arrangement.

9 Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA provides as follows:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act* , whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (*a*) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (*b*) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

10 The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* , supra, at pp. 12-17 (C.B.R.) and *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 296-298 (B.C. S.C.) and pp. 312-314 (B.C. C.A.) and *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 320 where Gibbs J.A. for the court stated:

> The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

11 The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from doing so: see *Gaz Métropolitain v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) at pp. 290-291 and *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 311-312 (B.C. C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) or to prevent landlords from terminating leases, or otherwise enforcing their rights thereunder (see *Feifer v. Frame Manufacturing Corp.* (1947), 28 C.B.R. 124 (C.A. Que.)). Amounts owing to landlords in

respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) especially at p. 318. The jurisdiction of the court to make orders under the CCAA in the interest of protecting the debtor company so as to enable it to prepare and file a plan is effective notwithstanding the terms of any contract or instrument to which the debtor company is a party. Section 8 of the CCAA provides:

> 8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

The power to grant a stay may also extend to prevent persons from exercising any right of set off in respect of the amounts owed by such a person to the debtor company, irrespective of whether the debtor company has commenced any action in respect of which the defense of set off might be formally asserted: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 312-314 (B.C.C.A.).

12 It was submitted by the applicants that the power to grant a stay of proceedings may also extend to a stay of proceedings against non-applicants who are not companies and accordingly do not come within the express provisions of the CCAA. In support thereof they cited a CCAA order which was granted staying proceedings against individuals who guaranteed the obligations of a debtor-applicant which was a qualifying company under the terms of the CCAA: see *Re Slavik* , unreported, [1992] B.C.J. No. 341 [now reported at 12 C.B.R. (3d) 157 (B.C. S.C.)]. However in the *Slavik* situation the individual guarantors were officers and shareholders of two companies which had sought and obtained CCAA protection. Vickers J. in that case indicated that the facts of that case included the following unexplained and unamplified fact [at p. 159]:

> 5. The order provided further that all creditors of Norvik Timber Inc. be enjoined from making demand for payment upon that firm or upon any guarantor of an obligation of the firm until further order of the court.

The CCAA reorganization plan involved an assignment of the claims of the creditors to “Newco” in exchange for cash and shares. However the basis of the stay order originally granted was not set forth in this decision.

13 It appears to me that Dickson J. in *International Donut Corp. v. 050863 N.D. Ltd.* , unreported, [1992] N.B.J. No. 339 (N.B. Q.B.) [now reported at 127 N.B.R. (2d) 290, 319 A.P.R. 290] was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated [at p. 295 N.B.R.]:

> In August 1991 the limited partnership, through its general partner the plaintiff, applied to the Court under the *Companies' Creditors Arrangement Act* , R.S.C., c. C-36 for an order delaying the assertion of claims by creditors until an opportunity could be gained to work out with the numerous and sizable creditors a compromise of their claims. An order was obtained but it in due course expired without success having been achieved in arranging with creditors a compromise. *That effort may have been wasted, because it seems questionable that the federal Act could have any*

application to a limited partnership in circumstances such as these . (Emphasis added.)

14 I am not persuaded that the words of s. 11 which are quite specific as relating as to a *company* can be enlarged to encompass something other than that. However it appears to me that Blair J. was clearly in the right channel in his analysis in *Campeau v. Olympia & York Developments Ltd.* unreported, [1992] O.J. No. 1946 [now reported at 14 C.B.R. (3d) 303 (Ont. Gen. Div.)] at pp. 4-7 [at pp. 308-310 C.B.R.].

The Power to Stay

The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) , and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act* , R.S.O. 1990, c. C.43, which provides as follows:

> 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Recently, Mr. Justice O'Connell has observed that this discre tionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 24127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure* . The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows.

The Power to Stay in the Context of C.C.A.A. Proceedings

By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness.": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) , and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is *a discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period* .

(emphasis added)

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement. [In this respect, see also *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77.]

I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance* , supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.

It is quite clear from *Empire-Universal Films Limited v. Rank*, [1947] O.R. 775 (H.C.) that McRuer C.J.H.C. considered that *The Judicature Act* [R.S.O. 1937, c. 100] then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of proceedings. See also *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 (H.C.) and *Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 29 C.P.C. 60 (H.C.) at pp. 65-66.

15 Montgomery J. in *Canada Systems* , supra, at pp. 65-66 indicated:

> Goodman J. (as he then was) in *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 in granting a stay reviewed the authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in *Edmeades v. Thames Board Mills Ltd.*, [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.)). Lord Denning's decision in *Edmeades* was approved by Lord Justice Davies in *Lane v. Willis; Lane v. Beach (Executor of Estate of George William Willis)*, [1972] 1 All E.R. 430, *(*sub nom. *Lane v. Willis; Lane v. Beach)* [1972] 1 W.L.R. 326 (C.A.) .
>
> . . . . .

In *Weight Watchers Int. Inc. v. Weight Watchers of Ont. Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122 , appeal allowed by consent without costs *(*sub nom. *Weight Watchers of Ont. Ltd. v. Weight Watchers Inc. Inc.)* 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.) , Mr. Justice Heald on an application for stay said at p. 426 [25 D.L.R.]:

> The principles which must govern in these matters are clearly stated in the case of *Empire Universal Films Ltd. et al. v. Rank et al.*, [1947] O.R. 775 at p. 779, as follows [quoting *St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al.*, [1936] 1 K.B. 382 at p. 398]:
>
> > (1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

16 Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Is it appropriate to do so in the circumstances? Clearly there is jurisdiction under s. 11 of the CCAA to grant a stay in respect of any of the applicants which are all companies which fit the criteria of the CCAA. However the stay requested also involved the limited partnerships to some degree either (i) with respect to the applicants acting on behalf of the Limited Partnerships or (ii) the stays being effective vis-à-vis any proceedings taken by any party against the property assets and undertaking of the Limited Partnerships in respect of which they hold a direct interest (collectively the "Property") as set out in the terms of the stay provisions of the order paragraphs 4 through 18 inclusive attached as an appendix to these reasons. [Appendix omitted.] I believe that an analysis of the operations of a limited partnership in this context would be beneficial to an understanding of how there is a close inter-relationship to the applicants involved in this CCAA proceedings and how the Limited Partnerships and their Property are an integral part of the operations previously conducted and the proposed restructuring.

17 A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Hepburn, *Limited Partnerships* , (Toronto: De Boo, 1991), at p. 1-2 and p. 1-12. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. A general partner

has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: see Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the *Bankruptcy Act* (now the BIA) sections 85 and 142.

18 A general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner. See Ontario *Rules of Civil Procedure* , O. Reg. 560/84, Rules 8.01 and 8.02.

19 It appears that the preponderance of case law supports the contention that contention that a partnership including a limited partnership is not a separate legal entity. See *Lindley on Partnership* , 15th ed. (London: Sweet & Maxwell, 1984), at pp. 33-35; *Seven Mile Dam Contractors v. R.* (1979), 13 B.C.L.R. 137 (S.C.) , affirmed (1980), 25 B.C.L.R. 183 (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad A. Milne, (1985) 23 Alta. L. Rev. 345, at pp. 350-351. Milne in that article made the following observations:

> The preponderance of case law therefore supports the contention that a limited partnership is not a separate legal entity. It appears, nevertheless, that the distinction made in *Re Thorne* between partnerships and trade unions could not be applied to limited partnerships which, like trade unions, must rely on statute for their validity. The mere fact that limited partnerships owe their existence to the statutory provision is probably not sufficient to endow the limited partnership with the attribute of legal personality as suggested in *Ruzicks* unless it appeared that the Legislature clearly intended that the limited partnership should have a separate legal existence. A review of the various provincial statutes does not reveal any procedural advantages, rights or powers that are fundamentally different from those advantages enjoyed by ordinary partnerships. The legislation does not contain any provision resembling section 15 of the *Canada Business Corporation Act* [S.C. 1974-75, c. 33, as am.] which expressly states that a corporation has the capacity, both in and outside of Canada, of a natural person. It is therefore difficult to imagine that the Legislature intended to create a new category of legal entity.

20 It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as

opposed to an "ordinary" partnership vehicle). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, "The Control Test of Investor Liability in Limited Partnerships" (1983) 21 Alta. L. Rev. 303; E. Apps, "Limited Partnerships and the 'Control' Prohibition: Assessing the Liability of Limited Partners" (1991) 70 Can. Bar Rev. 611; R. Flannigan, "Limited Partner Liability: A Response" (1992) 71 Can. Bar Rev. 552. The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me that there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner — the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners (and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide this as a conditional right: *Control Test* , (1992), supra, at pp. 524-525. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-à-vis any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to vote on the reorganization plan itself.

21 It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of s. 11 of the CCAA would be appropriate in the circumstances; it would be just and reasonable to do so. The business operations of the applicants are so intertwined with the limited partnerships that it would be impossible for relief as to a stay to be granted to the applicants which would affect their business without at the same time extending that stay to the undivided interests of the limited partners in such. It also appears that the applicants are well on their way to presenting a reorganization plan for consideration and a vote; this is scheduled to happen within the month so there would not appear to be any significant time inconvenience to any person interested in pursuing proceedings. While it is true that the provisions of the CCAA allow for a cramdown of a creditor's claim (as well as an interest of any other person), those who wish to be able to initiate or continue proceedings against the applicants may utilize the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain that particular stay. It seems to me that in such a comeback motion the onus would be upon the applicants to show that in the circumstances it was appropriate to continue the stay.

22 The order is therefore granted as to the relief requested including the proposed stay provisions.

Application allowed.

Footnotes

End of Document

1991 CarswellBC 503
British Columbia Supreme Court

Philip's Manufacturing Ltd., Re

1991 CarswellBC 503, [1992] B.C.W.L.D. 519, 31 A.C.W.S. (3d) 246, 4 B.L.R. (2d) 134, 9 C.B.R. (3d) 17

Re COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36; Re PHILIP'S MANUFACTURING LTD.

Scarth J. [in Chambers]

Judgment: December 9, 1991
Docket: Doc. Vancouver A913228

Counsel: *D. Tysoe*, for Philip's Manufacturing Ltd.
C. Emslie, for Hongkong Bank of Canada.
W.E.J. Skelly, for monitor.
D. Hyndman, for certain creditors.

Subject: Corporate and Commercial; Insolvency

Application to set aside or vary order for stay of proceedings.

Scarth J. **[In Chambers] (orally):**

1 On September 3, 1991, upon the ex parte application of Philip's Manufacturing Ltd., this court made an order pursuant to s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, staying all proceedings against Philip's Manufacturing Ltd. for a period of six months.

2 The order provided, inter alia:

3 1. That within the six-month period the company had leave to file a formal plan of compromise or arrangement between the company and its creditors, referred to as the "re-organization plan".

4 2. That Campbell, Saunders Ltd., licensed trustee, be appointed as monitor of the company.

5 3. That all creditors of the company be enjoined from making demand for payment upon the company or upon any guarantor of obligations of the company.

6 4. That both Her Majesty the Queen in Right of Canada and Her Majesty in Right of the Province of British Columbia are bound by the order of September 3, 1991 and other orders made herein.

7 5. Specifically with respect to the Hongkong Bank of Canada that:

> Irrespective of any other breaches of the terms and conditions applicable to the Petitioner's credit facilities with Hongkong Bank of Canada, unless and until the indebtedness owing by the Petitioner to Hongkong Bank of Canada under its operating of credit (sic) (but not including its term loan) as at a month end exceeds the aggregate of (i) 75% of the Petitioner's accounts receivable outstanding for 60 days or less as at such month end (whether or not other accounts receivable owing to the Petitioner by its debtors may be outstanding for more than 60 days) and such other accounts receivable that are part of a regular booking program of the Petitioner as are not overdue and (ii) 50% of the Petitioner's inventories of raw materials and finished goods at cost as at such month end, all as shown on

the accountant reviewed financial statements of the Petitioner, and such excess as at the 15th day of the following month is continuing, Hongkong Bank of Canada shall not be entitled to realize upon any security held by it on any of the undertaking, property or assets of the Petitioner (including, without limitation, the debenture, the assignment of book accounts and section 178 security held by Hongkong Bank of Canada), that Hongkong Bank of Canada shall not apply against the indebtedness owed to it by the Petitioner any monies deposited to any of the Petitioner's accounts with Hongkong Bank of Canada or other monies received by Hongkong Bank of Canada in connection with the Petitioner (whether the cheques or other instruments are payable to the Petitioner or Hongkong Bank of Canada) in the absence of a written direction from the Petitioner notwithstanding the assignment of book accounts, the section 178 security and any other security held by Hongkong Bank of Canada and that the Petitioner shall be entitled to draw cheques on or withdraw monies from any of its accounts with Hongkong Bank of Canada and to retain and utilize its collected accouns (sic) receivable as long as the outstanding principal balance owing under the Petitioner's operating line of credit does not exceed $1,700,000 (U.S.);

8 6. That liberty be reserved to any and all persons interested to apply to the court to set aside or vary the order or for such further or other order as they may advise upon 48 hours' notice.

9 In reasons for judgment delivered October 17, 1991 [reported ante, p. 1], Mr. Justice B.D. Macdonald dealt with a number of applications brought by various creditors to set aside the order made on September 3, 1991; alternatively, to remove any prohibition against suing directors or officers of the company, to reduce the time available, that is, the six-month period, to the company to file its reorganization plan, to expand the monitor's duties and to exclude particular claims from the stay of proceedings in order to permit certain actions against the company to proceed.

10 Mr. Justice Macdonald dismissed the applications to set aside the order, deleted from the order the prohibition against taking proceedings against directors and officers of the company, maintained the six-month period, granted leave to certain firms to file petitions against the company for a receiving order under the *Bankruptcy Act*, R.S.C. 1985, c. B-3, and directed no further proceedings be taken in respect of those petitions during the continuance of the order of September 3, and expanded the duties of the monitor.

11 By notice of motion filed October 18, 1991, the Hongkong Bank of Canada seeks an order setting aside the stay of proceedings with respect to the company and any guarantors of the company; alternatively, deleting that part of the stay order which allegedly requires the bank to lend money to the company pursuant to an operating line of credit, restricts the application of funds received by the bank to the company's outstanding indebtedness, and allows the company to draw cheques and withdraw moneys from any of its accounts with the bank, and to retain and utilize its collected accounts receivable. In the further alternative, the bank seeks an order declaring that the bank constitutes a class by itself, directing the holding of a meeting of that class immediately, requiring the company to put forward its reorganization plan at that meeting, directing the class to vote on the plan at that meeting, and directing the company to report the outcome of the vote to the court.

12 As well as the bank's application, the Crown Provincial, by notice of motion filed October 9, 1991, and the Crown Federal, by notice of motion filed October 16, 1991, seek declarations that Her Majesty in Right of the Province and in Right of Canada is not bound by the *Companies' Creditors Arrangement Act*, and an order varying the order made September 3, 1991, so as to delete the term of the order stipulating the Crown is bound thereby.

13 Apart from what are referred to as statutory secured creditors, which are owed approximately $100,000, the bank is the company's only secured creditor. As at October 17, 1991, the company owed the bank approximately $2.4 million. The debt is secured by a fixed and floating charge debenture, general assignment of book accounts and s. 178 (*Bank Act*, R.S.C. 1985, c. B-1) security, covering all assets of the company.

14 The bank, in June 1990, extended certain credit facilities to the company, including a revolving line of credit of $1.7 million Canadian or the equivalent in U.S. dollars. The evidence establishes that during the summer of 1991, the bank lost confidence in the ability of the company to repay the debt owing the bank. Under date of August 14, 1991, the bank

alleged certain breaches of the company's debenture, and gave notice they required correction. This was followed by a demand for payment on September 3, 1991, the same day this court granted the company an order staying proceedings against it under s. 11 of the *Companies' Creditors Arrangement Act*.

15 There are in excess of 300 creditors of this company. Of a total indebtedness of $5.7 million, the unsecured and trade creditors are owed approximately $3.15 million. The monitor, in his report to the court dated October 8, 1991, states:

> It is our view that on a liquidation or forced sale basis there will be insufficient funds to satisfy the secured debt to the Hongkong Bank of Canada. Accordingly there would be no funds available for distribution to the unsecured creditors.

The result, if the stay order is vacated, in all probability will be that these unsecured and trade creditors will not recover any amount on the dollar. Moreover, the company's 50 employees will be out of work, and firms who do business with the company, such as Triangle Transport and Warehousing Systems Inc. and Express Exterior Products Ltd., will suffer a substantial reduction in their own incomes.

16 On behalf of the bank, Mr. Emslie submits that the bank is, by virtue of its position as a secured creditor and the amount of its debt in relation to that of other creditors, in a class by itself, or so significant a creditor as to control a class of creditors. Section 6 of the Act requires each class of creditor to approve the reorganization plan, it is said. In his affidavit sworn to October 18, 1991 and filed that day, David Reid, an assistant vice-president, special credit, with the bank, deposes:

> 16. After careful consideration, the Bank is not prepared and will not agree, to any reorganization plan put forward by the Company regardless of its content.

Thus, it is argued, no plan can succeed and hence the court ought not to exercise its discretion in favour of the company by maintaining the stay order: *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, *(sub nom. Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1 O.R. (3d) 289 at p. 302 [O.R.]; *Diemaster Tool Inc. v. Svortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.) at p. 149.

17 In *Nova Metal Products Inc. v. Comiskey (Trustee of)*, supra, Mr. Justice Finlayson stated at p. 302 [O.R.]:

> My assessment of the secured creditors is that the Bank should be in its own class. This being so, it is obvious that no plan of arrangement can succeed without its approval. There is no useful purpose to be served in putting a plan of arrangement to a meeting of creditors if it is known in advance that it cannot succeed. This is another cogent reason for the court declining to exercise its discretion in favour of the debtor companies.

Moreover, the bank submits, since June 30, 1991, there has been a decline in the company's assets of over $1 million. This is prejudicial to the bank's interests, it is said, and thus creditors should be allowed their own remedies: *Chef Ready Foods Ltd.* (November 15, 1990), Doc. Vancouver A902447 (B.C. S.C.).

18 On behalf of the company it is submitted by Mr. Tysoe that the objectives of the *Companies' Creditors Arrangement Act* are to facilitate the reorganization of a company's financial affairs as much as possible for the benefit of a broad constituency, including employees, creditors and shareholders, and if necessary, by impinging on the rights of some. The statement of principle by Mr. Justice Gibbs, writing for the Court of Appeal in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136, at p. 88 [B.C.L.R.], is relied upon:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business.
>
> . . . . .
>
> When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or

it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

19 It is premature, at this stage, for the bank to commit itself to reject any reorganization plan which the company might file within the six-month period provided for by the order made September 3, Mr. Tysoe argues. In that time the company may refinance, in which event the bank would be paid out; or, if another financial institution is not prepared to refinance the debt, the company may be sold as a going concern to pay off its creditors, which is to be preferred to a forced liquidation; or the Job Protection Commission might assist. Finally, the company may be able to raise capital as part of a financial restructuring programme. The court, it is submitted, should keep the creditors at bay while these options are explored.

20 Moreover, the monitor's reports to the court dated October 8, 1991 and October 28, 1991 demonstrate that the bank's concern with respect to a deterioration of assets is not well founded, Mr. Tysoe submits. The monitor indicates operating losses can be expected in November and December based on the company's past performance, but the sales have historically improved in January and February, and more particularly in the spring and summer. The monitor, in his report of October 28, points to a gross profit margin on sales of 25 per cent, to a reduction of the expenditures for salaries and overhead of $20,000 per month, and to steps taken to improve control over inventory and the cost of production.

21 The bank, it is submitted, has violated the terms of the order made September 3, by applying 25 per cent of each deposit against the company's indebtedness, and accordingly ought not to be heard by the court until it has purged itself of its contempt: *Hadkinson v. Hadkinson*, [1952] 2 All E.R. 567 (C.A.) at p. 569. It is clear from the transcripts of tape recordings of the discussion between Murray Feist, senior manager, special credit, of the bank and representatives of the company, on September 24, October 1 and October 4, 1991, that Mr. Feist was aware the bank was contravening the order. Mr. Breivik, who appeared with Mr. Emslie for the bank on November 27, 1991, argues the bank has purged its contempt by making available the full amount of credit ordered by the court, but, in any event, equitable doctrines do not apply to the interpretation and application of the *Companies' Creditors Arrangement Act*, and thus no legal result flows from the bank's conduct.

22 In the circumstances here, it is clear the bank is overwhelmingly the largest secured creditor. It is not supportive of the company and says it will defeat any proposed plan the company files. It has the ability to do that by virtue of the dollar value of its secured claims.

23 Although I do not find the company is hopelessly insolvent — in fact the monitor suggests a ray of hope for its survival — it is clear, in view of the bank's position, that in the remaining three months of the stay, if the order remains, the company would have to find other capital to pay off the bank or sell its assets as a going concern. I do not, on the material before me, consider that realistic.

24 Moreover, the company has had since mid-August, when the bank pointed out its concerns, to attempt to restructure its affairs, but has not done so. The transcripts to which I have referred indicate the company consistently sought more time from the bank to obtain financial data or analyze information.

25 The bank's wilful disregard of this court's order respecting maintenance of the line of credit and use of deposits is a matter of concern to the court, and militates strongly against the bank's position. I am satisfied on the material that the bank has substantially purged its contempt, albeit only after becoming aware of the existence of the transcripts. Had it been necessary for the bank to reply on the court's equitable jurisdiction alone, I think it could not be heard. I am of the view, however, that the factors relevant to the disposition of the matters in issue here are broader than simply the bank's position.

26 The material before me indicates that the order made September 3, 1991 must be vacated, and it is so ordered.

27 This disposition of the bank's application makes it unnecessary to deal with the able arguments of Ms. Acheson, for the Provincial Crown, and Mr. Louie, for the Federal Crown, as to whether or not the Crown is bound by the Act.

Order vacated.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Redekop Properties Inc., Re | 2001 BCSC 1892, 2001 CarswellBC 3560, 165 A.C.W.S. (3d) 598, 40 C.B.R. (5th) 62 | (B.C. S.C. [in Chambers], Mar 2, 2001)

1992 CarswellBC 542
British Columbia Court of Appeal

Philip's Manufacturing Ltd., Re

1992 CarswellBC 542, [1992] B.C.W.L.D. 977, 32 A.C.W.S. (3d) 932, 4 B.L.R. (2d) 142, 67 B.C.L.R. (2d) 84, 9 C.B.R. (3d) 25

PHILIP'S MANUFACTURING LTD. v. HONGKONG BANK OF CANADA and PACIFIC LEAD & METAL INC., NORTHERN WAREHOUSE EQUIPMENT LTD. and CAMPBELL SAUNDERS LTD.

Carrothers, Cumming and Gibbs JJ.A.

Judgment: March 18, 1992
Docket: Doc. Vancouver CA014859

Counsel: *W.S. Berardino, Q.C.*, and *A.J. Bensler*, for appellants.
R.E. Breivik and *C.M. Emslie*, for respondent, Hongkong Bank of Canada.
W.E.J. Skelly, for receiver-manager, Coopers & Lybrand Ltd.
D.B. Hyndman and *P.S. Boles*, for unsecured creditors, A.B.L. Metals, Thyssen Canada, Pacific Lead & Metal, A.M.I. Metals.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — Stay of proceedings

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Order granting debtor protection under Companies' Creditors Arrangement Act vacated — Debtor appealing — Creditor not proving debtor's compromise being "doomed to failure" — Appeal allowed — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

On September 3, 1991, P. Ltd. obtained an order granting it protection under the *Companies' Creditors Arrangement Act*. Pursuant to the order, P Ltd. had six months to bring forward a formal plan. On December 9, 1991, the bank, as secured creditor applied to set aside the order. The order was vacated. A

receiver-manager was put in control of the day-to-day management of P Ltd.'s enterprise. On January 29, 1992, the activities of the receiver-manager were limited by terms of a stay order. P Ltd. appealed the setting aside of the *Companies' Creditors Arrangement Act* order.

Held:

The appeal was allowed.

The burden on an applicant seeking to set aside a *Companies' Creditors Arrangement Act* order is to prove that the debtor's attempt at making a compromise or arrangement is "doomed to failure". The bank showed that it would not facilitate a compromise or arrangement but did not address P Ltd.'s prospects for obtaining alternative financing such that the compromise or arrangement would provide for the retirement of the creditor's debt in full. The bank therefore failed to meet the evidentiary burden.

The appeal was made effective on March 20, 1992 to allow for the orderly transfer of custody, management and control of P Ltd. from the receiver-manager back to its executive officers.

Appeal from the setting aside of *Companies' Creditors Arrangement Act* order [reported at p.17, ante].

The judgment of the court was delivered by *Gibbs J.A.* (orally):

1 This is an appeal from an order made by a chambers judge (the second chambers judge) on December 9, 1991 [reported ante, p.17 (B.C. S.C.)], setting aside an order made by another chambers judge (the first chambers judge) on September 3, 1991. The history of the proceedings discloses an unfortunate proliferation of applications, hearings and orders. There is, however, no need to recite that history. It is well known to the parties and unlikely to be of interest to anyone else. The appeal can be disposed of on the merits by having regard only to the orders made on September 3, 1991 and December 9, 1991, respectively.

2 On September 3, 1991, on the application of Philip's Manufacturing, the first chambers judge made an order granting the company protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("C.C.A.A."). The company was given six months within which to bring forward "a formal plan of compromise or arrangement between the Petitioner and its creditors". There were subsequent applications before the same chambers judge by various of the creditors, but not including the Hongkong Bank, to have the order set aside or, in the alternative, varied. In reasons delivered on October 17, 1991 [reported ante, p.1], the setting-aside relief was refused. In respect of the six-month period, in those reasons the first chambers judge said [at pp. 9-10, ante]:

> **The Six-Month Stay**
>
> Six months is the usual period for the initial stay. In complicated cases, it has been extended, sometimes more than once, to enable the company to arrive at agreement with a majority of the creditors in each class. After hearing argument on these motions, and in light of the expansion of the monitor's duties on which I have decided, I am satisfied that the length of the stay originally ordered

> is appropriate. One and one-half months of that six have already gone by. The first report of the monitor, filed October 8, 1991, makes it clear that much remains to be done before a reorganization plan can be presented to the creditors and the court.

3 In view of the concerns expressed to us about the possible disposition or dissipation of assets during the reorganization period, it is worth noting that in the October 17, 1991 reasons the first chambers judge also gave leave for bankruptcy-crystallization proceedings.

4 Although it was not one of the applicants, the Hongkong Bank was represented during the proceedings which culminated in the October 17, 1991 reasons. On the very next day, October 18, the bank as a creditor filed a notice of motion seeking by way of relief to have the original September 3, 1991 order set aside or varied. Ultimately the application came on before the second chambers judge and was heard over the course of several days in late October and in November of 1991. The second chambers judge delivered reasons on December 9, 1991 setting aside the original September 3, 1991 C.C.A.A. order. It is this setting-aside order that is the subject of this appeal. It is of significance that only a little over half of the six-month reorganization period had elapsed when the setting-aside order was made. It is also of significance that less than two months had gone by since the first chambers judge had observed that "much remains to be done before a reorganization plan can be presented to the creditors and the court".

5 It is apparent that the second chambers judge reached his setting-aside decision primarily on three submissions advanced by the bank: that as a secured creditor it was in a class by itself or was, in any event, so significant as to control a class of creditors on a compromise or arrangement vote; that the bank, on the affidavit of a bank employee, "is not prepared and will not agree, to any reorganization plan put forward by the company regardless of its content"; and that the judgment of the Ontario Court of Appeal in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, *(*sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1 O.R. (3d) 289 applied.

6 If what Mr. Justice Finlayson said at p. 302 of *Nova Metal Products Inc.* was intended as a test, and it is not clear that it was so intended, it is not the test to be applied in this province. In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136, this court said, at p.88 [B.C.L.R.]:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

7 The burden on an applicant in this province and in these circumstances is therefore to lead evidence to the effect that the C.C.A.A.-protected company's attempt at making a compromise or arrangement is "doomed to failure". The evidence before the second chamber judge fell short of meeting that test. It went no further than demonstrating that the bank would not facilitate a compromise or arrangement. But it did not address the prospects of Philip's Manufacturing obtaining financing or making arrangements with some other source to the end that the compromise or arrangement would provide for the retirement of the bank debt in full. The possibility or probability of the company's officers achieving that goal was unknown to the chambers judge and is unknown to us. Whether it was or was not likely could not be more than speculation, and speculation cannot be accepted in lieu of evidence.

8 It follows that, as the bank did not meet the evidentiary burden of showing that the company's attempts to make a compromise or arrangement were doomed to failure, the trial judge erred in setting aside the original order of the first chambers judge.

9 That is not to say that a creditor can never succeed in an application to set aside a C.C.A.A. order. By a curious irony, that is what ultimately happened to *Chef Ready Foods*. Within about two weeks of the date this court handed down its judgment, a Supreme Court chambers judge set aside the C.C.A.A. order. He said that: "the situation has reached the point where for some days the company has not been doing any business. It is not so much at the point of collapsed as it is having collapsed". The obvious difference between that case and this is that there there was evidence that the attempt at compromise or arrangement was doomed to failure, whereas here there was not.

10 At the outset of this appeal the court, of its own volition, raised the question of the jurisdiction of the second chambers judge to set aside the order of the first chambers judge. As the appeal is being disposed of on the merits, it is not necessary to deal with jurisdiction. However, even apart from the question of jurisdiction, this is a circumstance where the second chambers judge would have been justified to conforming to the convention that, as a general rule and in the absence of other overriding considerations, an application to set aside or vary an order should be referred to the judge who made the order in the first instance.

11 It will be obvious from what I have said so far that in my opinion the appeal should be allowed, but there remains the question of a transition period. By reason of other orders made by other chambers judges, after the second chambers judge set aside the order of the first chambers judge, Coopers & Lybrand Ltd. have been in control of the day-to-day management of the Philip's Manufacturing enterprise. The activities of Coopers & Lybrand and the scope of their powers were limited by the terms of a stay order granted by Lambert J.A. of this court on January 29, 1992. We have been urged to impose a transition period for the orderly transfer of custody, management and control of the enterprise back to the executive officers of Philip's Manufacturing and for the reinstallation of the monitor appointed by the first chambers judge. I am persuaded that that would be a sensible and prudent thing to do.

12 Accordingly, I would allow the appeal and direct that the order of the second chambers judge be set aside, both to take effect at 4:00 p.m. on Friday, March 20, 1992. I would further order that the stay

order granted by Lambert J.A. on January 29, 1992 be continued in effect also until 4:00 p.m. on Friday, March 20, 1992.

***Carrothers J.A.*:**

13 I agree.

***Cumming J.A.*:**

14 I agree.

***Carrothers J.A.*:**

15 The appeal is allowed effective at the close of the Court of Appeal Registry at 4:00 p.m. on March 20, 1992, to allow the parties the opportunity to arrange the orderly transition with respect to the receiver-manager, the trustee in bankruptcy, and the monitor. The order of Scarth J. is set aside and the order of Macdonald J. of September 3, 1991 pursuant to the *Companies' Creditors Arrangement Act* is restored. The stay order of Lambert J.A. is to continue until the effective time of this judgment.

Appeal allowed.

End of Document

1992 CarswellBC 2735
Supreme Court of Canada

Philip's Manufacturing Ltd., Re

1992 CarswellBC 2735, 1992 CarswellBC 2736, 143 N.R. 286 (note), 15 C.B.R. (3d) 57 (note), 15 B.C.A.C. 240 (note), 27 W.A.C. 240 (note), 6 B.L.R. (2d) 149 (note), 70 B.C.L.R. (2d) xxxiii (note)

Hong Kong Bank of Canada v. Philip's Manufacturing Ltd., Pacific Lead & Metal Inc., Northern Warehouse Equipments Ltd., and Campbell Saunders Ltd.

Gonthier J., La Forest J., Sopinka J.

Judgment: September 3, 1992
Docket: 23004

Proceedings: Leave to appeal refused, 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 4 B.L.R. (2d) 142, [1992] B.C.W.L.D. 977, 1992 CarswellBC 542 (B.C. C.A.); Reversed, 9 C.B.R. (3d) 17, 4 B.L.R. (2d) 134, [1992] B.C.W.L.D. 519, 1991 CarswellBC 503 (B.C. S.C.)

Counsel: None given

Subject: Insolvency; Corporate and Commercial

Headnote

Business associations

Debtors and creditors

Per curiam:

1 Application for leave to appeal is dismissed.

1999 CarswellOnt 208
Ontario Court of Justice (General Division) [Commercial List]

Skydome Corp., Re

1999 CarswellOnt 208, [1999] O.J. No. 221, 85 A.C.W.S. (3d) 493

In the Matter of Skydome Corporation, Skydome Food Services Corporation and Sai Subco Inc.

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

In the Matter of the Business Corporations Act, R.S.O. 1990 c. B.16, as Amended

In the Matter of a Proposed Plan of Compromise or Arrangement of Skydome Corporation, Skydome Food Services Corporation and Sai Subco Inc.

Blair J.

Heard: January 21, 1999
Heard: January 22, 1999
Judgment: January 29, 1999
Docket: 98-CL-3179

Counsel: *Michael D. Rotsztain*, for Skydome Corporation.
Ms. Joy Casey, for Controlled Media Communications Inc.
Ms. Aïda Van Wees, for PricewaterhouseCoopers Inc., the Monitor.

Subject: Corporate and Commercial; Insolvency

MOTION by corporation during its Companies' Creditors Arrangement Act regime for order that preferred supplier be declared in breach of CCAA order and that it be ordered to pay amounts owing to corporation; CROSS-MOTION by preferred supplier for order permitting it to exercise its rights of set-of with respect to any amount which were owed by it to corporation.

***R.A. Blair J*:**

Overview and Issues

1 This decision deals with a Motion on behalf of SkyDome Corporation and a cross-Motion on behalf of Controlled Media Communications Inc., arising out of a dispute between these two corporations in the context of the CCAA proceedings presently outstanding in relation to SkyDome. I shall deal with the two Motions together, as counsel did, because the factual underpinnings for each are the same. They raise concerns regarding non-compliance with stay Orders granted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), on the part of those affected by such Orders, and unhappy with them, but who do not appeal them or move under the standard "come back" clause to have them varied. It is for this reason, primarily, that I have reserved decision to deliver some written reasons.

2 The real issue is not so much whether Controlled Media Communications Inc. ("CMC") has failed to comply with its obligations pursuant to the Initial Order granted under the CCAA on November 27, 1998 and extended by Order dated December 18, 1998 (together, "the CCAA Orders"). Counsel for CMC candidly acknowledges that it has not, and that it has failed to remit revenues payable to SkyDome under its contract by virtue of the Orders. The evidence amply

supports this concession. It also supports the conclusion that CMC declined to make the payments because it feared that SkyDome would terminate its Preferred Supplier contract under the protection of the Act, and it wished to negotiate with SkyDome about that before making any payments. The substantive issue, then, is whether CMC is entitled to refuse to observe the terms of the Orders — directing compliance with the contract — without appealing the Orders successfully or having them varied, while it builds up a hold back of funds to set off against claims it may have against SkyDome, particularly those arising from the feared termination of its contract. The short and obvious answer, of course, is that it is not entitled to do so.

3 CMC has been involved with the SkyDome since its inception. It was one of the original Consortium Members and contributed the sum of $5 million for construction of the stadium. It thus acquired what is known as a "Preferred Supplier" status, which affords certain advantages in such a supplier's contractual dealings with the SkyDome. In the case of CMC, that contractual relationship relates to SkyDome advertising. Pursuant to a Preferred Supplier Rights agreement, CMC is SkyDome's exclusive advertising agent for the sale, licencing and/or leasing of all advertising and all rights to advertising at the SkyDome. This contractual relationship (the "CMC Agreement") was confirmed and continued when ownership of the stadium was transferred from the Province to SkyDome's predecessor in 1994, and the parties continued to operate under its terms until the Initial Order was made on November 27, 1998. On December 21 st last, as a result of events which transpired following SkyDome's CCAA Application and the granting of the Initial Order, SkyDome purported to terminate the CMC agreement.

4 SkyDome argues that it was entitled to terminate the CMC agreement because of CMC's fundamental breach of that agreement in failing to remit monies collected by it for advertising, less commissions earned, as required. It submits that CMC was obliged to remit those monies by reason of its obligation under the Initial Order to continue to honour its contractual obligations to SkyDome, that it has failed to account for monies received by it on SkyDome's behalf prior to and following the Order, and that its failure in this regard justifies termination on fundamental breach principles. It does not take the position that it has terminated the CMC agreement pursuant to its right to terminate contracts under the CCAA Order as part of its restructuring efforts.

5 CMC argues, on the other hand, that SkyDome had determined even prior to its CCAA Application that it was going to terminate the Preferred Suppliers' agreements, including in particular, the CMC Agreement, and that the "fundamental breach" argument is simply a pretext to justify its preconceived strategy. Counsel for CMC quite candidly acknowledged at the outset of her argument, as I have noted, that CMC failed to comply with the CCAA Order by not remitting payments that would otherwise have been payable under the contract. CMC places those amounts at $177,774. If sums which CMC admits would have been payable by January 15 th are included, that amount becomes $251,645. SkyDome estimates the amounts owing at between $583,000 and $972,000.

6 CMC has remitted no advertising revenues received by it on SkyDome's behalf, since the date of the Initial Order. It is clear from the communications and correspondence exchanged between the parties after that date that CMC was simply refusing to do so because it and its chairman, G. Montegu Black, were concerned about the potential termination of the CMC Agreement under the CCAA umbrella, and they were not going to pay SkyDome anything until this latter issue was negotiated and as long as they felt that CMC had claims of its own against SkyDome to set-off against the advertising revenues CMC was holding.

7 A fax sent by Mr. Black to SkyDome on December 4, 1998, sums up the concern and upset of CMC, the tenor of its position and the position itself. It followed a number of telephone communications between CMC and SkyDome employees and two letters from SkyDome in which the latter had taken the position — politely, but firmly, in my opinion — that the continuation of revenue remittances was required under the terms of the Initial Order. Mr. Black's fax, which bears reciting in full, states:

> It appears to have escaped your notice that SkyDome has fallen upon the sword conveniently supplied to it by Labatts and the Bank of Commerce by seeking protection from its creditors under CCAA. It has done this because it feels it is necessary to renegotiate a number of long standing contractual obligations that it now considers onerous.
>
> Controlled Media Communications is not seeking protection from anything. It finds your several recent communications with Rae Armstrong not to be in the spirit of negotiation. *It finds them arrogant*. Unless I am missing something, it does not appear to me that SkyDome has anything to be arrogant about.
>
> Last weekend I left a voicemail for Patrick McDougall in which I said that with reluctance we realized that he was going to wish to negotiate with us. Up until this point, we have heard nothing from him. [1] *Until such time as the negotiations with him commence, your arrogant threat notwithstanding, absolutely nothing is going to happen.*
>
> (emphasis added)

8 This communication makes it patently clear that CMC refused to make any payments under the contract, notwithstanding the provisions of the outstanding CCAA Order, until Mr. Black and Mr. McDougall (the President of the SkyDome) had negotiated the termination issue. This stance was confirmed in later correspondence, including in a letter dated December 17, 1990, from Richard Watson, CMC's solicitor, which stated categorically, that "CMC is not at this time making the payment your are requesting".

9 Since cash flow is a matter of acute sensitivity for SkyDome during its CCAA regime, and because its takes umbrage at what Mr. Rotsztain referred to as "CMC taking the law into its own hands", SkyDome moves for an Order,

> a) declaring that CMC is in breach of the CCAA Order and that it has failed to pay and remit to SkyDome the amounts required to be paid under the CMC agreement;
>
> b) directing that CMC comply with the provisions of the CCAA Order by providing forthwith to SkyDome a full and accurate accounting of all unreported monies received on behalf of SkyDome and of all amounts that it is required to pay and remit;
>
> c) directing that CMC pay to SkyDome the amounts so payable — either as agreed after the accounting, or, in the absence of agreement, as determined later by the Court; and, finally,
>
> d) requiring CMC in any event to pay to SkyDome immediately the admitted sum of $177,774 plus a further sum of $74,865 which CMC acknowledges would have been payable by January 15, 1999 had the agreement not been terminated (the total is $252,639).

10 On its cross-Motion, CMC asks for an order varying the CCAA Order to permit it to,

> a) exercise its rights of set off with respect to any amounts which may be owing by CMC to SkyDome, including the right to set off amounts claimed by CMC for money now owing or payable in the future and for damages for breach of contract;
>
> b) initiate proceedings against SkyDome to claim for money owing and for damages; and,
>
> c) claim against SkyDome as a creditor within the CCAA proceeding for the amounts payable and for damages.

11 CMC also asks for an accounting and payment.

Analysis

12 Paragraph 9 of the Initial Order requires everyone who had an agreement with SkyDome for the supply of goods and/or services to "continue to perform and observe the terms and conditions" of such agreement during the CCAA

period so long as SkyDome pays the normal charges for the goods and services provided after the date of the Order "in accordance with present payment practices or terms". Those with such contracts are not permitted to accelerate, terminate, suspend, modify, determine or cancel their agreements, and they are restrained from doing so and from cutting off the supply of goods or services. Furthermore, under paragraph 4 of the Initial Order — the stay provision — all proceedings against the CCAA Applicants, including extra-judicial remedies, are stayed, and by virtue of paragraph 4(e),

> (e) all Persons are restrained from exercising any extra-judicial remedy against the Applicants in relation to amounts due or accruing due in respect of or arising from any indebtedness or obligation of any of the Applicants as at the date [of the Order], including, without limitation ... any right of ... set-off, consolidation of accounts ... or application of monies ... or from retaining cheques and/or monies owing to an Applicant or to which the Applicant is entitled...

13 What, then, were the terms and conditions of the CMC Agreement which CMC was obliged to continue to perform after the Initial Order?

14 In terms, and in substance, CMC is granted Preferred Supplier rights as the exclusive advertising agent for the SkyDome: paragraphs 1 and 9. Under paragraph 3 CMC *on behalf of SkyDome is to* invoice and *receive payments* for the advertising, *and is to remit to SkyDome*,

> all revenue received therefor less its Base Commission on the fifteenth day following the end of the month to which such revenue applies to the extent received by CMC and any balance as received by it for such month on the Friday of the week of receipt of payments received.

15 To take an example, then, if advertisers are billed, say in the month of June, and payments are received by CMC for that invoice in the same month, the revenues received from that invoice are to be remitted (less commissions) on July 15th. If, however, the revenues pertaining to such an invoice are received by CMC wholly or in part at some time after the end of June, the revenues received (less commissions) are to be remitted on the Friday of the week the revenues are received. Mr. Rotsztain argued that for a period of at least several months before the CCAA filing the parties had adopted a practice whereby CMC would make its remittances on each Friday, thus ignoring the 15th of the month provision, and that that existing practice should be enforced, as it formed the "present payment practice". The practice is supported by the last Advertising Remittance Summary submitted by CMC to SkyDome as at November 6, 1998, and Ms. Casey acknowledged on behalf of CMC that the practice existed. She pointed out, however, that the CMC agreement contains and "entire agreement" clause, and that by virtue of it any binding alteration to the agreement must be in writing. No such written amendment exists.

16 I agree with Ms. Casey in this respect, and since on a Motion of this nature the factual issue of whether the parties intended to amend the agreement by their relatively short change in practice over a few months — the CMC advertising contract has been in place since the beginning of SkyDome operations — cannot be determined, I intend to approach the problem on the basis that it is the formula in paragraph 3 of the CMC Agreement which governs. In the end, however, I do not think it matters for present purposes, because on any reading of the contract, CMC was and is obligated to account for *any and all monies it had received on behalf of* SkyDome (less its commissions) by Friday December 18, 1998 — just three days before the Agreement was terminated.

17 CMC's position is that it is obliged to remit only those monies received and payable during the period between the date of the Initial Order (November 27th) and the date of termination of the CMC Agreement (December 21st). This position is untenable in my view, however. It is based upon a misconception of the effect of the CCAA Orders, which is to require existing contracts to be honoured provided that the CCAA applicant pays the normal prices or charges for the goods and services provided during the stay period in accordance with the payment practices then in effect (or as otherwise negotiated). In this case, CMC was arranging advertising contracts for SkyDome and was collecting *SkyDome's* revenues for that advertising, with the obligation to remit those revenues, after deducting their

commissions, to SkyDome. CMC was required under the Initial Order to "continue to perform and observe [those] terms and conditions" contained in the CMC Agreement, absent a successful appeal from or variation of that Order. Any other result — apart from the implications of sanctioning the failure to obey an outstanding order — would deprive SkyDome of an integral part of its revenue base, and potentially cripple its ability to continue to operate during the CCAA period while it attempts to negotiate a restructuring with its creditors as a whole.

18 An additional argument was advanced on behalf of CMC to support the view that it was only obliged to remit monies received and payable during the November 27th to December 21st period. This argument was that once the CCAA Application was granted, CMC was not accountable for remitting advertising revenues that had been received by them but which, for one reason or another, had not been remitted as required on the 15th of a month or on a Friday of the week in which they had been received. These monies, CMC submitted, it was entitled to retain to be set-off against the growing number of claims and counter-claims now accumulating at a rapid pace between the parties. This position is illogical and insupportable. If correct, it would mean that CMC could negligently, recklessly or even deliberately miss a payment, on the one hand, while at the same time succeed in frustrating the clear intent and terms of the Agreement *and* the Orders, on the other hand, by refusing to remit to SkyDome its own monies!

19 Both of these arguments put forward by CMC become even more untenable when it is recognized that the unremitted advertising revenues are held by CMC as constructive trustee for SkyDome. While there is no evidence that CMC was obliged to hold the funds in a segregated account and, therefore, that there was an express or implied trust, CMC was nonetheless obliged to receive the advertising revenues "on behalf of SkyDome" and to remit them to SkyDome, less commissions. By withholding the funds CMC is enriched to the corresponding detriment of SkyDome in that regard, and no juristic reason exists in the circumstances to justify the enrichment. The only possible juristic reason would related to the contractual relationship between CMC and Skydome, and it is clear that in accordance with the terms of that Agreement CMC was only to have its percentage commission and not 100 per cent. See, *Soulos v. Korkontzilas* (1997), 146 D.L.R. (4th) 214 (S.C.C.); *Brown & Collett Ltd., Re* (1996), 11 E.T.R. (2d) 164 (Ont. Gen. Div. [Commercial List]), Winkler J., particularly at pp. 178-18; and, *Sharby v. N.R.S. Elgin Realty Ltd. (Trustee of)* (1991), 3 O.R. (3d) 129 (Ont. Gen. Div.), Killeen J. In such a case, there is no right of set-off against the trust monies for claims of a different nature being asserted by CMC against SkyDome: *McMahon v. Canada Permanent Trust Co.* (1979), 108 D.L.R. (3d) 71 (B.C. C.A.).

Conclusion and Disposition

20 CMC must comply with the terms of the CCAA Orders. The Orders have not been appealed, and CMC did not choon se to move to vary them until after it was faced with this Motion by SkyDome to compel it to comply. Parties affected by a CCAA Order — as with any other Order — are not entitled to ignore that Order, much less to flout it, simply because they don't like its effect on them or because they wish to use the difficulties caused to the CCAA company by their non-compliance as a lever to enhance their bargaining position with the debtor company. It is patently clear that that is exactly what CMC and Mr. Black were intent on accomplishing here, and it cannot be sanctioned.

21 CMC acknowledges, as I have indicated, that it has failed to comply with the Initial Order to the extent of $177,774.00 (see affidavit of G. Montegu Black, sworn January 20, 1999). In addition, it is admitted that a further $73,961.00 was payable under the CMC Agreement by January 15, 1999, a date which has now passed. For the reasons explained above, it is my view that CMC is obliged to account and to pay over all advertising revenues received by it in relation to the period pre-dating the termination of the Agreement. I therefore order that CMC pay to SkyDome immediately the sum of $251,645.00, being the sum of the foregoing two amounts. In addition, CMC is required to account to SkyDome forthwith as to the balance of the advertising revenues which have been received by it (less commissions) prior to Friday, December 18, 1998, and not remitted to SkyDome. After that accounting has been furnished, if the parties cannot agree, a motion may be made for the establishment of a court procedure to settle the accounting. The balance of the amounts found due on the accounting are to be paid to SkyDome forthwith thereafter.

22 Given its conduct, CMC does not come to court with clean hands. I am not prepared to permit an equitable remedy of set-off to be applied against the sums improperly held back following the granting of the Initial Order. CMC is entitled, of course, to assert its claims to set-off as a claimant/creditor in the CCAA proceedings.

23 The cross-Motion, however, is dismissed. I see nothing in the situation of CMC which puts it in a position different from other creditors of SkyDome who assert that they have claims of one sort or another against the Company. Those claims are stayed under the CCAA Orders, so that SkyDome will have the capacity to concentrate its time and resources, and the energies of its personnel, on attempting to gain the support of its creditors to a restructuring. If the stay were to be lifted to permit CMC to pursue its claims, it would be difficult to argue that others should not be accorded the same relief. The whole purpose of the proceeding would be nullified.

24 Order accordingly.

Motion granted. Cross-motion dismissed.

Footnotes

1 There is a conflict in the evidence as to the respective efforts made by Messrs. McDougall and Black to speak with each other.

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

BOOK OF AUTHORITIES OF THE MONITOR
(Motion for a Restraining Order)
(returnable January 22, 2018)

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