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., 9370-2751 QUEBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

APPLICANTS

JOINT BOOK OF AUTHORITIES OF THE APPLICANTS AND THE MONITOR

(Appointment of the Honourable Justice James Farley as Arbitrator and other Ancillary Relief -- Upper Canada Mall)

(Motion Returnable September 20, 2018)

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2014 SCC 35, 2014 CSC 35
Supreme Court of Canada

Bombardier inc. c. Union Carbide Canada inc.

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Union Carbide Canada Inc. and Dow Chemical Canada Inc. (now known as Dow Chemical Canada ULC), Appellants and Bombardier Inc., Bombardier Recreational Products Inc. and Allianz Global Risks US Insurance Company, Respondents and Attorney General of British Columbia and Arbitration Place Inc., Interveners

McLachlin C.J.C., LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: December 11, 2013
Judgment: May 8, 2014
Docket: 35008

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Jonathan Eades, Mark Witten, for Intervener, Attorney General of British Columbia
William C. McDowell, Kaitlyn Pentney, for Intervener, Arbitration Place INc.

Subject: Civil Practice and Procedure; Contracts; Evidence; International

Related Abridgment Classifications

Civil practice and procedure
XVI Disposition without trial
XVI.7 Settlement
XVI.7.c Enforcement of terms
Contracts
IX Performance or breach
IX.9 Miscellaneous

Headnote

Contracts --- Performance or breach — Miscellaneous

Following consumer complaints concerning tanks supplied by D, B commenced action for damages against D — Parties agreed to private mediation, and standard mediation agreement containing confidentiality clause was signed — D submitted settlement offer, which was accepted by B — However, parties subsequently disagreed on scope of release — D failed to send discussed settlement amount and B filed motion for homologation of transaction in Superior Court — D brought motion to strike out allegations contained in six paragraphs of motion for homologation on ground that they referred to events that had taken place in course of mediation process, which violated confidentiality clause in mediation agreement — Trial judge granted motion to strike in part and B appealed — Court of Appeal held that when mediation has resulted in agreement, communications made in course of mediation process cease to be privileged and held that settlement privilege did not prevent party from producing evidence of confidential communications in order to prove existence of disputed settlement agreement — D appealed — Appeal dismissed — Nature of contract, circumstances in which it was formed and contract as whole revealed that parties did not intend to disregard usual rule that settlement privilege can be dispensed with in order to prove terms of settlement — There was no evidence that parties thought they were deviating from settlement privilege that usually applies to mediation when they signed agreement — Therefore,

mediation contract did not preclude parties from producing evidence of communications made in course of mediation process in order to prove terms of settlement.

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

Following consumer complaints concerning tanks supplied by D, B commenced action for damages against D — Parties agreed to private mediation, and standard mediation agreement containing confidentiality clause was signed — D submitted settlement offer, which was accepted by B — However, parties subsequently disagreed on scope of release — D failed to send discussed settlement amount and B filed motion for homologation of transaction in Superior Court — D brought motion to strike out allegations contained in six paragraphs of motion for homologation on ground that they referred to events that had taken place in course of mediation process, which violated confidentiality clause in mediation agreement — Trial judge granted motion to strike in part and B appealed — Court of Appeal held that when mediation has resulted in agreement, communications made in course of mediation process cease to be privileged and held that settlement privilege did not prevent party from producing evidence of confidential communications in order to prove existence of disputed settlement agreement — D appealed — Appeal dismissed — Nature of contract, circumstances in which it was formed and contract as whole revealed that parties did not intend to disregard usual rule that settlement privilege can be dispensed with in order to prove terms of settlement — There was no evidence that parties thought they were deviating from settlement privilege that usually applies to mediation when they signed agreement — Therefore, mediation contract did not preclude parties from producing evidence of communications made in course of mediation process in order to prove terms of settlement.

Contrats --- Exécution ou défaut d'exécution — Divers

À la suite de plaintes des consommateurs concernant les réservoirs fournis par D, B a intenté contre D une action en dommages-intérêts — Parties ont convenu d'une médiation privée et ont signé une entente type de médiation, laquelle renfermait une clause de confidentialité — D a soumis une offre de règlement que B a acceptée — Toutefois, par la suite, les parties ne se sont pas entendues sur la portée de la quittance — D n'a pas envoyé le montant du règlement qui avait fait l'objet de discussions et B a déposé devant la Cour supérieure une requête en homologation du règlement — D a déposé une requête en radiation des allégations contenues dans six paragraphes de la requête en homologation au motif qu'elles faisaient état du déroulement de la médiation, en violation de la clause de confidentialité contenue dans l'entente de médiation — Juge de première instance a accordé la requête en radiation en partie et B a interjeté appel — Cour d'appel a estimé que les communications faites au cours de la médiation cessent d'être privilégiées lorsqu'elles ont conduit à une entente et a conclu que le privilège relatif aux règlements n'empêchait pas une partie de produire des communications confidentielles afin de faire la preuve de l'existence d'une entente de règlement contestée — D a formé un pourvoi — Pourvoi rejeté — Nature du contrat, les circonstances dans lesquelles il a été conclu, ainsi que le contrat dans son ensemble révélaient que les parties n'avaient pas l'intention de passer outre à la règle habituelle voulant que le privilège relatif aux règlements soit écarté afin de faire la preuve des modalités d'un règlement — Rien n'indiquait que les parties, au moment de signer l'entente, estimaient qu'elles écartaient le privilège relatif aux règlements qui s'applique habituellement — Par conséquent, le contrat de médiation n'avait pas pour effet d'empêcher les parties de produire en preuve les communications faites au cours de la médiation afin de faire la preuve des modalités d'un règlement.

Procédure civile --- Jugement rendu sans procès — Règlement — Enforcement of terms

À la suite de plaintes des consommateurs concernant les réservoirs fournis par D, B a intenté contre D une action en dommages-intérêts — Parties ont convenu d'une médiation privée et ont signé une entente type de médiation, laquelle renfermait une clause de confidentialité — D a soumis une offre de règlement que B a acceptée — Toutefois, par la suite, les parties ne se sont pas entendues sur la portée de la quittance — D n'a pas envoyé le montant du règlement qui avait fait l'objet de discussions et B a déposé devant la Cour supérieure une requête en homologation du règlement — D a déposé une requête en radiation des allégations contenues dans six paragraphes de la requête en homologation au motif qu'elles faisaient état du déroulement de la médiation, en violation de la clause de confidentialité contenue dans l'entente de médiation — Juge de première instance a accordé la requête en radiation en partie et B a interjeté appel — Cour d'appel a estimé que les communications faites au cours de la médiation cessent d'être privilégiées lorsqu'elles ont conduit à une entente et a conclu que le privilège relatif aux règlements n'empêchait pas une partie de produire des communications confidentielles afin de faire la preuve de l'existence d'une entente de règlement contestée — D a formé un pourvoi — Pourvoi rejeté — Nature du contrat, les circonstances dans lesquelles il a été conclu, ainsi que le contrat

dans son ensemble révélaient que les parties n'avaient pas l'intention de passer outre à la règle habituelle voulant que le privilège relatif aux règlements soit écarté afin de faire la preuve des modalités d'un règlement — Rien n'indiquait que les parties, au moment de signer l'entente, estimaient qu'elles écartaient le privilège relatif aux règlements qui s'applique habituellement — Par conséquent, le contrat de médiation n'avait pas pour effet d'empêcher les parties de produire en preuve les communications faites au cours de la médiation afin de faire la preuve des modalités d'un règlement.

D manufactured and distributed gas tanks for personal watercraft while B manufactured and distributed personal watercraft. A dispute arose over the fitness of the gas tanks as a result of consumer complaints. B claimed that the tanks supplied by D were unfit for the use for which they had been intended and commenced an action for damages against D in Montreal, in the Quebec Superior Court. The parties agreed to private mediation, and a standard mediation agreement containing a confidentiality clause was signed. D submitted a settlement offer, which was accepted by B. However, the parties subsequently disagreed on the scope of the release. D considered this to be a global settlement involving any gas tank models, and B replied that the settlement was for the Montreal litigation only. D failed to send the discussed settlement amount and B then filed a motion for homologation of the transaction in the Superior Court. D brought a motion to strike out the allegations contained in six paragraphs of the motion for homologation on the ground that they referred to events that had taken place in the course of the mediation process, which violated the confidentiality clause in the mediation agreement. The trial judge granted D's motion to strike in part, ordering that four of the six allegations be struck because they referred to discussions that had occurred or submissions that had been made in the context of the mediation. B appealed.

The Court of Appeal held that when mediation has resulted in an agreement, communications made in the course of the mediation process cease to be privileged and held that settlement privilege did not prevent a party from producing evidence of confidential communications in order to prove the existence of a disputed settlement agreement. Accordingly, the Court of Appeal allowed the appeal, and D appealed.

Held: The appeal was dismissed.

Per Wagner J. (McLachlin C.J.C., LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis JJ. concurring): At common law, settlement privilege is a rule of evidence that protects communications exchanged by parties as they try to settle a dispute. However, a communication that has led to a settlement will cease to be privileged if disclosing it is necessary in order to prove the existence or the scope of the settlement. Both the common law privilege and this exception to it form part of the civil law of Quebec.

On the other hand, a confidentiality clause is a binding agreement. It should be noted that the mere fact of signing a mediation agreement that contains a confidentiality clause does not automatically displace the privilege and the exceptions to it. To produce such a result, its terms must be clear.

Here, the nature of the contract, the circumstances in which it was formed and the contract as a whole revealed that the parties did not intend to disregard the usual rule that settlement privilege can be dispensed with in order to prove the terms of a settlement. The mediation agreement was a standard form contract provided by the mediator, and neither party amended it or added any provisions relating to confidentiality. There was no evidence that the parties thought they were deviating from the settlement privilege that usually applies to mediation when they signed the agreement. Therefore, the mediation contract did not preclude the parties from producing evidence of communications made in the course of the mediation process in order to prove the terms of a settlement.

D fabriquait et distribuait des réservoirs à carburant pour motomarines tandis que B fabriquait et distribuait des motomarines. Des plaintes des consommateurs étaient à l'origine d'un différend au sujet du caractère approprié des réservoirs. B affirmait que des réservoirs fournis par D étaient impropres à l'usage auquel ils étaient destinés et a intenté contre D une action en dommages-intérêts devant la Cour supérieure du Québec à Montréal. Les parties ont convenu d'une médiation privée et ont signé une entente type de médiation, laquelle renfermait une clause de confidentialité. D a soumis une offre de règlement que B a acceptée. Toutefois, par la suite, les parties ne se sont pas entendues sur la portée de la quittance. D considérait que le montant offert visait un règlement global relativement à tous les modèles de réservoirs à carburant et B a répliqué que le règlement visait uniquement la poursuite engagée à Montréal. D n'a pas envoyé le montant du règlement qui avait fait l'objet de discussions et B a déposé devant la Cour supérieure une requête en homologation du règlement. D a déposé une requête en radiation des allégations contenues dans six paragraphes de la requête en homologation au motif qu'elles faisaient état du déroulement de la médiation, en violation

de la clause de confidentialité contenue dans l'entente de médiation. La juge de première instance a accordé la requête en radiation en partie et a ordonné que quatre des six allégations soient radiées parce qu'elles portaient sur les discussions et communications échangées dans le cadre de la médiation. B a interjeté appel.

La Cour d'appel a estimé que les communications faites au cours de la médiation cessent d'être privilégiées lorsqu'elles ont conduit à une entente et a conclu que le privilège relatif aux règlements n'empêchait pas une partie de produire des communications confidentielles afin de faire la preuve de l'existence d'une entente de règlement contestée. Aussi, la Cour d'appel a accueilli l'appel, et D a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Wagner, J. (McLachlin, J.C.C., LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis, JJ., souscrivant à son opinion) :

En common law, le privilège relatif aux règlements est une règle de preuve qui protège les communications échangées entre des parties qui tentent de régler un différend. Toutefois, une communication qui a conduit à un règlement cesse d'être privilégiée si sa divulgation est nécessaire pour prouver l'existence ou la portée du règlement. Ce privilège de la common law et son exception font partie du droit civil du Québec.

D'un autre côté, une clause de confidentialité est une entente exécutoire. Il est important de noter que le simple fait de signer une entente de médiation assortie d'une clause de confidentialité n'écarte pas automatiquement le privilège et ses exceptions. Pour arriver à un tel résultat, la clause doit l'exprimer clairement.

En l'espèce, la nature du contrat, les circonstances dans lesquelles il a été conclu, ainsi que le contrat dans son ensemble révélaient que les parties n'avaient pas l'intention de passer outre à la règle habituelle voulant que le privilège relatif aux règlements soit écarté afin de faire la preuve des modalités d'un règlement. L'entente de médiation consistait en un contrat type fourni par le médiateur et ni l'une ni l'autre des parties ne l'a modifié ni n'y a ajouté des dispositions concernant la confidentialité. Rien n'indiquait que les parties, au moment de signer l'entente, estimaient qu'elles écartaient le privilège relatif aux règlements qui s'applique habituellement. Par conséquent, le contrat de médiation n'avait pas pour effet d'empêcher les parties de produire en preuve les communications faites au cours de la médiation afin de faire la preuve des modalités d'un règlement.

Table of Authorities

Cases considered by *Wagner J.*:

Archambault c. Canada (Agence du Revenu) (2013), 365 D.L.R. (4th) 535, 2013 SCC 65, 2013 CarswellQue 11299, 2013 CarswellQue 11300, (sub nom. *Québec (Agence du Revenu) v. Services Environnementaux AES Inc.)* 2013 D.T.C. 5174 (Eng.), (sub nom. *Québec (Agence du Revenu) v. Services Environnementaux AES Inc.)* 2013 D.T.C. 5175 (Fr.), (sub nom. *Agebce du Revenu du Québec v. Services Environnementaux AES inc.)* 453 N.R. 119, (sub nom. *Quebec (Agence du revenu) v. Services Environnementaux AES inc.)* [2013] 3 S.C.R. 838 (S.C.C.) — followed

Bloom Films 1998 inc. c. Christal Films productions inc. (2011), 2011 QCCA 1171, 2011 CarswellQue 6389 (C.A. Que.) — referred to

Bombardier inc. c. Union Carbide Canada inc. (2012), 2012 CarswellQue 72, 2012 QCCS 22 (C.S. Que.) — referred to

Bombardier inc. c. Union Carbide Canada inc. (2012), 2012 QCCA 1300, 2012 CarswellQue 7252 (C.A. Que.) — referred to

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Ferlatte v. Ventes Rudolph Inc. (1999), 1999 CarswellQue 2751 (C.S. Que.) — considered

Globe & Mail c. Canada (Procureur général) (2010), (sub nom. *Globe & Mail v. Canada (Attorney General))* 220 C.R.R. (2d) 339, [2010] 2 S.C.R. 592, 2010 SCC 41, 2010 CarswellQue 10258, 2010 CarswellQue 10259, (sub nom. *CTVglobemedia Publishing Inc. v. Canada (Attorney General))* 407 N.R. 202, (sub nom. *Globe & Mail v. Canada (Procureur général))* 325 D.L.R. (4th) 193, 78 C.R. (6th) 205, 94 C.P.C. (6th) 1 (S.C.C.) — considered

Kosko c. Bijimine (2006), 2006 CarswellQue 4944, 2006 QCCA 671, 2006 CarswellQue 14225 (C.A. Que.) — considered

Luger c. Empire, Cie d'assurance-vie (1991), 1991 CarswellQue 1852 (C.S. Que.) — considered

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Sable Offshore Energy Inc. v. Ameron International Corp. (2013), 37 C.P.C. (7th) 225, 22 C.L.R. (4th) 1, 2013 SCC 37, 2013 CarswellNS 428, 2013 CarswellNS 429, 359 D.L.R. (4th) 381, [2013] 2 S.C.R. 623, 446 N.R. 35, 1052 A.P.R. 1, 332 N.B.R. (2d) 1 (S.C.C.) — followed

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

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Stewart v. Stewart (2008), 2008 CarswellAlta 2212, 2008 ABQB 348 (Alta. Q.B.) — referred to

Statutes considered:

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

art. 1414 — considered

art. 1425 — considered

art. 1426 — considered

art. 1427 — considered

art. 1431 — considered

Code de procédure civile, L.R.Q., c. C-25

en général — referred to

art. 151.16 [ad. 2002, c. 7, art. 19] — considered

art. 151.21 [ad. 2002, c. 7, art. 19] — considered

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Generally — referred to

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Generally — referred to

Treaties considered:

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Article 9 — considered

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United Nations, Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use, 2002* (New York: United Nations, 2004)

Words and phrases considered:

confidentiality

Confidentiality is often described as one of the factors that induce parties to opt for mediation (J. Thibault, *Les procédures de règlement amiable des litiges au Canada* (2000), at para. 197), and as one of the benefits of mediation (M. P. Silver, *Mediation and Negotiation: Representing Your Clients* (2001), at p. 82).

confidentiality clause

[A confidentiality clause] is a binding agreement.

mediation

Mediation is one of several forms of alternative dispute resolution that are available to parties in a legal dispute. It is defined by D. W. Glaholt and M. Rotterdam in *The Law of ADR in Canada: An Introductory Guide* (2011) as "a collaborative and strictly confidential process in which parties contract with a neutral, referred to as a mediator, to assist them in settling their dispute" (p. 10).

settlement privilege

Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. Sometimes called the "without prejudice" rule, it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation.

Termes et locutions cités:

Confidentialité

[La confidentialité] est (...) souvent considérée comme l'un des facteurs qui incitent les gens à recourir à la médiation (J. Thibault, *Les procédures de règlement amiable des litiges au Canada* (2000), par. 197) et l'un de ses avantages (M. P. Silver, *Mediation and Negotiation : Representing Your Clients* (2001), p. 82).

clause de confidentialité

[Une clause de confidentialité] est une entente exécutoire (...).

médiation

Dans *The Law of ADR in Canada : An Introductory Guide* (2011), D. W. Glaholt et M. Rotterdam définissent la médiation comme suit : [TRADUCTION] « un processus de collaboration strictement confidentiel dans le cadre duquel les parties concluent un contrat avec une personne neutre, en l'occurrence un médiateur, qui les aidera à régler leur différend » (p. 10).

privilège relatif aux règlements

En common law, le privilège relatif aux règlements est une règle de preuve qui protège les communications échangées entre des parties qui tentent de régler un différend. Parfois appelé la règle des communications faites « sous toutes réserves », le privilège permet aux parties de prendre part à des négociations en vue d'un règlement sans crainte que les renseignements qu'elles divulguent soient utilisés à leur détriment dans un litige ultérieur.

APPEAL by supplier from decision allowing manufacturer to allege information pertaining to out-of-court settlement in its pleadings.

POURVOI formé par un fournisseur à l'encontre d'une décision permettant à un fabricant d'alléguer des renseignements concernant une transaction dans des procédures écrites.

***Wagner J.* (McLachlin C.J.C., LeBel, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. concurring):**

I. Introduction

1 This Court recently confirmed the vital importance of the role played by settlement privilege in promoting the settlement of disputes and improving access to justice: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623 (S.C.C.). Settlement privilege is a common law evidentiary rule that applies to settlement negotiations regardless of whether the parties have expressly invoked it. This privilege is not the only tool available to parties, however, as parties like the appellants and the respondents in the case at bar often sign mediation agreements that provide for the confidentiality of communications made in the course of the mediation process.

2 This case concerns the interaction between these two protections: confidentiality of communications provided for in a private mediation contract, and the common law settlement privilege. More specifically, it relates to a common law exception to settlement privilege that applies where a party seeks to prove the existence or the scope of a settlement. At issue is whether a mediation contract with an absolute confidentiality clause displaces the common law settlement privilege, including this exception, thereby foreclosing parties from proving the terms of a settlement.

3 Ironically, both the appellants and the respondents argue that the Court's answer could negatively affect the development of mediation in Canada, either by undermining its confidential nature or by frustrating its main objectives. I disagree. I reach this decision bearing in mind the overriding benefit to the public of promoting the out-of-court settlement of disputes regardless of the legal means employed to reach a given settlement. For the reasons that follow, I find that parties are at liberty to sign mediation contracts under which the protection of confidentiality is different from the common law protection. This enables parties to secure the safeguards they deem important and fosters the free and frank negotiation of settlements, thereby serving the same purpose as settlement privilege: the promotion of settlements. However, I reject the presumption that a confidentiality clause in a mediation agreement automatically displaces settlement privilege, and more specifically the exceptions to that privilege that exist at common law. The exceptions to settlement privilege have been developed for public policy reasons, and they exist to further the overall purpose of the privilege. A mediation contract will not deprive parties of the ability to prove the terms of a settlement by producing evidence of communications made in the mediation context unless a court finds, applying the appropriate rules of contractual interpretation, that that is the intended effect of the agreement.

4 Because this dispute arose in Quebec, Quebec contract law applies. I find that although it was open to the parties to contract out of the exception to settlement privilege, they did not do so. They therefore retain their right to produce evidence of communications made in the mediation context in order to prove the terms of their settlement. I would affirm the Court of Appeal's decision, albeit for different reasons.

II. Facts

5 The parties are entangled in a decades-long, multi-million dollar civil suit about defective gas tanks used on Sea-Doo personal watercraft. The appellants, Dow Chemical Canada Inc. and Union Carbide Canada Inc., now known

as Dow Chemical Canada ULC ("Dow Chemical"), manufacture and distribute gas tanks for personal watercraft. The respondent Bombardier Inc. manufactured and distributed Sea-Doo personal watercraft before selling its recreational products division to the respondent Bombardier Recreational Products Inc. (jointly, "Bombardier"). A dispute arose over the fitness of the gas tanks as a result of consumer complaints.

6 This appeal results from an allegation by Bombardier that two gas tank models supplied by Dow Chemical were unfit for the use for which they had been intended. More specifically, Bombardier alleged that the material used and recommended by Dow Chemical for the gas tanks had been cracking and that this had in some cases caused explosions as a result of which owners and users of the watercraft had suffered property damage and bodily injury. Bombardier recalled the watercraft equipped with the gas tanks in question in 1997, 1998 and 2003, and it has been sued by a number of consumers.

7 In March 2000, Bombardier Inc. commenced an action against Union Carbide Canada Inc. in the Quebec Superior Court (file No. 500-05-056325-002) for $9,980,612.07 in damages. Dow Chemical Canada Inc. was subsequently added as a defendant, as a result of its merger with Union Carbide. They filed their defence to the action on May 6, 2003. On May 29, 2007, Bombardier Inc. amended the declaration to add Bombardier Recreational Products Inc., which had since acquired its recreational products division, and Allianz Global Risks US Insurance Company as co-plaintiffs (Allianz is also a respondent to this appeal). In this amended declaration, the amount of the claim was raised to $30,019,505, and an additional claim for $1,786,445.23 was made on behalf of Allianz. Finally, on or about July 31, 2008, Dow Chemical filed an amended defence.

8 Bombardier claimed three separate amounts: (1) $15,153,394 for the cost of the safety recall campaigns; (2) $13,474,142 for the cost of settlements with and lawsuits by consumers for damage and injuries caused by the gas tanks; and (3) $1,391,969 for other costs incurred by Bombardier.

9 After signing a joint list of admissions on the value of the claims, the parties agreed to private mediation to be conducted in Montréal by lawyer Max Mendelsohn. On April 26, 2011, before the mediation commenced, a standard mediation agreement was signed. It contained the following clause regarding the confidentiality of the process:

> 2. Anything which transpires in the Mediation will be confidential. In this regard, and without limitation:
>
> (a) Nothing which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding;
>
> (b) No statement made or document produced in the Mediation will become subject to discovery, compellable as evidence or admissible into evidence in any proceeding, as a result of having been made or produced in the Mediation; however, nothing will prohibit a party from using, in judicial or other proceedings, a document which has been divulged in the course of the Mediation and which it would otherwise be entitled to produce;
>
> (c) The recollections, documents and work product of the Mediator will be confidential and not subject to disclosure or compellable as evidence in any proceeding.

10 The agreement also contained a clause regarding the mediator's role:

> 4. The Mediator will have no decision-making power, but will merely assist the parties in attempting to arrive at a settlement of their dispute.

11 At the mediation session on April 27, 2011, Dow Chemical submitted a settlement offer for $7 million. Counsel for Bombardier asked Dow Chemical to keep this offer open for 30 days, as he had to ask his client for instructions, and Dow Chemical agreed to do so. On May 17, 2011, before the 30 days expired, counsel indicated to Dow Chemical that Bombardier was accepting the offer:

> My clients, BRP, Bombardier and Allianz have given me instructions to accept Dow Chemical's offer to settle the above-mentioned case for an amount of CAN$ 7 million in capital, interest and costs.
>
> I would ask that you request a check from your client to the order of Fasken Martineau in trust at your earliest convenience or have the amount wired to our trust account using the following coordinates.
>
> . . . . .
>
> In the meantime, I will prepare a draft release that I will forward to you very shortly. Of course, Fasken Martineau will undertake to hold the sums until the release documents have been signed and returned to Lavery.

12 Two days later, on May 19, 2011, counsel for Dow Chemical emailed counsel for Bombardier, stating that his client considered this to be a global settlement amount. Dow Chemical thus wanted Bombardier to sign a release absolving it of liability in any future litigation not only in Quebec and with respect to the two gas tank models at issue, but anywhere in the world and involving any gas tank models:

> It is my client's expectation that this settlement will put an end to all present and future litigation arising out of any fuel tanks supplied to Bombardier, BRP et al by Wedco, Union Carbide and Dow Chemicals et al. My client realizes that it may be conceivably named as a co-defendant with your client in matters arising out of one of the fuel tanks delivered, but expects that the settlement document will be clear so that neither party would institute a warranty or third party proceedings against the other. It is my client's feeling that litigation with respect to fuel tanks supplied by Wedco, Union Carbide, Dow Chemicals et al has been going on long enough and has proven to be very expensive for both parties and it wants to put an end to the dispute once and for all.

13 After a short follow-up email from Dow Chemical's counsel on June 1, 2011, counsel for Bombardier replied, on June 6, 2011, that the settlement amount was for the Montréal litigation only. His email also detailed further courses of action:

> As you well know, the object of the discussions at the mediation and the offer that Dow presented at that time never encompassed the type of release referred to in your e-mail of May 19th. The numbers exchanged were always based on the claim before the Superior court of the district of Montreal and the third party claims covered by that action. These were limited to existing claims at the time the admissions were made and no other....
>
> I therefore enclose a release that reflects the scope of your offer and our binding acceptance. For the purpose of buying the peace, BRP has agreed to extend the release to any exi[s]ting or potential claims involving 109 and 183 tanks manufactured by Wedco regardless of whether or not they existed at the time the admissions were made. However, they will not go so far as to settle existing or potential claims for fuel tanks that are not the object of the Montreal litigation.
>
> It appears to me we now have 3 choices:
>
> 1) Dow significantly increases its offer to cover the release it now wants;
>
> 2) We settle the Montreal action and attempt to settle the other existing and potential claims you now want to settle (with or without the assistance of a mediator). If you wish to go this latter route I suggest Dow obtain settlement authority before we engage in the process to avoid a take it or leave position as occurred last time around.
>
> 3) Dow refuses to settle and BRP will either a) continue the suit or b) decide to file an homologation action.
>
> [Emphasis in original.]

14 On June 14, 2011, counsel for Bombardier sent counsel for Dow Chemical a demand letter for payment of the $7 million settlement amount. Counsel for Dow Chemical replied on June 16, 2011, reiterating their position on the release sought by their client:

> Your clients were fully aware of the nature of the release that our clients required and at no time suggested that they would provide a narrower release. If your clients are not prepared to grant the release that we have outlined to you, then no payment will be forthcoming and any proceedings will be contested.
>
> I remind you of the confidentiality provisions of the mediation agreement signed by yourself on your own behalf and on behalf of your clients on April 26, 2011. Any attempt to violate the confidentiality of what transpired in the mediation will be met with the appropriate proceedings.

15 Counsel for Bombardier replied to that letter on June 29, 2011, stating that they would proceed by filing a motion if they did not receive the payment:

> We understand that your client is no longer willing to abide by the agreement that was reached in the above-mentioned matter.
>
> As such, unless Dow Chemical revisits its position, BRP will have no other choice but to file the attached Motion.
>
> We have considered the arguments raised in your letter with regard to the confidentiality of discussions that may have taken place during the mediation. However, these are without merit.
>
> First of all, as you know, there is an exception to confidentiality when settlement discussions have led to a transaction.
>
> Moreover, the contract between the parties is not applicable in this case as Dow Chemical agreed to keep its offer open for consideration after the mediation and the acceptance of BRP was sent outside of the mediation forum.

16 In a further letter dated July 6, 2011, counsel for Dow Chemical argued that neither the correspondence from Bombardier nor the draft motion had addressed the issue of the consideration to be provided by Bombardier in return for the sum to be paid by Dow Chemical. Counsel for Dow Chemical reiterated that in their client's opinion, there was "no agreement and no transaction".

17 Dow Chemical did not send the discussed settlement amount, and Bombardier then filed a motion for homologation of the transaction on July 8, 2011, in the Superior Court, District of Montréal. The motion detailed the history of the dispute between the parties and referred to both the mediation and the subsequent settlement discussions.

18 Dow Chemical brought a motion to strike out the allegations contained in six paragraphs of the motion for homologation on the ground that they referred to events that had taken place in the course of the mediation process, which was in violation of the confidentiality clause in the mediation agreement. The paragraphs at issue were the following:

> [TRANSLATION]
>
> 17. The Joint List of Admissions was the sole basis for discussion by the Parties at the mediation session of April 27, 2011;
>
> 18. All the discussions in the course of the mediation related exclusively to the Covered Claims and the other costs claimed in the Re-amended Action R-4. No claims concerning tanks other than tanks 275 500 109 and 275 500 183 were ever discussed;

19. Moreover, the mediation related exclusively to the existing dispute between the parties as described in the Pleadings, as can be seen from a copy of the mediation contract signed by the Parties on April 26, 2011 that is attached hereto as Exhibit **R-8**;

20. The mediation was terminated unsuccessfully on April 27, 2011 when Dow Chemical submitted to BRP and Allianz an offer to settle the Re-amended Action for $7,000,000 in capital, interest and costs, but indicated to BRP and to the mediator that it had no authority to increase this offer;

21. Yves St-Arnaud, in-house counsel for BRP, asked Dow Chemical to keep this offer open for thirty (30) days and promised to get back to them shortly. Dow Chemical acceded to this request;

22. On May 17, 2011, that is, twenty (20) days after the end of the mediation, counsel for BRP and for Allianz advised counsel for Dow Chemical that the applicants accepted the settlement offer for $7,000,000 in capital, interest and costs in full and final settlement of the claims made in the case bearing court file No. 500-05-056325-002 (the "**Transaction**"), as can be seen from a copy of an email attached hereto as Exhibit **R-9**;

19 In oral argument in this Court, counsel for Dow Chemical stated that no settlement had been reached between the parties. This is not completely accurate. The record of communications between the parties shows that there was a settlement offer and that it was accepted, but that the parties subsequently disagreed on the scope of the release. In short, Bombardier's view is that the settlement is limited to the ongoing Montréal litigation, and seeks to admit evidence from the mediation session to enable it to prove this. Dow Chemical disagrees on the scope of the settlement, viewing it as a global settlement, and argues that the evidence from the mediation session on which Bombardier seeks to rely in its motion for homologation is inadmissible by virtue of the confidentiality agreement.

III. Judicial History

A. Quebec Superior Court, 2012 QCCS 22 (C.S. Que.) (CanLII) (Corriveau J.)

20 Corriveau J. based her analysis on art. 151.16 of the *Code of Civil Procedure*, CQLR, c. C-25 ("*CCP*"), as well as on art. 151.21, which provides that anything said or written during a settlement conference is confidential. She cited cases from the Quebec Court of Appeal which confirmed the confidential nature of mediation or settlement conferences, and reasoned that those cases applied regardless of whether the mediation was conducted by a judge or, as in the instant case, by a lawyer. She held that in light of the confidentiality clause in the mediation agreement, the mediation proceedings were covered by art. 151.21 of the *CCP*.

21 On this basis, Corriveau J. granted the appellants' motion to strike in part, ordering that four of the six allegations (paras. 17, 18, 20 and 21) be struck from the respondents' motion for homologation because they referred to discussions that had occurred or submissions that had been made in the context of the mediation. She denied Dow Chemical's request to strike para. 22 from the motion for homologation, as it referred to the settlement offer itself, which had been kept open after the mediation session. Having struck the four paragraphs in question, Corriveau J. explained that Bombardier could continue to rely on the remainder of the motion for homologation relating to the claim, the mediation contract and the discussions that followed the mediation. Bombardier applied to the Quebec Court of Appeal for leave to appeal, which was granted on March 16, 2012.

B. Quebec Court of Appeal, 2012 QCCA 1300 (C.A. Que.) (CanLII) (Thibault, Rochette and Morissette JJ.A.)

22 Thibault J.A., writing for a unanimous court, allowed the appeal and, contrary to the motion judge, found that the rules of the *CCP* with respect to confidentiality do not apply to extrajudicial mediation proceedings. Given the absence of legislation in this regard, two factors must be considered to determine whether mediation proceedings presided over by someone other than a judge are confidential: (1) the mediation contract agreed to by the parties, and (2) the common law settlement privilege as recognized in Quebec law. In the Court of Appeal's view, the language of the contract ("Nothing

which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding") indicated that what was said in the course of the mediation session was subject to an obligation of confidentiality, and this obligation applied to some of the facts Bombardier sought to rely upon.

23 The Court of Appeal then restated the general rule that settlement negotiations are confidential, even in the absence of a legislated rule of procedure. It cited *Globe & Mail c. Canada (Procureur général)*, 2010 SCC 41, [2010] 2 S.C.R. 592 (S.C.C.), to reiterate that the purpose of settlement privilege is to enable parties to have frank discussions about a possible settlement without worrying that what they disclose in the course of the negotiations will be used against them in litigation. The court noted that settlement privilege is based on public policy considerations, as it is preferable, in the interests of the proper administration of justice, that parties try to resolve their own disputes before resorting to litigation.

24 Where mediation has resulted in an agreement, the Court of Appeal observed, communications made in the course of the mediation process cease to be privileged. It supported this comment by quoting various authors, from both civil law and common law backgrounds (at paras. 35-38), as well as two decisions of the Quebec Superior Court, including *Ferlatte v. Ventes Rudolph Inc.*, [1999] Q.J. No. 2735 (C.S. Que.), in which that court had commented as follows, at para. 12:

> Unchallenged judicial authority in Quebec, the common law provinces and in England holds that privilege protects communications between opposing counsel aimed at settling a dispute. Therefore offers of settlement cannot be introduced in evidence unless they are accepted. In that case they are admissible, not as proof that the offerors admit responsibility for the offerees' claims, but that they choose to end their conflict by settling on the terms of the offers. Such communications benefit from the protection of privilege on the policy ground that without it, disputing parties would be reluctant to attempt settlement negotiations, fearing their initiatives will come back to haunt them at trial if they fail.
>
> [Emphasis added.]

25 Thibault J.A. argued that, if a dispute arises regarding the existence or the terms of a transaction, the obligation of confidentiality of communications made in the course of the mediation process is no longer necessary given that the underlying purpose of confidentiality — to further the achievement of a settlement — is no longer relevant. If an agreement was not in fact reached, on the other hand, such communications cannot of course be admitted in evidence for any other purpose.

26 The Court of Appeal held that settlement privilege does not prevent a party from producing evidence of confidential communications in order to prove the existence of a disputed settlement agreement arising from mediation or to assist in the interpretation of such an agreement. It considered three cases cited by Dow Chemical in support of the proposition that the confidentiality of discussions and communications from an extrajudicial mediation process is absolute where the mediation agreement contains a confidentiality clause, but it noted that those cases did not call into question the application of the exception to settlement privilege that enables a party to produce evidence of such discussions and communications in order to prove the existence or the scope of a settlement agreement. Reversing the motion judge's ruling, the Court of Appeal held that the allegations at issue should not be struck from the motion for homologation. It left it to the judge hearing that motion to consider whether the impugned paragraphs were relevant to the identification of the terms of the agreement, in which case the exception to the common law settlement privilege would apply.

IV. Analysis

27 In my view, there are two questions to answer in this appeal. The first is whether a confidentiality clause in a private mediation contract can override the exception to the common law settlement privilege that enables parties to produce evidence of confidential communications in order to prove the existence or the scope of a settlement. The second question, which arises only if the answer to the first is yes, is whether the confidentiality clause at issue in the case at bar displaces that exception. If it does, the information referred to in the impugned paragraphs cannot be disclosed. If it does not, that information may be disclosed if it meets the criteria of the exception.

28 The appellants argue that a court must give effect to a confidentiality clause in a mediation agreement to which both parties have freely consented, and that there are no public policy reasons to nullify the clause. The respondents counter that a standard form confidentiality clause cannot displace the exception to the common law settlement privilege and that, even if it could do so, the clause at issue in this case, if correctly interpreted, does not preclude the application of that exception.

29 I see value in the submissions of both the appellants and the respondents. On the first question, I agree with the appellants that a court must give effect to a confidentiality clause to which both parties have agreed, and that it is open to the parties to contract out of common law rules, including the exception to settlement privilege. Parties may desire that the protection of confidential information disclosed in the mediation process be broader than that afforded by the common law privilege, and disregarding this desire would undermine one of the main features that encourage parties to opt for this oft-used form of alternative dispute resolution. On the second question, however, I agree with the respondents that, on the facts of this case, overriding the common law exception was not what the parties intended when they signed their mediation agreement, which means that the parties *can* produce communications from the mediation process to prove the terms of their settlement.

A. Does a Confidentiality Clause Supersede the Exception to the Common Law Doctrine of Settlement Privilege?

30 This case requires a review both of the common law settlement privilege in the mediation context and of the use of confidentiality clauses in mediation agreements. In my view, it will be helpful to consider each of these distinct concepts — including their application in Quebec — in turn, before discussing how they overlap.

(1) Settlement Privilege

31 Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. Sometimes called the "without prejudice" rule, it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation. This promotes honest and frank discussions between the parties, which can make it easier to reach a settlement: "In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming" (A. W. Bryant, S. N. Lederman and M. K. Fuerst, *The Law of Evidence in Canada* (3rd ed. 2009), at para. 14.315).

32 Encouraging settlements has been recognized as a priority in our overcrowded justice system, and settlement privilege has been adopted for that purpose. As Abella J. wrote in *Sable Offshore*, at para. 12, "[s]ettlement privilege promotes settlements." She explained this as follows, at para. 13:

> Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible (see David Vaver, "'Without Prejudice' Communications — Their Admissibility and Effect" (1974), 9 *U.B.C. L. Rev.* 85, at p. 88). The settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. As Oliver L.J. of the English Court of Appeal explained in *Cutts v. Head*, [1984] 1 All E.R. 597, at p. 605:
>
> > ... parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations ... may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v. Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table.
>
> What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.

33 There have been other occasions on which this Court discussed the importance of encouraging parties to settle their own disputes. For example, LeBel J., writing for the Court in *Globe & Mail* cited *Kosko c. Bijimine*, 2006 QCCA 671 (C.A. Que.) (CanLII), a case in which the Quebec Court of Appeal had commented as follows, at paras. 49-50:

> The protection of confidentiality of these "settlement discussions" is the most concrete manifestation in the law of evidence of the importance that the courts assign to the settlement of disputes by the parties themselves. This protection takes the form of a rule of evidence or a common law privilege, according to which settlement talks are inadmissible in evidence.
>
> The courts and commentators have unanimously recognized that, first, settlement talks would be impossible or at least ineffective without this protection and, second, that it is in the public interest and a matter of public order for the parties to a dispute to hold such discussions.
>
> (See also *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235, at p. 259, citing *Sparling v. Southam Inc.* (1988), 41 B.L.R. 22, at p. 28.)

34 Settlement privilege applies even in the absence of statutory provisions or contract clauses with respect to confidentiality, and parties do not have to use the words "without prejudice" to invoke the privilege: "What matters instead is the intent of the parties to settle the action .... Any negotiations undertaken with this purpose are inadmissible" (*Sable Offshore*, at para. 14). Furthermore, the privilege applies even after a settlement is reached. The "content of successful negotiations" is therefore protected: *Sable Offshore*, at paras. 15-18. As with other class privileges, there are exceptions to settlement privilege:

> To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement" (*Dos Santos Estate v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 B.C.A.C. 54, at para. 20). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (*Unilever plc v. Procter & Gamble Co.*, [2001] 1 All E.R. 783 (C.A. Civ. Div.), *Underwood v. Cox* (1912), 26 O.L.R. 303 (Div. Ct.)), and preventing a plaintiff from being overcompensated (*Dos Santos*).
>
> (*Sable Offshore*, at para. 19)

35 The exception to settlement privilege at issue in the case at bar is the rule that protected communications may be disclosed in order to prove the existence or scope of a settlement. This exception is explained by Bryant, Lederman and Fuerst:

> If the negotiations are successful and result in a consensual agreement, then the communications may be tendered in proof of the settlement where the existence or interpretation of the agreement is itself in issue. Such communications form the offer and acceptance of a binding contract, and thus may be given in evidence to establish the existence of a settlement agreement. [para. 14.340]

The rule is simple, and it is consistent with the goal of promoting settlements. A communication that has led to a settlement will cease to be privileged if disclosing it is necessary in order to prove the existence or the scope of the settlement. Once the parties have agreed on a settlement, the general interest of promoting settlements requires that they be able to prove the terms of their agreement. Far from outweighing the policy in favour of promoting settlements (*Sable Offshore*, at para. 30), the reason for the disclosure — to prove the terms of a settlement — tends to further it. The rule makes sense because it serves the same purpose as the privilege itself: to promote settlements.

36 In *Globe & Mail*, this Court confirmed that the common law settlement privilege applies in Quebec. As the Court of Appeal demonstrated in its reasons in the instant case, the exception for the purpose of proving the terms of a settlement

also clearly applies in Quebec. The Court of Appeal cited a number of Quebec authors and cases on this point, and I find it helpful to reiterate how J.-C. Royer and S. Lavallée explain the application of the exception:

> [TRANSLATION] **1137** — *Limits of this privilege* — This rule for the exclusion of evidence is grounded in a desire to promote the out-of-court settlement of disputes. The privileged nature of the communication is accordingly limited to facts related to the negotiation of a settlement. Thus, an expert's report is privileged if it is transmitted with a communication made for the purpose of settling a dispute. Moreover, a litigant cannot object to evidence of a fact that is independent of and separate from a settlement offer. Such an objection will be dismissed *a fortiori* if the fact is contrary to public order or to public morals, or if it is likely to cause serious injury to the recipient of the communication. Thus, a threat made by a debtor in a settlement offer, or a statement by a debtor that he or she cannot pay his or her creditors, would not be privileged. A communication ceases to be privileged if it resulted in a transaction that one of the parties wishes to prove. The existence of negotiations between the parties and of settlement offers can also be proven in order to prove certain relevant facts needed to resolve a question with respect to prescription, to prove fraudulent acts or to explain and justify a delay in pursuing litigation.
>
> [Emphasis added.]
>
> (*La preuve civile* (4th ed. 2008))

37 Although this rule has not been codified in Quebec, it is discussed in the academic literature on the law of evidence and forms part of the civil law of Quebec. The Court of Appeal cited two cases in which the Superior Court has applied the exception: *Ferlatte* and *Luger c. Empire, Cie d'assurance-vie*, [1991] J.Q. No. 2635 (C.S. Que.). In Quebec law, as at common law, settlement privilege is an evidentiary rule that relates to the admissibility of evidence of communications. It does not prevent a party from disclosing information; it just renders the information inadmissible in litigation.

(2) Confidentiality in the Mediation Context

38 Mediation is one of several forms of alternative dispute resolution that are available to parties in a legal dispute. It is defined by D. W. Glaholt and M. Rotterdam in *The Law of ADR in Canada: An Introductory Guide* (2011) as "a collaborative and strictly confidential process in which parties contract with a neutral, referred to as a mediator, to assist them in settling their dispute" (p. 10). It is unsurprising that confidentiality is mentioned in the very definition of mediation. Confidentiality is often described as one of the factors that induce parties to opt for mediation (J. Thibault, *Les procédures de règlement amiable des litiges au Canada* (2000), at para. 197), and as one of the benefits of mediation (M. P. Silver, *Mediation and Negotiation: Representing Your Clients* (2001), at p. 82).

39 A form of confidentiality is inherent in mediation in that the parties are typically discussing a settlement, which means that their communications are protected by the common law settlement privilege (Bryant, Lederman and Fuerst, at para. 14.348; see also L. Boulle and K. J. Kelly, *Mediation: Principles, Process, Practice* (1998), at pp. 301-4). But mediation is also a "creature of contract" (Glaholt and Rotterdam, at p. 13), which means that parties can tailor their confidentiality requirements to exceed the scope of that privilege and, in the case of breach, avail themselves of a remedy in contract.

40 As both the appellants and the intervener Arbitration Place Inc. mention, the reasons why parties might want to protect information exchanged in the mediation process are not limited to litigation strategy. Owen V. Gray states the following in this regard in "Protecting the Confidentiality of Communications in Mediation" (1998), 36 *Osgoode Hall L.J.* 667:

> When [the parties] have resorted to mediation in an attempt to settle pending or threatened litigation, they will be particularly alert to the possibility that information they reveal to others in mediation may later be used against them by those others in that, or other, litigation. The parties may also be concerned that their communications might be used by other adversaries or potential adversaries, including public authorities, in other present or future

> conflicts.... Parties may also be concerned that disclosure of information they reveal in the mediation process may prejudice them in commercial dealings or embarrass them in their personal lives.
>
> [Emphasis added; p. 671.]

Incentives for choosing confidential mediation include both "a disinclination to 'air one's dirty laundry' in the neighborhood" and legitimate concerns such as the protection of trade secrets (L. R. Freedman and M. L. Prigoff, "Confidentiality in Mediation: The Need for Protection" (1986), 2 *Ohio St. J. Disp. Resol.* 37, at p. 38).

41 It is therefore no surprise that mediation contracts often contain strongly worded confidentiality clauses that place limits on the disclosure of communications exchanged in the course of the mediation process. Such clauses have been upheld by courts, though not in a context in which the parties were trying to prove the existence of a settlement. In *Bloom Films 1998 inc. c. Christal Films productions inc.*, 2011 QCCA 1171 (C.A. Que.) (CanLII), the Quebec Court of Appeal upheld a confidentiality clause in a case in which a party was seeking to introduce evidence arising out of the mediation process. The clause in question specifically prohibited the use of such evidence for any purpose other than homologation or judicial review. And in *Stewart v. Stewart*, 2008 ABQB 348 (Alta. Q.B.) (CanLII), another case involving a confidentiality clause with respect to communications made in the course of a mediation process, albeit in a family law context, the Alberta Court of Queen's Bench refused to admit evidence arising out of that process.

42 Although the confidentiality provided for in a clause of a mediation contract may be broader, and set out in greater detail, than the common law settlement privilege, several authors caution that such a clause nevertheless does not represent a "watertight" approach to confidentiality and that a court may refuse to enforce it after balancing competing interests, such as the role of confidentiality in encouraging settlement, and evidentiary requirements in litigation (see Boulle and Kelly, at pp. 309 and 312-13; F. Crosbie, "Aspects of Confidentiality in Mediation: A Matter of Balancing Competing Public Interests" (1995), 2 *C.D.R.J.* 51, at p. 70; K. L. Brown, "Confidentiality in Mediation: Status and Implications", [1991] *J. Disp. Resol.* 307; E. D. Green, "A Heretical View of the Mediation Privilege" (1986), 2 *Ohio St. J. Disp. Resol.* 1, at pp. 19-22; Freedman and Prigoff, at p. 41).

43 The intervener Arbitration Place suggests that the four-part Wigmore test, sometimes used by common law courts to determine whether evidence of communications is admissible, be applied to balance the competing interests. The four parts of the test are:

> (i) The communications must originate in a confidence that they will not be disclosed.
>
> (ii) The element of confidentiality must be essential to the maintenance of the relationship in which the communications arose.
>
> (iii) The relationship must be one which, in the opinion of the community ought to be "sedulously fostered."
>
> (iv) The injury caused to the relationship by disclosure of the communications must be greater than the benefit gained for the correct disposal of the litigation.

(I.F., at para. 4, citing *Slavutych v. Baker* (1975), [1976] 1 S.C.R. 254 (S.C.C.), at p. 260.)

This Court applied this test in *Slavutych* to determine whether a confidential document signed by the appellant at the request of the university authorities should remain privileged in dismissal proceedings subsequently taken against the appellant. The Court also applied it in *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.) [hereinafter *Gruenke*], to determine whether religious communications should remain privileged in a criminal context.

44 The intervener Attorney General of British Columbia, on the other hand, suggests that the plain meaning of an unambiguous confidentiality agreement should prevail, barring extreme circumstances. As for the respondents, they say that courts should look beyond the plain meaning to account for the wishes of the parties. I agree with these approaches. In principle, there is relatively little that can displace the intent of the parties once it is clearly established. Only the fourth

step of the Wigmore test — the balancing of interests — is potentially relevant in this case. In my view, the first three steps of the Wigmore test are redundant where parties have not only opted for a confidential dispute resolution process, but have also signed a confidentiality agreement.

(3) Can a Confidentiality Clause in a Mediation Agreement Displace the Exception to Settlement Privilege That Applies Where a Party Seeks to Prove the Terms of a Settlement?

45 The common law settlement privilege and confidentiality in the mediation context are often conflated. They do have a common purpose: facilitating out-of-court settlements. But as we saw above, confidentiality clauses in mediation agreements can also have different purposes. In most cases involving such clauses, the status of the common law settlement privilege will not arise, because the two protections generally serve the same purpose, namely to foster negotiations by encouraging parties to be honest and forthright in reaching a settlement without fear that the information they disclose will be used against them at a later date. However, as I mentioned above, settlement privilege and a confidentiality clause are not the same, and they may in some circumstances conflict. One is a rule of evidence, while the other is a binding agreement; they do not afford the same protection, nor are the consequences for breaching them necessarily the same.

46 The differences between these protections may be muddled in a case like this one in which both of them could apply, but to different parts of the sequence of events. The parties met for the mediation session on April 27, 2011, the day after they had signed an agreement with a confidentiality clause. The clause in question applied to discussions that took place in the course of the mediation session and prohibited the disclosure of information about those discussions at any time in the future. A settlement offer was made at the mediation session, was kept open for 30 days after that date, and was discussed by the parties' lawyers after the session. Any additional information that came up in the course of these subsequent discussions falls outside the protection of the confidentiality clause — however, since it formed part of negotiations aimed at reaching a settlement, it is protected by settlement privilege. As regards the timing of the communications, the scope of settlement privilege is broader, because it is not limited to the duration of the mediation session.

47 On the other hand, there are recognized exceptions to settlement privilege at common law that limit the scope of its protection, but such exceptions may be lacking in the case of a confidentiality clause. The question is whether an absolute confidentiality clause in a mediation agreement displaces the common law exception, thereby preventing parties from producing evidence of communications made in the mediation process in order to prove the terms of a settlement.

48 There is indeed a delicate balance to be struck. The concerns articulated by commentators about the uncertainty of confidentiality clauses in mediation contracts are legitimate. Boulle and Kelly accurately identify the most important of these concerns:

> The principle of sanctity of contract supports the maintenance of confidentiality where the parties have committed themselves to it. If, however, the confidentiality is too wide, it will sterilise too much evidence and seriously undermine the trial process. If the confidentiality is too narrow, it will discourage parties from entering mediation and from using their best endeavours to settle once there. A balance is required between supporting mediation, on one hand, and not freezing litigation or upholding illegality, on the other. [pp. 312-13]

49 In my view, the inquiry in each case will begin with an interpretation of the contract. It must be asked whether the confidentiality clause actually conflicts with settlement privilege or with the recognized exceptions to that privilege. Where parties contract for greater confidentiality protection than is available at common law, the will of the parties should presumptively be upheld absent such concerns as fraud or illegality. I have discussed reasons why parties might desire greater confidentiality protection, and allowing parties to freely contract for such protection furthers the valuable public purpose of promoting settlement. As Professor Green states,

> if a written confidentiality agreement exists, the parties are in a stronger position to argue that the court should exercise its discretion to grant a protective order assuring confidentiality because protecting the confidentiality of mediation statements furthers the expressed intentions of the parties as well as the public policy of encouraging extra-judicial settlements. [p. 22]

50 But contracting out of the exception to settlement privilege that applies where a party seeks to prove the terms of a settlement is a different matter. As I mentioned above, a failure to apply this common law exception could frustrate the broader purpose of promoting settlements in that it might prevent parties from enforcing the terms of settlements they have negotiated. Thus, whereas contracting for broader protection than is afforded by the common law settlement privilege may further the overall purpose of that privilege in most circumstances, contracting out of the exceptions to the privilege might undermine that purpose. This may be what was behind the Court of Appeal's decision, as it largely favoured the exception to settlement privilege over the confidentiality clause.

51 In my respectful opinion, the Court of Appeal did not devote adequate attention in its analysis to freedom of contract. It is open to contracting parties to create their own rules with respect to confidentiality that entirely displace the common law settlement privilege. This furthers both freedom of contract and the likelihood of settlement, two important public purposes. However, the mere fact of signing a mediation agreement that contains a confidentiality clause does not automatically displace the privilege and the exceptions to it. As I mentioned above, these protections do not have the same scope. For instance, settlement privilege applies to all communications that lead up to a settlement, even after a mediation session has concluded. It cannot be argued that parties who agree to confidentiality in respect of a mediation session thereby deprive themselves of the application of settlement privilege after the conclusion of the mediation session. The protection afforded by the privilege does not evaporate the moment the parties contract for confidentiality with respect to the mediation process, unless that is the contract's intended effect.

52 I would note that there has been some international agreement on this approach to confidentiality in the mediation context. Jurisdictions in 14 countries with both common law and civil law systems, including Ontario (S.O. 2010, c. 16) and Nova Scotia (S.N.S. 2005, c. 36), have adopted the United Nations Commission on International Trade Law's Model Law on International Commercial Conciliation. Article 9 of the Model Law states:

> Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.
>
> [Emphasis added.]
>
> (*UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002* (2004), at p. 5)

53 This article, with which my approach is consistent, recognizes the need for confidentiality in the settlement context, but also provides that parties may enter into their own agreements in this regard. Furthermore, it indicates widespread acceptance in both common law and civil law jurisdictions that an exception to settlement privilege applies where a party seeks to prove the existence or the terms of a settlement.

54 Where an agreement could have the effect of preventing the application of a recognized exception to settlement privilege, its terms must be clear. It cannot be presumed that parties who have contracted for greater confidentiality in order to foster frank communications and thereby promote a settlement also intended to displace an exception to settlement privilege that serves the same purpose of promoting a settlement. Parties are free to do this, but they must do so clearly. To avoid a dispute over the terms of a settlement, they may also choose to stipulate that, to be valid, any settlement agreed to in the mediation must be immediately put into writing. This practice is specifically contemplated in art. 1414 of the *Civil Code of Québec*, which provides that "[w]here a particular or solemn form is required as a necessary

condition of formation of a contract, it shall be observed". Such a stipulation would underscore the binding nature of any agreement reached in the course of the mediation process.

55 I wish to emphasize that my analysis concerns one exception to the common law settlement privilege — the one that applies where a party seeks to prove the terms of a settlement. I have not discussed other exceptions, such as the one with respect to fraudulent or unlawful communications, as they are not at issue in this case. Nor will I consider whether the mediator could be compelled to testify in a situation such as this one. The evidence before this Court is limited to the impugned paragraphs of the motion for homologation, so I will not address the appropriate legal threshold for permitting or compelling direct testimony by the mediator. I will leave that question for another day.

56 In my opinion, the information the respondents seek to disclose with the impugned paragraphs of their motion for homologation is protected by the confidentiality clause, and not solely by settlement privilege. It was open to the parties to displace settlement privilege, including the exceptions to it. The question is whether they did so.

57 The mediation contract was signed and performed in Quebec. It must be interpreted in accordance with the *Civil Code of Québec* and with the law of obligations.

B. Does This Mediation Contract Permit the Parties to Use Confidential Information in Order to Prove the Terms of a Settlement?

58 I have concluded that it is generally open to parties, in the mediation context, to contract for confidentiality that exceeds that of the common law settlement privilege; in particular, parties may contract out of the exception to that privilege that enables a party to disclose confidential information in order to prove the terms of a settlement. I will now inquire into whether that is what the parties did in this case. What is the effect of the mediation contract at issue here?

59 In Quebec, contractual interpretation is centered on the intention of the parties. As J.-L. Baudouin and P.-G. Jobin explain, where the parties disagree about the scope of a contract clause, the judge must determine what the parties originally intended, at the time of formation of the contract (*Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, eds., at pp. 488-89). This rule of contractual interpretation is codified in a number of provisions of the *Civil Code of Québec*:

> **1425.** The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.
>
> **1426.** In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.
>
> **1427.** Each clause of a contract is interpreted in light of the others so that each is given the meaning derived from the contract as a whole.
>
> **1431.** The clauses of a contract cover only what it appears that the parties intended to include, however general the terms used.

60 The Quebec Court of Appeal explained this interpretive approach in *Coopérative des consommateurs de Ste-Foy c. Sobeys Québec inc.*, 2005 QCCA 1172, [2006] R.J.Q. 100 (C.A. Que.):

> [TRANSLATION] To establish the true will of the parties, and their common intention within the meaning of article 1425 C.C.Q., it is of course necessary to consider the actual words of the contract, but it is also necessary, as required by article 1426 C.C.Q., to consider the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage.

> Deciphering the parties' intention is of course a delicate exercise, especially where that intention conflicts with the intention expressed in a writing that is by all appearances clear. Moreover, it can happen, which does not make things easier, that a review of the contract itself, of its context, of the circumstances in which it was formed, of the subsequent conduct of the parties, and so on, shows that there was no real common intention. Pineau and Gaudet [*Théorie des obligations* (4th ed. (2001)), at pp. 401-02] explain this as follows:
>
> > ... Moreover, the principle stated in article 1425 C.C.Q. presupposes that there is always a common intention to "find". But that is not always the case. Of course, for there to be a contract, there must be a minimal common intention, but it is very possible that the parties, although they had a genuine common intention regarding the essential elements of the contract, also agreed on certain incidental clauses that each of them, in his or her heart of hearts, interpreted differently. In such a case, it is of course impossible to rely on the common intention of the parties, as there is none. All that can then be done is to adopt the interpretation that can most readily be reconciled with the rest of the contract and with the circumstances in which it was concluded. [paras. 59-60]

61 This approach was also confirmed by this Court in *Archambault c. Canada (Agence du Revenu)*, 2013 SCC 65, [2013] 3 S.C.R. 838 (S.C.C.): "... the determination of the common intention, or will, of the parties represents a true exercise of interpretation" (para. 48; see also D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at paras. 1587-90; S. Grammond, A.-F. Debruche and Y. Campagnolo, *Quebec Contract Law* (2011), at paras. 297-301).

62 On its face, the mediation contract at issue in the case at bar shows a common intention on the part of the parties to be bound by confidentiality in respect of anything that might transpire in the course of the mediation. But the question to be answered is more specific and concerns an incidental aspect of the contract, for which the common intention of the parties is not immediately clear: Was the confidentiality clause intended to exceed the protection of the common law settlement privilege and, more specifically, to displace the exception to that privilege that applies where a party seeks to prove the existence or the scope of a settlement? I find that a review of the nature of the contract, of the circumstances in which it was formed and of the contract as a whole reveals that the parties did not intend to disregard the usual rule that settlement privilege can be dispensed with in order to prove the terms of a settlement.

63 The nature of the contract is that of a mediation agreement signed on the eve of the mediation with the apparent purpose of settling an ongoing dispute that was the subject of an action in the Quebec Superior Court. The word "settlement" appears twice in the mediation agreement, the first time in a clause relating to the mediator that reads "[t]he Mediator will have no decision-making power, but will merely assist the parties in attempting to arrive at a settlement of their dispute", and the second time in the mediator's concluding words: "I look forward to working with you, and hope that the Mediation will give rise to a settlement of the dispute."

64 The nature of the contract must be considered together with the circumstances in which it was formed. Neither of the parties drafted the mediation contract or the confidentiality clause. It was a standard form contract provided by the mediator, who sent it to both parties to sign on the eve of the mediation. Neither party amended the standard mediation agreement or added any provisions relating to confidentiality when they signed it. There is no evidence that the parties thought they were deviating from the settlement privilege that usually applies to mediation when they signed the agreement.

65 It is my opinion that the parties entered into this mediation process with the intention of settling their dispute and that they had no reason to assume that they were signing away their ability to prove a settlement if necessary. There is no evidence that they had any expectation for this mediation other than that it might help them settle the dispute. Lluelles and Moore write that, [TRANSLATION] "[i]f the spirit pervading a contract is considered to be the best guide in this regard (art. 1425) ..., the common intention of the parties can sometimes be self-evident, and a question of logic" (para. 1589). Absent an express provision to the contrary, I find it unreasonable to assume that parties who have agreed to mediation for the purpose of reaching a settlement would renounce their right to prove the terms of the settlement. Such a result would be illogical.

66 I therefore find that the mediation contract does not preclude the parties from producing evidence of communications made in the course of the mediation process in order to prove the terms of a settlement. However, I would note that this exception is a narrow one. Parties may produce such evidence only insofar as it is necessary in order to prove the terms of the settlement. The judge who hears the motion for homologation will consider the impugned paragraphs of the motion individually to determine whether each of them is necessary for that purpose. If either party would prefer that potentially sensitive information tendered in support of those paragraphs not be made available to the public, an application can be made to the motion judge for a confidentiality order and to consider the evidence *in camera*, as long as the parties meet the test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (S.C.C.). Not all cases will meet that test, which requires parties to show

> (a) [that] such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) [that] the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

(*Sierra Club*, at para. 53)

In camera hearings such as this should be reserved for cases in which there is a genuine dispute about the scope of the confidentiality agreement.

67 I find that it is open to parties, in agreeing to confidentiality for a mediation process, to go so far as to limit their ability to prove the terms of any settlement. When any such limit is placed on the usual rule in this regard, however, it must be clear, on applying the principles of contractual interpretation of the relevant jurisdiction, that that is what the parties intended. In this case, the principles of Quebec contract law applied because the agreement at issue was entered into in Quebec. Had the law of another jurisdiction applied, the question whether the parties intended to renounce the common law exception to settlement privilege that applies where a party seeks to prove the terms of a settlement would have been decided in accordance with the principles applicable in that jurisdiction.

68 Although I find that the Court of Appeal failed to conduct the necessary contractual interpretation exercise before applying the exception to the common law settlement privilege that enables parties to prove the terms of a settlement, I nevertheless uphold the result it reached. The parties did not renounce the common law rule, which also applies in Quebec, that communications made in the course of negotiations can be used to prove the terms of a settlement.

V. Conclusion

69 For the foregoing reasons, the appeal is dismissed with costs throughout.

Appeal dismissed.

Pourvoi rejeté.

TAB 2

2017 QCCS 284
Quebec Superior Court

Bloom Lake General Partner Ltd., Re

2017 CarswellQue 329, 2017 QCCS 284, 275 A.C.W.S. (3d) 251,
31 C.C.P.B. (2nd) 216, 45 C.B.R. (6th) 110, EYB 2017-275611

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 as replacement 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)

Hamilton J.

Heard: December 20, 2016
Judgment: January 30, 2017
Docket: 500-11-048114-157

Counsel: Bernard Boucher, for Petitioners
Sylvain Rigaud, Chrystal Ashby, for Monitor
Nicholas Scheib, Andrew Hatnay, for mises en cause Michael Keeper, Terence Watt, Damien Lebel, and Neil Johnson
Daniel Boudreault, for mise en cause Syndicat des métallos, sections locales 6254 et 6285
Ronald A. Pink, for mise en cause Morneau Shepell Ltd, in its capacity as replacement pension plan administrator
Doug Mitchell, Edward Béchard-Torres, for mise en cause Her Majesty in Right of Newfoundland and Labrador, as represented by Superintendent of Pensions
Pierre Lecavalier, for mise en cause Attorney General of Canada, acting on behalf of office of the Superintendent of financial institutions
Sophie Vaillancourt, Roberto Clocchiatti, for mise en cause Régie des rentes du Québec
Martin Roy, for mise en cause Ville de Sept-Îles

Subject: Insolvency; International
Related Abridgment Classifications
Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.2 Jurisdiction of courts
I.2.a Jurisdiction of Bankruptcy Court
I.2.a.iv Territorial jurisdiction
I.2.a.iv.A Foreign bankruptcies

Headnote

Faillite et insolvabilité --- Compétence en matière de faillite et d'insolvabilité — Compétence des tribunaux — Compétence du tribunal de faillite — Compétence territoriale — Faillites étrangères

Débiteurs exploitaient une mine dans la province de Terre-Neuve-et-Labrador et une installation portuaire dans la province de Québec — Employés de la mine et de l'installation portuaire participaient aux régimes de retraite des débiteurs — Débiteurs étaient les administrateurs des régimes de retraite, lesquels étaient régis en partie par une loi de Terre-Neuve-et-Labrador — En particulier, des fiducies présumées et des sûretés avaient été créées en vertu de la loi de Terre-Neuve-et-Labrador — Débiteurs ont éprouvé des difficultés financières et se sont placés sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Ordonnance initiale a été émise et un contrôleur a été nommé — Contrôleur a déposé une requête faisant valoir que le Tribunal devrait demander l'aide de la Cour suprême de Terre-Neuve-et-Labrador — Requête rejetée — En principe, toutes les questions se rapportant à l'insolvabilité d'un débiteur doivent être tranchées par un seul tribunal — Toutefois, il peut survenir des situations où un tribunal puisse demander l'aide d'un autre tribunal — Tribunal saisi d'une question d'insolvabilité a le pouvoir discrétionnaire de prendre cette décision — En l'espèce, les arguments avancés au soutien d'un renvoi des questions à un autre tribunal n'étaient pas convaincants — Simple fait qu'un litige est régi par une loi étrangère n'est pas une bonne raison pour envoyer un dossier à une juridiction étrangère — Il n'y avait rien de particulièrement unique à propos des dispositions applicables de la loi en question — Par conséquent, il n'était pas nécessaire de demander l'aide de la Cour suprême de Terre-Neuve-et-Labrador.

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Jurisdiction of courts — Jurisdiction of Bankruptcy Court — Territorial jurisdiction — Foreign bankruptcies

Debtors operated mine in province of Newfoundland and Labrador and port facility in province of Quebec — Employees of mine and port facility were members of debtors' pension plans — Debtors were administrators of pension plans which were governed in part by Act of Newfoundland and Labrador — In particular, deemed trusts and liens had been created pursuant to Act of Newfoundland and Labrador — Debtors experienced financial difficulties and sought protection under Companies' Creditors Arrangement Act — Initial order was issued and monitor was appointed — Monitor brought motion asserting that Court should seek assistance of Supreme Court of Newfoundland and Labrador — Motion dismissed — In principle, all issues relating to debtor's insolvency are decided by one single court — However, there are cases where court may decide to seek assistance of another court — Court hearing insolvency matter has discretionary power to make that decision — Here, arguments put forward in support of referral of issues to another court were not convincing — Mere fact that dispute is governed by foreign law is not good reason to send case to foreign jurisdiction — There was nothing particularly unique about relevant provisions of Act in question — Therefore, assistance of Supreme Court of Newfoundland and Labrador was not necessary.

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art. 3083-3133 — considered

art. 3135 — considered

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art. 8(1) — considered

art. 8(2) — considered

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art. 187(7) — considered

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art. 28 — referred to
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art. 57 — referred to
Saskatchewan Pension Benefits Act, 1992, S.S. 1992, ch. P-6.001
art. 43 — referred to

MOTION brought by monitor asserting that Court should seek assistance of Supreme Court of Newfoundland and Labrador because many issues were governed by legislation enacted by legislature of Newfoundland and Labrador.

Hamilton J.:

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* 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*, *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 arid 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 local court.

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]

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.*

Motion dismissed.

Footnotes

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 (Que. Bktcy.); motion for leave to appeal dismissed, 2015 QCCA 1351 (C.A. Que.).

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 *Eagle River International Ltd., Re*, 2001 SCC 92 (S.C.C.), par. 25-28.

20 *Ibid*, par. 27.

21 *Ibid*, par. 64.

22 *Ibid*, par. 76.

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

24 *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), par. 22; *AbitibiBowater Inc., Re*, 2012 SCC 67 (S.C.C.), par. 21; *Montreal, Maine & Atlantic Canada Co. / Montreal, Maine & Atlantique Canada Cie, Re*, 2013 QCCS 5194 (C.S. Que.), par. 24-25; *Nortel Networks Corp., Re*, 2015 ONSC 1354 (Ont. S.C.J. [Commercial List]), par. 24; *Essar Steel Algoma Inc., Re*, 2016 ONSC 595 (Ont. S.C.J. [Commercial List]), 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 (Ont. C.A.).

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 *Chatigny v. Emerson électrique du Canada ltée*, 2013 QCCA 163 (C.A. Que.); *Boucher c. Stelco Inc.* [2004 CarswellQue 327 (C.A. Que.)], 2004 CanLII 13895.

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

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

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 Ltd., Re*, 2012 ONSC 2515 (Ont. S.C.J. [Commercial List]).

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 Corp., Re*, 2015 BCSC 836 (B.C. S.C.), par. 90.

46 Watt Affidavit, par. 16.

47 Article 2809 C.C.Q.

48 *Constructions Beauce-Atlas inc. c. Pomerleau inc.*, 2013 QCCS 4077 (C.S. Que.), par. 14.

49 *Saini v. Canada (Minister of Citizenship & Immigration)*, 2001 FCA 311 (Fed. C.A.), par. 26.

50 *Supra* note 37.

51 2014 QCCS 174 (Que. Bktcy.).

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

TAB 3

2016 ONSC 595
Ontario Superior Court of Justice [Commercial List]

Essar Steel Algoma Inc., Re

2016 CarswellOnt 1040, 2016 ONSC 595, 263 A.C.W.S. (3d) 301, 33 C.B.R. (6th) 313

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

In the Matter of a Plan of Compromise or Arrangement of Essar Steel Algoma Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company, and Essar Steel Algoma Inc. USA

Newbould J.

Heard: January 14, 2016
Judgment: January 25, 2016
Docket: 15-CV-0011169-00CL

Counsel: Eliot Kolers, Maria Konyukhova, Yannick Katirai, for Applicants
Andrew Kent, Markus Koehnen, Jeffery Levine, for Moving Parties, Cleveland-Cliffs Iron Company, Cliffs Mining Company and Northshore Mining Company ("Cliffs")
Derrick Tay, Clifton Prophet, Nicholas Kluge, for Monitor
L. Joseph Latham, Bradley Whiffen, for Ad Hoc Committee of Noteholders
Natalie E. Levine, for Ad Hoc Committee of senior and junior secured Noteholders
Sarah-Anne Van Allen, for Wilmington Trust, National Association
Evan Cobb, for Directors of the applicants
Andrea Lockhart, for Deutsche Bank
Ronald Carr, for Her Majesty the Queen in right of Ontario

Subject: Civil Practice and Procedure; Contracts; Insolvency; International

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Conflict of laws
VI Contracts
VI.1 Choice of law
VI.1.c Forum conveniens
VI.1.c.iv Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Jurisdiction — Steel company E and group of mining companies C were parties to supply agreement governed by Ohio law — Dispute arose regarding amount of iron ore pellets E was obliged to take from 2013 to 2015 — C commenced action in Ohio for damages for breach of contract — E commenced counterclaim for damages for breach of contract — C purported to terminate agreement in October 2015 based on E's alleged multiple breaches and repudiation — E commenced application for relief under Companies' Creditors Arrangement Act (CCAA) in November 2015 — Action in Ohio was essentially stayed — E commenced motion in Ontario essentially seeking resolution of prior dispute as part of CCAA proceedings — C brought motion for dismissal or stay of E's motion on basis of lack of jurisdiction or forum

non conveniens — Motion dismissed — Court acting under CCAA clearly had power to make procedural orders of kind sought by E in this case — Issues between E and C were subject to "single control" model that favoured litigation involving insolvent company to be dealt with in one jurisdiction — C was not stranger to present insolvency proceedings — C's action against E in Ohio made C purported creditor of E — C's termination of agreement had been important factor that led to E filing for protection under CCAA — Single control model required C's claim against E to be dealt with in this CCAA proceeding — Issues between E and C were completely interwoven so it made no sense to require E to litigate its claim against C in United States when C's claim had to be considered here — Ontario court also had jurisdiction simpliciter, and C failed to establish Ontario was not convenient forum.

Conflict of laws --- Contracts — Choice of law — Forum conveniens — Miscellaneous

Steel company E and group of mining companies C were parties to supply agreement governed by Ohio law — Dispute arose regarding amount of iron ore pellets E was obliged to take from 2013 to 2015 — C commenced action in Ohio for damages for breach of contract — E commenced counterclaim for damages for breach of contract — C purported to terminate agreement in October 2015 based on E's alleged multiple breaches and repudiation — E commenced application for relief under Companies' Creditors Arrangement Act (CCAA) in November 2015 — Action in Ohio was essentially stayed — E commenced motion in Ontario essentially seeking resolution of prior dispute as part of CCAA proceedings — C brought motion for dismissal or stay of E's motion on basis of lack of jurisdiction or forum non conveniens — Motion dismissed — Ontario court had jurisdiction simpliciter, and C failed to establish Ontario was not convenient forum — Cost of proceeding in Ontario was neutral factor — Lawyers from United States could appear in Ontario courts in certain circumstances — Proving Ohio law would be relatively minor expense — Familiarity of Ohio judge with case was neutral factor, since no determination had been made on relevant issues — Nothing indicated Ohio court was in better position to hear case sooner than Ontario court — Distance from court was neutral factor, since E was geographically farther from present court than C — Ohio law was not substantially different from Ontario law regarding material breach — Nothing indicated standards of good faith and fair dealing that would be applied in Ohio would necessarily reflect Ohio standards rather than Ontario standards — Enforcement of Ontario judgment in Ohio, even with injunctive relief, did not raise insurmountable barriers — Risk of non-enforcement did not rise to level that would render Ontario forum non conveniens.

Table of Authorities

Cases considered by *Newbould J.*:

Black v. Breeden (2012), 2012 SCC 19, 2012 CarswellOnt 4272, 2012 CarswellOnt 4273, 343 D.L.R. (4th) 629, 17 C.P.C. (7th) 1, 91 C.C.L.T. (3d) 153, 429 N.R. 192, 291 O.A.C. 311, (sub nom. *Breeden v. Black)* [2012] 1 S.C.R. 666, 114 O.R. (3d) 78 (note) (S.C.C.) — followed

Eagle River International Ltd., Re (2001), 2001 SCC 92, 2001 CarswellQue 2725, 2001 CarswellQue 2726, 30 C.B.R. (4th) 105, (sub nom. *Sam Lévy & Associates Inc. v. Azco Mining Inc.)* 207 D.L.R. (4th) 385, (sub nom. *Lévy (Sam) & Associés Inc. v. Azco Mining Inc.)* 280 N.R. 155, (sub nom. *Sam Lévy & Associés Inc. v. Azco Mining Inc.)* [2001] 3 S.C.R. 978, 2001 CSC 92 (S.C.C.) — followed

Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente (1999), 1999 CarswellOnt 2807, 178 D.L.R. (4th) 409, (sub nom. *Eastern Power Ltd. v. Azienda Communale Energia & Ambiente)* 125 O.A.C. 54, 50 B.L.R. (2d) 33, 39 C.P.C. (4th) 160, 82 O.T.C. 313 (Ont. C.A.) — referred to

Hilton v. Guyot (1895), 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (U.S. N.Y. Sup.) — followed

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — followed

Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re (2013), 2013 QCCS 5194, 2013 CarswellQue 10709 (C.S. Que.) — considered

Nortel Networks Corp., Re (2014), 2014 ONSC 6973, 2014 CarswellOnt 17291, 20 C.B.R. (6th) 171, 17 C.C.P.B. (2nd) 10 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2015), 2015 ONSC 1354, 2015 CarswellOnt 2936, 23 C.B.R. (6th) 264 (Ont. S.C.J. [Commercial List]) — referred to

Ontario v. Rothmans Inc. (2013), 2013 ONCA 353, 2013 CarswellOnt 7000, 115 O.R. (3d) 561, 305 O.A.C. 261, 363 D.L.R. (4th) 506 (Ont. C.A.) — referred to
SNV Group Ltd., Re (2001), 2001 BCSC 1644, 2001 CarswellBC 2662, 95 B.C.L.R. (3d) 116 (B.C. S.C.) — considered
Sea Search Armada v. Republic of Colombia (2011), 821 F.Supp.2d 268 (U.S. Dist. Ct.) — followed
Smoky River Coal Ltd., Re (1999), 1999 CarswellAlta 491, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94, 1999 ABCA 179 (Alta. C.A.) — referred to
Stewart v. LePage (1916), 53 S.C.R. 337, 29 D.L.R. 607, 1916 CarswellPEI 1 (S.C.C.) — referred to
Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — considered
Trillium Motor World Ltd. v. General Motors of Canada Ltd. (2014), 2014 ONCA 497, 2014 CarswellOnt 8775, 53 C.P.C. (7th) 1, 120 O.R. (3d) 598, 374 D.L.R. (4th) 411, 322 O.A.C. 161 (Ont. C.A.) — referred to
Tucows.Com Co. v. Lojas Renner S.A. (2011), 2011 ONCA 548, 2011 CarswellOnt 8081, 7 C.P.C. (7th) 35, 95 C.P.R. (4th) 49, 106 O.R. (3d) 561, 336 D.L.R. (4th) 443, 87 B.L.R. (4th) 42, 281 O.A.C. 379, 18 P.P.S.A.C. (3d) 296 (Ont. C.A.) — referred to
Van Breda v. Village Resorts Ltd. (2012), 2012 SCC 17, 2012 CarswellOnt 4268, 2012 CarswellOnt 4269, 343 D.L.R. (4th) 577, 91 C.C.L.T. (3d) 1, 17 C.P.C. (7th) 223, 10 R.F.L. (7th) 1, 429 N.R. 217, 291 O.A.C. 201, (sub nom. *Club Resorts Ltd. v. Van Breda)* [2012] 1 S.C.R. 572, (sub nom. *Charron Estate v. Village Resorts Ltd.)* 114 O.R. (3d) 79 (note) (S.C.C.) — referred to

Statutes considered:

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

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

s. 11 — considered

s. 11(4) — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 17.02 — considered

R. 17.02(f)(i) — considered

R. 17.02(p) — considered

MOTION by mining companies for dismissal or stay of steel company's motion on basis of lack of jurisdiction or forum non conveniens.

***Newbould J.*:**

1 The Cleveland-Cliffs Iron Company, Cliffs Mining Company and Northshore Mining Company (collectively "Cliffs") move to object to the jurisdiction of this Court to hear a motion brought by the applicants (together "Essar Algoma") for relief in connection with a supply contract under which Cliffs supplied Essar Algoma for a number of years with all of its iron ore pellets until Cliffs purported to terminate the contract on October 5, 2015, shortly before this CCAA proceeding was commenced. Cliffs submits in the alternative that Ontario is not the convenient forum in

which to determine the dispute between Cliffs and Essar Algoma, and in the further alternative a ruling that a summary procedure for the determination of the dispute is inappropriate.

2 For the reasons that follow, I have concluded that this Court does have jurisdiction over the claim of Essar Algoma against Cliffs and that Cliffs has not established that Ontario is not the convenient forum for the dispute. What the procedure will be to determine the dispute has not yet been settled.

Relevant history

3 In 2001 Algoma Steel Inc. ("Old Algoma") began proceedings under the CCAA and eventually put forward and had approved a plan of compromise and arrangement. As part of its restructuring, Old Algoma divested itself of certain non-core assets, including its interest in a mine in Michigan (the "Tilden Mine") from which Old Algoma sourced its iron ore pellets. In January 2002 Old Algoma sold its interest in the Tilden Mine to Cliffs in consideration for an assumption by Cliffs of certain Old Algoma liabilities and future obligations in respect of the Tilden Mine and Old Algoma and Cliffs entering into a long-term supply agreement effective January 31, 2002 (the "Cliffs Contract"). The Cliffs Contract has been amended a number of times. Essar Algoma succeeded to Old Algoma's rights and obligations under the Cliffs Contract in 2007. The Cliffs Contract is governed by Ohio law.

4 The Cliffs Contract provides that Essar Algoma will source its long-term needs for iron ore pellets exclusively from Cliffs to 2016. As last amended by term sheet in 2013, the Cliffs Contract obliged Essar Algoma to purchase iron ore pellets exclusively from Cliffs until and including 2016. From 2017 to 2024 it obliged Essar Algoma to purchase a portion of its pellets each year from Cliffs. The Cliffs Contract provides that Essar Algoma is obliged in November of each year to provide to Cliffs its good faith estimate of its iron ore requirements (or nomination) for the next year. After Essar Algoma has set its nomination, it has certain rights to modify its nomination to increase or decrease its nomination within a specified range of percentages if it provides written notice to Cliffs by certain deadlines.

5 The Cliffs Contract specifies: (a) a formula for calculating the price of iron ore pellets for the 2013 calendar year; (b) a price for the purchase and sale of iron ore pellets for the 2014 calendar year; (c) a formula for fixing the price of iron ore pellets in 2015 and 2016; and (d) a separate pricing formula for calendar years 2017 to 2024.

6 Cliffs mines the iron ore in Michigan at its mines at the Tilden site and then processes and delivers iron ore pellets by rail to a dock in Michigan known as the Marquette dock or a railway yard in Michigan known as the Partridge rail yard, from which points Essar Algoma takes delivery. Essar Algoma then arranges delivery to Sault Ste. Marie by ship or train.

7 There have been several disputes between Cliffs and Essar Algoma under the Cliffs Contract. The most recent and relevant of such disputes relates to the timing and volume of shipments of iron ore pellets from Cliffs to Essar Algoma beginning in late 2013. At the end of 2013, Essar Algoma advised Cliffs of its nomination for the 2014 calendar year. However, it soon became apparent that the 2013/2014 winter season was one of the coldest and longest in recent history. As a result, the Great Lakes thawed later than usual and the 2014 shipping season was accordingly shortened and Essar Algoma determined that it would not be able to take and use all of the iron ore pellets that it had nominated for 2014. It met with Cliffs to discuss the situation.

8 Whether an agreement was reached to reduce the 2014 shipments became contested, Cliffs saying there was no agreement and Essar Algoma saying there was. The number of tons to be taken by Essar Algoma in 2014 remained a question of debate when Essar Algoma nominated in October 2014 what it would take in 2015 and when it reduced its nomination in July 2015. Cliffs took the position that Essar Algoma had to take the entire tonnage that it had nominated in 2014. Essar Algoma took the position that there was an agreement to reduce the tonnage for 2014.

9 On January 12, 2015, Cliffs filed a complaint in the United States District Court for the Northern District of Ohio (Eastern Division) (the "Ohio Court"). On August 31, 2015, Cliffs amended its complaint. In its Amended Complaint, Cliffs claimed, among other things, damages plus interest and costs for alleged breaches of the Cliffs Contract, including Essar Algoma's alleged failure to take timely delivery of iron ore pellets in the requisite amounts, and a declaratory

judgment that Essar Algoma had materially breached the Cliffs Contract by failing to take delivery of or pay for the full amount of ore that it nominated it would require in 2013, 2014 and 2015 by the end of each calendar. Cliffs did not claim any order or direction permitting it to terminate the Cliffs Contract.

10 In response to the Amended Complaint, Essar Algoma filed an Answer to Plaintiffs' Amended Complaint and Counterclaim on September 14, 2015, wherein it denied Cliffs' allegations and counterclaimed against Cliffs, seeking damages, including a claim for a long-term contract renewal credit payment payable to Essar Algoma pursuant to the Cliffs Contract and a claim for damages for alleged underreporting of moisture levels in pellets delivered by Cliffs.

11 On July 31, 2015, Cliffs filed a motion for partial summary judgment, seeking judgment on its claim that Essar Algoma breached a contractual duty to take its 2014 nomination and to dismiss Essar Algoma's claim for damages related to Cliffs' underreporting of moisture levels to Algoma since 2010. The Cliffs motion was scheduled to be heard on October 6, 2015.

12 On October 5, 2015 Cliffs purported to terminate the Cliffs Contract by letter which stated that as a result of multiple and material breaches and repudiation of the Cliffs Contract by Essar Algoma, Cliffs was treating the Cliffs Contract as terminated effective immediately. The termination came with no advance notice and within days of the next adjustment in price and at a time of year that Essar Algoma has historically begun building up inventory before the winter freeze.

13 On October 7, 2015, Cliffs offered to resume supplying Essar Algoma on a "just in time basis" at a materially higher price than provided for in the Cliffs Contract. The next day Essar Algoma notified Cliffs that the proposed price was commercially unfeasible for it. On October 14, 2015 Cliffs proposed a slightly lower price to Essar Algoma that was still materially higher than the price Essar Algoma had been paying.

14 The Cliffs summary judgment motion in the Ohio Court was heard on October 6, 2015. On the following day, Judge Nugent released his reasons. He granted Cliffs motion in part and denied it in part. He held that there had been no agreement reached in an exchange of emails in April 2014 regarding Essar Algoma's request to decrease its 2014 nomination and that Essar Algoma had thus failed to meet its annual requirements by a margin of at least 500,000 tons. He held however that there were issues as to whether Essar Algoma had given effective notice to reduce a further amount of tons for 2014, whether a force majeure clause gave Essar Algoma a defence to any liability for damages stemming from its alleged failure to meet its annual requirements nomination amounts for 2014, and whether any outstanding damages remained following any allowable off-sets for alleged over-billing caused by Cliffs' use of the 2014 pricing structure in its 2015 sales. In the result he dismissed Cliffs' motion for summary judgment for breach of contract relating to Essar Algoma's 2014 nomination. He also granted Cliffs' motion to dismiss the counterclaim of Essar Algoma with respect to moisture content.

15 On October 6, 2015, one day after Cliffs purported to terminate the Cliffs Contract, Essar Algoma moved in the Ohio Court for a temporary restraining order and a preliminary injunction requiring Cliffs to supply Essar Algoma with iron ore pellets. On October 15, 2015 Essar Algoma filed a notice of withdrawal of its motion. In the notice, Essar Algoma stated that it had obtained supply from another supplier that would provide it with supply for the next several weeks and that this supply removed the need for immediate injunctive relief.

16 A trial for all of the issues in the Ohio litigation was scheduled for December 7, 2015. On October 30, 2015 Essar Algoma filed a motion to adjourn the trial, essentially on the grounds that too much work, particularly documentary production, the conducting of depositions and the production of expert reports, was required for the parties to be ready to start the trial as scheduled.

17 This CCAA proceeding commenced on November 9, 2015 when the Initial Order was made. On November 10, 2015, Essar Algoma commenced ancillary insolvency proceedings under chapter 15 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware. On that day the foreign representative of Essar Algoma sought and obtained, among other things, orders recognizing and enforcing in the United States the orders granted in the CCAA

proceeding which was recognized as a foreign main proceeding. The foreign representative of Essar Algoma also filed a complaint for a declaratory judgment against Cliffs and a motion for entry of an order compelling Cliffs to resume supplying iron ore pellets under the Cliffs Contract. Judge Shannon who heard the motions in Delaware was advised by counsel for the foreign representative that this motion was filed as a "placeholder" in the event that the Canadian Court declined to assume jurisdiction to hear Essar Algoma's motion for injunctive relief against Cliffs.

18 On November 11, 2015 Essar Algoma filed with the Ohio Court a notice pursuant to 11 U.S.C. Section 362 that the Ohio action was automatically stayed as to the defendant Essar Algoma. On December 3, 2015 Judge Nugent of the Ohio Court on his own without argument dismissed the case without prejudice. The order stated that upon application, the action may be reinstated, if necessary, when the bankruptcy proceedings have concluded.

19 On December 4, 2015 Cliffs moved in the Ohio Court for an order vacating the without prejudice dismissal of the action and instead placing the case on the suspense docket until the claim is resolved by the bankruptcy court. No decision on that motion has been rendered by Judge Nugent.

Relevant motions in the CCAA proceeding

20 In mid-November 2015 Essar Algoma served a motion seeking a critical supplier order against Cliffs under section 11.4 of the CCAA. The motion was adjourned to December 3, 2015 and then ultimately not proceeded with. The explanation given by Essar Algoma is that following the filing of the motion, it was able to find alternative suppliers for the shorter term. It now has supply of pellets to the end of March. What is at issue on its motion is the right of Essar Algoma under Cliffs Contract to the end of 2024.

21 On December 8, 2015 the applicants served a motion for an order (i) declaring that the CCAA proceedings are the correct forum for the determination of issues relating to the Cliffs Contract; (ii) declaring that the purported termination of the Cliffs Contract was not effective and that it remains in full force and effect and that Cliffs must supply iron ore pellets to Essar Algoma at the price payable under the Cliffs Contract; (iii) directing Cliffs to comply with its obligations under the Cliffs Contract, and (iv) directing Cliffs to pay damages resulting from its purported termination of the Cliffs Contract.

22 On December 23, 2015 Cliffs delivered a notice of motion for an order (i) dismissing or staying the applicants' motion on the grounds that this Court does not have jurisdiction to grant the relief sought by Essar Algoma; (ii) in the alternative, an order staying the applicants' motion on the grounds that Ontario is not a convenient forum for the hearing of the applicants' motion and (iii) in the further alternative, an order dismissing the applicants' motion without prejudice to the applicants to seek the same relief in the form of an action. It is this motion that was heard on January 14, 2016.

Analysis

23 Cliffs raises a number of issues, including (i) the lack of power to deal with this matter under the CCAA, (ii) a lack of jurisdiction to deal with the claim against Cliffs in Ontario, (iii) Ontario is *forum non conveniens* and (iv) the relief sought is inappropriate for a summary CCAA proceeding.

Jurisdiction under the CCAA

24 Cliffs takes the position that there is no jurisdiction in the CCAA to grant the relief sought by Essar Algoma declaring the termination of the Cliffs Contract to be ineffective and requiring Cliffs to deliver iron ore pellets as required by that contract. It says that the Cliffs Contract was terminated before the CCAA proceedings were commenced and thus the powers of the Court given under the CCAA cannot be used in this case. It relies on *SNV Group Ltd., Re*, 2001 BCSC 1644 (B.C. S.C.) in which Justice Pitfield refused to make an order under the CCAA ordering the repayment of money paid before the CCAA proceeding was brought that was said to have been in breach of an agreement that the debtor had with a third party. In that case, Pitfield J. stated:

> The capacity to stay, whether pursuant to section 11 or by virtue of the Court's inherent jurisdiction, applies to prospective proceedings. By its very nature, a proceeding that has been carried to completion cannot be stayed. An order to repay an amount obtained in contravention of a stay granted by the Court would be appropriate, but it is my opinion that the Court cannot rely on the CCAA or its inherent jurisdiction to compel repayment of an amount alleged to have been obtained in reliance upon a contract in a manner that would amount to adjudication of a claim. The CCAA is not intended to give the Court the capacity to undo transactions completed before the effective date of the initial or subsequent orders.

25 Essar Algoma takes the position that Cliffs has misconstrued what Essar Algoma seeks. Rather, it says that it is requesting the Court to invoke its broad and inherent jurisdiction in exercising its territorial jurisdiction, retaining its territorial jurisdiction under the principles of *forum non conveniens*, and determining the appropriate procedures for the determination of the substantive issues in dispute between the parties. It is the consequent modification of Cliffs' procedural rights that Essar Algoma seeks under the CCAA which it says is routinely granted.

26 I do not see the *SNV Group* case as being apposite. Essar Algoma is not asking the Court on its motion to declare the Cliffs Contract as operative because of some provision of the CCAA, which is what the situation was in *SNV Group*.

27 The CCAA is skeletal in nature and does not contain a comprehensive code that lays out all that is permitted or barred. A court under the CCAA has both statutory authority granted under the CCAA and an inherent and equitable jurisdiction when supervising a reorganization. The most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the CCAA text before turning to inherent or equitable jurisdiction to anchor measures taken in a CCAA proceeding. See *Ted Leroy Trucking Ltd., Re*, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services] at paras. 57, 64 and 65.

28 The CCAA provides in section 11 that a court has jurisdiction to make any order "that it considers appropriate in the circumstances" [1] . A CCAA court clearly has the power as per *Century Services* to make the procedural orders of the kind sought by Essar Algoma in this case. See also *Smoky River Coal Ltd., Re* (1999), 12 C.B.R. (4th) 94 (Alta. C.A.) at paras. 60 and 67 per Hunt J.A. in which he held that a judge has the discretion under the CCAA to permit issues to be decided in another forum (in that case arbitration) but is under no obligation to do so.

29 The "single control" model also favours a CCAA court to deal with the issues between Essar Algoma and Cliffs. In *Eagle River International Ltd., Re*, [2001] 3 S.C.R. 978 (S.C.C.) ["*Sam Lévy*"] Binnie J. referred to and adopted a "single control" model that favours litigation involving an insolvent company to be dealt with in one jurisdiction. He stated:

> **26** The trustees will often (and perhaps increasingly) have to deal with debtors and creditors residing in different parts of the country. They cannot do that efficiently, to borrow the phrase of Idington J. in *Stewart v. LePage* (1916), 53 S.C.R. 337, at p. 345, "if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation"...
>
> **27** Stewart was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse...

30 *Sam Lévy*, involved a BIA proceeding. In it, Binnie J. referred to *Stewart v. LePage* [1916 CarswellPEI 1 (S.C.C.)], a winding-up application. I see no reason why the principles in *Sam Lévy*, should not be applicable in a CCAA proceeding. In *Century Services* it was noted that the harmonization of insolvency law common to the BIA and CCAA is desirable to the extent possible. The central nature of insolvency and the resolution of issues caused by insolvency are common to both BIA and CCAA proceedings and so too should the underlying principles. See my comments in *Nortel Networks Corp., Re* (2015), 23 C.B.R. (6th) 264 (Ont. S.C.J. [Commercial List]) at para. 24.

31 In this case Cliffs has sued in Ohio for damages claiming material breaches of the Cliffs Contract. It is thus a party that has claimed to be a creditor of Essar Algoma [2] . The single control model requires that its claim against Essar Algoma be dealt with in this CCAA proceeding. Essar Algoma claims in this Court a declaration that the Cliffs Contract has not been legally terminated. Cliffs says that the material breaches by Essar Algoma that it claimed in the Ohio litigation to have occurred permit it to terminate the Cliffs Contract. These issues are completely interwoven and it would make no sense to require Essar Algoma to litigate its claim against Cliffs in the United States [3] when Cliffs' claim against Essar Algoma must be dealt with in this Court in Ontario. The claim of Essar Algoma against Cliffs is an asset of the applicants to be dealt with in this Court.

32 In *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re*, 2013 QCCS 5194 (C.S. Que.), a CCAA proceeding arising out of the Lac-Mégantic rail disaster, it was held that a claim by the debtor against its American insurer under a policy governed by Maine law with a forum selection clause in favour of Maine was an asset of the debtor and should be dealt with in Quebec. Dumas J.C.S. referred to the single control model for insolvencies and stated:

> In the present case, we deal with the contrary. It concerns a bankrupt's claim (via the trustee) against its insurance company. Without a shadow of a doubt, this is an asset of the debtor over which the Bankruptcy Court has jurisdiction. [4]

33 For the single control model to apply, the third-party, in this case Cliffs, must not be a stranger to the insolvency proceedings. Cliffs has raised significant damage claims against Essar Algoma and seeks to have those claims remain alive and dealt with in Ohio. Its purported termination of the Cliffs Contract was an important factor that led to Essar Algoma filing for protection under the CCAA. Cliffs is not a stranger to these proceedings.

Jurisdiction simpliciter

34 Jurisdiction must be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. See *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17 (S.C.C.) at para. 82 per LeBel J. See also para. 79 in which LeBel J. referred to the link between the subject matter of the litigation and the defendant to the forum.

35 To establish jurisdiction *simpliciter*, a plaintiff need only establish that there is a good arguable case for assuming jurisdiction. See *Ontario v. Rothmans Inc.*, 2013 ONCA 353 (Ont. C.A.) at para. 54, 110, 118-19. The phrase a "good arguable case" is not a high threshold and means no more than a "serious question to be tried" or a "genuine issue" or that the case has "some chance of success". See *Tucows.Com Co. v. Lojas Renner S.A.*, 2011 ONCA 548 (Ont. C.A.) at para. 36.

36 It is for the plaintiff to establish that there is a presumptive connecting factor to the forum. If the plaintiff establishes that, the defendant has the burden of rebuttal and must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them. See *Van Breda* at paras. 95 and 100.

37 Apart from this test of the connection between the subject matter of the litigation and the forum, traditional tests for basing jurisdiction continue to exist. See *Van Breda* at para. 79 in which LeBel J. stated:

> However, jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.

38 The subject matter of the dispute is whether the Cliffs Contract has been breached and by whom. Cliffs claims Essar Algoma has materially breached provisions of the contract, which if proven, would be grounds to terminate it

under Ohio law. Essar Algoma claims that Cliffs had no basis to terminate the contract. Counsel for Cliffs in argument contended that the subject matter of the dispute is a request for specific performance of the contract in Ohio where the ore is mined and delivered to Essar Algoma. I do not agree with that contention. The subject matter of the dispute is the Cliffs Contract and who breached it. While the relief sought by Essar Algoma includes mandatory injunctive relief, that does not make that prayer for relief the subject matter of the dispute. LeBel J. in *Van Breda* stated that it was the legal situation or the subject matter of the litigation that must be connected to the forum. The legal situation is the contention that the Cliffs Contract has been breached and by whom.

39 Rule 17.02 provides a guide to what may be a presumptive factor. LeBel J. stated:

> **83** At this stage, I will briefly discuss certain connections that the courts could use as presumptive connecting factors. Like the Court of Appeal, I will begin with a number of factors drawn from rule 17.02 of the Ontario Rules of Civil Procedure. These factors relate to situations in which service *ex juris* is allowed, and they were not adopted as conflicts rules. Nevertheless, they represent an expression of wisdom and experience drawn from the life of the law. Several of them are based on objective facts that may also indicate when courts can properly assume jurisdiction...Thus they offer guidance for the development of this area of private international law.

40 Rule 17.02 refers to the following in dealing with contract claims:

> **17.02** A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,
>
> (f) in respect of a contract where,
>
> (i) the contract was made in Ontario,...

41 Essar Algoma takes the position that the Cliffs Contract was made in Ontario.

42 The genesis of the Cliffs Contract was the 2001 CCAA proceeding of Old Algoma. As part of that restructuring, Old Algoma sold Cliffs its interest in the Tilden Mine and concurrently entered into the Cliffs Contract. Old Algoma's restructuring, including the Cliffs Contract, required the approval of the CCAA court which was given by order of Chief Justice LeSage of this Court in 2002.

43 There are traditional rules governing where a contract is made. The general rule of contract law is that a contract is made in the location where the offeror receives notification of the offeree's acceptance. See *Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente* (1999), 50 B.L.R. (2d) 33 (Ont. C.A.) at para. 22 per MacPherson J.A. When acceptance of a contract is transmitted electronically and instantaneously, the contract is usually considered to be made in the jurisdiction where the acceptance is received. See *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2014 ONCA 497 (Ont. C.A.) at para. 66 per Lauwers J.A. There is an exception to this rule which is the postal acceptance rule that when contracts are to be concluded by post the place of mailing the acceptance is to be treated as the place where the contract was made. See *Eastern Power Ltd.* at para. 22.

44 There is no provision in the Cliffs Contract or any of its amendments that would give rise to the postal acceptance rule. Thus the traditional rule that a contract is made in the location where the offeror receives notification of the offeree's acceptance would apply. The evidence as to how the original Cliffs Contract or its amendments was concluded is somewhat unclear but unlikely to get better. Mr. Mee of Cliffs in his affidavit stated:

> I no longer have a specific recollection of where the Agreement and each of its amendments was negotiated or signed. My general recollection is that Essar would sign amendments first and that Cliffs would sign them in Cleveland, Ohio after they had been signed by Essar. I have looked back in my calendar for face to face meetings with Essar in which I participated since 2002. I found a total of 50 meetings 20 of which were in Canada and 30 of which were in the United States.

45 Neither the original Cliffs Contract nor the amendments provide that the contract or amendments becomes binding when signed without delivery. The original Cliffs Contract states in the first recital that "concurrently with the execution *and delivery* of this Agreement [the parties] are entering into that Purchase and Sale Agreement in which [Cliffs is acquiring the interest of Algoma in the Tilden Mine Company]" (Underlining added). This language would indicate that the parties expected delivery of the contract to the other to be required for it to be binding.

46 Therefore if the evidence of Mr. Mee of Cliffs is accepted, it would mean that Essar Algoma generally signed the contract and amendments first, then sent them to Cliffs in Cleveland who then signed them and then sent them back to Essar Algoma. That would mean that the contract was formed when Essar Algoma received notice from Cliffs in Ontario of the acceptance of its offer.

47 There is no date of execution on the original Cliffs Contract effective January 31, 2002 or many of the amendments. There are exceptions. The second amendment was signed and dated by Algoma three days after it was signed by Cliffs. The third amendment was signed and dated by Algoma one day before it was signed by Cliffs. Some were signed the same day. The final amendment that extended the term to 2014 that was produced by Cliffs has an execution date by Essar Algoma of June 7, 2013 and no execution by Cliffs.

48 Based on the evidence led by Cliffs, I find that based on the traditional rules governing where a contract is made, Essar Algoma has at least an arguable case, and likely a stronger case than that, that the Cliffs Contract and its amendments generally were contracts made in Ontario.

49 Beyond this, the fact that the original Cliffs Contract became effective only when approved in Ontario by Justice LeSage under the CCAA is a strong indicator that there is a strong and substantial connection of the Cliffs Contract to Ontario. In *Trillium* Lauwers J.A. referred to Professor Waddams and consideration whether the traditional rules in determining the place of contract are appropriate for jurisdictional cases. He stated:

> **70** Should the traditional rules for determining the place of the contract be determinative in applying the fourth PCF [presumptive connecting factor]? This is perhaps an issue for another case, but I agree with the observation of Professor Waddams, at paras. 108-109, that the arbitrary common law rules for determining the place of a contract may not always be apposite in jurisdictional cases. The traditional contract placement rules respond to concerns that are different from those engaged by a jurisdictional analysis. A broader, more contextual analysis is required, which would inevitably engage the same considerations as the real and substantial connection test itself.

50 One may ask why a technical rule as to where an e-mail or fax was sent or received should determine the local of an international piece of litigation. The fact that the Cliffs Contract had its genesis in an Ontario CCAA process and required the approval of the CCAA court in Ontario appears to me to be at least as much a factor in holding that the contract is an Ontario contract as the factor of who sent or received confirmation of the terms of the contract. Often, and in this case, contract terms or amendments are discussed and agreed orally over the phone or in meetings and then papered afterwards.

51 I conclude and find that Essar Algoma has established a presumptive connecting factor to Ontario for its claim under the Cliffs Contract to Ontario on the basis that the contract was made in Ontario.

52 Essar Algoma also says that Cliffs has operated its business in Ontario and on that basis Ontario has jurisdiction to hear the Essar Algoma request for relief against Cliffs. As stated in para. 79 of *Van Breda*, a defendant's presence in the jurisdiction is a traditional basis for a court having jurisdiction. LeBel J. also stated that carrying on business in a jurisdiction could be an appropriate connecting factor. He stated:

> **87** Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of

business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction. But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction. With these reservations, "carrying on business" within the meaning of rule 17.02(p) may be an appropriate connecting factor. (Underlining added)

53 Rule 17.02(p) provides:

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

(p) against a person ordinarily resident or carrying on business in Ontario;

54 The three Cliffs corporations that are a party to the Cliffs Contract are The Cleveland-Cliffs Iron Company, an Ohio corporation with its principal place of business in Cleveland, Cliffs Mining Company, a Delaware corporation with its principal place of business in Cleveland and Northshore Mining Company, a Delaware corporation with its principal palce of business in Silver Bay, Minnesota. They are each wholly-owned subsidiaries of Cliffs Natural Resources Inc. which is an international mining and natural resources company and publicly traded in the United States and until 2014 owned a mining project in the "Ring of Fire" region of Ontario.

55 Under the Cliffs Contract, Cliffs mined the iron ore in Michigan, refined the ore into iron ore concentrate in Michigan, processed the iron ore concentrate into iron ore pellets in Michigan and delivered the iron ore pellets to Essar in Michigan. Cliffs asserts that it has not carried on any business in Canada and has no presence here. However, the fact that all of the mining and delivery took place in Michigan does not by itself mean that it did not carry on business in Canada.

56 Essar Algoma relies on the fact that during the course of the Cliffs Contract representatives of Cliffs have continuously dealt with Essar Algoma or its predecessor Old Algoma in Sault Ste. Marie in Ontario. Mr. Mee of Cliffs stated that he himself had visited Canada 20 times in connection with the Cliffs Contract. Essar Algoma and its predecessor Old Algoma has been a significant customer of Cliffs. Mr. Marwah of Essar Algoma stated in his affidavit that representatives of Cliffs visit Sault Ste. Marie and representatives of Essar Algoma visit Cleveland in alternating years, during which visits they discuss the status of the Cliffs Contract and ongoing issues relating to their business relationship. Representatives of Cliffs review Essar Algoma's operations and stockpiles of iron ore pellets when they visit Sault Ste. Marie. The most recent visit by Cliffs' personnel was on September 18, 2015 shortly before Cliffs purported to terminate the Cliffs Contract. Prior to that, representatives of Cliffs, including sales, operational, safety and quality personnel visited Essar Algoma in Sault Ste. Marie in October 2014 and August 2013. All of these visits fall within LeBel J.'s statement in *Van Breda* that "regularly visiting the jurisdiction" can constitute carrying on business in the jurisdiction.

57 Cliffs has previously appeared in the Ontario Superior Court of Justice in connection with the Cliffs Contract. In 2010 after Cliffs purported to terminate the Cliffs Contract after a pricing dispute, Essar Algoma applied for and obtained interim injunctive relief. Cliffs appeared on the application and did not oppose the jurisdiction of the Court to hear the relief. Rather it opposed the injunction on the merits. Cliffs complied with the terms of the injunction.

58 I conclude and find that Essar Algoma has established a presumptive connecting factor to Ontario for its claim under the Cliffs Contract to Ontario on the basis that Cliffs has carried on business in Ontario.

59 Cliffs has the burden of rebuttal and must establish facts which demonstrate that the presumptive connecting factors in this case do not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them. I do not think Cliffs has met that burden. The relationship between

the Cliffs Contract and Ontario is not weak and the visits and meetings by Cliffs personnel in Sault Ste. Marie were not for trivial purposes. They were regular visits to meet with an important customer.

60 Accordingly I find that this Court has jurisdiction over the claim of Essar Algoma against Cliffs.

Forum non conveniens

61 The party raising *forum non conveniens* has the burden of showing that the alternative forum is clearly more appropriate. The use of the word "clearly" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. See *Van Breda* at paras. 108 and 109.

62 The factors to be considered are numerous and variable. See *Black v. Breeden*, [2012] 1 S.C.R. 666 (S.C.C.) at para. 23. In *Van Breda*, at para. 5 LeBel J. provided a non-exhaustive list of factors that could play a role. Cliffs relies on a number of these factors as supporting Ohio as the more convenient forum.

63 Before going through these factors, there is an issue as to whether Ohio is the alternative jurisdiction. Essar Algoma says the alternative jurisdiction is Delaware in which the chapter 15 proceedings are taking place. I hesitate to get into that issue and will assume that the alternative forum is the Ohio District Court. That is certainly the view of the expert witness Allan L. Gropper relied on by Cliffs.

(i) The cost of transferring the case or of declining the stay

64 Cliffs says it will result in substantial additional cost and delay to litigate the issues in Ontario. It says that both parties have teams of lawyers in Ohio who are intimately familiar with the case, the relevant documents, witnesses and issues. Cliffs had spent approximately U.S. $1 million on the Ohio litigation before it was dismissed. Essar Algoma has stated that it has a team of 12 attorneys who have spent more than 5,000 hours reviewing documents in the Ohio litigation and that its attorneys have reviewed more than 43,000 documents that Cliffs has produced.

65 Cliffs is concerned that if the matter is litigated in Ontario, both sides will have to educate Ontario lawyers about all of this. At one time, that would have been a major concern. However it is now possible and becoming commonplace in cross-border litigation for American lawyers to appear in an Ontario court, and *vice versa*. The recent Nortel trial was a perfect example of that in which on many days there were 10 to 20 U.S. lawyers in Toronto attending the trial.

66 Cliffs also says that as the Cliffs Contract is governed by Ohio law, there would be the added expense of proving Ohio law. That appears to me to be a minor expense. Essar Algoma has already provided an affidavit of an expert on Ohio law, which Cliffs accepted at least on one point during argument. An affidavit on Ohio contract law could not be relatively expensive in comparison to what has already been expended. Cliffs has also provided a copy of Ohio jury instructions for a civil breach of contract case. The concepts seem virtually identical to Ontario concepts.

67 This factor is essentially a neutral one.

(ii) The impact of a transfer on the conduct of the litigation or on related parallel proceedings

68 Cliffs says having an Ontario court hear the dispute would deprive it of an Ohio judge who is familiar with the issues. Judge Nugent is certainly far more familiar with the issues than an Ontario judge would be. However an Ontario judge, like any other judge hearing a trial or proceeding, is used to coming in cold and picking it up quickly.

69 Judge Nugent has not ruled on whether the Cliffs Contract can be terminated or on whether there were breaches of the contract by Essar Algoma that could be considered material breaches. He merely found on the summary judgment motion, that he dismissed, that there was no legally enforceable agreement between the parties to reduce the 2014 annual nomination to 3.3 million tons and that Essar Algoma therefore failed to meet its annual requirements by a margin of at least 500,000 tons. He did not deal with other defences that Essar Algoma was asserting and stated that he could not conclude that there was a breach entitling Cliffs to damages. Cliffs did not claim any declaration that it had a right to terminate the Cliffs Contract. Cliffs says that if it can prove that there were material breaches, it would have the right to terminate the Cliffs Contract. These are issues yet to be dealt with.

70 So far as the timing of any trial or other proceeding is concerned, there is no evidence that the Ohio District Court would be in a better position to hear the case sooner than in this Court. Cliffs says it is ready to proceed to trial. Essar Algoma has said it needs more discovery. Both Cliffs and Essar Algoma say they want the matter determined as quickly as possible.

71 Whatever the situation, this Court can accommodate the parties quickly. The situation for Essar Algoma is critical, and the Monitor has stated in its sixth report that in developing and carrying out the SISP, which has tight timelines, Algoma needs certainty concerning the status of the Cliffs Contract and an expedited determination of the rights of the parties is linked to the development of the SISP. Whether those rights can be determined that quickly may be a question mark, but this Court is in at least as good a position as the Ohio court to deal with the issues quickly.

72 I see this factor as neutral or at best perhaps slightly favouring Cliffs.

(iii) The possibility of conflicting judgments

73 I do not see this as an issue. In argument, Essar Algoma acknowledged that it is bound by the finding made by Judge Nugent, to which I have already referred. It could hardly say otherwise, given the principle of *res judicata*. All other issues remain open.

(iv) Location of evidence

74 Cliffs says it will have to call evidence of witnesses in the U.S. regarding its advance planning and why Essar Algoma's actions were a problem to Cliffs. These witnesses would come from Cleveland.

75 However, Essar Algoma's witnesses are from Sault Ste. Marie. There is no evidence how many from each side will need to be called. It is a shorter trip from Cleveland to Toronto than from Sault Ste. Marie to Toronto, whether by air or car. In this day of international contracts, particularly between parties near the Canadian border, I do not see this factor as compelling. It is a neutral factor.

(v) Applicable law

76 Ohio law governs the Cliffs Contract. Cliffs says there is a risk an Ontario court will apply Ohio law incorrectly. I suppose it can be said that an Ohio judge would also apply it incorrectly. This might be a material factor if the law in question was markedly different from Ontario law with concepts unknown to Ontario law. It is clear from the record however that this is not the case. It was acknowledged in argument that Ohio law is not substantially different from Ontario law regarding material breach.

77 Cliffs cites the standard jury instructions in Ohio which defines material breach as follows:

> "Material breach" by plaintiff means a breach that violates a term essential to the purpose of the contract. Mere nominal, trifling, slight or technical departures from the contract terms are not material breaches so long as they occur in good faith.

78 The jury instructions go on to say that some Ohio courts have utilized the following five factors listed in the Restatement of the Law, (2d) Contracts (1981) in deciding whether a breach is material:

> (i) The extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (ii) The extent to which the injured party can be adequately compensated for the part of the benefit of which he will be deprived;
>
> (iii) The extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (iv) The likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (v) The extent to which the behaviour of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.
>
> (vi) The extent to which the behaviour of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

79 Cliffs argues that the determination of whether a party failed to comport with standards of good faith and fair dealing is an inherently local reflection of local commercial mores and that the nature of an Ontario court's determination of standards of good faith and fair dealing would inevitably reflect Ontario values and standards rather than Ohio values and standards. I find this argument a stretch. There is no suggestion in the evidence that the values in Cleveland on such an issue would be different from the values in Sault Ste. Marie. In any event, there is nothing in the Ohio law that says that in a case involving parties undertaking a contract in Cleveland and Sault Ste. Marie, it is the Cleveland values rather than the Sault Ste. Marie values that are to be considered.

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.

(vi) Recognition and enforcement of an Ontario judgment

81 Cliffs takes the position that there is no jurisdiction in this Court to deal with the Essar Algoma claim against Cliffs because an injunction should not be ordered against a U.S. resident such as Cliffs that could not be enforced.

82 This argument assumes that Cliffs would ignore a decision of an Ontario court. Whether that is so is a question. Cliffs complied with an injunction ordered in Ontario in 2010 after it purported to terminate the Cliffs Contract. Cliffs has requested alternative relief if this Court assumes jurisdiction requiring a statement of claim to be delivered by Essar Algoma, which is some indication that it intends to appear and deal with the issue if it is to be dealt with in Ontario. If it does there could be no issue of Ontario having jurisdiction that would not be recognized by a U.S. Court as Cliffs would have attorned to the jurisdiction.

83 Cliffs relies on a passage from Sharpe, *Injunctions and Specific Performance*, (loose-leaf ed. November 2015 Toronto: Canada Law Book), ¶1.1220 that refers to a reluctance of courts to make an order that cannot be enforced, as follows:

> Claims for injunctions against foreign parties present jurisdictional constraints which are not encountered in the case of claims for money judgments. In the case of a money claim, the courts need not limit assumed jurisdiction to cases where enforceability is ensured. Equity, however, acts *in personam* and the effectiveness of an equitable decree depends upon the control which may be exercised over the person of the defendant. If the defendant is physically present, it will be possible to require him or her to do, or permit, acts outside the jurisdiction. The courts have, however, conscientiously avoided making orders which cannot be enforced. The result is that the courts are reluctant to grant injunctions against parties not within the jurisdiction and the practical import of rules permitting service

ex juris in respect of injunction claims is necessarily limited. Rules of court are typically limited to cases where it is sought to restrain the defendant from doing anything within the jurisdiction. As a practical matter the defendant "who is doing anything within the jurisdiction" will usually be physically present within the jurisdiction to allow ordinary service.

84 I have not been provided with any case however involving cross-border insolvencies in which orders in proceedings under the CCAA cannot be enforced in the United States in chapter 15 proceedings under the U.S. Bankruptcy Code or that deal with evidence as in this case regarding the enforceability of a non-monetary judgment in the United States.

85 Cliffs relies on an opinion of Allan L. Gropper, a highly regarded federal bankruptcy judge for the Southern District of New York from 2000 to 2015. In that opinion, Mr. Gropper stated that United States courts have the greatest respect for the orders and judgments of courts of other nations, particularly those of Canada and judgments for money are ordinarily enforced. He stated that while non-monetary judgments are less regularly enforced, in appropriate circumstances they may be enforced under the common law principle of comity. However, in order for a foreign order or judgment to be enforced, the foreign court must have personal jurisdiction over the defendant. [5]

86 I could hardly quarrel with an opinion on these matters by someone as eminent as Mr. Gropper. However, Mr. Gropper was instructed to assume that Cliffs does not carry on business in Canada, and that assumption is critical to his analysis. That assumption cannot stand in light of the findings that I have made regarding Cliffs carrying on business in Ontario. While Mr. Gropper opines that a U.S. court must scrutinize the basis on which a foreign court asserts jurisdiction over a defendant, and in light of international concepts of jurisdiction to adjudicate, there is no discussion of this issue if the foreign court such as this Court has found that the defendant has carried on business in Ontario under a contract made in Ontario.

87 Essar Algoma relies on an opinion of Ronald A. Brand, a professor of law at the University of Pittsburgh and highly qualified in the area of the recognition of foreign judgments. Professor Brand's opinion is that the fact that a Canadian judgment provides relief in the form of (a) a declaratory order concerning the rights and obligations of parties under and the status of a contract, and/or (b) specific performance of contractual obligations, would not prevent the recognition and enforcement of that judgment in a court in the United States. Recognition is based on the principle of comity and derives from a U.S. case of *Hilton v. Guyot*, 159 U.S. 113 (U.S. N.Y. Sup. 1895). Professor Brand says that the principles of comity discussed in that case have made the U.S. one of the most liberal countries in the world in recognizing foreign judgments.

88 Cliffs relies on an opinion of Richard B. McQuade Jr., as U.S. District Court judge from 1986 to 1989 and before that an Ohio Common Pleas Court judge from 1978. Since 1998 he has served as a judge by assignment in both federal and Ohio states courts. His opinion is that an Ohio, Minnesota or Michigan court would not enforce an order of an Ontario court in the nature of specific performance. I must say that I prefer the opinion of Professor Brand for the reasons given by Professor Brand and his impressive credentials on the subject, credentials that I believe to be superior to those of Mr. McQuade.

89 Mr. McQuade states in his opinion that recognition of foreign judgments is based upon general principles of comity. He then goes on to state that the Uniform Foreign-Money Judgments Recognition Act that has been adopted in many states, including Ohio, Michigan and Minnesota, restricts the enforcement of foreign judgments to the recovery of money only. This, however, is not the whole picture. As Professor Brand points out, those state statutes are limited in scope to the recognition of foreign money judgments, but they all include a "savings clause" which specifically acknowledges that judgments other than money judgments may be recognized by applying traditional concepts of comity.

90 Mr. McQuade in his opinion stated that courts that adopted the Uniform Act have consistently denied enforcement to non-monetary judgments, and he cited one case *Sea Search Armada v. Republic of Colombia*, 821 F.Supp.2d 268 (U.S. Dist. Ct. 2011) as authority for that proposition. However, as explained by Professor Brand, that decision dealt with a version of the Uniform Foreign Money-Judgments Recognition Act that was in effect in Washington D.C. in 2011 that

did not contain the savings clause that other states including Ohio, Michigan and Minnesota had adopted. A Washington D.C. statute was later passed in 2011 after the decision to expressly preserve the D.C. courts' discretion to recognize foreign non-money judgments under principles of comity or otherwise. Curiously, Mr. McQuade in a footnote to his opinion stated that a U.S. court may provide injunctive relief to enforce a foreign judgment it has recognized and that a U.S. court in doing so may take into account a number of factors typically taken into account in ordering injunctive relief. That footnote was contrary to his opinion stated in the body of his affidavit. [6]

91 There is also the issue as to what a U.S. court would consider in recognizing an injunctive order from this Court. In a recent article in 2014 by Judge Martin Glenn of the United States Bankruptcy Court for the Southern District of New York, Judge Glenn commented on the practice of comity between the U.S. and Canada. He stated:

> In *Hilton v. Guyot*, the Supreme Court held that if the foreign forum provides "a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting," the judgment should be enforced and not "tried afresh." *Hilton*, 159 U.S. at 202-03. "[W]hen the foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, comity should be extended with less hesitation, there being fewer concerns over the procedural safeguards employed in those foreign proceedings." *In re Bd. of Dirs. of Hopewell Int'l. Ins. Ltd., Inc.*, 238 B.R. 25, 66 (Bankr. S.D.N.Y. 1999), *aff'd*, 238 B.R. 699 (S.D.N.Y. 2002) (internal quotation marks and citations omitted). For example, the U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process. U.S. federal courts have repeatedly granted comity to Canadian proceedings.

92 Judge Glenn also referred to a reluctance to second guess a decision of a foreign court in taking jurisdiction if the defendant appeared in the foreign court to challenge its jurisdiction and failed to prevail. He stated:

> In deciding whether to enforce a foreign judgment, a court in the United States may scrutinize the basis for the assertion of jurisdiction by the foreign court. *See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 482 cmt. c. ("*Lack of jurisdiction over defendant.* The most common ground for refusal to recognize or enforce a foreign judgment is lack of jurisdiction to adjudicate in respect of the judgment debtor. If the rendering court did not have jurisdiction over the defendant under the laws of its own state, the judgment is void and will not be recognized or enforced in any other state. Even if the rendering court had jurisdiction under the laws of its own state, a court in the United States asked to recognize a foreign judgment should scrutinize the basis for asserting jurisdiction in the light of international concepts of jurisdiction to adjudicate."). Whether jurisdiction was challenged in the foreign court is relevant but not necessarily decisive in deciding whether to enforce a foreign judgment, although a renewed challenge to jurisdiction is generally precluded. *Id.* ("If the defendant appeared in the foreign court to challenge the jurisdiction of the court and failed to prevail, it is not clear whether such determination will be considered *res judicata* by a court in the United States asked to recognize the resulting judgment."); *Id.* at § 482 rn.3 ("[i]f the defendant challenged the jurisdiction of the rendering court in the first action and the challenge was unsuccessful or was not carried to conclusion ... a renewed challenge to jurisdiction of the rendering court is generally precluded").

93 I recognize the reluctance expressed by Justice Sharpe in his text that our courts avoid making orders that cannot be enforced. However on the basis of the evidence before me, Cliffs has not established that an order made in this Court requiring Cliffs to perform the Cliffs Contract would not be enforced in those states where Cliffs has assets. I accept that there may be some risk as opinions are only opinions, but the risk on the basis of the evidence before me does not rise to the level that would render Ontario a *forum non conveniens* in this case.

(vii) Conclusion on forum non conveniens

94 Cliffs has not met its burden of showing that the alternative forum, in this case Ohio, is clearly more appropriate.

Is the relief inappropriate for a summary proceeding?

95 Cliffs takes the position that the relief Essar Algoma seeks is inappropriate for a summary proceeding and that there is no basis for Essar Algoma claiming urgency. This is not raised as a *forum non conveniens* point. It requests an order that Essar Algoma must deliver a statement of claim.

96 So far as the urgency is concerned, the Monitor has made clear that the issue needs to be quickly decided. I cannot find that Essar Algoma has purposely delayed the issue. In any event, Cliffs in argument took the position that it wanted the issue decided quickly.

97 Regarding the kind of hearing required to deal with the dispute, there is nothing in the record before me to say that Essar Algoma is demanding some summary procedure that would impair Cliffs' procedural rights in any material way. In argument, counsel for Essar Algoma said that what procedure will be adopted is for this Court on another day and that the parties will have to work together to come up with an appropriate procedure. It could be a full trial or less.

98 I would not at this stage order that Essar Algoma deliver a statement of claim. What the form of the process will take is yet to be decided. I agree with Cliffs that the procedural rights of the parties should be protected as much as possible as the circumstances will permit. Those circumstances, of course, include the fact that Essar Algoma filed under the CCAA shortly after Cliffs purported to terminate the Cliffs Contract and that the issue needs to be dealt with quickly for the sake of both parties. As well, the principles laid out in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) and the need to be mindful of the most proportionate procedure for a case will need to be considered.

Conclusion

99 The motion of Cliffs is dismissed.

Motion dismissed.

Footnotes

1 The power in section 11 is "subject to the restrictions set out in this Act." Cliffs argued that an inference should be drawn that because Essar Algoma withdrew its critical supplier motion, an inference should be drawn that it did so because it could not comply with the critical supplier tests in section 11(4). Thus the failure to be able to comply with section 11(4) should be read as a restriction in the Act preventing the use of section 11 by the applicants. I decline to make such an inference and in any event do not think a failure to fall into the language of section 11(4) which provides that a court *may* make an order can be read to be a restriction under section 11. It is commonplace in CCAA proceedings to make orders requiring supply without invoking section 11(4).

2 At the request of Cliffs, the claims procedure order signed on January 14, 2016 in this CCAA proceeding by agreement did not cover Cliffs' claims and the procedure to govern those claims is to await the determination of this motion.

3 It would be up to the Delaware Bankruptcy Court to determine if the claim should proceed in that Court or in the Ohio District Court.

4 Although Justice Dumas referred to a trustee and the Bankruptcy Court, the case was a CCAA case and the MME was not a bankrupt.

5 Mr. Gropper went on in his opinion to give his view ("it is submitted...") that a U.S. Court would not find that Cliffs has submitted to the jurisdiction of the Canadian courts. I have serious doubts as to whether an expert in foreign law should go beyond stating what the foreign law is and give an opinion on what the foreign court would do in a particular case. See my comments in *Nortel Networks Corp., Re* (2014), 20 C.B.R. (6th) 171 (Ont. S.C.J. [Commercial List]) at paras. 103-104. In any event, his opinion was based on the assumption that Cliffs did not carry on business in Canada.

6 Mr. Gropper also referred, in a footnote to his statement that in appropriate circumstances a non-monetary may be enforced under the common law principle of comity, to the *Sea Search* case as authority that where the Uniform Act has been adopted, courts have consistently denied enforcement to non-monetary judgments. However Professor Brand's analysis is a complete answer to that case. I would note that while Mr. Gropper has extremely impressive credentials as a bankruptcy expert, his *curriculum vitae* does not list experience in dealing with state courts or the enforcement of foreign judgments under state legislation.

TAB 4

2009 BCSC 1169
British Columbia Supreme Court

Hayes Forest Services Ltd., Re

2009 CarswellBC 2286, 2009 BCSC 1169, [2009] B.C.W.L.D. 7080, [2009] B.C.W.L.D. 7082, [2009] B.C.W.L.D. 7252, [2009] B.C.J. No. 1725, 180 A.C.W.S. (2d) 861, 57 C.B.R. (5th) 52

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-3 And In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57 And In the Matter of Hayes Forest Services Limited, Hayes Holding Services Limited and Hayes Helicopter Services Ltd.

Burnyeat J.

Heard: July 8, 10, 24, 2009; August 14, 2009
Judgment: August 27, 2009
Docket: Vancouver S085453

Counsel: S.C. Fitzpatrick for Teal Cedar Products Ltd.
J.I. McLean for Hayes Forest Services Limited, Hayes Holding Services Limited, Hayes Helicopter Services Ltd.
E.J. Milton, Q.C. for Western Forest Products Inc.
J. Cytrynbaum for G.E. Canada Corporation
J. Mistry for Steelworkers Locals 1-80, 1-85
F.R. Dearlove for Canadian Imperial Bank of Commerce

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

Related Abridgment Classifications

Alternative dispute resolution
III Relation of arbitration to court proceedings
  III.1 Where jurisdiction of court ousted by statute
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
  XIX.1 General principles
    XIX.1.e Jurisdiction
      XIX.1.e.i Court
Natural resources
IV Timber
  IV.5 Timber licences
    IV.5.d Miscellaneous

Headnote

Natural resources --- Timber — Timber licences — Miscellaneous

H Ltd. filed for protection under Companies' Creditors Arrangement Act ("CCAA") — H Ltd. logged timber for T Ltd. under contract in respect of tree farm licence — In accordance with regulation, contract provided that H Ltd. could assign its rights or interest under agreement provided H Ltd. obtained T Ltd.'s consent which would not be unreasonably withheld — Contract provided for disputes to be referred to arbitration — H Ltd. requested consent of T Ltd. to assignment of contract to N Ltd. — T Ltd. advised that it was withholding consent because N Ltd. was not suitable assignee — T Ltd. brought application to lift stay of proceedings so that it could commence arbitration proceedings in respect of issue of whether it was reasonable to withhold its consent to assignment of contract — H Ltd. brought

application for approval of sale of contract to N Ltd. — Application to lift stay of proceedings dismissed; application for approval of sale granted — Issue should be dealt with in CCAA proceedings — Language of s. 11(4) of CCAA was broad enough to allow decision in CCAA proceedings to be substituted for arbitration process contemplated under contract — H Ltd. met burden of showing that reasonable person would not have withheld consent — T Ltd. should have had no hesitation in concluding that equipment, crew and expertise to undertake work required under contract would be available to N Ltd. — If N Ltd. failed to perform under contract, H Ltd. would be in position to take back contract and perform required logging — Concerns regarding financial capability of N Ltd. and lack of business plan were answered — Part of T Ltd.'s refusal to provide consent was designed to achieve collateral purpose of having contract revert to T Ltd. — T Ltd. did not meet burden of showing that it was reasonable to approve offer of another company, 858 Ltd., since no information was provided regarding financial capability of 858 Ltd. and offer contained conditions precedent that were not met.

Alternative dispute resolution --- Relation of arbitration to court proceedings — Where jurisdiction of court ousted by statute

H Ltd. filed for protection under Companies' Creditors Arrangement Act ("CCAA") — H Ltd. logged timber for T Ltd. under contract in respect of tree farm licence — In accordance with regulation, contract provided that H Ltd. could assign its rights or interest under agreement provided H Ltd. obtained T Ltd.'s consent which would not be unreasonably withheld — Contract provided for disputes to be referred to arbitration — H Ltd. requested consent of T Ltd. to assignment of contract to N Ltd. — T Ltd. advised that it was withholding consent because N Ltd. was not suitable assignee — T Ltd. brought application to lift stay of proceedings so that it could commence arbitration proceedings in respect of issue of whether it was reasonable to withhold its consent — H Ltd. brought application for approval of sale of contract to N Ltd. — Application to lift stay of proceedings dismissed; application for approval of sale granted — Issue should be dealt with in CCAA proceedings — But for filing under CCAA, disputes under contract would have been governed by dispute resolution provisions under contract, Forest Act and related regulations — Language of s. 11(4) of CCAA was broad enough to allow decision in CCAA proceedings to be substituted for arbitration process — Determination of issue was less expeditious and more expensive under arbitration provisions — Time constraints imposed by N Ltd. could not be met by arbitration proceedings — Issue was commonly dealt with by court and required no forestry related experience — Assignment could be approved even if conclusion was reached that it was not unreasonable for T Ltd. to withhold its consent.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court

H Ltd. filed for protection under Companies' Creditors Arrangement Act ("CCAA") — H Ltd. logged timber for T Ltd. under contract in respect of tree farm licence — In accordance with regulation, contract provided that H Ltd. could assign its rights or interest under agreement provided H Ltd. obtained T Ltd.'s consent which would not be unreasonably withheld — Contract provided for disputes to be referred to arbitration — H Ltd. requested consent of T Ltd. to assignment of contract to N Ltd. — T Ltd. advised that it was withholding consent because N Ltd. was not suitable assignee — T Ltd. brought application to lift stay of proceedings so that it could commence arbitration proceedings in respect of issue of whether it was reasonable to withhold its consent — H Ltd. brought application for approval of sale of contract to N Ltd. — Application to lift stay of proceedings dismissed; application for approval of sale granted — Issue should be dealt with in CCAA proceedings — But for filing under CCAA, disputes under contract would have been governed by dispute resolution provisions under contract, Forest Act and related regulations — Language of s. 11(4) of CCAA was broad enough to allow decision in CCAA proceedings to be substituted for arbitration process — Determination of issue was less expeditious and more expensive under arbitration provisions — Time constraints imposed by N Ltd. could not be met by arbitration proceedings — Issue was commonly dealt with by court and required no forestry related experience — Assignment could be approved even if conclusion was reached that it was not unreasonable for T Ltd. to withhold its consent — H Ltd. met burden of showing that reasonable person would not have withheld consent.

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Doman Industries Ltd., Re (2003), 2003 BCSC 376, 2003 CarswellBC 538, 14 B.C.L.R. (4th) 153, 41 C.B.R. (4th) 29 (B.C. S.C. [In Chambers]) — referred to

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — referred to

Exxonmobil Canada Energy v. Novagas Canada Ltd. (2002), 2002 CarswellAlta 739, 30 B.L.R. (3d) 262, [2003] 3 W.W.R. 657, 318 A.R. 99, 10 Alta. L.R. (4th) 80, 2002 ABQB 455 (Alta. Q.B.) — considered

Gauntlet Energy Corp., Re (2003), 2003 ABQB 718, 2003 CarswellAlta 1209, 45 C.B.R. (4th) 47, [2004] 4 W.W.R. 373, 336 A.R. 302, 36 B.L.R. (3d) 250, 20 Alta. L.R. (4th) 314, 5 P.P.S.A.C. (3d) 236 (Alta. Q.B.) — considered

Hayes Forest Services Ltd. v. Teal Cedar Products Ltd. (2008), [2008] 11 W.W.R. 612, 257 B.C.A.C. 105, 432 W.A.C. 105, 2008 CarswellBC 1325, 2008 BCCA 283, 82 B.C.L.R. (4th) 110 (B.C. C.A.) — referred to

Landawn Shopping Centres Ltd. v. Harzena Holdings Ltd. (1997), 1997 CarswellOnt 4328, 44 O.T.C. 288 (Ont. Gen. Div. [Commercial List]) — considered

Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd. (1987), 46 R.P.R. 34, 13 B.C.L.R. (2d) 367, 1987 CarswellBC 128 (B.C. S.C.) — referred to

Philip's Manufacturing Ltd., Re (1991), 9 C.B.R. (3d) 1, [1992] 1 W.W.R. 651, 60 B.C.L.R. (2d) 311, 1991 CarswellBC 502 (B.C. S.C.) — referred to

Playdium Entertainment Corp., Re (2001), 2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) — followed

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Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — considered

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T. Eaton Co., Re (1997), 1997 CarswellOnt 5954 (Ont. Gen. Div.) — referred to

T. Eaton Co., Re (1997), 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.) — referred to

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Statutes considered:

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

Generally — referred to

s. 11 — referred to

s. 11(4) — referred to

Forest Act, R.S.B.C. 1996, c. 157

Generally — referred to

s. 160 — referred to

s. 162 — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

R. 3(3.1) [en. B.C. Reg. 191/2000] — pursuant to

R. 10 — pursuant to

R. 12 — pursuant to

R. 13(1) — pursuant to

R. 13(6) — pursuant to

R. 14 — pursuant to

R. 44 — pursuant to

Regulations considered:

Forest Act, R.S.B.C. 1996, c. 157

Timber Harvesting Contract and Subcontract Regulation, B.C. Reg. 22/96

Generally — referred to

s. 4(1) — referred to

s. 5 — referred to

ss. 48-51 — referred to

APPLICATION by company under *Companies' Creditors Arrangement Act* for approval of sale of logging contract; APPLICATION to lift stay of proceedings.

***Burnyeat J.*:**

1 Hayes Forest Services Limited, Hayes Holding Services Limited and Hayes Helicopter Services Ltd. ("Hayes") apply pursuant to the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), the *Forest Act*, R.S.B.C. 1996, c. 157 and its Regulations, Rules 3(3.1), 10, 12, 13(1), 13(6), 14 and 44 of the *Rules of Court* and the inherent jurisdiction of the Court for Orders approving the sale of that "certain replaceable stump to dump logging contract" ("Contract") between Hayes Forest Services Limited and Teal Cedar Products Ltd. ("Teal") to North View Timber Ltd. ("North View") relating to Timber Forest Licence 46 ("TRL46"). A $50,000.00 deposit has been paid by North View, and a further $277,000.00 would be paid at the time of the closing contemplated by the purchase. The balance of the purchase price of $1,614,266.00 is to be paid at the rate of $3.00 per cubic metre of the timber harvested under the Contract.

2 In opposing that application, Teal applies to lift the stay of proceedings granted under the July 31, 2008 Order so that Teal may commence arbitration proceedings in respect of the issue of whether it is reasonable to withhold its consent to the assignment of the Contract to North View and adjourning the application of Hayes pending the completion of the arbitration proceedings. In the alternative, Teal requests an order adjourning the application pending the production of certain documentation and information concerning the proposed sale to North View. In the further alternative, Teal seeks an order that a sale of the Contract be approved to 0858434 B.C. Ltd. ("858") for a purchase price of $1,400,000.00, with a down payment of $400,000.00, and with the balance of the purchase price to be paid at the rate of $2.00 per cubic metre of timber harvested under the Contract.

3 As part of a July 31, 2008 Order, a Monitor was appointed to report to the Court and the creditors from time to time. In a June 25, 2009 letter to counsel for Hayes, the Monitor states in part regarding the proposed sale to North View:

> In our opinion, the offer represents a reasonable price for this asset in today's market and we believe that the Company has diligently attempted to market this asset over an extended period of time.
>
> The purchase price is payable based on Northview logging activity under the contract. We believe that this is the only realistic mechanism to conclude a sale at this value. In order to protect its position and ensure future payments are made, the Company will receive a deposit of $327,000 on completion of the sale, and take security over the contract such that in the event Northview defaults on its future obligations the Company will be in a position to enforce that security and retake ownership of the contract.

Background

4 A "replaceable stump to dump" logging contract in respect of Tree Farm Licence 46 dated January 9, 1990 was entered into by Fletcher Challenge Canada Ltd. as the holder of the contract and Pat Carson Bulldozing Ltd. as the contractor. The interests of the original parties have both been acquired by other parties. The interest of Pat Carson Bulldozing Ltd. was acquired by Hayes Forest Services Limited. The interest of Fletcher Challenge Canada Ltd. was acquired by Teal pursuant to a January 19, 2004 Asset Purchase Agreement and a May 6, 2004 Assignment of Agreement. From January 1, 2008 through August 2, 2008, Hayes logged approximately 43,000 cubic meters of timber for Teal under the Contract.

5 These proceedings under the *CCAA* were commenced on July 31, 2008. At the time of the July 31, 2008 "initial Order", there were four ongoing disputes regarding key operating and financial terms of the Contract. In each dispute, the dispute resolution mechanism under the provisions under the *Forest Act* and its Regulations and under the Contract required mediation, arbitration and court proceedings. The applicable "Dispute Resolution" mechanism under the Contract was set out in paragraph 22.01:

> The Company and the Contractor mutually agree that where a dispute arises between them regarding a term, condition or obligation under this Agreement, and the Work under this Agreement is carried out on lands managed by the Company under a Tree Farm Licence or Forest Licence, then either party may require the dispute to be resolved in accordance with the Dispute Resolution Clause attached as Schedule "D" to this Agreement.

6 Portions of the Schedule "D" referred to in Paragraph 22.01 of the Contract are attached as Appendix "A" to these Reasons for Judgment.

7 In a September 30, 2008 letter, Hayes notified Teal that Hayes was in the process of seeking expressions of interest with respect to the purchase of the Contract as part of the restructuring contemplated under the *CCAA* filing. In an October 10, 2008 response, counsel for Teal advised counsel for Hayes that:

> Teal is certainly prepared to consider any potential assignee of the contract, and will expect the usual information, including financial information, that would normally be produced in that process.

8 The relationship between Hayes and Teal was such that a number of positions were taken by Teal which resulted in applications by Hayes in the *CCAA* proceedings. Hayes took the position that monies were owing by Teal under the Contract. Against what was owing, Teal attempted to set-off "unliquidated claims" it alleged it had under rate disputes arising out of the Contract. An Order was made on August 15, 2008 prohibiting such a set-off.

9 An attempt was made by Teal along with Western Forest Products Ltd. ("Western") to set aside the *CCAA* proceedings on September 4, 2008. That application was unsuccessful.

10 In October, 2008, Teal reduced the contract rate payable to Hayes for work done under the Contract. An order was made compelling payment on the existing contractual rates.

11 Teal sought to lift the stay of proceedings imposed under the July 31, 2008 Order to permit it to proceed with the various ongoing rate disputes under which it claimed Hayes owed it in excess of $2,500,000. Hayes consented to the lifting of the stay of proceedings to permit those claims to proceed. By November, 2008, Teal had not taken any steps to prosecute the arbitrations contemplated under the Contract. Hayes obtained an order establishing a "bar date" by which time Teal was required to have those claims arbitrated. Before the bar date was reached, Teal and Hayes settled all rate disputes between them on the basis that Hayes was not indebted to Teal. That settlement agreement was approved by the Court in February, 2009.

12 In November 2008, Teal made an offer to Hayes to purchase the Contract for $764,112 with $191,028 on closing and the remainder at the rate of $2.00 per cubic meter of timber harvested under the Contract paid quarterly with the first payment to be made on April 1, 2009. The offer had a December 15, 2009 completion date. The offer provided that Teal would be the successor employer for those employees of Hayes engaged under the Contract who were not eligible

for compensation under the B.C. Forestry Revitalization Trust. The offer was open for acceptance until December 1, 2008. The offer was not accepted by Hayes.

13 Under the Contract, Teal was to provide a 2009 logging plan to Hayes. The 2009 logging plan was provided to Hayes on December 9, 2008. On January 12, 2009, a representative of Teal advised a representative of Hayes that Teal was "... suspending operations indefinitely with respect to the work allocated to Hayes ..." Since December, 2008, Teal has not assigned work under the Contract to Hayes. Under the Contract, Hayes is entitled to 34.6% of the stump to dump logging work available relating to TFL46.

Possible Transfer of the Contract to North View

14 The *Timber Harvesting Contract and Subcontract Regulation*, B.C. Reg. 22/93, and paragraph 18 of the Contract governs the question of whether the Contract can be assigned. Section 4(1) of the Regulation provides: "Every replaceable contract must provide that the interests of the contractor are assignable, subject to the consent of the licence holder, and that consent must not be withheld unreasonably." In accordance with that section, paragraph 18 of the Contract provides:

> 18.01 The Contractor may assign any of its rights or interests under this Agreement, provided the Contractor first obtains the consent of the Company. The Company will not unreasonably withhold its consent to any assignment proposed by the Contractor.
>
> 18.02 Any assignment or transfer by the Contractor of this Agreement or of any interest therein ... without the written consent of the Company will be void....

15 In a May 8, 2009 letter to Teal, Hayes requested the consent of Teal to the assignment of the Contract to North View and advised that they contemplated completing the transfer prior to June 15, 2009. The letter also stated:

16 The outstanding payments under the Purchase Agreement will be secured by a security interest granted by the Purchaser (North View) to Hayes in all of the Purchaser's rights, title and interest in and to the Logging Contract and all proceeds thereof or therefrom.

17 In a May 14, 2009 letter, Hayes provided further information to Teal with respect to North View. In a May 15, 2009 letter, Teal sought information concerning North View and forwarded a questionnaire for completion and return. In a May 22, 2009 letter, Hayes provided the questionnaire to Teal. At that stage, it is clear that not all of the questions set out in the questionnaire had been answered in full. In any event, the questionnaire was not answered to the satisfaction of Teal. Despite the fact that all of the questions it had set out had not been answered, Teal wrote to Hayes on May 29, 2009 advising that it would be withholding their consent to the assignment of the Contract because Teal was of the view that the information provided did not justify providing their consent.

18 The matters which remained of concern to Teal were set out in that letter, being that North View:

> 1. is not a going concern;
>
> 2. when it last operated, was a minor business with revenues of about 1 to 2% of what the Contract currently delivers to the contractor and financial statements that suggest it is financially not viable or capable of performing the Contract;
>
> 3. has no experience performing a Coastal stump to dump contract;
>
> 4. has no equipment or crew or substantive projections of the equipment or crew it needs to perform its obligations under the Contract;

5. despite the difficult circumstances in the Coastal forest industry, has no business plan demonstrating that it can viably perform the obligations under the Contract, and no apparent financial resources to fund acquisition of equipment or ongoing expenses of operations; and

6. has no executed assignment of the Contract conditional on our consent being provided.

19 The letter then detailed the nature of the concerns of Teal. Despite the position having been taken, Hayes continued to provide information and Teal continued to request further information. On June 5, 2009, Hayes provided further information regarding North View and on June 8, 2009, Teal requested further information. In a June 12, 2009 letter, Teal advised that it was continuing to withhold its consent setting out detailed reasons regarding why they were continuing to take that position. The following "summary" was provided by Teal regarding the proposed assignment to North View:

In summary, the evidence continues to indicate North View is not a suitable assignee. It is a small and virtually inactive company, particularly in the context of the operation required under the Contract. It has no experience performing a Coastal stump to dump operation, let alone a significant one; no experience with a union operation; few financial resources; no commitments from financial institutions or others to provide the necessary working capital to begin operations; and no equipment or crew. Moreover, it has no firm plans to address these issues in the context of the five-year replaceable contract it seeks to obtain.

In our view, these and the other concerns we have raised comprise, at any time, reasonable grounds for us to withhold consent.

However, beyond this, you are proposing to assign this important Contract to a company with these shortcomings at a time when the Coast forest industry is, as you acknowledge, in a severe downturn. In these conditions, few licensees, Teal included, can afford to expend scarce resources dealing with weak or failing contractors. Teal has already incurred significant time and expenses addressing the financial difficulties experienced by you as the current contractor. You incurred these difficulties despite your significant resources and experience in Coastal, unionized, stump to dump operations. If a contractor with significant resources and experience has had difficulties, it is most probable an under-resourced and inexperienced contractor such as North View will also face significant difficulties. Teal is no position to bear the costs in time, money and process of another failure of the contractor holding this Contract. It is unreasonable to expect Teal to put itself in that position by consenting to an assignment to a contractor with North View's shortcomings.

Should the Dispute Go to Arbitration?

20 The "Dispute Resolution Clause" set out in the Contract provides for a period of 30 days for the parties to attempt to resolve any dispute arising, the ability of either party to then refer the matter to arbitration, the ability of each party to have two days to complete their submissions and the requirement that the arbitrator shall hand down the arbitral award within seven days of the completion of the submissions. However, each party is entitled to an "examination for discovery" as that term is defined in the Rules of Court, including discovery of documents and discovery of one officer representative of the other party, to a maximum of three days. Once the award of the arbitrator has been received, a party would be at liberty to apply to this Court to have the award set aside. Any party not satisfied with the decision of a Judge of this Court could then apply to the Court of Appeal to overturn the decision reached by a Judge of this Court. These parties have had a history of a number of their disputes going to the Court of Appeal.

21 Teal contacted Mr. Daniel B. Johnston regarding his availability to act as an arbitrator. Although Mr. Johnston is Counsel for the law firm representing Hayes, Mr. Johnston has served as an mediator and arbitrator in disputes between Hayes and Teal pertaining to the Contract in the past and has advised Teal that it is "highly likely" that he would be available for "a few days over the next six weeks to act as the arbitrator...."

22 But for the filing under the *CCAA*, disputes under the Contract would be governed by the Dispute Resolution provisions under the Contract and under ss. 162 and 160 of the *Forest Act* and ss. 5 and 48 - 51 of the Regulation under that *Act*: *Hayes Forest Services Ltd. v. Teal Cedar Products Ltd.* (2008), 82 B.C.L.R. (4th) 110 (B.C. C.A.). However, the Court under the *CCAA* has the jurisdiction to decide a dispute which arises under the Contract between Hayes and Teal despite the provincial statutory authority and the terms of the Contract: *Smoky River Coal Ltd., Re* (1999), 175 D.L.R. (4th) 703 (Alta. C.A.).

23 In *Luscar*, *supra*, the Court dealt with the issue of whether a judge had the discretion under the *CCAA* to establish a procedure for resolving a dispute between the parties who had previously agreed under a contract to arbitrate their disputes. The question before the Court was whether the dispute should be resolved as part of the "supervisory role of the reorganization" of the company under the *CCAA* or whether the Court should stay the proceedings while the dispute was resolved by an arbitrator. The decision of the Learned Chambers Judge was that the dispute should be resolved as expeditiously as possible by the Court of Queen's Bench under the *CCAA* proceedings.

24 In upholding the ruling of the Learned Chambers Judge, and concluding that the discretion of the Learned Chambers Judge had been exercised properly, Hunt J.A., on behalf of the Court stated:

> The above jurisprudence persuades me that "proceedings" in s. 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 bys. 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 s. 11 of the CCAA.
>
> (at para. 33)
>
> The language of s. 11(4) is very broad. It allows the court to make an order "on such terms as it may impose". Paragraphs (a), (b) and (c) empower the court order to stay "all proceedings taken or that might be taken" against the debtor company; restrain further proceedings "in any action, suit or proceeding" against the debtor company; and prohibit "the commencement of or proceeding with any other action, suit or proceeding" (emphasis added). These words are sufficiently expansive to support the kind of discretion exercised by the chambers judge.
>
> (at para. 50)

25 I agree that the language of s. 11(4) of the *CCAA* is broad enough to allow this Court to substitute a decision in these proceedings for the arbitration process contemplated under the Contract. In this regard, see also the decision in *Landawn Shopping Centres Ltd. v. Harzena Holdings Ltd.* (1997), 44 O.T.C. 288 (Ont. Gen. Div. [Commercial List]) where the Court allowed the arbitration stipulated under a contract to be replaced by a claim of the landlord being dealt with by the Court under the terms of a plan of arrangement.

26 Of similar effect are other decisions where the contracts between landlords and tenants were affected by the power contained under s. 11 of the *CCAA*: *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.); *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]); *Philip's Manufacturing Ltd., Re* (1991), 9 C.B.R. (3d) 1 (B.C. S.C.); *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) with additional reasons at (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]); *Armbro Enterprises Inc., Re* (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.); and *Skeena Cellulose Inc., Re* (2003), 13 B.C.L.R. (4th) 236 (B.C. C.A.).

27 *Skeena*, *supra*, dealt with the interaction between logging contracts established under the *Forest Act* and the scheme of judicial stays and creditors' compromises available under the *CCAA*. The Court authorized the termination

of contracts similar to the Contract here despite the provisions in the contracts themselves. In this regard, Newbury J.A. on behalf of the Court stated at paragraph 37:

> In the exercise of their 'broad discretion' under the CCAA, it has now become common for courts to sanction the indefinite, or even permanent, affecting of contractual rights. Most notably, in *Re Dylex Ltd.* (1995) 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), Farley J. followed several other cases in holding that in "filling in the gaps" of the CCAA, a court may sanction a plan of arrangement that includes the termination of leases to which the debtor is a party. (See also the cases cited in *Dylex*, at para. 8; *Re T. Eaton Co.* (1999) 14 C.B.R. (4th) 288 (Ont. S.C.), at 293-4; *Smoky River Coal*; *supra*, and *ReArmbro Enterprises Inc.* (1993) 22 C.B.R. (3d) 80 (Ont. Ct. (Gen. Div.)), at para. 13.) In the latter case, R.A. Blair J. said he saw nothing in principle that precluded a court from "interfering with the rights of a landlord under a lease, in the CCAA context, any more than from interfering with the rights of a secured creditor under a security document. Both may be sanctioned when the exigencies of the particular re-organization justify such balancing of the prejudices." In its recent judgment in *Syndicat national de l'amianted'Asbestos inc. v. Jeffrey Mines Ltd*, [2003] Q.J. No. 264, the Quebec Court of Appeal observed that "A review of the jurisprudence shows that the debtor's right to cancel contracts prejudicial to it can be provided for in an order to stay proceedings under s. 11." (para. 74.)

28 In May 31, 2008 Oral Reasons for Judgment (Supreme Court of British Columbia Action No. S080752). In *Backbay Retailing Corporation, and Gray's Apparel Company Ltd.*, the Court approved an assignment of the interests of the Petitioner's interests in leases in certain retail outlets to a third party despite the objection of the landlords and despite the fact that leases provided that the approval or consent of the landlords was required prior to the transfer, assignment or assumption of the leases. The new tenants were not prepared to agree to be liable for past defaults under the leases and required that all of the rights under the leases including those that were expressed to be personal to Petitioners be assigned to them. The petitioners had asserted no common law entitlement to the orders that they sought but, rather, had submitted that the Court has a statutory discretion under the *CCAA* to make the orders sought so long as that is consistent with the objectives of the *CCAA* to facilitate a restructuring. Citing with approval the decision in *Playdium*, *supra*, Hinkson J. concluded that the proposed purchase and sale agreement was in the best interests of the Petitioners, would afford significant benefits to their landlords, and that the refusal of the proposed tenants to assume the liabilities of the immediate predecessors was not a reasonable basis upon which to withhold consent.

29 Hinkson J. also cited with approval the decision of Kent J. in *Gauntlet Energy Corp., Re* (2003), 336 A.R. 302 (Alta. Q.B.): "Interference with contractual rights of creditors and non-creditors is consistent with the objective of the CCAA to allow struggling companies an opportunity to survive whenever reasonably possible." (at para. 58). Hinkson J. also relied on the decision in *Doman Industries Ltd., Re* (2003), 14 B.C.L.R. (4th) 153 (B.C. S.C. [In Chambers]) and *T. Eaton Co., Re*, [1997] O.J. No. 6388 (Ont. Gen. Div.). In July 11, 2008 Oral Reasons for Judgment, Levine J.A. denied leave to appeal the Order of Hinkson J.

30 I have concluded that I should override the arbitration provisions in this Contract to allow a Court determination of the issue of whether Teal is or is not unreasonably withholding its approval for the transfer of the Contract to North View. First, I am satisfied that the determination of this issue is less expeditious and more expensive under the arbitration provisions. The past history between these parties is that the arbitration proceedings have been both lengthy and incredibly costly. In the context of a previous application, counsel for Teal indicated that the cost of an arbitration might approach $250,000.00. Second, an arbitration award is subject to judicial review, further lengthening and complicating the decision-making process. Third, there are time constraints imposed by North View regarding the purchase of this Contract. Those deadlines cannot be met by the arbitration proceedings contemplated under the Contract. Fourth, there is no reason why the question whether the consent has been unreasonable withheld or not cannot be determined by the Court. Although a number of arbitrators are experienced in dealing with the type of issues that would arise in the arbitration of other issues which have arisen between Hayes and Teal, the question of whether consent has been unreasonably or reasonably withheld is an issue which is commonly dealt with by the Court and requires no forestry related expertise. Taking into account all of those factors, I am satisfied that the issue raised by the dispute

between the parties should be dealt with by this Court in the *CCAA* proceedings. The application of Teal to lift the stay of proceedings granted on July 31, 2008 is dismissed.

Can the Court Approve the Assignment of the Contract, Even Though It Is Not Unreasonable for Teal to Withhold Its Consent?

31 I am satisfied that the *CCAA* Court can approve an assignment even if I reach the conclusion that it is not unreasonable for Teal to withhold its consent. In *Playdium, supra*, Spence J. dealt with a proposal to transfer all of the assets of Playdium to a new corporation as the only viable alternative to a liquidation of the assets of the company. Under that tenancy, an agreement could not be assigned without the consent of Famous Players, which consent could not be unreasonably withheld. Famous Players had argued that it had not been properly requested to consent and it had not received adequate financial information and assurances regarding management expertise and how their agreement might be brought into good standing. Save for the *CCAA* Order in place, Spence J. concluded that there could be no assignment but that the *CCAA* Order affords "... a context in which the court has the jurisdiction to make the order." Spence J. concluded that he had jurisdiction to compel the assignment of leases over the objections of other parties and held that he had the jurisdiction to approve the assignment of leases even though it would not have been unreasonable for Famous Players to withhold its consent to the assignment. I am prepared to adopt the path taken by Spence J. in *Playdium, supra*, if I conclude that it is reasonable for the consent of Teal to be withheld.

Has the Consent of Teal Been Unreasonably Withheld?

32 The determination of the reasonableness of withholding consent is a question of whether a reasonable person would have withheld consent in the circumstances. The determination will be dependent on such factors as the commercial realities of the marketplace, the economic impact of the assignment, and the financial position of the proposed assignee. *Exxonmobil Canada Energy v. Novagas Canada Ltd.*, [2003] 3 W.W.R. 657 (Alta. Q.B.), dealt with the assignment of the management of the interest of Exxonmobil Canada Energy in a gas processing plant. Regarding the argument that the assignment had been unreasonably withheld, Park J. concluded that it was reasonable to have refused the consent to the assignment and, in these regards, made the following statements:

> The reasons for including a consent requirement in the assignment was to allow each party the opportunity of reasonably assessing any future contractual partners. If a proposed assignee did not meet the criteria reasonably required by the other party, the assignment should not proceed. (at para. 54)
>
> On an objective basis it is entirely reasonable to enquire into the financial capability of a proposed business partner in determining whether to accept that party as a business partner. There must be adequate information provided to EMC regarding the strength of the Solex financial covenant. Further, if NCLP and Solex wish to argue (as they did) that EMC would be in a better position with the financial covenant of each of Solex and NCLP, in the absence of Solex being novated into the Agreement, then it would be reasonable for Solex and NCLP to provide adequate information on the strengths of those financial covenants rather than leaving EMC to surmise.
>
> However, it is not the final strength or weakness of Solex's financial covenant which prevents consent. Rather it is the failure of Solex to provide relevant and material financial information which will enable EMC to assess the financial strength of Solex on a go forward basis. The absence of financial information provided by Solex means that EMC has reasonably withheld its consent. EMC in the circumstances cannot satisfy itself as to the financial ability of Solex to meet its prospective obligations as the proposed assignee under the Agreement.
>
> Finally, I note that EMC has not withheld its consent for improper reasons. As I noted previously, the desire of EMC to resolve outstanding issues between itself and NCLP is a separate issue, and is not tied to EMC's desire to receive proper and adequate financial information from Solex as a separate entity. EMC did not withhold its consent in order to secure additional benefits as argued by Solex and NCLP.
>
> (at paras. 58-60)

33 The reasonableness of withholding consent has often been considered in the context of leases. In *1455202 Ontario Inc. v. Welbow Holdings Ltd.* (2003), 9 R.P.R. (4th) 103 (Ont. S.C.J.), Cullity J. concluded that the landlord was justified in its decision based on the lack of information concerning the business experience of the proposed assignee stating:

> In determining whether the Landlord has unreasonably withheld consent, I believe the following propositions are supported by the authorities cited by counsel and are of assistance:
>
> 1. The burden is on the Tenant to satisfy the court that the refusal to consent was unreasonable: *Shields v. Dickler*, [1948] O.W.N. 145 (C.A.),at pages 149-50; *Sundance Investment Corporation Ltd. v. RichfieldProperties Limited et al*, [1983] 2 W.W.R. 493 (Alta. C.A.), at page 500;cf. *Welch Foods Inc. v. Cadbury Beverages Canada Inc.* (2001), 140 O.A.C. 321 (C.A.), at page 331. In deciding whether the burden has been discharged, the question is not whether the court would have reached the same conclusion as the Landlord or even whether a reasonable person might have given consent; it is whether a reasonable person could have withheld consent: *Whiteminster Estates v. HedgesMenswear Ltd.* (1972), 232 Estates Gazette 715 (Ch. D.), at pages715-6; *Zellers Inc. v. Brad-Jay Investments Ltd.*, [2002] O.J. No. 4100 (S.C.J.), at para. 35.
>
> 2. In determining the reasonableness of a refusal to consent, it is the information available to - and the reasons given by - the Landlord at the time of the refusal - and not any additional, or different, facts or reasons provided subsequently to the court - that is material: *Bromley ParkGarden Estates Ltd. v. Moss*, [1982] 2 All E.R. 890 (C.A.), at page 901-2 per Slade L.J. Further, it is not necessary for the Landlord to prove that the conclusions which led it to refuse consent were justified, if they were conclusions that might have been reached by a reasonable person in the circumstances: *Pimms, Ltd. v. Tallow Chandlers in the City of London*, [1964] 2 All E.R. 145 (C.A.), at page 151.
>
> 3. The question must be considered in the light of the existing provisions of the lease that define and delimit the subject matter of the assignment as well as the right of the Tenant to assign and that of the Landlord to withhold consent. The Landlord is not entitled to require amendments to the terms of lease that will provide it with more advantageous terms: *Jo-EmmaRestaurants Ltd. v. A. Merkur & Sons Ltd.* (1989), 7 R.P.R. (2d) 298 (Ont. Div. Ct.); *Re Town Investments Ltd.*, [1954] Ch. 301 (Ch. D.) -but, as a general rule, it may reasonably withhold consent if the assignment will diminish the value of its rights under it, or of its reversion: *Federal Business Development Bank v. Starr* (1986), 55 O.R. (2d) 65 (H.C.), at page 72. A refusal will, however, be unreasonable if it was designed to achieve a collateral purpose, or benefit to the Landlord, that was wholly unconnected with the bargain between the Landlord and the Tenant reflected in the terms of the lease: *Bromley Park Garden EstatesLtd. v. Moss*, above, at page 901 per Dunn L.J.)
>
> 4. A probability that the proposed assignee will default in its obligations under the lease may, depending upon the circumstances, be a reasonable ground for withholding consent. A refusal to consent will not necessarily be unreasonable simply because the Landlord will have the same legal rights in the event of default by the assignee as it has against the assignor: *Ashworth Frazer Ltd., v. Gloucester City Council*, [2001] H.L.J. 57.
>
> 5. The financial position of the assignee may be a relevant consideration. This was encompassed by the references to the "personality" of an assignee in the older cases see, for example, *Shanley v. Ward* (1913), 29 T.L.R. 714 (C.A.); *Dominion Stores Ltd. v. Bramalea Ltd.*, [1985] O.J.No. 1874 (Dist. Ct.)
>
> 6. The question of reasonableness is essentially one of fact that must be determined on the circumstances of the particular case, including the commercial realities of the market place and the economic impact of an assignment on the Landlord. Decisions in other cases that consent was reasonably, or unreasonably, withheld are not precedents that will dictate the result in the case before the court: *Bickel et al. v. Duke ofWestminster et al.*, [1976] 3 All E.R. 801 (C.A.), at pages 804-5;*Ashworth Frazer Ltd. v. Gloucester City Council*, above, at para. 67;*Dominion Stores Ltd. v. Bramalea Ltd.*, above, at para. 25.

(at para. 9)

34 Of the six general areas of concern raised by Teal, the objection that there was no executed Assignment of Contract is no longer an issue as an executed assignment conditional on the consent of Teal has now been provided.

35 Regarding the concern regarding the lack of equipment or crew, I am satisfied that this should not be an impediment to the assumption of the contractual obligations by North View. Some of the crew that will be required has already been contracted through Horsman Trucking Ltd. ("Horsman"), who has entered into a services subcontract with North View. In general, I accept the evidence of Donald P. Hayes who makes this statement in his July 2, 2009 Affidavit:

> At present there is no work available under the Teal Bill 13 Contract and no equipment is currently required. When logging recommences under the Contract, the Purchaser will be able to acquire equipment either directly or be able to subcontract out portions of the work (as is currently done by Hayes) and service the Contract without difficulty.
>
> There is currently a surplus of logging equipment on Vancouver Island. The most recent auction of equipment was held in June, 2009 by Ritchie Bros. in Duncan, BC. The sale prices at that recent Ritchie Bros.' auction were extremely low and any contractor on the Island will have no difficulty acquiring the necessary equipment at some of the lowest historic prices for that equipment.
>
> There is current an abundance of logging equipment from Coastal BC operations that has been returned to various leasing companies. I am aware of certain lessors that are now re-leasing this equipment without the requirement of a down payment by the new lessee. Essentially the new lessee simply makes payments based on the returned value of the equipment. This will make it very easy for any contractor or subcontractor to acquire any equipment needed to service a contract for logging or road building.

36 I am also satisfied that North View sets out a satisfactory explanation regarding equipment in its July 16, 2009 letter to Teal:

> I have made inquiries in the market as to the availability of equipment. Hayes has all of the equipment for sale that I would require to start the operations. I confirm that in the event of short notice from Teal that Hayes would rent or rent to purchase suitable equipment as required including a grapple yarder, log loaders, back spar, cat etc.
>
> Finning also has new and used inventory in stock. I am also aware of several contractors who are shut down and will likely have equipment for short term rent or rental purchase.
>
> Pick up trucks are readily available for purchase or lease in the market and Hayes will sell me the industrial box liners required.
>
> Until there is a logging plan and a start date, I have not tried to firm up equipment arrangements. Without the logging plan and a start date, I cannot be sure of the equipment actually required or the timing of that requirement.

37 Regarding the concern that North View is not a going concern, while it is clear that North View is an entity which is not presently operating, my review of the experience of the principals of North View allows me to conclude that the principals have sufficient experience to allow North View to be successful in performing the work that is provided by Teal under the Contract. The principal of North View has over 35 years of logging experience and worked as a subcontractor for Hayes between 2005 and 2008 on the work required under the Contract. As well, North View will have the assistance of the principals of Hayes, and has contracted with an experienced hauler to subcontract the hauling of timber to the dump operations.

38 I also accept the following evidence regarding the proposed operations of North View under the Contract which is set out in the July 24, 2009 Affidavit of Donald P. Hayes:

The contract will be operated as follows:

(a) Falling. The falling work under the contract is currently done by a sub contractor, Gemini, they had done the falling work for years, and will continue to do so for North View Timber Ltd. ("North View");

(b) Yarding. Mr. Horsman is one of the most experienced yarders on the coast and has done this work on this contract for Hayes. He will do this work;

(c) Loading. This work will be contracted out to an experienced loader. The loading takes place in close proximity to the yarding and can be supervised by the yarder, in this case Mr. Horsman;

(d) Hauling. The hauling will be subcontracted to Horsman Trucking Ltd, a well know and experienced hauler on the Island. I have know them for years and they have a good reputation.

39 I am satisfied that Teal should have no hesitation in concluding that the equipment, crew and expertise to undertake the work required under the Contract will be available to North View. In this regard, I am also mindful of the fact that, if North View fails to perform under the Contract, Hayes will be in a position to take back the Contract and then perform the logging required under the Contract. In the past, Teal was satisfied with the performance of Hayes under the Contract, and should have some solace that Hayes will be in a position to perform under the Contract if North View does not.

40 Regarding the concern of Teal that North View is not financially capable, I note that a $50,000.00 deposit has already been paid, that an agreement has been reached with Horsman to sell to Horsman the hauling subcontract for $400,000.00 so that the further $277,000.00 required at the date of closing will be available, that $100,000.00 will be set aside to meet capital requirements, and that preliminary discussions are underway with B.D.C. and Caterpillar Finance regarding financing once any logging plan proposed by Teal is known. In this regard, I am satisfied that the payments under the Contract must be made by Teal every two weeks, and I take into account the advice received from North View that its expenses need to be paid monthly so that the working capital that would otherwise be required to service this Contract is reduced.

41 Finally, Teal is concerned that North View has no "business plan". I am satisfied that this concern is answered in the July 16, 2009 letter from North View to Teal:

I have not regularly prepared business plans. My practice is to study the logging plan, when I receive it and then determine the equipment and people that I need. I then closely supervise the production and all purchases to control the cash flow.

I have had Mr. Donald P. Hayes assist me with the preparation of the

Business Plan. Mr. Hayes is a Chartered Accountant and the President of Hayes Forest Services Limited, the current operator of the contract. This is a much more detailed plan than I could produce myself. I have reviewed it with Mr. Hayes and based on my knowledge I confirm that in my opinion the Business Plan reflects the economic conditions in the industry and uses reasonable assumptions concerning rates, costs, financing and working capital needs including the payment of the $3.00 per cubic meter promissory note to Hayes. I further confirm that I believe that the contract is viable at market rates.

This Business Plan has not been independently reviewed but was developed in conjunction with Mr. Hayes who has operated this contract for over 20 years and is extremely knowledgeable in respect of this contract. Once the actual logging plan is provided, it will likely require material changes to the Business Plan.

42 As well, it should be obvious to Teal that it is difficult to put forward a "business plan" when the 2009 and 2010 work allocated under the Contract is not known. While it is clear that North View does not have the present capacity

or business plan in place to handle a cut of 125,000 cubic metres, it is also clear that there is no current work under the Contract and this yearly volume has not been required of Hayes for over three years.

43 In the context of leases, the Court must look at all of the circumstances to determine if consent has been reasonably withheld: *Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd.* (1987), 13 B.C.L.R. (2d) 367 (B.C. S.C.) at para. 51. The *Forest Act* and the *Timber Harvesting Regulations* require similar contracts to be assignable and puts the onus on licence holders such as Teal to justify their refusal to consent to any assignment. Taking into account all of the circumstances surrounding this question, I am satisfied that Teal has not shown that it is reasonable to withhold its consent. At the same time, I am satisfied that Hayes has met the burden of showing that a reasonable person would not have withheld consent.

44 In this regard, I have concluded that at least part of the refusal to provide consent was designed by Teal to achieve a collateral purpose that is wholly unconnected with the bargain between Teal and Hayes. In November 2008, Teal made an offer to purchase the Contract for $764,112.00. From this, I can conclude that Teal believes that there is significant value to it if the Contract cannot be performed by Hayes or if Teal can otherwise obtain the benefits of the Contract in order that they can be transferred to another operator. Teal has also provided an offer through 858 to purchase the Contract for $1,400,000.00. This is further evidence of the value to Teal of stopping a transfer of the Contract to North View in the hope that the Contract will revert to it by virtue of the inability or unwillingness of Hayes to perform under the Contract.

What Should Be Made of the Offer of 858?

45 The offer of 858 was open for acceptance until August 11, 2009 and was directed to the attention of Hayes Forest Services Ltd. ("Offer"). It was a condition of the Offer that Horsman enter into a replaceable services sub-contract with 858 in the same form as the Horsman contract with North View. As at August 14, 2009, no confirmation had been received from Horsman that they were prepared to accept that stipulation. The purchase price under the Offer is $1,400,000, with $400,000 at the time of closing (being the amount that would be available to 858 under the Horsman contract) and with balance of the purchase price by a promissory note for $1,000,000.

46 In response to the concern raised by Hayes that Teal would be in a position to control the amount of work that would be available to 858 so that 858 would not be in a position to pay the balance due and owing under the Promissory Note quickly or at all, the following provision was inserted after the first draft of the Offer was forwarded to Hayes:

> 2.11 **Amount of Work Dispute.** Teal and the Purchaser agree that if, at any time before the Purchaser pays the Contract Purchase Price in full, the Vendor reasonably believes that Teal has failed to meet its obligation under Paragraph 2.05 of the Teal Contract, the Vendor may give notice (the "**Dispute Notice**") to Teal and the Purchaser specifying in reasonable detail the particulars of the default, in which case a dispute is deemed to exist between the Vendor and Teal under this Agreement, which dispute, despite the reference in Paragraph 2.05 of the Teal Contract to resolving amount of work disputes in accordance with the Contract Regulation (as defined in the Teal Contract), will be resolved as follows:
>
> (a) as soon as reasonably practicable after the notice is given, the Vendor and Teal will:
>
> (i) cause their respective appropriate personnel with decision making authority to meet in an attempt to resolve the dispute through amicable negotiations; and
>
> (ii) provide frank, candid and timely disclosure of all relevant facts, information and documents to facilitate those negotiations;
>
> (b) if the dispute is not resolved by such negotiations within 15 days of the Vendor having given the Dispute Notice, either the Vendor or Teal may, within 30 days after the Dispute Notice was given, deliver a Notice (a "Mediation Notice") to the other party requiring the dispute to go to mediation, in which case the Vendor

and Teal will attempt to resolve the dispute by structured negotiation with a mediator administered under the Commercial Mediation Rules of the British Columbia International Commercial Arbitration Centre before a mediator agreed upon by the Vendor and Teal or, failing agreement, appointed by the Centre;

(c) if:

(i) the dispute is not resolved within 14 days after the mediator has been agreed upon or appointed under Section 2.11(b); or

(ii) the mediation is terminated earlier as a result of a written notice by the mediator to the Vendor and Teal that the dispute is not likely to be resolved through mediation, either the Vendor or Teal may, not more than 14 days after the conclusion of the period referred to in Section 2.1 1(c)(i) or the receipt of the notice referred to in Section 2.11(c)(ii), as the case may be, commence arbitration proceedings by giving a notice of arbitration to the other party, in which case the dispute will be referred to and finally resolved by arbitration administered under the British Columbia International Commercial Arbitration Centre's Shorter Rules for Domestic Commercial Arbitration before an arbitrator agreed upon by the Vendor and Teal or, failing agreement, appointed by the Centre, and the decision of the arbitrator will be final and binding on the Vendor, the Purchaser and Teal, but will not be a precedent in any subsequent arbitration under this Section;

(d) pending resolution or other determination of the dispute under this Section, the Purchaser will continue to perform its obligations under the Teal Contract; and

(e) if, as a result of the resolution or other determination of the dispute under this Section, Teal allocates an additional amount of work to the Purchaser, the Purchaser will perform that additional amount of work in accordance with the terms of the Teal Contract.

47 Some of the objections to the Offer are summarized in the August 10, 2009 letter from counsel for Hayes to counsel for Teal:

As you are aware our client has entered into a contract with North View Logging Ltd. to sell that contract to North View. Having done so Hayes is not in a position to enter into a second contract to sell the same contract.

Apart from that problem, there are a number of other issues that make this offer problematic from Hayes' perspective, these include:

1. The proposed purchase price is substantially less than the North View offer, some $250,000. In addition, to obtain an extension of the closing of the transaction to North View, Hayes has had to agree to a break fee of $50,000 payable to North View if Hayes sells the contract to Teal. A copy of that agreement is enclosed;

2. The rate of payment on the Promissory Note is only $2 per M3 as opposed to the $3 per M3 to be paid by North View;

3. The Purchaser is a shell company incorporated on August 6, 2009 that appears to have no assets. It is proposed that the sale proceeds derived from the Horsman Trucking subcontract be used to fund the cash component of the transaction, with the balance to be paid by the $2 per M3 payable under the Promissory Note. The Purchaser will not have any of its assets invested in this contract and is not at any financial risk. There is no consequence to the Purchaser simply walking away from its obligations and allowing Teal to cancel the underlying Bill 13 contract for non performance;

4. The only security proposed is from what appears to be a shell company and even that is limited to the underlying Bill 13 contract itself. If the Purchaser, a Teal nominee, defaults in performance, Teal will cancel the Bill 13 contract, and the "security" held by Hayes would vanish;

5. Payment under the promissory note is wholly dependent upon Teal allocating the amount of work that the holder of the Bill 13 contract is entitled to. An arm's length purchaser, such as North View, has a strong economic interest in enforcing its rights as against Teal to ensure that it receives the volume of work it is entitled to. The Purchaser proposed by Teal is a Teal nominee and will have no such economic interest. Teal has taken every step it can in the course of the CCAA proceedings to terminate the Bill 13 contract. We see no reason to expect that this attitude will change once both sides of the Bill 13 contract are in the control of Teal;

6. Teal can arbitrarily reduce and or delay the amount payable under the Promissory Note by allocating work that could or should be done by Hayes to other contractors working for Teal on TFL 46. It is doing so now;

7. There is no evidence of the ability of the Purchaser to do the work required under the contract, its finances, equipment or personnel.

48 Many of the objections raised by Hayes regarding the Offer parallel many of the objections raised by Teal regarding the North View offer. While Teal and 858 have common shareholders, none of the information that Teal required of North View is available to Hayes or the Court regarding the Offer of 858. If it is the position of Teal that the Court should approve the offer of 858 because it is reasonable to do so and is in the best interests of the creditors of Hayes to do so, then I conclude that Teal has not met the burden of showing that it is. In the context of whether withholding consent has been reasonable or not, a number of factors apply. If those factors are applied to the application of Teal, it is clear that a reasonable person would withhold consent and it is clear that approval of the offer of 858 would not be ordered. It is difficult for Teal to argue on one hand that a reasonable person would withhold consent for the proposed assignment to North View but, at the same time, the Court should approve the proposed transfer to 858, even though there is even less information available to allow the Court to reasonably assess the future contractual partner recommended by Teal. There is no information regarding the financial capability of 858. There is nothing which would allow the Court to satisfy itself as to the financial ability of 858 to meet its prospective obligations. As well, the Court is not in a position to approve offers where the offer continues to contain conditions precedent that have not been met. In this regard, the approval of Horsman to "transfer" its contract with Hayes to 858 so that 858 receives $400,000.00 remains an unfulfilled condition.

49 There are also significant economic advantages to the creditors of Hayes to accept the North View offer and for the Court to make a finding that the consent of Teal has been unreasonably withheld so that the assignment of the Contract to North View should be approved. First, the offer of North View is $214,266.00 better. Second, the balance of the purchase price is paid off more quickly as the payment will be based on $3.00 per cubic metre, whereas the payment of the balance of the purchase price contemplated by 858 will be based on a payment of $2.00 per cubic metre. Third, if there is default, it is clear that the creditors of Hayes will benefit if there is a reversion of the Contract to Hayes. I cannot conclude that is the case with the Offer. Fourth, it may well be that Hayes will have to pay a $50,000.00 cancellation fee to Horsman if the Offer is approved by the Court.

50 It also should be noted that 858 is bringing none of its own money "to the table". Rather, all of the $400,000.00 that will be due on closing comes from the funds that would be available from Horsman if Horsman is prepared to enter into a similar subcontract with 858. As well, all payments of the $2.00 per cubic metre contemplated under the Offer are wholly dependent upon Teal allocating the amount of work that is contemplated under the Contract. North View has a stronger economic interest to enforce its rights against Teal to ensure that it receives the volume of work it is entitled to under the Contract whereas 858 has no such economic interest. As well, what is proposed under the Offer provides ample opportunity for the arbitration process and appeals therefrom to delay the question of the allocation of work to 858.

51 I am satisfied that Teal has unreasonably withheld its consent for the assignment of the Contract from Hayes to North View. Even if I had not reached that conclusion, I am satisfied that the advantages to the creditors of Hayes far outweigh any disadvantages so that I should exercise the discretion available to me under the *CCAA* to approve the assignment of the Contract despite the consent of Teal being reasonably withheld. The sale to North View Timber Ltd. of

the replaceable stump to dump logging contract between Hayes Forest Services Limited and Teal Cedar Products Ltd. is approved. The application by Teal Cedar Products Ltd. to approve a sale of that contract to 858434 BC Ltd. is dismissed.

52 The parties will be at liberty to speak to the question of costs.

Application for approval of sale granted; application to lift stay of proceedings dismissed.

APPENDIX "A"

Schedule "D"

Dispute Resolution Cause Timber Harvesting Contracts

Dispute Resolution

Where the Work performed by the Contractor under an agreement with the Company is carried out on lands managed by the Company under a Tree Farm Licence or Forest Licence, and where a dispute arises over a term, condition or obligation under the agreement which cannot be resolved amicably between the parties within 30 days of the dispute arising, the Company and the Contractor mutually agree that either party may invoke the following dispute resolution provisions:

(a) The parties may by agreement first attempt to resolve their dispute with the assistance of a single professionally qualified mediator. The mediator shall be chosen by agreement between the parties. In the event that the parties fail to agree on the choice of a mediator, then a mediator shall be chosen by a mutually agreed upon third party unrelated to the parties to this agreement.

(b) In the event that the mediator is unsuccessful in assisting the parties to resolve their dispute within 5 days of the commencement of the mediation, or either party wishes the dispute to proceed directly to arbitration, then either party may require by notice in writing that the. matter be referred to arbitration as provided for by the provisions of the Dispute Resolution Clause.

Where either party to the agreement has commenced an action in a court of competent jurisdiction regarding a term, condition or obligation under the agreement, and the action is in good standing, then the parties to the agreement shall not invoke or continue with the dispute resolution provisions of the agreement until such time as the court action has been finally concluded. Where a court issues a judgement in an action regarding a term, condition or obligation under the agreement and the judgement becomes final, then that judgement shall constitute the final resolution of the dispute between the parties.

Arbitration

The Company and the Contractor mutually agree that where a dispute is to be resolved by arbitration (the "Arbitration Proceeding"), it shall be so resolved by a single arbitrator to be agreed on by the parties. If the parties are unable to agree on the choice of arbitrator then a single arbitrator shall be selected pursuant to the Commercial Arbitration Act, S.B.C. 1996, c. 3 as amended.

The Arbitration Proceeding shall be conducted in Vancouver British Columbia or such other place as the parties may agree in writing. The rules of procedure for the Arbitration Proceeding shall be those provided for in the Commercial Arbitration Act for domestic commercial arbitrations. as amended by the provisions of the Dispute Resolution Clause.

Each party shall only be entitled to two days to complete their submissions to the arbitrator. Each party shall have the right of reply to the submission of the other for one hour only. ....

The arbitrator shall hand down the arbitral award within 7 days of the completion of the submissions and reply of the parties.

Discovery

Each party shall be entitled to the following pre-arbitration "examination for discovery" rights, as that term is defined in the Rules of Court of the Supreme Court of British Columbia:

(a) discovery of all relevant documents pertaining directly to the issue or issues in dispute between the parties;

(b) discovery of one officer or representative of the other party;

(c) each party shall be allowed to discover the officer or representative of the other for no more than one day for each $50,000.00 in dispute to a maximum of three days, and where no amount has been specified, then each party shall only be allowed a maximum of two days of discovery of the officer or representative of the other.

Costs of the Dispute Resolution

Where a provision in the agreement has been referred to mediation or arbitration by the Company or the Contractor, then any funds actually in dispute shall be deposited in an interest bearing trust account. Upon the resolution of the dispute, the funds and interest thereon shall be paid to the Company and the Contractor proportionately as agreed between the parties, or as directed by the arbitration award.

The Company and the Contractor shall pay all costs associated with the provision of mediation or arbitration services forthwith upon an invoice for these services being rendered, equally, except as provided for below.

The Company and the Contractor shall each bear their own costs in resolving the dispute between them, with the following exceptions:

(a) Where one party is found, on a balance of probabilities

(i) not to have pursued its various rights and responsibilities under this agreement in good faith,

(ii) not to have used all reasonable effort to resolve its dispute with the other through mediation with a minimum of delay and expense, or

(iii) not to have used all reasonable effort to resolve its dispute with the other by the Arbitration Proceeding with a minimum of delay and expense,

then the offending party shall pay the disbursements and one half of all other direct expense incurred by the other;

(b) Where both parties are found, on a balance of probabilities, to have acted in bad faith or made less than all reasonable effort to resolve their dispute, then each party shall bear its own direct costs and disbursements and shall share equally all costs associated with the conduct of the mediation and/or the Arbitration Proceeding; and

(c) For the purposes of sub-paragraphs (a) and (b) of this paragraph, the costs associated with the provision of mediation and arbitration services and the Conduct of the Arbitration Proceeding shall be considered a disbursement.

Any award or division of costs referred to herein shall constitute a liquidated debt immediately due and payable by the one party to the other, and shall be satisfied to the extent possible by the indebted party to the other from the funds held in trust and referred to above.

Failure of Arbitration

Where the Contractor and the Company agree in writing, or where the arbitrator is unable to resolve the dispute, then the dispute shall be resubmitted for arbitration in accordance with the provisions of the Dispute Resolution Clause of the agreement.

Where the inability of the arbitrator to resolve the dispute arises out of the misconduct of one of the parties in the dispute or a party affiliated with one of the parties in the dispute, then the dispute shall be deemed to be settled in favour of the other party with that other party entitled to their full costs arising out of the dispute as a liquidated debt.

End of Document

TAB 5

1999 ABCA 179
Alberta Court of Appeal

Smoky River Coal Ltd., Re

1999 CarswellAlta 491, 1999 ABCA 179, [1999] 11 W.W.R. 734, [1999] A.J. No. 676, 12 C.B.R. (4th) 94, 175 D.L.R. (4th) 703, 197 W.A.C. 326, 237 A.R. 326, 71 Alta. L.R. (3d) 1

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

In the Matter of Smoky River Coal Limited, Allstate Insurance Company, Allstate Life Insurance Company, Security Life of Denver Insurance Company, Indiana Insurance Company, Peerless Insurance Company, Pacific Life Insurance Company, AH (Michigan) Life Insurance Company, Northern Life Insurance Company, Reliastar Life Insurance Company, Modern Woodmen of America, Phoenix Home Life Mutual Insurance Company, American International Life Assurance Company of New York, and Phoenix American Life Insurance Company, Petitioners/not Parties to the Appeal;

Luscar Ltd. and Consol of Canada Inc., Appellants and Smoky River Coal Limited, Respondent/Debtor and Canadian National Railway Company, Respondent/Creditor

Picard, Hunt, McIntyre JJ.A.

Heard: April 13, 1999
Judgment: June 9, 1999 *
Docket: Calgary Appeal 99-18164

Proceedings: affirming (January 27, 1999), Doc. Calgary 9801-10214 (Alta. Q.B.); refused reconsideration or rehearing (August 16, 1999), Doc. Calgary Appeal 99-18164 (Alta. C.A.)

Counsel: *R.B. Davison, Q.C.*, and *J.H. Hockin*, for the appellants.
D.R. Haigh, Q.C., and *B.T. Beck*, for the respondent Smoky River Coal.
W.E. Cascadden, for Neptune Bulk Terminals.
T.M. Warner, for the respondent Canadian National Railway.
D.W. Mann, for the petitioners.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Alternative dispute resolution
III Relation of arbitration to court proceedings
III.3 Stay of court proceedings
III.3.b Discretion of court to grant stay
Alternative dispute resolution
III Relation of arbitration to court proceedings
III.3 Stay of court proceedings
III.3.c Whether matter within terms of arbitration clause
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.e Jurisdiction

XIX.1.e.i Court
Business associations
V Legal proceedings involving business associations
V.3 Practice and procedure in proceedings involving corporations
V.3.s On appeal
Civil practice and procedure
XXIII Practice on appeal
XXIII.19 Miscellaneous

Headnote

Arbitration --- Relation to other proceedings — Stay of court proceedings — Discretion of court to grant stay

Relationship among respondent corporation, appellant shareholders and other corporate shareholder was governed by shareholders' agreement, which provided that disputes would be arbitrated — Petition was filed to place corporate shareholder under protection of Companies' Creditors Arrangement Act ("CCAA") when allegations of breach of contractual obligations were brought against it by appellants — Stay of all actions ordered against corporate shareholder — Corporate shareholder brought motion to prohibit arbitration — Appellants brought cross-motion for stay of corporate shareholder's motion pursuant to s. 15 of Commercial Arbitration Act ("CAA") — Chambers judge dismissed appellants' motion, finding that corporate shareholder's insolvency, appointment of monitor and role of court under CCAA made shareholders' agreement void, preventing stay under s. 15 of CAA — Appellants appealed — Appeal dismissed — Chambers judge had authority under s. 11 of CCAA to order stay of arbitration proceedings, as arbitration is "proceeding" under s. 11 — Appellants were creditors for purposes of CCAA, as it could be said they claimed right to property in corporate shareholder's possession — Even if appellants were not creditors, words of s. 11(4) of CCAA were sufficiently expansive to support discretion exercised by chambers judge — Chambers judge's reasons for stay, which included view that arbitration would compromise process under CCAA, indicated he properly exercised discretion under s. 11(4) — Even if chambers judge erred in interpreting s. 15 of CAA, outcome of case would not change since CCAA would prevail over provincial Act in case of conflict — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11(4) — Commercial Arbitration Act, R.S.B.C. 1996, c. 55, s. 15.

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Farm Credit Corp. v. Holowach (Trustee of), 86 A.R. 304, 59 Alta. L.R. (2d) 279, 51 D.L.R. (4th) 501, [1988] 5 W.W.R. 87, 68 C.B.R. (N.S.) 255 (Alta. C.A.) — applied

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Meridian Development Inc. v. Toronto Dominion Bank, [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576 (Alta. Q.B.) — considered

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Reference re Companies' Creditors Arrangement Act (Canada), 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75 (S.C.C.) — referred to

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s. 2(1) "creditor" [rep. & sub. 1997, c. 12, s. 1(2)] — considered

s. 81 — considered

s. 81(1) — considered

s. 121 — considered

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s. 121(2) [rep. & sub. 1997, c. 12, s. 87] — considered

s. 121(3) — considered

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s. 15 — considered

s. 15(1) — considered

s. 15(2) — considered

s. 23 — considered

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Generally — considered

Pt. I — referred to

s. 2 — considered

s. 2 "secured creditor" — considered

s. 2 "unsecured creditor" — considered

ss. 4-8 — referred to

s. 6 — referred to

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s. 11(4) [rep. & sub. 1997, c. 12, s. 124] — considered

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s. 11(4)(c) [rep. & sub. 1997, c. 12, s. 124] — considered

s. 12 — considered

s. 12(1) — considered

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APPEAL by appellants from dismissal of motion to stay respondent's motion to prohibit arbitration of dispute arising under shareholders' agreement.

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

1 This case raises a question about the scope of the powers of a judge pursuant to the *Companies' Creditors Arrangement Act* ("*CCAA*"), R.S.C. 1985, c. C-36. Specifically, does a judge have the discretion to establish a procedure for resolving

a dispute between parties who have agreed to arbitrate their disputes under a contract? In my view, the judge is granted that power by the *CCAA*, in this case his discretion was exercised properly, and the appeal must be dismissed.

Facts

2 The Appellants Luscar Ltd. and Consol of Canada Inc. ("the Appellants") and the Respondent Smoky River Coal Limited ("Smoky") are owners and operators of coal mines in Western Canada. Neptune Bulk Terminals (Canada) Ltd. ("Neptune") owns and operates a port facility in Vancouver. Smoky and the Appellants are shareholders of Neptune and ship coal for export through the port facility.

3 The relationship between Neptune and its shareholders is governed by a Shareholders' Agreement ("the Agreement"), key provisions of which are reproduced below. Briefly, the Agreement restricts the manner in which a shareholder may dispose of rights arising from the Agreement. Among the consequences of a breach specified in the Agreement are that shareholders are given a right of refusal to purchase, at book value, the Neptune shares belonging to an offending shareholder. The Agreement also provides that disputes among the parties will be arbitrated in British Columbia.

4 In April 1998, a dispute arose between the Appellants and Smoky when the Appellants alleged that Smoky had breached its obligations under the Agreement. Neptune issued a Notice of Default as required by the Agreement. Over the next several months, information was exchanged among the parties concerning the facts giving rise to the alleged breach. The Appellants say it was not until September 1998 that they received information, on a "with prejudice" basis, that confirmed their view that Smoky had breached its contractual obligations. Because until September they had been unable to use the information obtained earlier, they had taken no further steps in the interim to trigger formally the default provisions of the Agreement.

5 In the meantime, on July 30, 1998, a syndicate of Smoky's lenders had filed a petition to place Smoky under the protection of the *CCAA*. They, along with Canadian National Railway Company (a major unsecured creditor of Smoky) are also Respondents. On August 7, 1998, an order was made retroactive to July 31, 1998, staying all actions against Smoky and its assets. This order ("the Cairns order") made specific reference to rights arising under the Agreement, even though Neptune and the Appellants had been unaware of the *CCAA* filing. The Cairns order, which was of limited duration, has since been extended several times. A Monitor has been appointed to oversee Smoky's affairs, although not empowered to take possession of Smoky's assets or manage Smoky's business.

6 Upon learning of the Cairns order, the Appellants became involved in the *CCAA* proceedings, arguing that the stay should not be extended against them and asserting that their dispute with Smoky should be resolved by arbitration pursuant to the Agreement. The chambers judge suggested that the parties attempt to resolve this issue among themselves. When they were unable to do so, cross-motions resulted. In its motion, Smoky sought various declarations concerning the status of the "dispute" under the Agreement or, alternatively, an order prohibiting arbitration proceedings under the Agreement and giving directions for the determination of issues arising under the Agreement. The Appellants' motion sought a stay of Smoky's motion pursuant to s. 15 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (the "B.C. *Arbitration Act*").

Decision Appealed From

7 The learned chambers judge dismissed the Appellants' motion, concluding that the Court of Queen's Bench (which is the "court" under s. 2 of the *CCAA*) has jurisdiction "to hear and determine ... whether Smoky has been or is in default under the ... Agreement and any and all related issues arising therefrom." He ordered the parties to appear before him for further directions concerning a trial of the issues arising from the Agreement.

8 Among his undisputed findings were that:

- the law of British Columbia applies to the dispute under the Agreement

- the question of whether or not Smoky was in default under the Agreement was an issue that, pursuant to the Agreement, the parties had agreed would be decided by arbitration

- Smoky's motion was a commencement of "legal proceedings" within the meaning of s. 15 (1) of the B.C. *Arbitration Act*

- the Appellants had applied to stay Smoky's motion

9 He framed the question this way at para. 1: "Should this Court establish a procedure to resolve a dispute between [the Appellants and Smoky] as part of its supervisory role of the reorganization of Smoky under the *CCAA*, or should this Court stay the pending Notice of Motion of Smoky dated January 6, 1999 while that dispute is resolved by an arbitrator in British Columbia in accordance with the *Commercial Arbitration Act*?"

10 He concluded that s. 15 of the B.C. *Arbitration Act* obliged him to stay Smoky's motion and send the matter to British Columbia for arbitration unless, in the words of that section, the agreement to arbitrate was "void, inoperative or incapable of being performed." He suggested at para. 31 that the latter condition applied because of Smoky's insolvency, the appointment of the Monitor, and the role of the Court under the *CCAA*. He said this incapacity was beyond the parties' control.

11 He considered that the *CCAA* process would be compromised if the contractual dispute was not settled within its ambit. But he noted that, in so dealing with the matter, the resolution of the dispute would be neither precluded nor postponed. Rather, it had to be addressed expeditiously because of its likely impact on the viability of a plan of arrangement. Were it not resolved under the umbrella of the *CCAA*, moreover, the efforts of Smoky's officers could be drained through involvement in the B.C. arbitration, at a time when they should be attending to Smoky's reorganization. Additionally, other stakeholders (including the Monitor) would be excluded from an arbitration in B.C. He rejected the Appellants' argument that their rights as non-creditors could not be affected by *CCAA* orders. He concluded that the dispute should be resolved as expeditiously as possible in the Court of Queen's Bench under the *CCAA* proceedings, "so as to permit Smoky to move forward with certainty as to its status as a shareholder of Neptune" (para. 43).

12 O'Leary J.A. subsequently granted leave to appeal pursuant to s. 13 of the *CCAA*. He suggested the following as the issues for the appeal:

(1) Did the chambers judge err in finding that the arbitration agreement was "incapable of performance" because Smoky is subject to proceedings under the CCAA?

(2) If [the chambers judge] erred in finding that the arbitration agreement was incapable of performance, did he nevertheless have jurisdiction under the CCAA to override the NSA arbitration agreement with respect to the forum and procedure for resolving disputes?

(3) If the Order appealed adversely affected the substantive rights of Luscar and Consol under the *Commercial Arbitration Act* and the arbitration rules of the British Columbia International Commercial Arbitration Centre, did the chambers judge have jurisdiction under the CCAA to make the Order?

13 Because of the approach I have taken to this case, I do not find it necessary to deal with the first issue in quite the way framed by O'Leary J.A. The second and third issues are considered in the reasons that follow.

Contractual Provisions

14 A number of provisions of the Agreement are relevant to the issue under appeal.

15 Paragraph 8.01 provides:

> Except as otherwise expressly permitted by this agreement or a Terminal Contract, no Shareholder or Affiliate shall sell, transfer or otherwise dispose of or offer to sell, transfer or otherwise dispose of, any of its Interest, or any Terminal Contract or any of its rights thereunder.

16 It is alleged that Smoky breached this provision when it transported six train loads of coal through the terminal. According to the Appellants, on this occasion Smoky "subcontracted" its capacity at the terminal.

17 Paragraph 8.04 describes the sole method by which a shareholder may dispose of its contracted shipping capacity. Briefly, it must offer that capacity to the other shareholders and only if they do not take up the right may the capacity be subcontracted to a third party.

18 Paragraph 10 deals with default:

> 10.01 It is an event of default, if a Shareholder (the "Defaulting Shareholder") (the other Shareholders being the "Non-Defaulting Shareholders"):
>
> (a) fails to observe, perform or carry out any of its obligations hereunder and such failure continues for 30 days after Neptune has given notice in writing to the Defaulting Shareholder specifying the nature of the default and requiring that the default be cured within 30 days; or
>
> (b) becomes a bankrupt or commits an act of bankruptcy, or permits or authorizes the appointment of a receiver or if a receiver-manager of its assets is appointed or if the Defaulting Shareholder makes an assignment for the benefit of creditors or otherwise.

Neptune shall give a copy of any notice under this paragraph to the Non-Defaulting Shareholders.

> 10.02 Upon the expiration of the 30 day period referred to in subparagraph 10.01(a) hereof or upon Neptune becoming aware of an event described in 10.01(b) hereof, Neptune shall declare a Default and give notice thereof to the Non-Defaulting Shareholders.

19 In the event of a continuing default, paragraph 11.01 grants other shareholders the option to purchase the defaulting shareholder's shares at book value. In this case, the evidence suggests that the book value of Smoky's shares is about $880,000, while the market value of Smoky's rights in the Neptune Terminal may exceed $46,000,000. During the course of argument, the chambers judge observed that, from a practical perspective, a plan of arrangement under the *CCAA* could not go forward without a resolution of the dispute between Smoky and the Appellants. (AB 83-84)

20 The relevant paragraph dealing with dispute resolution is 12.02:

> The parties agree that all disputes or differences between or among the parties hereto, other than a dispute or difference decided by the auditors pursuant to paragraph 12.01, shall be submitted to a single arbitrator under the auspices of and pursuant to the rules of the British Columbia International Commercial Arbitration Centre and pursuant to the Commercial Arbitration Act of British Columbia whose decision shall be final and binding upon the parties to the arbitration. The arbitrator may determine all questions of procedure and after hearing any evidence and representations of the parties, the arbitrator shall make an award and reduce the same to writing together with the reasons therefor.

21 Paragraph 15.11 provides that the Agreement will be governed by and construed in accordance with the laws of British Columbia.

Statutory Provisions

22 Section 11(4) of the *CCAA* is central to this appeal.

11(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceedings against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company. (Emphasis added)

23 Part I of the *CCAA* (ss. 4 to 8) provides for the making of a compromise or arrangement between the company and its creditors. If accepted by two-thirds of the creditors, the plan may be sanctioned by the court.

24 Section 2 of the *CCAA* contains the following definitions:

"secured creditor"

"secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds;

"unsecured creditor"

"unsecured creditor" means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issued under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.

25 Section 12 sets out the claims procedure. Section 12(1) states that a "claim" means "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the Bankruptcy and Insolvency Act." Section 12(2) mandates how the "amount" of a "claim" is to be determined. Section 12(2)(a) states:

For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:

(a) the amount of an unsecured claim shall be the amount...

(iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor...

26 For reasons that will become apparent, the following provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") are also relevant.

Definitions - s. 2(1)

"claim provable in bankruptcy", "provable claim" or "claim provable"

"claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;

"creditor"

"creditor" means a person having a claim, unsecured, preferred by virtue of priority under section 136 or secured, provable as a claim under this Act;

. . . . .

Persons claiming property in possession of bankrupt

81(1) Where a person claims any property, or interest therein, in the possession of a bankrupt at the time of the bankruptcy, he shall file with the trustee a proof of claim verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the property to be identified.

Claims provable

121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

Contingent and unliquidated claims

121(2) The determination of whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

Debts payable at a future time

121(3) A creditor may prove a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

27 Section 15(2) of the B.C. *Arbitration Act*, referred to by the chambers judge, provides:

In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

(Emphasis added)

28 Section 23 states:

An arbitrator must adjudicate the matter before the arbitrator by reference to law unless the parties, as a term of an agreement referred to in section 35, agree that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.

(Emphasis added)

29 Under ss. 8 and 9 of the *Domestic Commercial Arbitration, Rules of Procedure* of the B.C. International Commercial Arbitration Centre (as amended June 1, 1998) ("Rules"), arbitration may be commenced by a notice from one party to another and to the Centre or by the filing of a Joint Submission to Arbitrate to the Centre. The arbitration is deemed to have commenced following this filing and the payment of fees (s. 10). There is no evidence to suggest that arbitration was commenced in this case.

30 Section 33 of the Rules provides:

> An arbitration tribunal shall decide the dispute in accordance with the law unless the parties agree in writing in accordance with section 23 of the *Commercial Arbitration Act* that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.
>
> (Emphasis added)

Analysis

1. Did the Chambers Judge Have the Authority under s. 11 of the CCAA to Order a Stay of the B.C. Arbitration Proceedings?

(A) Does the term "proceedings" in s. 11 of the CCAA include the proposed arbitration in B.C.?

31 There is little doubt that the term "proceedings" in s. 11 is broad enough to encompass extra-judicial proceedings. Trial and appellate courts have treated the term expansively, relying upon jurisprudence that takes a broad, liberal approach to the interpretation of the *CCAA*. *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 11 D.L.R. (4th) 576, 53 A.R. 39 (Alta. Q.B.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.) ("*Quintette Coal*"). Such courts have observed that, were it otherwise, non-judicial proceedings could operate against the interests of creditors and render impossible the achievement of effective arrangements.

32 Thus, in *Quintette Coal*, the term "proceedings" was held to include extra-judicial conduct such as the withholding of payments to the debtor company. In *Meridian*, it was said to embrace payment pursuant to a letter of credit. Without specific discussion of the point, it seems also to have been assumed that "proceedings" includes the exercise of a contractual right to replace an operator of jointly-owned petroleum properties. *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 (Alta. Q.B.).

33 The above jurisprudence persuades me that "proceedings" in s. 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 s. 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 s. 11 of the *CCAA*.

(B) Are the Appellants creditors for the purposes of the CCAA?

34 If the Appellants can be considered creditors under the *CCAA*, there is little doubt that the chambers judge had the power to affect their rights in the way he did. It is obvious that the contractual rights of a creditor can be affected permanently under the *CCAA*. To take a simple example, a plan of arrangement or compromise that is approved by the requisite number of creditors can alter permanently the contractual rights of even those creditors that have not approved the plan (*CCAA*, s.6).

35 To explain my conclusion that the Appellants can be considered creditors under the *CCAA*, it is necessary to examine the statutory linkage between the *CCAA* and the *BIA* and the courts' view of that linkage.

36 The relevant provisions of the *CCAA* and the *BIA* have been set out above. For the purposes of the claims procedure in s. 12 of the *CCAA*, "claim" is defined as the *BIA's* meaning of "a debt provable in bankruptcy". Could the Appellants' claims in this case constitute a "debt provable in bankruptcy"?

37 The answer is not readily apparent from the *BIA*, since nowhere does it define "*debt* provable in bankruptcy". The closest definition is "*claim* provable in bankruptcy". A contingent and unliquidated claim recoverable by legal process is a "claim provable in bankruptcy" for the purposes of s. 121(1) of the *BIA*: *Farm Credit Corp. v. Holowach (Trustee of)*, [1988] 5 W.W.R. 87, at 90, 51 D.L.R. (4th) 501 (Alta. C.A.), leave to appeal to the Supreme Court of Canada dismissed at [1989] 4 W.W.R. lxx (S.C.C.). Section 81(1) of the *BIA* contemplates proof of a claim arising from "any property, or interest therein" in the possession of the bankrupt at the time of bankruptcy. Some of the Respondents argue that the Appellants' claim against Smoky under the Agreement would fall under one of these sections and is, therefore, a "claim" under the *CCAA* that would give the Appellants access to the s. 12 claims procedure, making them creditors under that statute.

38 This legal result is contingent on whether the terms "debt" and "claim" are interchangeable under the *BIA*. Both terms are used in s. 121, which is entitled "Claims Provable". There are cases which, without directly considering the point, appear to have assumed that the two terms are synonymous: *Re Central Capital Corp.* (1995), 22 B.L.R. (2d) 210 (Ont. Gen. Div. [Commercial List]); affirmed (1996), 27 O.R. (3d) 494 (Ont. C.A.).

39 There are also cases where the point has been addressed directly. In *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.), the issue was whether the holder of a loan guaranteed by the debtor company should be treated as a creditor for the purposes of the plan of arrangement filed by the debtor company, notwithstanding the fact that the loan holder had made no demand of payment under the loan agreement or the guarantee. Farley J. concluded that the loan holder was a creditor. He distinguished *Quebec Steel Products (Industries) Ltd. v. James United Steel Ltd.*, [1969] 2 O.R. 349, 5 D.L.R. (3d) 374 (Ont. H.C.) because of changes that had been made to the wording of s. 12 of the *CCAA* in the meantime. Specifically, he noted that the earlier wording had bundled together the concepts of "claim" and "amount", leading in *Quebec Steel* to the application of the common law definition of "debt" as a certain sum of money.

40 At 6-7, Farley J. said:

> It strikes me that [under the current *CCAA*] the double recitation in s. 12(1) and (2) of "[f]or the purposes of this Act" and the segregation of these subsections was intended to allow "claim" to be determined as any "indebtedness, liability or obligation of any kind" by reference to whether it "could be a debt provable in bankruptcy within the meaning of the *Bankruptcy Act*". The determination of the amount of that claim is to be determined under another provision, also "[f]or the purposes of this Act". Under the structure and context of the C.C.A.A. could there be a claim (unsecured debt provable as such under the *Bankruptcy Act*) without there being a creditor as the holder of that claim. I think not. I therefore conclude that the B. of M. is creditor of Algoma vis-à-vis the guarantee (see *Re Film House Ltd.* (1974), 19 C.B.R. (N.S.) 231 (Ont. S.C.), varied (1974), 19 C.B.R. (N.S.) 231 at 234 (Ont. S.C.); *Re Froment*, 5 C.B.R. 765, [1925] 2 W.W.R. 415, [1925] 3 D.L.R. 377 (Alta. T.D.), which indicate that the contingent liability of a guarantor who has not been called upon to pay or who has not in fact paid should be considered a debt provable in bankruptcy pursuant to the *Bankruptcy Act*).

41 He held to similar effect in *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17 (Ont. Gen. Div. [Commercial List]), where the party found to be a "claimant" for the purposes of the *CCAA* had merely launched a lawsuit against the debtor company, seeking, among other things, declarations concerning the validity of certain agreements and recovery of damages for the breach of the agreements by the debtor company. See also *Re Quintette Coal Ltd.* (1991), 7 C.B.R. (3d) 165 (B.C. S.C.) at 174 where it was held that "claim" under the *CCAA* included "future prospects".

42 I find this reasoning persuasive. There is a possible explanation for the fact that the *CCAA* refers to a "debt", rather than a "claim", provable under the *BIA*. At the time the *CCAA* was passed, the *Bankruptcy Act*, R.S.C. 1927, c. 11, contained s. 104, entitled "Debts provable". That section is the forerunner of s. 121, now entitled "Claims provable". The language used in the body of s. 104 was "debts provable"; in the current s. 121, it is "claims provable". The definitions at that time also referred to "debts" rather than "claims". It may be that Parliament failed to re-align the language of the *CCAA* when the relevant language of the *Bankruptcy Act* was amended in 1949, S.C. 1949, 2nd sess., c. 7.

43 Nor am I convinced there are compelling reasons why the notion of a "debt" should be treated narrowly under the *CCAA*, rather than as broadly as a "claim" under the *BIA*. It is true that, in comparison to *CCAA* proceedings, bankruptcy proceedings are by nature more final. If it is ever to be dealt with, a claim must be resolved during the bankruptcy proceedings. In contrast, if a *CCAA* plan of arrangement is accepted, there is the future possibility of a going concern against which a claim may be asserted.

44 But there may also be situations (like the present one) where it would be difficult for a plan of arrangement to be prepared and voted upon without some resolution, in the same process, of a claim that is relatively unripe. This appears to have been the reasoning of Blair J. in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.). There, the plaintiffs had served a statement of claim (seeking damages for breach of contract against the debtor company) before an initial stay under the *CCAA* was ordered. In refusing to lift the stay and permit the action to proceed, he noted that, unless the claim was dealt with in the context of *CCAA* proceedings, the creditors would have no way to assess whether to accept or reject the debtor company's plan (notwithstanding that the plan itself had treated the plaintiffs as parties that were unaffected by it). His language at 311 suggests a tacit acceptance of the fact that the plaintiffs were not "creditors" in the same sense as other creditors. He held, nevertheless, that their "claim" should be dealt with under the *CCAA*.

45 In this case, the essence of the Appellants' claim is that Smoky has breached the Agreement. Although paragraph 11.01 of the Agreement grants an option to purchase the defaulting shareholder's shares, it is clear from paragraph 11.02 that other remedies are contemplated. Viewed this way, the Appellants' claim is not significantly different than the breach of contract claims in some of the cases just discussed. To the extent that the Appellants might exercise an option to acquire Smoky's shares, moreover, it could be said that they claim a right to "property" in Smoky's possession, a right that would be provable under s. 81 of the *BIA*.

46 For these reasons, I conclude that the Appellant's claim against Smoky can be treated under the claims process of s. 12 and that they are creditors for the purposes of the *CCAA*. In case I am wrong, I will now consider whether, if the Appellants *cannot* be considered creditors, the chambers judge nevertheless had the power to make the order.

(C) Even if the Appellants are not creditors for the purposes of the CCAA, does s. 11 authorize the order made in this case?

47 The Appellants do not dispute that the rights of non-creditor third parties can be affected by the s. 11 power to order a stay. They agree this is the clear implication of cases such as *Norcen*, *supra*, a decision that has been followed widely and cited with approval by many Canadian courts. But they say in no case has a court altered permanently the contractual rights of a non-creditor and doing so is beyond the scope of the *CCAA*. They assert that, if the order is upheld, they will have lost forever the opportunity to resolve the dispute pursuant to the arbitration procedure accepted by the parties to the Agreement. As discussed later, in my view the nature of the contractual right being affected is an important factor to take into account.

48 The Respondents disagree with the Appellants' assessment of the jurisprudence. They also maintain that the impugned order affects the Appellants' procedural, not substantive, rights.

49 In my opinion, the language of s. 11(4), considered in the context of the *CCAA's* purpose, authorizes the order made by the chambers judge. To recapitulate, that order declared that the Alberta Court of Queen's Bench "has jurisdiction to hear and determine the issue of whether Smoky has been or is in default under the Neptune Shareholders' Agreement and any and all related issues arising therefrom", required the parties to appear before him for further directions, and dismissed the Appellants' motion for a stay pursuant to the B.C. *Arbitration Act*. Although there are no previous decisions on all fours with the present situation, I read the existing jurisprudence as supportive of my interpretation of s. 11(4).

50 The language of s. 11(4) is very broad. It allows the court to make an order "on such terms as it may impose". Paragraphs (a), (b) and (c) empower the court order to stay "*all* proceedings taken or that might be taken" against the debtor company; restrain further proceedings "in *any* action, suit or proceeding" against the debtor company; and

prohibit "the commencement of or proceeding with *any* other action, suit or proceeding" (emphasis added). These words are sufficiently expansive to support the kind of discretion exercised by the chambers judge.

51 This interpretation is supported by the legislative objectives underlying the *CCAA*. The purpose of the *CCAA* and the proper approach to its interpretation have been described as follows:

> 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 [sic] 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.

per Farley J. in *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at 31.

52 As has been noted often, the *CCAA* was enacted by Parliament in 1933 during the height of the Depression. At that time, corporate insolvency led almost inevitably to liquidation because that was the only option available under legislation such as the *Bankruptcy Act* and the *Winding-Up Act*. In the result, shareholder equity was destroyed, creditors received very little, and the social evil of unemployment was exacerbated. The *CCAA* was intended to provide a means of enabling the insolvent company to remain in business: *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.); *Quintette Coal Ltd., supra.*

53 The courts have underscored that the *CCAA* requires account to be taken of a number of diverse societal interests. Obviously, the *CCAA* is designed to "provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both": *Re Lehndorff General Partner Ltd., supra*, at 31. It is intended to "prevent any manoeuvers for positioning among creditors during the interim period which would give the aggressive creditor an advantage to the prejudice of others who were less aggressive and would further undermine the financial position of the company making it less likely that the eventual arrangement would succeed": *Meridian, supra*, at 114. But the *CCAA* also serves the interests of a broad constituency of investors, creditors and employees: *Hongkong Bank of Canada, supra*, at 320; *Quintette Coal Ltd., supra*, at 314. These statements about the goals and operation of the *CCAA* support the view that the discretion under s. 11(4) should be interpreted widely.

54 There are a number of cases where third party rights have been affected by a stay order. *Norcen* provides a convenient starting point.

55 Under the terms of the contract pursuant to which the debtor company (Oakwood) operated jointly owned oil and gas properties, the parties were entitled to replace the operator in the event of insolvency. Norcen was a party to the operating agreement, but not a creditor of Oakwood, nor present at the initial *CCAA* application. The stay order specifically enjoined Oakwood's removal as operator under any operating agreements. Norcen applied to vary the stay order and replace Oakwood pursuant to the terms of its operating agreement.

56 In denying Norcen's application, Forsyth J. agreed that, by bringing its *CCAA* application, Oakwood had declared itself insolvent and that, normally, this would bring into play the replacement of operator provisions. He acknowledged at 11 (C.B.R.) that Norcen's rights might be affected permanently under the operating agreement were it not prevented from replacing Oakwood: if Oakwood's plan of arrangement was approved by its creditors and its insolvency thereby "cured", Norcen might lose forever its claim to replace Oakwood as operator. While not deciding the issue of whether the insolvency was capable of being "cured", he approached the case as involving more than a mere suspension of Norcen's rights. He concluded at 12, nevertheless, that the s. 11 powers were broad enough to affect the rights of non-creditors,

noting that there was much room for discretion within the application of s. 11 "to refuse a stay when third party rights will be seriously prejudiced by its terms."

57 Having determined that the s. 11 powers permitted interference with Norcen's contractual rights, Forsyth J. addressed the *CCAA*'s constitutional validity, observing that it had been upheld by the Supreme Court of Canada in *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 (S.C.C.). Thus, he said, the continuance of insolvent companies must be considered a constitutionally valid statutory objective. "[I]t follows that a stay which happens to affect some non-creditors in pursuit of that end is valid" (p. 16). He concluded that continuance of a company involves more than a consideration of creditor claims, adding that s. 11 of the *CCAA* could be used to interfere with some other contractual relationships in circumstances which threaten a company's existence. In *obiter*, he expressed the view that fairness required that such interference "should be effective only for a relatively short period of time" (p. 16).

58 A related case is *Re T. Eaton Co.* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.). Dylex (not a creditor of T. Eaton but an operator of stores in malls where T. Eaton was the anchor tenant) applied to amend a *CCAA* stay order so that it could exercise rights pursuant to its leases. Those leases permitted Dylex to alter the lease terms if T. Eaton ceased to operate in the shopping centres. Houlden J.A. denied the motion, noting that, if such rights were accorded to Dylex, there might be other tenants who would make the same claim. This would likely increase the claims of landlords against T. Eaton and seriously impact its re-structuring plan. He took account of T. Eaton's position as a large employer and purchaser from suppliers. At 295-96, without extensive analysis, he opined that s. 11 and the inherent jurisdiction of the Court gave him the power to make orders against non-creditor third parties when their actions would potentially prejudice the success of the plan. I acknowledge that it is not clear that his order had the effect of altering contractual rights permanently, since, depending on the outcome of the re-organization proceedings, at a future time the tenants might still be able to exercise their rights under the leases. In this regard, the situation was akin to that in *Norcen*.

59 In *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), the debtor company was permitted to terminate its leases in shopping malls, as part of its restructuring program. Farley J. viewed s. 11 as giving the court the inherent jurisdiction, in the interim between the filing and the approval of a plan, to "fill in gaps in [the] legislation so as to give effect to the objects of the CCAA, including the survival program of a debtor until it can present a plan" (p. 110).

60 To summarize, the language of s. 11(4) is very broad. The *CCAA* must be interpreted in a remedial fashion. Cases support the view that third-party rights may be affected by a stay order, although there are none where the third-party rights appear to have been affected in quite the same way as those of the Appellants as a result of this order. I am satisfied, nevertheless, that the *CCAA* gives the chambers judge the discretion to make the impugned order. It remains to consider whether he properly exercised that discretion.

2. Did the Chambers Judge Properly Exercise his Discretion under s. 11(4) of the CCAA?

61 The fact that an appeal lies only with leave of an appellate court (s. 13, *CCAA*) suggests that Parliament, mindful that *CCAA* cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.

62 A similar opinion was expressed by Macfarlane J.A. in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]). In considering whether to grant leave to appeal, he observed at 272:

> ...I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made....
>
> Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A.

63 The Appellants point to cases where a specific issue arising under the *CCAA* has been sent for resolution to a forum other than the *CCAA* court. In each of those cases, however, it has been determined that resolution in the other forum would promote the objectives of the *CCAA*. In each such case, moreover, the *CCAA* judge has retained control over the impact of the outside determination.

64 For example, in *Re Philip's Manufacturing Ltd.* (1991), 9 C.B.R. (3d) 1 (B.C. S.C.), the debtor company's landlord alleged that its leases were about to expire since the company had not given requisite notice. The judge noted that it was essential to the reorganization plan that the company be able to remain in the leased premises. He permitted the landlord to pursue proceedings under the *Commercial Tenancy Act*, R.S.B.C. 1979, c. 54. But that legislation contained a summary procedure for determining the issue at hand (whether the landlord was entitled to a writ of possession). The judge, moreover, maintained some control over the process by ordering that, if an order of possession was granted, it would be stayed for as long as the *CCAA* stay, "to be dealt with in the context of any reorganization plan ultimately brought before the court" (para. 44). Additionally, the summary procedure was to occur in the B.C. Supreme Court, the same court that supervised the *CCAA*.

65 Similarly, in *Re Cadillac Fairview Inc.* (January 29, 1995), Doc. B348/94 (Ont. Gen. Div. [Commercial List]), an issue arose about the quantification of a claim affecting the debtor company. Farley J. permitted this issue to be determined by a court in Chicago, because that court undertook to resolve the matter expeditiously and in coordination with the *CCAA* proceedings.

66 On the other hand, in *Landawn Shopping Centres Ltd. v. Harzena Holdings Ltd.* (1997), 44 O.T.C. 288 (Ont. Gen. Div. [Commercial List]), a plan of arrangement was already in effect when a landlord sought to proceed to arbitration with its claim against the debtor company. Instead, the court ordered that the claim be dealt with by the court under the terms of the plan of arrangement.

67 These cases compel the conclusion that a judge has the discretion under the *CCAA* to permit issues to be determined in another forum but is under no obligation to do so. The proper exercise of the discretion will be very fact-dependent.

68 As noted by Gibbs J.A. in *Quintette Coal Ltd.*, *supra*, at 312, the judicial exercise of discretion under s. 11 should "produce a result appropriate to the circumstances." The power under s. 11 should be exercised in a manner to give effect to the purpose of the *CCAA*, and not to "seriously ... impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period."

69 In this case, the chambers judge considered a number of matters in refusing to permit the arbitration. Among these were his view that the arbitration would compromise the *CCAA* process; that the effect of his order would not be to preclude or postpone the resolution of the dispute but to expedite it; that an expedited resolution of the dispute was critical to the *CCAA* proceedings given its possible impact on a plan of arrangement; and that it was desirable for Smoky's officers to focus on the re-organization.

70 These were all legitimate matters to consider. Another factor, not mentioned by the chambers judge, is that arbitration had not been commenced in this case by the time the initial *CCAA* order was made. There may be reasons why the Appellants had not moved toward arbitration more rapidly. But the fact remains that several months had elapsed between the origin of the dispute under the Agreement and the *CCAA* petition, during which time no steps to commence arbitration were taken by the Appellants.

71 It is also important to consider the nature of and the extent to which the Appellants' contractual rights may be compromised as a result of the order under appeal. I agree there are some potential advantages to the Appellants under arbitration. Specifically, they would be able to play a role in selecting the decision-maker. If their interpretation of s. 33 of the Rules and s. 23 of the B.C. *Arbitration Act* is correct, arguably the arbitration would limit Smoky's ability to rely on certain arguments that might be available in a court proceeding (for example, equitable arguments such as relief from forfeiture).

72 But as the Appellants acknowledged during argument, no decision has yet been made about what rules will apply to the resolution of this dispute under the procedures to be determined by the chambers judge. It remains open to the Appellants to argue that Rule 33 and s. 23 of B.C. *Arbitration Act* ought to govern the resolution of their dispute in the *CCAA* proceedings. The only "rights" of the Appellants that have been affected so far are that they cannot help select the decision-maker and they must participate in proceedings in the Court of Queen's Bench of Alberta. I do not consider that the order under appeal permanently affects the substantive contractual rights of the parties. It merely affects the forum in which those contractual rights will be assessed. This is a relatively minor incursion compared to the large benefit that may result from the *CCAA* proceedings. I assume that, in settling the details of the *CCAA* procedure, the chambers judge will take account of the Appellants' arguments and ensure that their substantive contractual rights are protected.

3. What is the Relationship between the Discretion of the Chambers Judge under s. 11 of the CCAA and s. 15 of the B.C. Arbitration Act?

73 It is apparent that I have taken a different approach than the chambers judge, who focussed largely on s. 15 of the B.C. *Arbitration Act*. He was correct in his opinion that, under that legislation, a stay must be ordered unless one of the three disabling events exists. If a case is governed by that legislation, a court should honour the choice of the parties to go to arbitration and has very limited power to refuse a stay of competing proceedings. *Kaverit Steel & Crane Ltd. v. Kone Corp.* (1992), 87 D.L.R. (4th) 129 (Alta. C.A.); *Prince George (City) v. McElhanney Engineering Services Ltd.*, [1995] 9 W.W.R. 503 (B.C. C.A.).

74 He concluded that, as a result of Smoky's insolvency, the appointment of a Monitor, and the court's role under the *CCAA*, the agreement to arbitrate was "incapable of being performed". The Appellants say this conclusion was wrong.

75 But even if the chambers judge erred in interpreting s. 15, the outcome of this case would not change. There would then be a conflict between the *CCAA* and a provincial statute. The Appellants do not contest the constitutional validity of the *CCAA*. The authorities are clear that, in the event of a conflict with a provincial law, the *CCAA* must prevail. *Gaz métropolitain Inc. v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.); *Re Pacific National Lease Holding Corp., supra*; *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* (1995), 34 C.B.R. (3d) 4 (B.C. C.A.). Accordingly, it is not necessary to decide whether he misapplied s. 15.

76 For these reasons, I would dismiss the appeal.

Appeal dismissed.

Footnotes

* Reconsideration refused (1999), 12 C.B.R. (4th) 126, 71 Alta. L.R. (3d) 46, 175 D.L.R. (4th) 703 at 727, 244 A.R. 196, 209 W.A.C. 196 (C.A.).

TAB 6

2017 ONSC 3138
Ontario Superior Court of Justice (Divisional Court)

Yeung v. Chan

2017 CarswellOnt 7602, 2017 ONSC 3138, 279 A.C.W.S. (3d) 205

Tammy Mei Kwai Yeung and Chi Kin Ho (Plaintiffs / Respondents) and Yin Canny Chan (Defendant / Appellant)

Boswell J.

Heard: May 16, 2017
Judgment: May 19, 2017
Docket: Newmarket DC-14-750

Counsel: Howard A. Wright, for Plaintiffs, Respondents
James H. Chow, for Defendant / Appellant

Subject: Civil Practice and Procedure; Contracts; Property

Related Abridgment Classifications

Real property
III Sale of land
III.4 Remedies
III.4.h Damages
III.4.h.ii Failure to close
III.4.h.ii.C Repudiation by purchaser

Headnote

Real property --- Sale of land — Remedies — Damages — Failure to close — Repudiation by purchaser
Underlying action arose out of failed real estate transaction involving condominium unit in downtown Toronto — Appellant was vendor of unit and respondents were purchasers — Trial judge found that respondents purchasers breached agreement to acquire unit, but concluded that vendor's damages were limited by mutual release purportedly executed by parties after scheduled closing date — Vendor appealed judgment of Small Claims Court — Appeal allowed — Trial judgment was set aside — Net Damages were calculated at $13,411.90 — Trial judge erred in concluding that release was valid and binding on parties — He also erred in concluding that vendor was estopped from challenging validity of release.

Table of Authorities

Cases considered by *Boswell J.*:

Meyers v. Dunphy (2007), 2007 NLCA 1, 2007 CarswellNfld 7, 262 Nfld. & P.E.I.R. 173, 794 A.P.R. 173, 38 C.P.C. (6th) 265 (N.L. C.A.) — referred to

Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust (2007), 2007 CarswellOnt 1705, 222 O.A.C. 102, 2007 ONCA 205, 29 B.L.R. (4th) 312, 56 R.P.R. (4th) 163, 85 O.R. (3d) 254 (Ont. C.A.) — referred to

APPEAL by vendor from judgment in which trial judge found that respondents purchasers breached agreement to acquire unit, but concluded that vendor's damages were limited by mutual release purportedly executed by parties after scheduled closing date.

***Boswell J.*:**

OVERVIEW

1 The defendant/appellant appeals the judgment of Deputy Judge A. Fisher of the Richmond Hill Small Claims Court dated November 25, 2014.

2 The underlying action arose out of a failed real estate transaction involving a condominium unit in downtown Toronto. The appellant was the vendor of the unit and the respondents were the purchasers. The trial judge found that the respondents breached the agreement to acquire the unit, but concluded that the appellant's damages were limited by a mutual release purportedly executed by the parties after the scheduled closing date.

3 The appellant argues that the trial judge erred in concluding that the parties had entered into a valid and enforceable release. She agrees with his conclusion that the respondents breached the agreement but argues that she is entitled to her full expectation damages up to the $25,000 jurisdictional limit of the Small Claims Court.

4 The following reasons explain why I agree that no enforceable release was ever concluded and what damages I calculate as owing to the appellant in the result.

THE FACTS

The Agreement

5 The appellant was a party to a binding agreement to purchase a residential unit at a newly constructed condominium building at the corner of Bay and Front Streets in Toronto. The purchase price was $456,900. The closing date was scheduled for January 6, 2012.

6 Before the scheduled closing date, the appellant decided to flip the property. On November 24, 2011 the respondents agreed with the appellant to assume her right to purchase the unit (the "assignment agreement"). The respondents agreed to pay $490,000 for the unit, in accordance with the terms of the assignment. The appellant accordingly expected to realize a quick profit of $33,100. The respondents paid a deposit of $15,000 towards the acquisition of the unit. The deposit was held by the appellant's solicitor.

7 How the assignment agreement fell apart is not particularly germane to the appeal. Suffice it to say that the respondents failed to complete the transaction. The trial judge concluded that the respondents breached the assignment agreement and no challenge is made in relation to that conclusion.

8 The appellant was obliged to complete the purchase transaction on her own account and became the registered owner of the unit.

The Mutual Release

9 Someone drafted a mutual release after the aborted closing. It purports to be an agreement about how the respondents' $15,000 deposit is to be divided and it includes a clause that the realtor will abandon any claim for commissions on the failed deal. For such a critically important document, there was surprisingly little detail about it adduced in evidence at the trial.

10 The evidentiary record leaves a great many questions unanswered in relation to the release. For instance:

(a) It is not clear who drafted it;

(b) While it is agreed that the appellant and the respondents signed the release at different times, there was no evidence adduced as to the circumstances surrounding the execution of the document by any of them. The realtor never signed it;

(c) On its face, the release indicated that it was irrevocable by the respondents until 5:00 p.m. on January 27, 2012, after which time it would become null and void. Presumably this means if it was not accepted prior to that time, it

became null and void. The face of the document has been amended, however, to provide that it is irrevocable by the appellant until 5:00 p.m. on January 31, 2012, after which it would become null and void. There is no evidence as to who made these amendments, when, or why;

(d) It would appear that the release was initially sent from the respondents' lawyer, Henry Hui, to the appellant's lawyer, Chak Wong, on February 6, 2012. There is no evidence as to why it was sent on that date, apparently a week (more or less) after it was already null and void according to its terms. Ms. Yeung testified that Mr. Hui sent a cover letter dated February 6, 2012 to Mr. Wong which said the release was open for acceptance until 3:00 p.m. that date. A copy of Mr. Hui's letter was not filed in evidence, nor were any questions put to the respondents about their intentions in terms of when the release might be validly accepted;

(e) The release initially provided that the $15,000 deposit would be disbursed as follows: $10,000 would be returned to the respondents and $5,000 would be paid to the appellant. The allocations are scratched out and the reverse handwritten over them. In other words, the appellant was to get $10,000 and the respondents $5,000. There was no evidence as to who made that change, when, or why;

(f) On its face, the appellant appears to have executed the release on May 2, 2012. What she was doing with it in the interim and the circumstances surrounding her execution of it remain unclear. There is no evidence that the signed release was ever conveyed back to the respondents' counsel.

11 On July 12, 2012, the respondents' counsel, Mr. Hui, wrote to Mr. Wong and asked him to return the release "sent under our April 10 cover". Mr. Hui went on to say that the respondents' "proposal for settlement is hereby withdrawn forthwith". I have not seen a copy of the April 10 letter and have no idea what it said. It was not entered into evidence at trial.

12 The respondents hired new counsel, Ms. Marina Li, sometime after July 12, 2012. On October 16, 2012 the appellant's counsel, Mr. Wong, wrote to Ms. Li. I will set out the essential content of his letter because its contents were a crucial part of the trial judge's reasoning:

We have spoken with our client and they disagree with the (sic) your client's assertions. Our client and your client signed a mutual release which our client had signed on May 2, 2012. Your client's previous solicitor had tried to withdraw the mutual release on July 12, 2012 but the release had already been signed by our respective clients and our client's position is that the release is binding between our mutual clients.

Our client had been waiting for the agent to sign the mutual release and our client had already forwarded the mutual release to the agent and the broker to sign such release. As the agent's signature was not forthcoming, our client had made a complaint to RECO with respect to the agent's action and our client is awaiting a decision from RECO. If RECO decides that that (sic) there should not be any payment to the agent due to the fact that the transaction did not proceed, then our client can settle this matter with your client based upon the release executed between our respective clients of May 2, 2012.

Please be advised that our client will counterclaim against your client if your client decides to issue a statement of claim for your client's breach of the assignment agreement.

The Pleadings

13 The respondents commenced a claim in the Richmond Hill Small Claims Court on October 17, 2012 seeking a return of the $15,000 deposit. The appellant filed a defence, undated, which described the release and provided, at para. 8:

On July 12, 2012, the Plaintiff's lawyer had sent a letter to withdraw the mutual release sign (sic). However since both the Plaintiff and the Defendant had signed the mutual release then this was a binding agreement between the Plaintiff and the Defendant and can not be withdrawn.

14 The respondents filed an answer to the defence (in effect a reply) on January 28, 2013. At para. 4 of the answer, they alleged that "the mutual release is not a binding document as it is not fully executed."

15 On December 3, 2012, the appellant commenced a Defendant's Claim seeking damages of $25,000 for breach of the assignment agreement. The mutual release was not mentioned in the pleading.

16 On January 7, 2013, the respondents filed a Defence to the Defendant's Claim. Again, the release was not mentioned in the pleading.

The Trial Judge's Findings

17 The trial judge's decision was rendered orally. At the outset, he found that the respondents were in breach of the terms of the assignment agreement. Again, neither side challenges that finding.

18 The trial judge went on to find that the release was duly executed by the appellant and the respondents. While he observed that it had not been executed by the realtor, he found that the realtor did not need to sign the release because it dealt with the rights of the buyer and seller. He appeared to be influenced in his conclusion by the fact that the realtor had never commenced a claim for any commission in the more than two years that had passed since the deal fell apart.

19 In view of the content of Mr. Wong's letter of October 16, 2012, as well as the appellant's pleadings, the trial judge found that the appellant was estopped from asserting that the release was not binding. He also relied on the evidence of Stanley Lum — the appellant's spouse — that *his* intent with respect to the release was to reach a settlement. The appellant did not testify at trial. Mr. Lum was not a party to the transaction or the release so his intention was not relevant.

20 Ultimately, and in accordance with the terms of the release, the trial judge awarded $5,000 in damages to the respondents, to be paid from the $15,000 deposit, plus $2,500 in costs. The balance of the deposit, $7,500, was to be paid to the appellant.

THE ISSUES

21 The appellant raises the following grounds of appeal:

(a) The trial judge erred in concluding that the release was binding when it was not accepted by the appellant in the time set out in counsel's letter and it was never signed by the realtor;

(b) The trial judge erred in admitting into evidence Mr. Wong's letter dated October 16, 2012, which should have been excluded because it was protected by settlement privilege;

(c) The trial judge erred in finding that the appellant was estopped from asserting that the release was not binding; and,

(d) The trial judge erred in not awarding the appellant $25,000 in damages.

THE PARTIES' POSITIONS

22 The appellant submits that the release was never a binding and enforceable agreement between the parties. First, it was intended that the realtor execute the release. He did not do so. In the result, the document was not fully executed and is not binding. Second, the release was not executed by the appellant within the time that it was open for acceptance. It became null and void. The subsequent execution of the document by the appellant does not, in law, revive it.

23 The appellant further submits that her lawyer's letter of October 16, 2012 should never have been admitted into evidence. Her counsel argues that the letter was written at a time when litigation was on the horizon and that it contains

an offer of compromise. It was, in the result, protected by settlement privilege. The trial judge should not have admitted or considered the document.

24 Finally, the appellant submits that the trial judge should not have applied the principle of estoppel because (1) the October 16, 2012 letter was inadmissible; and (2) Mr. Wong was simply wrong about whether there was a binding release in place. His assertion that the release was valid and binding cannot make an invalid release valid.

25 The respondents submit that the appeal should be dismissed. Their counsel asserts that the trial judge correctly admitted the October 16, 2012 letter from Mr. Wong. He argues that the evidentiary record supports a finding that the appellant and respondent intended to settle with one another regardless of the signature of the realtor. Mr. Wong was correct when he said the release was binding and the trial judge was right not to let the appellant resile from that position.

DISCUSSION

26 As I noted above, my view is that the trial judge erred in concluding that the release was a valid and binding document. I will explain my view as I address the grounds of appeal in turn:

Lack of Execution

27 The evidentiary record is so lacking in detail regarding the creation and proffering of the release that I have no confidence in commenting about the issues of offer and acceptance as between the appellant and the respondent.

28 On the other hand, it is patently clear that the realtor did not sign the document. On its face, it is apparent that the drafter intended that three parties would sign it — the appellant, the respondents and the realtor.

29 The trial judge avoided the issue of the absence of the realtor's signature by suggesting that the realtor had no skin in the game. But this conclusion was based on the fact that the realtor had not, in the two or more years since the deal fell apart, advanced a claim for his commission. The passage of a limitation period may mean that the realtor no longer has a viable claim to commissions, but the situation at the time the release was drafted was far different.

30 The appellant, as vendor, was particularly exposed to a potential claim by the realtor for commissions. The appellant, presumably, would not be keen to release any of the deposit back to the respondents until she was certain that she was not exposed to a claim by the realtor.

31 The appellant's concerns in this regard are evident in Mr. Wong's letter of October 16, 2012. Although Mr. Wong expressed the view that the release was binding, he also said that he had tried, without success, to get the realtor to sign the document. He was now waiting on word from RECO about whether the realtor had any claim to commissions. If not, then he indicated the appellant and respondent could proceed to settle in accordance with the release.

32 Contracts are to be interpreted according to some basic principles. In particular, the release in this case must be considered:

> (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
>
> (b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said;
>
> (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract); and,
>
> (d) in a fashion that accords with sound commercial principles and good business sense, and that avoid a commercial absurdity.

See *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254 (Ont. C.A.) at para. 24.

33 Absent evidence to the contrary, and there was none, I must interpret the release as though the parties intended that it be signed by the realtor. Such an interpretation accords with the wording on the face of the release and also makes good business sense, in view of the exposure of the appellant to a potential claim by the realtor for commissions.

34 In my view, the trial judge erred in concluding that the release had been validly executed.

Admissibility of the October 16, 2012 Letter

35 The appellant's counsel objected at trial to the admission of Mr. Wong's letter of October 16, 2012 on the basis that it was protected by settlement privilege.

36 The parties were agreed in terms of the legal parameters of settlement privilege. It is a class privilege intended to protect and thus foster settlement negotiations. There are generally three preconditions:

(a) There must be existing or contemplated litigation;

(b) The communication must be made on the express or implied expectation that it would not be disclosed to the court; and,

(c) The communication must have been for the purpose of attempting to effect a settlement.

See *Meyers v. Dunphy*, 2007 NLCA 1 (N.L. C.A.) at para. 12.

37 The trial judge effectively found that the communication was not for the purpose of attempting to effect a settlement. He found that a settlement had already been reached. Reasonable people may differ about the content of Mr. Wong's letter. I tend to think he took somewhat contradictory positions from one paragraph to the next. That said, there was an evidentiary basis which reasonably supports the trial judge's conclusion and I would not interfere with it.

Estoppel

38 Where I differ with the trial judge, in relation to the October 16, 2012 letter, is whether it creates an estoppel against the appellant.

39 The trial judge was not entirely clear about the particulars of the estoppel and how it arose. As Professor Waddams describes in his influential text, "the basic concept of estoppel is that a person is precluded from retracting a statement upon which another has relied": S.M. Waddams, *The Law of Contracts*, 4th ed. (Aurora: Ont.: Canada Law Book Inc., 1999).

40 In other words, there is a reliance component to estoppel. And I would add to that a fairness component as well. I would be unfair and inequitable to permit a party to retract a statement he or she has made and upon which another has relied.

41 The problem in terms of applying the doctrine of estoppel to this case is that there is no evidence of reliance. Indeed, the opposite is true. This is a very unusual case. Each side took a certain position about the enforceability of the release in their pleadings. Each did a 180 degree turn by the time of trial and took the opposite position. As I noted above, the respondents took the position in their Answer to the Defence that the release was not binding because it was not fully executed. The trial judge did not comment on whether the respondents were estopped from asserting otherwise at trial.

42 In my view, an equitable estoppel did not arise in the circumstances of this case. There is evidence that both sides were prepared to change their positions with respect to the enforceability of the release on the basis of what suited them

at any particular time. Absent evidence of reliance on the part of the respondents, the trial judge was wrong to find that an estoppel arose on the basis of Mr. Wong's letter.

43 Whether the appellant's pleading amounted to an admission may be an arguable issue. But that argument was not raised at trial nor argued on appeal and as such I am not going to address it.

Damages

44 I have found that the trial judge erred in concluding that the release was valid and binding on the parties. I have also found that he erred in concluding that the appellant was estopped from challenging the validity of the release. In the result, the trial judgment is set aside.

45 The appellant asks that damages be awarded in her favour in the amount of $25,000. She provided a summary of her damages at trial and her lawyer took her husband through each of the items on that list.

46 The summary as provided is set out on Appendix "A" to these reasons. The total damages allegedly incurred were $50,727.18. The appellant reduced her claim, of course, to $25,000 to remain within the jurisdiction of the Small Claims Court.

47 The trial judge did not make any specific findings about damages, other than to compliment counsel on his presentation.

48 It is necessary to make a number of adjustments to the amounts claimed by the appellant.

49 I am assessing damages as of the time of trial in late November 2014. At that time the appellant still owned the unit. She was renting it out, as she had been since the month after she acquired it.

50 In calculating damages, it is appropriate to take into account any change in the value of the unit. The appellant presented the trial judge with a number of purportedly comparable sales to support the assertion that the unit had not increased in value between the aborted assignment and the trial. They were only current, however, to October 2013.

51 I take judicial notice that prices have risen dramatically in the Toronto real estate market over the past several years. I am unable, absent evidence, to conclude what the actual value of the condominium was at the time of trial. I am confident, however, that the absence of evidence works to the benefit of the appellant.

52 In any event, the adjustments I make, with reference to Appendix "A", are as follows:

(a) The appellant's math is wrong. The total for out-of-pocket closing costs is $28,440.37 and not $17,627.18. That means the gross losses are actually $61,540.37;

(b) The appellant has neglected to deduct certain expenses she would have had in the event the transaction with the respondents closed. Notably, real estate commission was saved. The evidence at trial was a little thin in terms of the commission being charged with respect to the assignment. I am inferring it was the same as the 5.5% being charged when the condo was re-listed for sale. The total commission payable on $490,000 would have been $26,950 plus HST of $3,503.50. The appellant saved the payment of commission;

(c) The appellant would also have incurred legal fees and disbursements on closing. I expect they would have been similar to the fees incurred on the purchase and so I have deducted all legal fees claimed;

(d) The estimated real estate taxes were over-stated. The appellant's 2012 tax return indicated annual taxes paid (and claimed against rental income) were $2,906.21. Moreover, the appellant — or at least her husband — claimed those taxes as a deduction against rental income and, in the final analysis, still realized an annual profit on rental income. I am removing them from the damage claim altogether;

(e) The appellant realized a profit the first year of renting of the unit of $1,271.81. That sum included only 11 months rental income, but all the expenses for 12 months. The rental income for 11 months was $20,583. Extrapolated over 12 months, the rental income would be $22,454.18. Expenses claimed, for twelve months, were $19,311.19. Assuming rental income was steady over the next two years and expenses were also steady, the profits realized in 2013 and 2014 would have been $3,143 per year. Moreover, in the 2012 expenses, there were agent's fees payable of $2,147. There was no direct evidence relating to those fees, but I infer they had to do with the rental of the unit. They would presumably not be payable in subsequent years. I accordingly add them back into profit for the years 2013 and 2014. I calculate rental profit at $5,290 per year for each of 2013 and 2014. To be fair, the trial was heard in November 2014 and so I will include only 11/12 of the profit for 2014, namely $4,849.16. I calculate total rental profit to the time of trial to be $11,410.97. There should also have been some calculation made as to the present value of the anticipated future rental profit stream, but there is no evidence before the court as to what that figure might be.

53 My adjusted calculation of the appellant's damages is, therefore, as follows:

Loss of Anticipated Profit	$33,100.00
Out-of-Pocket Expenses	28,440.37
Saved Commissions with HST	(30,453.50)
Saved Legal Fees and Disbursements	(1,695.00)
Claimed Real Estate Taxes	(4,569.00)
Rental Profits to date of trial	(11,410.97)
Net Damages	*$13,411.90*

54 The net damage figure is favourable to the appellant because it does not include mitigation for the present value of the future rental income stream. Without evidence, I am unable to include that figure.

Costs

55 The trial judge indicated that he would not have awarded costs, but for an offer the respondents had submitted. That offer was to walk away, which would have seen the appellant receive $15,000 in damages. The respondents have still done better than their offer and I see no reason to interfere with the trial judge's award of costs of $2,500 in favour of the respondents.

56 As for appeal costs, the simple fact is that the appeal was not a reasonable exercise. In my view, the trial judge's approach to resolution was a sensible one, notwithstanding what I have identified as legal errors. The result on appeal is only marginally different than the result achieved at trial and remains below the respondents' offer. Moreover, the appellant is fortunate that the evidence on mitigation is not complete as her damages would undoubtedly be subject to further reduction.

57 The results on appeal were mixed, at best. There will be no order for costs of the appeal.

58 In the result, from the deposit being held, the sum of $13,411.90, less $2,500 for costs, for a total of $10,911.90 will be paid to the appellant. The balance will be returned to the respondents.

Appeal allowed.

Appendix "A" — Appellant's Damages Claim

Loss of Profit on Assignment ($490,000 - $456,900)		$33,100.00
Out of Pocket Closing Expenses		
Pro-rated Common Expenses	307.84	
2011 Estimated Realty Taxes	951.35	
2012 Estimated Realty Taxes	4,569.00	
Development Charges	4,985.00	

Education Levy	2,457.00	
Park Levy	1,749.00	
s. 37 Levy	325.00	
Water Installation	221.00	
Tarion Warranty	1,039.60	
Legal Fees for Discharges	678.00	
Other Legal Fees	542.60	
Disbursements	474.40	
Status Certificate	100.00	
Land Transfer Tax and Title Ins.	5,563.00	
Toronto Land Transfer Tax	4,477.58	
Subtotal	17,627.18 (sic)	
TOTAL		*50,727.18 (sic)*

TAB 7

I.I.C. Ct. Filing 363442192010

AbitibiBowater Inc. — Court File No. 500-11-036-133-094
310. — **Claims Procedure Order (Review and Determination of Claims) (# 414), January 18, 2010**

Re AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., Court File No. 500-11-036-133-094 (Superior Court, Commercial Division, Montreal, Quebec)

In the Matter of the Plan of Compromise or Arrangement of: AbitibiBowater Inc. And Abitibi-Consolidated Inc. And Bowater Canadian Holdings Inc. And The other Petitioners listed on Schedules "A", "B" and "C" Debtors And Ernst & Young Inc. Monitor

SUPERIOR COURT

CANADA PROVINCE OF QUEBEC DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: *JANUARY 18, 2010*

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

Claims Procedure Order (Review and Determination of Claims) (# 414)

[1] *CONSIDERING* the Petitioners' *Motion for an Order Establishing a Procedure for the Review and Determination of Claims, Subsequent Claims and Former Employee Grievances against the Petitioners* (the "*Motion*");

[2] *CONSIDERING* the representations of the parties and the absence, in the end, of any contestation on the final wording of this Order;

FOR THESE REASONS, THE COURT:

[1] *GRANTS* the Motion.

[2] *ISSUES* this Order divided under the following headings:

(a) Definitions

(b) Cross-Border Claims Protocol

(c) Review and Determination of Claims and Subsequent Claims

(d) Review and Determination of Former Employee Grievances

(e) Notices and Communications

(f) Aid and Assistance of Other Courts

(g) General Provisions

Definitions

[3] *ORDERS* that, for purposes of this Order, the following terms shall have the following meanings:

(a) "*ACCC*" means Abitibi-Consolidated Company of Canada;

(b) "*ACI*" means Abitibi-Consolidated Inc.;

(c) "*BCFPI*" means Bowater Canadian Forest Products Inc.;

(d) "*BI*" means Bowater Incorporated;

(e) "*Business Day*" means a day, other than a Saturday or a Sunday, on which banks are generally open for business in Montreal, Quebec;

(f) "*Canadian Claims Procedure Order*" means the order of this Court dated August 26, 2009 in these proceedings;

(g) "*Canadian Petitioners*" means (i) ACI and the other petitioners listed on *Appendix "A"* hereto; and (ii) Bowater Canadian Holdings Inc. and the other petitioners listed on *Appendix "B"* hereto; *provided that "Canadian Petitioners"* shall not include the 18.6 Petitioners listed on *Appendix "C"* hereto;

(h) "*CCAA*" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;

(i) "*Claim*" means any right or claim of any Person against one or more of the Canadian Petitioners or Partnerships in connection with any indebtedness, liability or obligation of any kind whatsoever of one or more of the Canadian Petitioners or Partnerships, whether reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including without limitation any claim arising from or caused by the repudiation by a Canadian Petitioner or Partnership of any contract, lease or other agreement, whether written or oral, the commission of a tort (intentional or unintentional), any breach of duty (legal, statutory, equitable, fiduciary or otherwise), any right of ownership or title to property, employment, contract, a trust or deemed trust, howsoever created, any claim made or asserted against any one or more of the Canadian Petitioners or Partnerships through any affiliate, or any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any grievance, matter, action, cause or chose in action, whether existing at present or commenced in the future, based in whole or in part on facts which existed on the Canadian Filing Date, together with any other claims of any kind that, if unsecured, would constitute a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3; *provided that for the purposes of the present Order "Claim" shall not include the following*:

(a) any Excluded Claim;

(b) any Restructuring Claim; and

(c) any Former Employee Grievance;

(j) "*Claims Bar Date*" means, in respect of Claims, Subsequent Claims or Former Employee Grievances 4:00 p.m. (Eastern Standard Time) on November 13, 2009 or such other date as may be ordered by the Court;

(k) "*Claims Officer*" means the individual(s) appointed as claims officer(s) pursuant to paragraph 9 of the present Order;

(l) "*Collective Agreement*" means a collective agreement to which the Canadian Petitioners and the Partnerships or any of them and a Union were parties on or before April 17, 2009, and any subsequent amendment and/or renewal thereof;

(m) "*Court*" means the Superior Court of Quebec;

(n) "*Creditor*" means any Person asserting a Claim or Subsequent Claim or Restructuring Claim;

(o) "*Cross-Border Claims Protocol*" means the cross-border claims determination protocol attached hereto as *Appendix "E"*;

(p) "*Cross-Border Petitioners*" means Bowater Canadian Holdings Inc., Bowater Canada Finance Corporation, Bowater Canadian Limited, AbitibiBowater Canada Inc., BCFPI, Bowater LaHave Corporation and Bowater Maritimes Inc. who filed for protection under the CCAA and commenced U.S. Proceedings;

(q) "*Determination Date*" means April 17, 2009;

(r) "*Dispute Package*" means, with respect to any Claim, Subsequent Claim or Former Employee Grievance, a copy of the related Proof of Claim, Notice of Revision or Disallowance and Notice of Dispute;

(s) "*Excluded Claim*" means (each otherwise undefined capitalized term as defined in the Canadian Claims Procedure Order) (i) any Claim, Secured Claim or Restructuring Claim secured by the Abitibi Administration Charge, the Bowater Administration Charge, the Abitibi D&O Charge, the Bowater D&O Charge, the ACI DIP Charge or the BI DIP Lenders Charge (as each term is defined in the Second Amended Initial Order); (ii) any Claim, Subsequent Claim or Restructuring Claim of the Pre-Petition Lenders or any other Person under the Pre-Petition Facilities (a "*Pre-Petition Lender Claim*"); (iii) subject to paragraphs 11 and 12 of the Canadian Claims Procedure Order, any Claim, Subsequent Claim or Restructuring Claim of a Noteholder for principal, interest and other applicable fees and charges under any Canadian Unsecured Notes and/or any Canadian Secured Notes (a "*Noteholder Claim*"); (iv) any Intercompany Claim including those secured by the ACI Inter-Company Advances Charge and the BI Inter-Company Advances Charge (as each term is defined in the Second Amended Initial Order); (v) any Claim, Subsequent Claim or Restructuring Claim of an employee of any of the Canadian Petitioners or Partnerships who was employed by that Canadian Petitioner or Partnership as of April 16, 2009; (vi) any Claim, Subsequent Claim or Restructuring Claim asserted by any person, including pension plan administrators, or pension authorities, in respect of the 20 registered pension plans for the Canadian Petitioners' Canadian employees; or (vii) any other Claim, Subsequent Claim or Restructuring Claim ordered by the Court to be treated as an Excluded Claim;

(t) "*Former Employee Grievance*" means any claim arising from a grievance in respect of events, actions or circumstances arising out of or under any Collective Agreement and which does not constitute an Excluded Claim;

(u) "*Grievance Claims Officer*" means the individual(s) appointed as grievance claims officers) pursuant to paragraph 18 of the present Order;

(v) "*Grievance Proof of Claim*" means any proof of claim filed by a Union in accordance with the Canadian Claims Procedure Order setting forth its purported Former Employee Grievance with respect to a former employee;

(w) "*Monitor*" means Ernst & Young Inc., in its capacity as the Court-appointed Monitor of the Canadian Petitioners and Partnerships;

(x) "*Notice of Dispute*" means the notice that may be delivered by a Creditor who has received a Notice of Revision or Disallowance disputing such Notice of Revision or Disallowance, which notice shall be substantially in the form attached hereto as *Appendix "F"*;

(y) "*Notice of Revision or Disallowance*" means the notice advising a Creditor or a Union that the Monitor has revised or rejected all or part of such Creditor's or Union's Claim, Subsequent Claim or Former Employee Grievance set out in its Proof of Claim or Grievance Proof of Claim and setting out the reasons for such revision or disallowance, which notice shall be substantially in the form attached hereto as *Appendix "E"*;

(z) "*Partnerships*" means the entities listed on *Appendix* "*D*" hereto, *excluding* however, for the purposes of this Order, Abitibi-Consolidated Finance LP;

(aa) "*Person*" means any individual, partnership, firm, joint venture, trust, entity, corporation, body corporate, unincorporated association or organization, trade union, employee or other association, governmental agency, or similar entity, howsoever designated or constituted and any individual or other entity owned or controlled by or which is the agent of any of the foregoing;

(bb) "*Plan*" means the plan(s) of arrangement and compromise to be filed in these proceedings in connection with the restructuring efforts of the Canadian Petitioners and Partnerships.

(cc) "*Proof of Claim*" means any proof of claim filed by a Creditor in accordance with the Canadian Claims Procedure Order setting forth its purported Claim or Subsequent Claim;

(dd) "*Proven Claim*" means the amount of any Claim, Subsequent Claim or Former Employee Grievance of any Creditor or Union as of 12:01 a.m. on the Determination Date, determined in accordance with the provisions of the CCAA and this Order;

(ee) "*Restructuring Claim*" means (i) any Claim arising as a result of or in connection with the repudiation, termination or restructuring by the Canadian Petitioners or Partnerships of any contract, lease, employment or other obligation after August 31, 2009; or (ii) any Claim against any of the Canadian Petitioners or Partnerships as a former owner, occupier, person in possession or otherwise in connection with any property (whether moveable or immoveable, real or personal) transferred on or after April 17, 2009 *provided that* "*Restructuring Claim*" shall not include an Excluded Claim or a Subsequent Claim.

(ff) "*Subsequent Claim*" means any Claim arising as a result of or in connection with the repudiation, termination or restructuring by the Canadian Petitioners or Partnerships of any contract, lease or other agreement after the Canadian Filing Date but on or before August 31, 2009; *provided that* "*Subsequent Claim*" shall not include an Excluded Claim;

(gg) "*Threshold Claim*" shall have the meaning set forth in the Cross-Border Claims Protocol;

(hh) "*UCC*" means the statutory committee of unsecured creditors appointed in the Chapter 11 proceedings, the U.S. Creditors' Committee;

(ii) "*Union*" means the following unions, in each case comprising any affiliated union(s) representing one or more employees (respectively and collectively, the "*Unions*"):

- Canadian Office and Professional Employees Union (COPE);
- Centrale des syndicats démocratiques (CSD);
- Communications, Energy and Paperworkers Union of Canada / Syndicat canadien des communications, de l'énergie et du papier (CEP / SCEP);
- Confédération des syndicats nationaux / Fédération des travailleurs et des travailleuses du papier et de la forêt / Syndicat national des travailleurs des pâtes et papiers (CSN / FTTPF / SNTPP);
- Fraternité unie des charpentiers menuisiers d'Amérique (FUCMA);
- International Association of Machinists & Aerospace Workers (IAMS);
- International Brotherhood of Electrical Workers (IBEW);

- International Longshoremen Association (ILA);
- International Union of Operating Engineers (IUOE);
- Office and Professional Employees International Union (OPEIU);
- Syndicat des employées et employés professionnels-les et de bureau — Quebec (SEPB);
- United Association of Plumbers and Steamfitters (UAPS); and
- United Steel Workers (USWA).

(jj) "*U.S. Court*" means the United States Bankruptcy Court for the District of Delaware;

(kk) "*U.S. Debtors*" means AbitibiBowater Inc., AbitibiBowater US Holding LLC, Donohue Corp., Abitibi Consolidated Sales Corporation, Abitibi-Consolidated Alabama Corporation, Alabama River Newsprint Company, Abitibi-Consolidated Corporation, Augusta Woodlands, LLC, Tenex Data Inc., AbitibiBowater US Holding 1 Corp., Bowater Ventures Inc., Bowater Incorporated, Bowater Nuway Inc., Bowater Nuway Mid-States Inc., Catawba Property Holdings LLC, Bowater Finance Company Inc., Bowater South American Holdings Incorporated, Bowater America Inc., Lake Superior Forest Products Inc., Bowater Newsprint South LLC, Bowater Newsprint South Operations LLC, Bowater Finance II LLC, Bowater Alabama LLC, Coosa Pines Golf Club Holdings LLC and Abitibi-Consolidated Finance LP; *provided that* "*U.S. Debtors*" shall *not* include the Cross-Border Petitioners, but, for the purposes of this Order, shall include Abitibi Consolidated Finance, LP; and

(ll) "*U.S. Proceedings*" means the proceedings commenced on April 16, 2009 by the Chapter 11 Debtors under chapter 11 of title 11 of the United States *Bankruptcy Code* in the U.S. Court.

Cross-Border Claims Protocol

[4] *ORDERS* that (i) the Cross-Border Claims Protocol be and is hereby approved and shall become effective upon its approval by the U.S. Bankruptcy Court, (ii) to the extent any terms of this Order are inconsistent with the Cross-Border Claims Protocol, the terms of the Cross-Border Claims Protocol shall govern, (iii) all claims against any Cross-Border Petitioner shall be proven in accordance with the Cross-Border Claims Protocol, and (iv) the parties to these proceedings and any other Person shall be governed by the Cross-Border Claims Protocol and shall comply with same.

[5] *ORDERS* that, notwithstanding paragraphs 8 and 17 hereof, the Monitor shall not accept, amend or disallow any Claim, Subsequent Claim or Former Employee Grievance which constitutes a Threshold Claim against any Cross-Border Petitioner unless, prior to such acceptance, amendment or disallowance, the Monitor shall have consulted with the UCC in the manner described in the Cross-Border Claims Protocol.

[6] *ORDERS* that notwithstanding anything to the contrary contained therein, the Cross Border Claims Protocol and this Order shall not determine: (a) the choice of law applicable to the determination and ultimate allowance of claims filed in the present proceedings and in the U.S. Proceedings; (b) the priority to which such claims are entitled under the U.S. *Bankruptcy Code* and/or the CCAA, including whether any claim may be entitled to priority under section 503(b)(9) of the U.S. *Bankruptcy Code*; (c) the distribution to which such claims shall be entitled under any plan of compromise, arrangement or reorganization approved in the present proceedings and in the U.S. Proceedings; and (d) the validity, enforceability, characterization, allowance, priority, valuation, and/or value allocation of any prepetition or postpetition intercompany claims or equity interests, including, without limitation, wind-up claims, contribution claims, and preferred stock interests.

[6.1] *ORDERS*, notwithstanding paragraph 4 hereof, that the Ad Hoc Unsecured Noteholder Committee of ACI et al. shall have the same rights as the UCC in relation to Special Notice Claims and Duplicate Claims as described in the Cross-Border Claims Protocol.

Review and Determination of Claims and Subsequent Claims

[7] *ORDERS* that all Claims and Subsequent Claims shall be determined pursuant to the procedure contained herein, and the resulting award shall determine the amount of the Claim or Subsequent Claim for voting and distribution purposes under the Plan, in the event that such Claim or Subsequent Claim is subject to compromise under the CCAA and the Plan.

[8] *ORDERS* that, subject to (i) the Claims Bar Date; (ii) paragraph 5 hereof; and (iii) the Cross-Border Claims Protocol, the following procedure shall apply to Proofs of Claim filed against any of the Canadian Petitioners or the Partnerships:

(a) the Monitor, together with the Canadian Petitioners or the Partnerships, shall review the Proof of Claim and the terms set out therein;

(b) where applicable, the Monitor shall send the Creditor a Notice of Revision or Disallowance in accordance with paragraph 27 below;

(c) the Creditor who receives a Notice of Revision or Disallowance and wishes to dispute it shall, within ten (10) Business Days of the Notice of Revision or Disallowance, send by registered mail or courier a Notice of Dispute to the Monitor setting out the basis for its dispute;

(d) unless otherwise authorized by this Court, if the Creditor does not provide a Notice of Dispute within the time period provided for above, such Creditor shall be deemed to have accepted the determination of its Claim or Subsequent Claim as set out in the Notice of Revision or Disallowance;

(e) the Monitor, with the assistance of the Petitioners, shall attempt to consensually resolve the disputed Claim or Subsequent Claim following the receipt by the Monitor of the Notice of Dispute;

(f) if, after the expiration of such period of time as the Monitor believes appropriate, the disputed Claim or Subsequent Claim has not been resolved:

(i) the Monitor, after consultation with the Canadian Petitioners or the Partnerships, shall refer the Claim or Subsequent Claim to a Claims Officer and the Monitor shall deliver a Dispute Package to the Claims Officer; or

(ii) the Monitor, after consultation with the Canadian Petitioners or Partnerships, shall refer the Claim or Subsequent Claim to the Court, and either the Creditor, the Monitor or the Canadian Petitioners or Partnerships may bring a motion for the resolution of such Claim or Subsequent Claim by the Court; and

(g) the Monitor shall not be required to send any Creditor a confirmation of receipt by the Monitor of any document provided by a Creditor pursuant to this Order and each Creditor shall be responsible for obtaining proof of delivery, if they so require, through their choice of delivery method.

[9] *ORDERS* that the Canadian Petitioners or Partnerships shall have the power and authority to appoint from time to time one or more individuals to act as a Claims Officer for the purposes of this claims procedure, provided however that the Monitor and this Court shall have both approved such appointment.

[10] *ORDERS* that upon receipt of a Dispute Package, the Claims Officer shall schedule and conduct a hearing to settle the disputed portion of the Claim or Subsequent Claim and shall, as soon as practicable thereafter, notify the Canadian Petitioners or the Partnerships, the Monitor and the Creditor of his or her determination.

[11] *ORDERS* that the Claims Officer shall have the authority to determine the procedure for adjudication of disputed Claims or Subsequent Claims that are referred to him or her, including the manner of presenting evidence and the conduct of any hearing before him or her, provided that a Creditor may request that such adjudication be conducted in either English or French.

[12] *ORDERS* that each Claims Officer may, with the consent of the parties, act as a mediator in respect of any Claim or Subsequent Claim without thereby being disqualified from adjudicating upon such claim.

[13] *ORDERS* that the Canadian Petitioners or the Partnerships, the Creditor or the UCC (in the case of a Threshold Claim), may appeal a Claims Officer's determination to this Court within ten (10) Business Days of notification of the Claims Officer's determination of the disputed portion of such Creditor's Claim by serving upon the Canadian Petitioners or the Partnerships, the Creditor, the UCC (in the case of a Threshold Claim), as applicable, and the Monitor, and filing with this Court a notice of motion returnable on a date to be fixed by this Court. If an appeal is not filed within such period then the Claims Officer's determination shall, subject to a further order of the Court, be deemed to be final and binding on the Canadian Petitioners or the Partnerships, the UCC and the Creditor and shall be a Proven Claim.

Review and Determination of Former Employee Grievances

[14] *ORDERS* that all Former Employee Grievances shall be determined pursuant to the procedure contained herein, and the resulting award shall determine the amount of the Former Employee Grievance, if applicable, for voting and distribution purposes under the Plan, in the event that such Former Employee Grievance is subject to compromise under the CCAA and the Plan,

[15] *ORDERS* that, in the event that any Former Employee Grievance is subject to compromise under the CCAA and the Plan, each Union shall hereby be authorized to exercise any voting rights in respect of all such Former Employee Grievances as agent for their affected members for the purposes of the Plan.

[16] *ORDERS* that the Monitor shall assist the Canadian Petitioners, Partnerships and Unions in connection with the administration of the claims procedure provided for herein, as requested by the Canadian Petitioners, Partnerships or Unions from time to time, and is hereby directed and empowered to take such other actions and fulfill such other roles as are contemplated by this order.

[17] *ORDERS* that, subject to (i) the Claims Bar Date; (ii) paragraph 5 hereof; and (iii) the Cross-Border Claims Protocol, the following procedure shall apply to Grievance Proofs of Claim filed against any of the Canadian Petitioners or the Partnerships:

(a) the Monitor, together with the Canadian Petitioners or the Partnerships, shall review the Grievance Proofs of Claim and the terms set out therein;

(b) where applicable, the Monitor shall send the Union a Notice of Revision or Disallowance in accordance with paragraph 27 below;

(c) the Union who receives a Notice of Revision or Disallowance and wishes to dispute it shall, within ten (10) Business Days of the Notice of Revision or Disallowance, send by registered mail or courier a Notice of Dispute to the Monitor setting out the basis for its dispute;

(d) unless otherwise authorized by this Court, if the Union does not provide a Notice of Dispute within the time period provided for above, such Union shall be deemed to have accepted on behalf of itself and of its members the determination of the Former Employee Grievance as set out in the Notice of Revision or Disallowance;

(e) the Monitor, with the assistance of the Petitioners, shall attempt to consensually resolve the Former Employee Grievance following the receipt by the Monitor of the Notice of Dispute;

(f) if, after the expiration of such period of time as the Monitor believes appropriate, the Former Employee Grievance has not been resolved the Monitor, after consultation with the Canadian Petitioners or the Partnerships, shall refer the Former Employee Grievance to a Grievance Claims Officer and the Monitor shall deliver a Dispute Package to the Grievance Claims Officer; and

(g) the Monitor shall not be required to send any Union a confirmation of receipt by the Monitor of any document provided by a Union pursuant to this Order and each Union shall be responsible for obtaining proof of delivery, if they so require, through their choice of delivery method.

[18] *ORDERS* that the Honourable Louise Otis is hereby appointed as Grievance Claims Officers) for the purposes of the present claims procedure and that the Canadian Petitioners or Partnerships shall have the power and authority to appoint from time to time one or more additional individual(s) to act as Grievance Claims Officer for the purposes of this claims procedure, provided however that the Monitor and this Court shall have both approved such appointment.

[19] *ORDERS* that following the Monitor's referral of a Former Employee Grievance to a Grievance Claims Officer, the latter shall schedule a hearing according to a timetable to be set in consultation with the Canadian Petitioners and Partnerships, the Monitor, the Unions and, in the case of a Threshold Claim, the UCC, to hear, determine and adjudicate the Former Employee Grievance, including determining the Former Employee Grievance for voting and distribution purposes under the Plan. Failing agreement of the affected parties to the scheduling of the Former Employee Grievance, the Grievance Claims Officer shall set the hearing schedule.

[20] *ORDERS* that each Grievance Claims Officer shall have the powers of an arbitrator appointed pursuant to the Quebec *Labour Code*, the Ontario *Labour Relations Act*, the British Columbia *Labour Relations Code*, the New Brunswick *Industrial Relations Act*, the Nova Scotia *Trade Union Act*, the Newfoundland and Labrador *Labour Relations Act* or the *Canada Labour Code* (as the case may be) and under the Collective Agreement under which the Former Employee Grievance arose, and further, *ORDERS* that each Grievance Claims Officer may, with the consent of the parties, act as a mediator in respect of any Former Employee Grievance without thereby being disqualified from adjudicating upon such grievance.

[21] *ORDERS* that subject to the terms of this order and directions of this Court, the Grievance Claims Officers shall determine the manner, if any, in which evidence may be brought before them by the parties as well as any other procedural matters which may arise in respect of the determination of any Former Employee Grievance under this order, provided that a Union may request that such mediation or adjudication be conducted in either English or French.

[22] *ORDERS* that in the event the Grievance Claims Officer determines that written submissions should be made, the affected Union and any party to arbitration proceedings pursuant to this order shall be notified of the date scheduled for the arbitration hearing at least fifteen (10) Business Days prior to such hearing. No later than five (5) Business Days prior to any such arbitration hearing, the affected Union, the Canadian Petitioner and Partnership party to that arbitration and, in the case of a Threshold Claim, the UCC, shall serve on the party opposite and the Monitor, and file with the Grievance Claims Officer, written submissions not exceeding seven (7) pages in length in support of their position and request for relief, if any, together with all documents (and authorities) relevant to the arbitration which have not been filed by the other party to the arbitration and witness statements not exceeding five (5) pages in length summarizing the evidence to be tendered at the arbitration hearing by any individual from whom a party intends to elicit evidence.

[23] *ORDERS* that the Canadian Petitioners or the Partnerships, the Union or the UCC (in the case of a Threshold Claim), may appeal a Grievance Claims Officer's determination to this Court within ten (10) Business Days of notification of the Grievance Claims Officer's determination of the disputed portion of such Union's Former Employee Grievance by serving upon the Canadian Petitioners or the Partnerships, the Union, the UCC (in the case of a Threshold Claim), as applicable, and the Monitor, and filing with this Court a notice of motion returnable on a date to be fixed by this Court. If an appeal is not filed within such period then the Grievance Claims Officer's determination shall, subject to

a further order of the Court, be deemed to be final and binding on the Canadian Petitioners or the Partnerships, the UCC and the Union and shall be a Proven Claim. For the purposes of such an appeal, the Court shall apply the criteria applicable to judicial reviews.

[24] *ORDERS* that any mediated settlement, award rendered or Former Employee Grievance determined shall not constitute a precedent and shall not be referred to or relied upon in any subsequent proceeding, including any arbitration.

[25] *ORDERS* that any submission made or position taken by a party in any proceedings conducted pursuant to this order are without prejudice to any arbitration conducted under the applicable Collective Agreement to which the present procedure does not apply.

[26] *ORDERS* that notwithstanding any other provision of this order the filing by any party of any Former Employee Grievance shall not, for that reason only, grant any Person any standing or rights under the Plan.

Notices and Communications

[27] *ORDERS* that any document sent by the Monitor or the Canadian Petitioners or the Partnerships pursuant to this Order may be sent by e-mail, ordinary mail, registered mail, courier or facsimile transmission, in either English or French as requested by the Creditor or the Union. A Creditor or Union shall be deemed to have received any document sent pursuant to this Order four (4) Business Days after the document is sent by ordinary mail and one (1) Business Day after the document is sent by registered mail, courier, e-mail or facsimile transmission. Documents shall not be sent by ordinary or registered mail during a postal strike or work stoppage of general application.

Aid and Assistance of Other Courts

[28] *REQUESTS* the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province or any court or any judicial, regulatory or administrative body of the United States and of any other nation or state to, act in aid of and to be complementary to this Court in carrying out the terms of this Order.

General Provisions

[29] *ORDERS* that, for the purposes of this Order, all Claims and Former Employee Grievances denominated in a foreign currency shall be filed in the currency in which they are incurred but, for purposes of determination of the value of such Claim or Former Employee Grievance for voting and distribution purposes, shall be converted by the Monitor to Canadian dollars at the Bank of Canada noon spot rate of exchange for exchanging currency to Canadian dollars on the Determination Date (U.S. dollar claims are to be converted at the rate of US$1 = CDN$1.2146).

[30] *ORDERS* that, for the purposes of this Order, all Subsequent Claims denominated in a foreign currency shall be filed in the currency in which they are incurred but, for purposes of determination of the value of such Subsequent Claims for voting and distribution purposes, shall be converted by the Monitor to Canadian dollars at the Bank of Canada noon spot rate of exchange for exchanging currency to Canadian dollars on the date of the notice of repudiation or termination which gave rise to said Subsequent Claim.

[31] *ORDERS* that the Monitor shall use reasonable discretion as to the adequacy of completion and execution of any document completed and executed pursuant to this Order and, where the Monitor is satisfied that any matter to be proven under this Order has been adequately proven, the Monitor may waive strict compliance with the requirements of this Order as to the completion and execution of documents.

[32] *ORDERS* that references in this Order to the singular include the plural, to the plural include the singular and to any gender include the other gender.

[33] *ORDERS* that the Monitor may apply to this Court for advice and direction in connection with the discharge or variation of its powers and duties under this Order.

[34] *ORDERS* the provisional execution of this Order notwithstanding appeal.

[35] *THE WHOLE* without costs.

CLÉMENT GASCON, J.S.C.

Me Guy P. Martel and Me Joseph Reynaud

STIKEMAN, ELLIOTT

Attorneys for Petitioners

Me Avram Fishman

FLANZ FISHMAN MELAND PAQUIN

Attorneys for the Monitor

Me Robert I. Thornton

THORNTON GROUT FINNINGAN

Attorneys for the Monitor

Me Jean-Yves Simard

LAVERY, DE BILLY

Attorneys for the Ad Hoc Committee of Bondholders

Me Dominique Gibbens

FASKEN MARTINEAU DuMOULIN

Attorneys for Silver Oak Capital LLC et al., DDJ Capital Management, LLC et al.

Me Yves Saint-André

TRUDEL NADEAU

Attorneys for Syndicat canadien des communications, de l'énergie et du papier (SCEP) et ses sections locales and Syndicat des employes(es) et employés(es) professionnels(les) et de bureau — Québec (SEPB) et les sections locales 110, 151 et 526

Me Marc Duchesne

BORDEN, LADNER, GERVAIS

Attorneys for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders

Me Louis Dumont

FRASER, MILNER, CASGRAIN

Attorneys for Aurelius Capital Management, LLC

Me Neil Peden

WOODS

Attorneys for The Official Committee of Unsecured Creditors of AbitibiBowater Inc. & al.

Date of hearing January 18, 2010

Schedule "A" Abitibi Petitioners

1. ABITIBI-CONSOLIDATED INC.

2. ABITIBI-CONSOLIDATED COMPANY OF CANADA

3. 3224112 NOVA SCOTIA LIMITED

4. MARKETING DONOHUE INC.

5. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.

6. 3834328 CANADA INC.

7. 6169678 CANADA INC.

8. 4042140 CANADA INC.

9. DONOHUE RECYCLING INC.

10. 1508756 ONTARIO INC.

11. 3217925 NOVA SCOTIA COMPANY

12. LA TUQUE FOREST PRODUCTS INC.

13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED

14. SAGUENAY FOREST PRODUCTS INC.

15. TERRA NOVA EXPLORATIONS LTD.

16. THE JONQUIERE PULP COMPANY

17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY

18. SCRAMBLE MINING LTD.

19. 9150-3383 QUÉBEC INC.

20. ABITIBI-CONSOLIDATED (U.K.) INC.

Schedule "B" Bowater Petitioners

1. BOWATER CANADIAN HOLDINGS INC.

2. BOWATER CANADA FINANCE CORPORATION

3. BOWATER CANADIAN LIMITED

4. 3231378 NOVA SCOTIA COMPANY

5. ABITIBIBOWATER CANADA INC.

6. BOWATER CANADA TREASURY CORPORATION

7. BOWATER CANADIAN FOREST PRODUCTS INC.

8. BOWATER SHELBURNE CORPORATION

9. BOWATER LAHAVE CORPORATION

10. ST-MAURICE RIVER DRIVE COMPANY LIMITED

11. BOWATER TREATED WOOD INC.

12. CANEXEL HARDBOARD INC.

13. 9068-9050 QUÉBEC INC.

14. ALLIANCE FOREST PRODUCTS (2001) INC.

15. BOWATER BELLEDUNE SAWMILL INC.

16. BOWATER MARITIMES INC.

17. BOWATER MITIS INC.

18. BOWATER GUÉRETTE INC.

19. BOWATER COUTURIER INC.

Schedule "C" 18.6 CCAA Petitioners

1. ABITIBIBOWATER INC.

2. ABITIBIBOWATER US HOLDING 1 CORP.

3. BOWATER VENTURES INC.

4. BOWATER INCORPORATED

5. BOWATER NUWAY INC.

6. BOWATER NUWAY MID-STATES INC.

7. CATAWBA PROPERTY HOLDINGS LLC

8. BOWATER FINANCE COMPANY INC.

9. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED

10. BOWATER AMERICA INC.

11. LAKE SUPERIOR FOREST PRODUCTS INC.

12. BOWATER NEWSPRINT SOUTH LLC

13. BOWATER NEWSPRINT SOUTH OPERATIONS LLC

14. BOWATER FINANCE II, LLC

15. BOWATER ALABAMA LLC

16. COOSA PINES GOLF CLUB HOLDINGS LLC

Appendix "D" Partnerships

1. Bowater Canada Finance Limited Partnership

2. Bowater Pulp and Paper Canada Holdings Limited Partnership

3. Abitibi-Consolidated Finance LP

Appendix "E" Cross-Border Protocol for the Determination of Claims Against the Cross-Border Petitioners

This cross-border protocol (the "*Claims Determination Protocol*") is intended to supplement the procedures established by each of the Canadian Court and the U.S. Court (each as defined below) with respect to the review and determination of claims against the Cross-Border Petitioners in the Insolvency Proceedings (each as defined below).

Capitalized terms used herein and not otherwise defined shall have the meanings set forth in the Claims Procedure Orders issued by the Superior Court of Quebec (the "*Canadian Court*") on August 26, 2009 and on January 18, 2010 and by the United States Bankruptcy Court for the District of Delaware (the "*U.S. Court*") on September 3, 2009 (collectively, the "*Claims Procedure Orders*").

Background

1. On April 16, 2009, AbitibiBowater Inc., Bowater Inc. and certain of their direct and indirect U.S. and Canadian subsidiaries listed in Appendix "A" hereto (the "*U.S. Debtors*") filed voluntary petitions (collectively, the "*U.S. Proceedings*") for relief under Chapter 11 of the U.S. *Bankruptcy Code*, 11 U.S.C. §§101 et seq. in the U.S. Court. For the purposes of this Claims Determination Protocol, the meaning of "*U.S. Debtors*" shall not include the Cross-Border Petitioners (as defined below), but does include Abitibi Consolidated Finance, L.P. ("*ACFLP*").

2. On April 17, 2009, Abitibi-Consolidated Inc. ("*ACI*") and its subsidiaries listed in Appendix "B" hereto (collectively with ACI, the "*ACI Petitioners*") and Bowater Canadian Holdings Inc. ("*BCHI*") and its subsidiaries listed in Appendix "C" hereto (collectively with BCHI, the "*Bowater Petitioners*") (the ACI Petitioners and the Bowater Petitioners are collectively referred to herein as the "*Canadian Petitioners*") filed for and obtained protection from their creditors under the *Companies' Creditors Arrangement Act* (the "*CCAA*" and the "*CCAA Proceedings*") pursuant to an Order issued by the Canadian Court (the "*Initial Order*").

3. The Canadian Petitioners include BCHI, Bowater Canada Finance Corporation, Bowater Canadian Limited, AbitibiBowater Canada Inc., Bowater Canadian Forest Products Inc., Bowater LaHave Corporation and Bowater Maritimes Inc., each of which filed for protection under the CCAA and commenced Chapter 11 Proceedings (the "*Cross-Border Petitioners*").

4. Pursuant to the Initial Order, Ernst & Young Inc. was appointed as Monitor of the Canadian Petitioners (the "*Monitor*") under the CCAA.

5. The "*Partnerships*" include Bowater Canada Finance Limited Partnership, Bowater Pulp and Paper Canada Holdings Limited Partnership and ACFLP, but for the purposes of this Claims Determination Protocol, the meaning of "Partnerships" shall *not* include ACFLP. The Partnerships are also subject to the provisions set forth in the Claims Procedure Orders.

6. For convenience, the U.S. Proceedings and the CCAA Proceedings shall be referred to herein collectively as the "*Insolvency Proceedings*".

7. The Cross-Border Court-to-Court Protocol, as amended (the "*Court Cooperation Protocol*") was approved by the U.S. Court on July 27, 2009 and by the Canadian Court on July 28, 2009. The provisions of the Court Cooperation Protocol, including the defined terms contained therein, are incorporated herein by reference. To the extent of any direct and irreconcilable conflict between the Court Cooperation Protocol and this Claims Determination Protocol with respect to any matter concerning claims administration and claims adjudication procedures in respect of the Cross-Border Petitioners, the term(s) of this Claims Determination Protocol shall govern.

8. By order dated August 26, 2009, the Canadian Court approved the Canadian Petitioners' motion for the approval of a Canadian claims procedure and on January 18, 2010, the Canadian Court approved the Canadian Petitioners' motion for the approval of a claims procedure regarding the review and determination of claims (collectively, the "*Canadian Claims Order*") in respect of the Canadian Petitioners, including the Cross-Border Petitioners, and the Partnerships.

9. By order dated September 3, 2009, the U.S. Court entered an order establishing a bar date for filing proofs of claim in the U.S. Proceedings and approving the form and manner of notice thereof (the "*U.S. Claims Order*").

10. The claims bar date in both Canada and the U.S. was November 13, 2009 (the "*Claims Bar Date*").

11. Pursuant to the Canadian Claims Order, any claims asserted against the Canadian Petitioners or the Partnerships were to have been filed in the CCAA Proceedings in accordance with the Canadian Claims Procedure. This includes any claims asserted against the Cross-Border Petitioners.

12. Pursuant to the U.S. Claims Order, subject to certain exceptions, any person or entity (including any governmental unit) asserting a claim against a debtor in the U.S. Proceedings must have filed a proof of claim so that it was actually received by the U.S. claims agent on or before the Claims Bar Date; *provided, however*, that any person or entity asserting a claim against a Cross-Border Petitioner in the U.S. Proceedings may file a timely proof of claim pursuant to the Canadian Claims Order so that it is actually received by the Monitor on or before the Claims Bar Date. The U.S. Claims Order further provides that proofs of claim timely filed against any Cross-Border Petitioner with the Monitor shall be deemed timely-filed claims against the applicable Cross-Border Petitionees) in the U.S. Proceedings.

13. The Canadian Claims Order provides that a proof of claim timely filed against a Cross-Border Petitioner in accordance with the U.S. Claims Order is deemed to be a Canadian proof of claim that has been timely delivered to the Monitor in accordance with the Canadian Claims Order. If a Canadian proof of claim is delivered to the Monitor in accordance with the Canadian Claims Order and a U.S. proof of claim is also filed in accordance with the U.S. Claims Order in respect of the same claim against the same Cross-Border Petitioner, the last timely filed claim shall govern in the Canadian Claims Procedure, subject to paragraph 19 hereof.

14. The purpose of this Claims Determination Protocol is to supplement the procedures set forth in the Claims Procedure Orders in an effort to establish an efficient and consistent procedure with respect to the review and determination of claims in the Insolvency Proceedings against the Cross-Border Petitioners only.

Allowance of Claims

(a) — Claims against the Canadian Petitioners or the Partnerships

15. Subject to paragraph 17 below, claims filed against the Canadian Petitioners or the Partnerships only shall be subject to the procedures for allowance or disallowance of claims established by the Canadian Court and shall be determined in the CCAA Proceedings.

(b) — Claims against the U.S. Debtors

16. Subject to paragraph 17 below, claims filed against the U.S. Debtors only shall be subject to allowance or disallowance of claims in the U.S. Proceedings and shall be determined by the U.S. Court.

(c) — Claims against the Cross-Border Petitioners

17. For claims filed against the Cross-Border Petitioners in the CCAA Proceedings and/or the U.S. Proceedings:

(a) The Monitor, together with the Canadian Petitioners, shall review each proof of claim and the terms set out therein filed against the Cross-Border Petitioners, and subject to paragraphs 17(b) and (c) hereof, the Canadian Claims Order shall govern the allowance or disallowance of such proofs of claim. Any such claim shall be determined in accordance with the Canadian Claims Order in both the U.S. Proceedings and the CCAA Proceedings if the Monitor accepts, amends or disallows such claim and no objection is filed with respect thereto as provided herein or in the respective proceedings.

(b) The Monitor shall not accept, amend or disallow any claim or part thereof filed against the Cross-Border Petitioners for an amount in excess of $100,000 (Canadian dollars) (such claim, a "*Threshold Claim*") unless, prior to such intended treatment, the Monitor shall have consulted with the UCC concerning the subject claim as provided herein. The Monitor shall provide notice (the "*Threshold Claim Notice*") of its intended acceptance, amendment or disallowance of a Threshold Claim to counsel for the UCC and such notice shall include a copy of the applicable proof of claim form with all supporting documentation, or if such supporting documentation is voluminous, in the opinion of the Monitor, a summary thereof, in respect of the subject claim that the Monitor recommends be accepted, amended or disallowed (without prejudice to the rights of the UCC to request and examine such further supporting documentation as it deems necessary), along with the Monitor's analysis for such recommendation. In the case of a Threshold Claim in excess of $1,000,000 (Canadian dollars) for which a creditor has also filed a proof of claim against any ACI Petitioner based upon similar grounds of liability or arising from or related to the same underlying debt or claim (including, without limitation, any claim in respect of a debt and any guaranty, surety or indemnity in respect of such debt) as that asserted in such Threshold Claim (such Threshold Claim, a "*Special Notice Claim*" and such claim against the ACI Petitioner, a "*Duplicate Claim*"), the Monitor shall include in the Threshold Claim Notice a copy of the Duplicate Claim form with all supporting documentation, or if such supporting documentation is voluminous in the opinion of the Monitor, a summary of the Duplicate Claim (without prejudice to the rights of the UCC to request and examine such further supporting documentation as it deems necessary), along with the Monitor's recommendation as to whether the Duplicate Claim shall be accepted, amended or disallowed in the CCAA Proceedings, along with the Monitor's analysis for such recommendation. After review of the Threshold Claim Notice by the UCC, the Monitor shall also provide such additional information relative to the subject claim as the UCC may reasonably request.

(i) The Monitor may accept, amend or disallow any Threshold Claim (including any Special Notice Claim) if, within the period of fifteen (15) business days following delivery of the Threshold Claim Notice pursuant to paragraph 17(b), the UCC has not provided the Monitor with its written objection to the proposed treatment of such claim. While the UCC's consideration of a Special Notice Claim is pending, or, if the UCC objects to the treatment of a Special Notice Claim, until such time as an objection pursuant to paragraphs 17(c) and 18 is resolved, the Monitor will not accept, amend or disallow the relevant Duplicate Claim. Notwithstanding

the foregoing, the Monitor reserves its right to participate fully in the determination of any claim made in the CCAA Proceedings, including any claims against the Cross-Border Petitioners.

(ii) The Monitor may accept, amend or disallow any claim filed against the Cross-Border Petitioners for less than $100,000 (Canadian dollars) without advance notice to the UCC; *provided, however*, that the Monitor shall provide the UCC with reports identifying such claims at the earlier of either (a) a monthly basis or (b) at such time as the aggregate amount of such claims filed against the Cross-Border Petitioners in any thirty day period exceeds $5,000,000 (Canadian dollars).

(iii) The Monitor shall not accept, amend or disallow any claim or part thereof which has been filed by or on behalf of, or deemed filed by or on behalf of, any of the Canadian Petitioners, the Partnerships or the U.S. Debtors against any of the Cross-Border Petitioners without first consulting with the UCC.

(iv) The Monitor and the UCC shall reasonably cooperate in exchanging information, including pursuant to paragraph 17(b) hereof, on the terms previously agreed to by the parties. Any further information sharing between the Monitor and the UCC, including pursuant to paragraph 17(b) hereof, shall be as agreed upon between the Monitor and the UCC or, failing agreement, as directed by the Canadian Court. All rights of the Monitor and the UCC are expressly reserved, and the failure to specify the terms of information sharing herein shall not be cited against or prejudice either party.

(c) If an objection to the Monitor's allowance, amendment or disallowance of a Threshold Claim (including a Special Notice Claim) is made by the UCC in accordance with paragraph 17(b) above or a creditor objects to the determination of its claim pursuant to the Canadian Claims Order, the creditor, the UCC, the Monitor and the Cross-Border Petitioners shall seek to agree and stipulate to the determination of the objection in either the U.S. Court or the Canadian Court, whereupon the Court so stipulated to may determine the objection in accordance with the procedures established by, or applicable to, such determination in such Court and the determination of such objection by such Court shall be binding on all parties in the Insolvency Proceedings.

(i) If such creditor, the Cross-Border Petitioners, the UCC and the Monitor fail to agree on the appropriate forum to determine the objection or any proposed resolution thereof, then the Canadian Court shall determine the appropriate forum for determination of the objection; *provided, however* that prior to any such determination by the Canadian Court, such creditor, the Cross-Border Petitioners or the Monitor may seek a Joint Hearing pursuant to the Court Cooperation Protocol to determine the appropriate forum for determination of the objection, or whether a joint hearing on the merits of the objection or proposed resolution thereof is appropriate; *provided further, however*, that if the UCC is the party objecting to the selected forum to determine the objection or any proposed resolution thereof, then the Cross-Border Petitioners or the Monitor shall seek a Joint Hearing pursuant to the Court Cooperation Protocol to determine the appropriate forum for determination of the objection, or whether a joint hearing on the merits of the objection or proposed resolution thereof is appropriate.

(ii) In the event a claim is referred to the Canadian Court for determination pursuant to this provision of the Claims Determination Protocol, the Canadian Claims Order and procedures set forth therein will govern its allowance, amendment or disallowance and the UCC shall have standing to participate in such determination as provided therein.

Final Determination

18. In the event a claim is determined by the Canadian Court or the U.S. Court pursuant to the procedures established herein, subject to all applicable rights of appeal with respect to such determination in the jurisdiction in which the determination was made, such determination shall be binding upon the CanadianPetitioners, including the Cross-Border

Petitioners, the U.S. Debtors, the creditor and the UCC for the purposes of both the U.S. Proceedings and the CCAA Proceedings.

Choice of Law

19. Nothing herein shall determine:

(a) the choice of law applicable to the determination and ultimate allowance of claims filed in the Insolvency Proceedings;

(b) the priority to which such claims are entitled under the U.S. *Bankruptcy Code* and/or the CCAA;

(c) the distribution to which such claims shall be entitled under any plan of compromise, arrangement or reorganization approved in the Insolvency Proceedings; or

(d) the validity, enforceability, characterization, allowance, priority, valuation, and/or value allocation of any prepetition or postpetition intercompany claims or equity interests, including, without limitation, wind-up claims, contribution claims, and preferred stock interests.

Comity and Independence of the Courts

20. The approval and implementation of this Claims Determination Protocol shall not divest or diminish the U.S. Courts' and the Canadian Courts' respective independent jurisdiction over the subject matter of the U.S. Proceedings and the CCAA Proceedings, respectively. By approving and implementing this Claims Determination Protocol, neither the U.S. Court, the Canadian Court, the Canadian Petitioners, the Partnerships, the U.S. Debtors, nor any creditor or any other interested party shall be deemed to have approved or engaged in any infringement on the sovereignty of the United States or Canada.

Effectiveness; Modification

21. This Claims Determination Protocol shall become effective only upon its approval by both the U.S. Court and the Canadian Court pursuant to orders setting forth procedures for filing and determining claims in the Insolvency Proceedings consistent with this Claims Determination Protocol.

22. This Claims Determination Protocol may not be supplemented, modified, terminated or replaced in any manner except upon the approval of both the U.S. Court and the Canadian Court after notice and a hearing; *provided, however,* that the Monitor and the UCC may, only by mutual written consent and with the written consent of the Cross-border Petitioners, extend the notice period set forth in paragraph 17(b)(i) with respect to any specific Threshold Claim. Notice of any legal proceeding to supplement, modify, terminate or replace this Claims Determination Protocol shall be given in accordance with the Court Cooperation Protocol.

Procedure for Resolving Disputes under the Claims Determination Protocol

23. Disputes relating to the terms, intent or application of this Claims Determination Protocol may be addressed by interested parties to the U.S. Court, the Canadian Court or both Courts upon notice in accordance with the Court Cooperation Protocol.

Preservation of Rights

24. Nothing in this Claims Determination Protocol shall prejudice the right of the Canadian Petitioners, the Partnerships, the U.S. Debtors, the UCC or any other party in interest to dispute or assert offsets or defenses to any claim filed in the Insolvency Proceedings.

25. Subject only to the notice and delay obligations specified in paragraphs 17(b) and (c) hereof, nothing in this Claims Determination Protocol shall prejudice the right of the Monitor to perform all of its responsibilities and obligations as required under the Canadian Proceedings, under applicable order of the Canadian Court or otherwise under applicable law, including with respect to the acceptance, amendment or disallowance of Duplicate Claims, and the provisions of this Claims Determination Protocol are intended by the parties and the Courts to facilitate the performance of such responsibilities and obligations by the Monitor.

26. Except as specifically provided herein, neither the terms of this Claims Determination Protocol nor any actions taken under this Claims Determination Protocol shall: (i) prejudice or affect the powers, rights, claims and defenses of the Canadian Petitioners, the Partnerships, the U.S. Debtors and their respective estates or creditors, the UCC, the U.S. Trustee, the Monitor or any of the foregoing parties' representatives or professionals under applicable law, including, without limitation, the U.S. *Bankruptcy Code*, the CCAA and orders of the Courts, or require any of such foregoing parties to take any action or refrain from taking any action that would result in a breach of any duty imposed upon them by any applicable law; or (ii) preclude or prejudice the rights of any person to assert or pursue such person's substantive rights against any other person under the applicable laws of Canada or the United States.

. . . . .

Cross Border Claims Protocol Appendix "A" U.S. Debtors (as Defined in the Cross Border Claims Protocol)

1. AbitibiBowater Inc.

2. AbitibiBowater U.S. Holding 1 Corp.

3. AbitibiBowater U.S. Holding LLC

4. Abitibi-Consolidated Alabama Corporation

5. Abitibi-Consolidated Corporation

6. Abitibi-Consolidated Finance LP

7. Abitibi Consolidated Sales Corporation

8. Alabama River Newsprint Company

9. Augusta Woodlands, LLC

10. Bowater Alabama LLC

11. Bowater America Inc.

12. Bowater Finance Company Inc.

13. Bowater Finance II LLC

14. Bowater Incorporated

15. Bowater Newsprint South LLC

16. Bowater Newsprint South Operations LLC

17. Bowater Nuway Inc.

18. Bowater Nuway Mid-States Inc.

19. Bowater South American Holdings Incorporated

20. Bowater Ventures Inc.

21. Catawba Property Holdings, LLC

22. Coosa Pines Golf Club Holdings LLC

23. Donohue Corp.

24. Lake Superior Forest Products Inc.

25. Tenex Data Inc.

Cross Border Claims Protocol Appendix "B" ACI Petitioners

1. Abitibi-Consolidated Company of Canada

2. Abitibi-Consolidated Inc.

3. 3224112 Nova Scotia Limited

4. Marketing Donohue Inc.

5. Abitibi-Consolidated Canadian Office Products Holding Inc.

6. 3834328 Canada Inc.

7. 6169678 Canada Inc.

8. 4042140 Canada Inc.

9. Donohue Recycling Inc.

10. 1508756 Ontario Inc.

11. 3217925 Nova Scotia Company

12. La Tuque Forest Products Inc.

13. Abitibi-Consolidated Nova Scotia Incorporated

14. Saguenay Forest Products Inc.

15. Terra Nova Explorations Ltd.

16. The Jonquière Pulp Company

17. The International Bridge and Terminal Company

18. Scramble Mining Ltd.

19. 9150-3383 Quebec Inc.

20. Abitibi-Consolidated (U.K.) Inc.

Cross Border Claims Protocol Appendix "C" Bowater Petitioners

1. Bowater Canada Finance Corporation

2. Bowater Canadian Limited

3. Bowater Canadian Holdings. Inc.

4. 3231378 Nova Scotia Company

5. AbitibiBowater Canada Inc.

6. Bowater Canada Treasury Corporation

7. Bowater Canadian Forest Products Inc.

8. Bowater Shelburne Corporation

9. Bowater LaHave Corporation

10. St-Maurice River Drive Company Limited

11. Bowater Treated Wood Inc.

12. Canexel Hardboard Inc.

13. 9068-9050 Quebec Inc.

14. Alliance Forest Products Inc. (2001)

15. Bowater Belledune Sawmill Inc.

16. Bowater Maritimes Inc.

17. Bowater Mitis Inc.

18. Bowater Guérette Inc.

19. Bowater Couturier Inc.

Appendix "F" Form of Notice of Revision or Disallowance of a Claim, Subsequent Claim or Former Employee Grievance Against Abitibi Consolidated Inc. and Bowater Canadian Forest Products Inc., et al.

Name of Creditor: .....

Sent VIA:

Claim Reference #: .....

Pursuant to the order issued by the Superior Court of Quebec on ....., 2010 (the "*Claims Determination Order*"), Ernst & Young Inc. in its capacity as Court-appointed Monitor of Abitibi Consolidated Inc. and Bowater Canadian Forest Products Inc. *et al.*, hereby gives you notice that it has reviewed your Proof of Claim or Grievance Proof of Claim

against ..... and has revised or rejected your claim or grievance as follows (all undefined capitalized terms herein shall have the meaning attributed to them in the Claims Determination Order):

	Proof of Claim or Grievance Proof of Claim as submitted	**Revised Claim or Former Employee Grievance as accepted**
Nature of Claim or Subsequent Claim (secured or unsecured) Former Employee Grievance		

Reason(s) for the Revision or Disallowance: (to insert particulars of the matter at hand)

.....

If you do not agree with this Notice of Revision or Disallowance please take notice of the following:

1. If you intend to dispute this Notice of Revision or Disallowance, you must, within ten (10) business days of the date of this Notice of Revision or Disallowance, deliver a Notice of Dispute by registered mail or courier at the addresses indicated hereon. The Form of Notice of Dispute is attached to this Notice.

2. Creditors or Unions shall be responsible for obtaining proof of delivery of such Notice of Dispute through their choice of delivery method, No acknowledgement of receipt will be provided by the Monitor.

3. If you do not deliver a Notice of Dispute within the above prescribed time period, the determination of your Claim, Subsequent Claim or Former Employee Grievance shall be deemed to be as set out in this Notice of Revision or Disallowance.

Address for Service of the Notice of Dispute:

Ernst & Young Inc., Court-appointed Monitor of Abitibi Consolidated Inc. and Bowater Canadian Forest Products Inc., *et al.*

By Registered Mail or Courier:

Ernst & Young Inc.

800 Rene-Levesque Blvd. West, Suite 1900

Montréal, Québec

H3B 1X9

Attention: Donna Comerford

Telephone: 866-246-7889

Fax: 514-879-3992

E-mail: abitibibowater@ca.ey.com

IF YOU FAIL TO DELIVER A NOTICE OF DISPUTE WITHIN THE PRESCRIBED TIME PERIOD, THIS NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU FOR VOTING AND/OR DISTRIBUTION PURPOSES UNDER A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT.

Dated at Montreal, Quebec this ..... day of ....., 2010.

ERNST & YOUNG INC.

In its capacity as Court-appointed Monitor of Abitibi Consolidated Inc. and Bowater Canadian Forest Products Inc. *et al.*

Per: .....

Encl.

Appendix "G" Form of Notice of Dispute of a Notice of Revision or Disallowance of a Claim, Subsequent Claim or Former Employee Grievance Against Abitibi Consolidated Inc. and Bowater Canadian Forest Products Inc. et al.

Pursuant to the order issued by the Superior Court of Quebec on ....., 2010 (the "*Claims Determination Order*"), we hereby give you notice of our intention to dispute the Notice of Revision or Disallowance bearing Reference Number ..... and dated ..... issued by Ernst & Young Inc. in its capacity as Court-appointed Monitor of Abitibi Consolidated Inc. and Bowater Canadian Forest Products Inc., *et al.*, in respect of our [Claim / Subsequent Claim / Former Employee Grievance] (all undefined capitalized terms herein shall have the meaning attributed to them in the Claims Determination Order).

Name of Creditor or Union: .. ..

Reason(s) for dispute (*attach additional sheet and copies of all supporting documentation if necessary*):

.....

Signature of Creditor or Union (or representative): .....

(Please print name): .....

Date: .....

Telephone number: (.....) .....

Facsimile number: (.....) .....

Full mailing address:

.....

Email:

.....

THIS FORM AND SUPPORTING DOCUMENTATION ARE TO BE RETURNED TO THE MONITOR BY REGISTERED MAIL OR COURIER AT THE ADDRESS INDICATED BELOW IN ORDER TO BE RECEIVED BY THE MONITOR WITHIN TEN (10) BUSINESS DAYS OF RECEIPT BY THE CREDITOR OR UNION OF THE NOTICE OF REVISION OR DISALLOWANCE.

Creditors or Unions shall be responsible for obtaining proof of delivery of such Notice of Dispute through their choice of delivery method. No acknowledgement of receipt will be provided by the Monitor.

Address for Service of the Notice of Dispute:

Ernst & Young Inc., Court-appointed Monitor of Abitibi Consolidated Inc. and Bowater Canadian Forest Products Inc., *et al.*

By Registered Mail or Courier:

Ernst & Young Inc.

800 Rene-Levesque Blvd. West, Suite 1900

Montréal, Québec

H3B 1X9

Attention: Donna Comerford

Telephone: 866-246-7889

Fax: 514-879-3992

E-mail: abitibibowater@ca.ey.com

End of Document

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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

JOINT BOOK OF AUTHORITIES OF THE APPLICANTS AND THE MONITOR

(Appointment of the Honourable Justice James Farley as Arbitrator and other Ancillary Relief -- Upper Canada Mall)

(Motion Returnable September 20, 2018)

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