C A N A D A

PROVINCE DE QUÉBEC
District de Montréal

N° : 500-11-048114-157

C O U R S U P É R I E U R E
(Chambre commerciale)

DANS L'AFFAIRE DE LA *LOI SUR LES ARRANGEMENTS AVEC LES CRÉANCIERS DES COMPAGNIES*, L.R.C. 1985, CH. C-36, TELLE QU'AMENDÉE :

BLOOM LAKE GENERAL PARTNER LIMITED, QUINTO MINING CORPORATION, 8568391 CANADA LIMITED ET CLIFFS QUÉBEC MINE DE FER ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC.

Débitrices

et

SOCIÉTÉ EN COMMANDITE MINE DE FER DU LAC BLOOM, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED

Mises en cause

et

FTI CONSULTING CANADA INC.,

Contrôleur

et

SYNDICAT DES MÉTALLOS, SECTION LOCALE 6254, SYNDICAT DES MÉTALLOS, SECTION LOCALE 6285,

Mis-en-cause

et

SA MAJESTÉ DU CHEF DE TERRE-NEUVE-LABRADOR, REPRÉSENTÉE PAR LE SURINTENDANT DES PENSIONS,

PROCUREUR GÉNÉRAL DU CANADA,

MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL ET NEIL JOHNSON, À TITRE DE REPRÉSENTANTS

RÉGIE DES RENTES DU QUÉBEC

MORNEAU SHEPELL

Mis-en-cause

TABLE DES MATIÈRES

ARGUMENTATION ÉCRITE DES MIS-EN-CAUSE SYNDICAT DES MÉTALLOS, SECTIONS LOCALES 6254 ET 6285 SUR LA JURIDICTION DE LA COUR QUANT À LA REQUÊTE DU CONTRÔLEUR INTITULÉE *MOTION BY THE MONITOR FOR DIRECTIONS WITH RESPECT TO PENSION CLAIMS*

TABLE DES MATIÈRES

Montréal, le 15 décembre 2016

Philion Leblanc Beaudry avocats s.a.

Philion Leblanc Beaudry, avocats s.a.
Procureurs des Mis-en-cause, Syndicat des Métallos, section locale 6254 et Syndicat des Métallos, section locale 6285

ONGLET 1

C A N A D A

PROVINCE DE QUÉBEC
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C O U R S U P É R I E U R E
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ARGUMENTATION ÉCRITE DES MIS-EN-CAUSE SYNDICAT DES MÉTALLOS, SECTIONS LOCALES 6254 ET 6285 SUR LA JURIDICTION DE LA COUR QUANT À LA REQUÊTE DU CONTRÔLEUR INTITULÉE *MOTION BY THE MONITOR FOR DIRECTIONS WITH RESPECT TO PENSION CLAIMS*

I. INTRODUCTION

1. Conformément à ce qui a été convenu lors de l'audience du 28 octobre dernier, les Mis-en-cause Syndicat des Métallos, section locale 6254 et Syndicat des Métallos, section locale 6285 (ci-après le « Syndicat ») soumettent leurs arguments quant à la juridiction de la Cour Supérieure du Québec sur les questions soulevées par la *Motion for directions* présentée par le Contrôleur;

2. Ces questionnements font suite aux représentations de certaines parties quant à l'opportunité de référer certaines questions soulevées par la requête du Contrôleur à la *Supreme Court of Newfoundland and Labrador*;

3. Pour sa part, le Syndicat reconnaît la compétence de la Cour Supérieure du Québec quant à l'ensemble des questions soulevées par la requête du Contrôleur et s'oppose à ce que quelque question que ce soit en lien avec celle-ci ne soit référée pour adjudication devant un autre forum;

4. Le Syndicat soumet qu'il n'y a, en l'espèce, aucun motif suffisant qui permettrait de justifier que la Cour s'écarte de la norme du contrôle unique en matière de procédure sous la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (ci-après la «LACC») pour diviser les questions soulevées par la requête du Contrôleur devant deux forums;

II. ARGUMENTATION

A. La compétence de la Cour Supérieure du Québec

5. D'emblée, il convient de souligner que la Cour Supérieure du Québec est pleinement compétente pour entendre l'entièreté du litige, tel que reconnu par les parties lors de l'audience du 28 octobre dernier;

6. En effet, les Débitrices ont présenté leur requête pour l'émission d'une ordonnance initiale en vertu de la Loi devant le bon forum, soit le tribunal compétent dans la province où se situe son siège (Article 9 (1) LACC);

7. Ainsi, la Cour Supérieure du Québec a été valablement saisie du dossier et les ordonnances qu'elle prononce dans le présent dossier valent pleinement dans l'ensemble du pays (Article 16 LACC);

8. Les effets de ces dispositions de la LACC s'apparentent directement à ce que la Cour Suprême décrivait en matière de faillite dans *Sam Lévy & Associés Inc.* c. *Azco Mining Inc.*, [2001] 3 R.C.S. 978 (**Onglet #2**) comme :

> « En l'espèce, nous faisons face à une loi fédérale qui établit à première vue un centre de commandement ou un « contrôle unique » (Stewart, précité, p. 349) pour la totalité des procédures liées à la faillite (par. 183(1)). »[1]

9. Les tribunaux québécois et ontariens ont d'ailleurs confirmé l'applicabilité de ce principe directeur en matière d'arrangements avec les créanciers (Voir notamment : *Montréal, Maine & Atlantic Canada Co./Montréal, Maine & Atlantic Canada Cie (Arrangement relatif à),*

[1] *Sam Lévy & Associés Inc.* c. *Azco Mining Inc.*, [2001] 3 R.C.S. 978 (**Onglet #2**), par. 76;

2013 QCCS 5194 (**Onglet #3**), paragraphes 24 et suivants; *Re Nortel Networks Corporation et al.*, 2015 ONSC 1354 (**Onglet #4**), paragraphe 24; *Re Essar Steel Algoma Inc. et al.*, 2016 ONSC 595 (**Onglet #5**), paragraphe 30[2];

10. De plus, nul ne conteste que la Cour Supérieure puisse interpréter et appliquer des lois étrangères dans le cadre de l'exercice de sa compétence, comme c'est la norme en matière d'insolvabilité;

11. En effet, le législateur a choisi de mettre en place un processus pancanadien pour traiter les demandes en vertu de la LACC et un processus d'une telle ampleur territoriale appelle nécessairement l'application de lois de diverses provinces;

12. Par conséquent, la Cour est ainsi pleinement habilitée à interpréter certaines dispositions de la *Pension Benefits Act*, SNL 1996, c. P-4.01 (ci-après la « PBA ») aux fins de l'adjudication des réclamations en lien avec les régimes de retraite;

13. Ainsi, ne sont pas fondées les demandes de certaines parties visant à déférer des questions soulevées par la requête du Contrôleur à un autre tribunal;

B. Les principes applicables au renvoi de certaines questions

14. Suivant les principes dégagés quant au contrôle unique, les demandes de renvoi concernant certaines questions dans le cadre d'un processus LACC devront répondre à un test exigeant pour être accueillies;

15. Il reviendra au requérant de démontrer l'existence d'un motif suffisant justifiant le recours à plusieurs ressorts dans un contexte de procédures en matière d'insolvabilité[3];

16. Toutefois, le motif suffisant n'a pas été défini dans le détail par les tribunaux, ceux-ci préférant préserver la discrétion du juge qui entend chaque affaire;

17. Ainsi, le juge saisi d'une telle demande de renvoi devra analyser l'ensemble des circonstances du dossier faisant l'objet d'une telle demande;

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[2] Permission d'en appeler accordée : 2016 ONCA 138;
[3] *Sam Lévy & Associés Inc.* c. *Azco Mining Inc.*, [2001] 3 R.C.S. 978 (**Onglet #2**), par. 76;

18. Dans le cadre de son analyse, il pourra s'attarder aux éléments factuels en preuve permettant de rattacher les questions en litige à l'un ou l'autre des ressorts;

19. Par contre, l'importance de ces éléments ou encore le nombre d'entre eux requis pour en arriver à la conclusion qu'il existe un motif suffisant n'ont pas non plus été arrêtés par les tribunaux;

20. Par exemple, ont été jugés pertinents sans nécessairement être déterminants : la loi applicable au litige, la présence d'une clause d'élection de for, la présence d'une place d'affaire des parties concernées dans le ressort, l'emplacement des principaux témoins et de la preuve, les intérêts de l'ensemble des créanciers, les coûts et délais associés aux procédures et la possibilité de jugements contradictoires[4];

21. Le tribunal devant se prononcer sur une demande de renvoi devra ainsi pondérer l'ensemble de ces éléments afin de déterminer si le requérant a rencontré son fardeau de preuve et a ainsi démontré un motif suffisant permettant d'accueillir la demande;

C. L'application de ces principes en l'espèce

22. Au soutien de la demande de certaines parties visant à déférer certaines questions aux tribunaux de Terre-Neuve-Labrador, ont été invoqués jusqu'à présent les motifs suivants :

a) L'applicabilité d'une loi de Terre-Neuve-Labrador, soit la PBA;

b) La présence de créanciers dans la province de Terre-Neuve-Labrador, soit la majorité des participants aux régimes de retraite;

c) Le Surintendant des pensions en charge de l'administration du régime est celui de Terre-Neuve-Labrador;

23. Ces motifs feraient en sorte, selon les parties requérant le transfert de certaines questions à la *Supreme Court of Newfoundland and Labrador*, que la Cour Supérieure du Québec devrait décliner compétence sur les matières touchant l'application de la PBA au profit de la *Supreme Court*;

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[4] *Sam Lévy & Associés Inc.* c. *Azco Mining Inc.*, [2001] 3 R.C.S. 978 (**Onglet #2**); *Montréal, Maine & Atlantic Canada Co./Montréal, Maine & Atlantic Canada Cie (Arrangement relatif à)*, 2013 QCCS 5194 (**Onglet #3**); *Re Nortel Networks Corporation et al.*, 2015 ONSC 1354 (**Onglet #4**); *Re Essar Steel Algoma Inc. et al.*, 2016 ONSC 595 (**Onglet #5**);

24. Pourtant, le simple fait qu'une loi étrangère à celle du forum saisi du litige doive être considérée n'est en rien exceptionnel, tel que mentionné précédemment;

25. Dans le même sens, bien qu'il y ait une majorité de participants aux régimes de retraite à Terre-Neuve-Labrador, il demeure qu'il y a également une proportion importante de ceux-ci au Québec et nombre d'autres créanciers qui ont également le droit de faire des représentations si nécessaire;

26. Ainsi, le lieu des créanciers est au mieux un facteur neutre dans le cadre de cette détermination;

27. Toujours quant aux critères invoqués, la présence au débat du Surintendant de Terre-Neuve-Labrador n'est pas plus déterminante, étant donné que deux autres organismes de surveillance participent au débat et que l'un d'eux est Retraite Québec qui est situé dans la province;

28. Encore une fois, on saurait au mieux y voir un critère d'influence neutre;

29. En somme, le Syndicat soumet que l'espèce ne justifie aucunement le renvoi de certaines questions à Terre-Neuve-Labrador, d'autant plus que les raisons invoquées sont moindres qu'elles ne l'étaient dans l'affaire *Lawrence Home Fashions inc./Linge de maison Lawrence inc. (Syndic de)*, 2013 QCCS 3015 (**Onglet #6**) et pour laquelle la Cour avait conclu qu'il n'y avait pas lieu de procéder à un tel renvoi;

30. En effet, avec respect pour l'opinion contraire, le Syndicat estime que les motifs invoqués ne suffisent pas à justifier la demande de transfert, d'autant plus qu'il y a d'autres motifs qui militent en faveur du maintien de l'ensemble des questions devant les tribunaux québécois;

31. En effet, de nombreux facteurs de rattachement militent en faveur du contrôle unique :

    a) Ce dossier bénéficie de l'assignation d'un juge de la Cour Supérieure depuis plus d'un an, qui est bien aux faits du dossier, du droit applicable et des impacts qu'auront la détermination à venir sur les parties au dossier, alors qu'un juge de la *Supreme Court of Newfoundland and Labrador* devrait nécessairement être instruit longuement sur ces questions;

b) Déférer uniquement certaines questions implique que deux juges se prononceront sur des aspects de la réclamation associée au régime de retraite, ce qui constitue un risque de jugement contradictoire qui ne serait pas présent si la procédure demeurait unifiée;

En effet, un juge de Terre-Neuve-Labrador serait saisi de tout ce qui touche la PBA alors que la Cour Supérieure du Québec resterait saisie des questions touchant les autres lois similaires mais également de l'applicabilité de la PBA dans le contexte des procédures LACC;

c) L'ensemble des créanciers ont pris des dispositions afin d'être représentés dans le district de Montréal et un changement de forum implique très certainement des coûts additionnels pour nombre d'entre eux qui devront également s'assurer une représentation à Terre-Neuve-Labrador;

d) Les délais associés à une procédure divisée seront accrus comparativement à ceux d'une procédure qui demeurerait unifiée devant les tribunaux québécois;

32. Ainsi, la prépondérance des facteurs pertinents dégagés par les tribunaux en application de la LACC milite en faveur du maintien de l'ensemble des questions soulevées par la requête du Contrôleur devant les tribunaux québécois;

33. Par conséquent, aucun motif suffisant tel que défini par la jurisprudence ne justifie que l'on divise la compétence judiciaire quant à la requête du Contrôleur en deux;

34. Ce n'est pas parce que l'interprétation que pourrait dégager les tribunaux de la PBA aurait des applications dans d'autres dossiers que cela en fait une question étrangère aux procédures LACC qui pourrait par conséquent en être extraite;

35. Il demeure qu'il s'agit de questions soulevées dans le cadre de réclamations formulées dans la cadre des procédures LACC, lesquelles doivent bénéficier du contrôle unique permettant d'assurer un traitement conséquent avec le reste des procédures;

36. On ne saurait pas plus fonder un argument sur un précédent tel que l'affaire *Timminco*[5] étant donné l'absence de contestation en lien avec la demande de renvoi qui était alors présentée;

III. CONCLUSION

37. Pour conclure, le Syndicat s'oppose à ce que la demande de transfert de certaines questions vers la *Supreme Court of Newfoundland and Labrador* ne soit accueillie, étant donné que les requérants n'ont pas rencontré leur fardeau de prouver qu'il y avait un motif suffisant pour justifier un tel transfert;

38. Au contraire, le Syndicat estime que la majorité des facteurs pertinents militent en faveur du maintien devant la Cour Supérieure du Québec, district de Montréal;

39. Ainsi, le Syndicat requiert de la Cour qu'elle confirme sa juridiction pour répondre à l'ensemble des questions soulevées par la *Motion by the Monitor for directions with respect to pension claims* et qu'elle rejette toute demande visant à déférer certaines questions devant la *Supreme Court of Newfoundland and Labrador*;

LE TOUT, RESPECTUEUSEMENT SOUMIS.

Montréal, le 15 décembre 2016

Philion Leblanc Beaudry avocats s.a.

Philion Leblanc Beaudry, avocats s.a.
Procureurs des Mis-en-cause, Syndicat des Métallos, section locale 6254 et Syndicat des Métallos, section locale 6285

[5] *Re Timminco Limited*, Ontario Superior Court of justice file no. : CV-12-9539-00CL;

ONGLET 2

Azco Mining Inc. *Appellant*

v.

Sam Lévy & Associés Inc. *Respondent*

INDEXED AS: SAM LÉVY & ASSOCIÉS INC. *v.* AZCO MINING INC.

Neutral citation: 2001 SCC 92.

File No.: 27876.

2001: May 15; 2001: December 20.

Present: McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency — Courts — Jurisdiction — Trustee presenting petitigon to Quebec Superior Court sitting in bankruptcy seeking to "recuperate" assets held by company with office in British Columbia — Company bringing motion to transfer petition to British Columbia — Whether Superior Court lacked subject matter jurisdiction over petition — Whether Superior Court erred in exercising discretion against making transfer order — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-1, s. 187(7).

The appellant is a company incorporated under the laws of Delaware, offering venture capital services from its office in British Columbia. In 1996, a deal involving the financing of an African gold mine was struck between the appellant and Eagle, a company with offices in Quebec. The parties reduced their agreement to a series of documents, each of which contained a clause stating that the agreement was to be governed by the laws of British Columbia. In September 1997, Eagle was adjudged bankrupt by the Quebec Superior Court sitting in bankruptcy and the respondent firm was appointed trustee in bankruptcy. In January 1999, the respondent trustee presented a petition seeking to "recuperate" the assets of Eagle, including the monetary value of numerous shares held or controlled by the appellant. The appellant then brought a motion to transfer the petition "to the Supreme Court of British Columbia, Bankruptcy

Azco Mining Inc. *Appelante*

c.

Sam Lévy & Associés Inc. *Intimée*

RÉPERTORIÉ : SAM LÉVY & ASSOCIÉS INC. *c.* AZCO MINING INC.

Référence neutre : 2001 CSC 92.

N° du greffe : 27876.

2001 : 15 mai; 2001 : 20 décembre.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Iacobucci, Major, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Tribunaux — Compétence — Présentation à la Cour supérieure du Québec siégeant en matière de faillite d'une requête du syndic visant à « recouvrer » des biens retenus par une société ayant un bureau en Colombie-Britannique — Présentation par la société d'une requête sollicitant le renvoi en Colombie-Britannique de la requête en recouvrement de biens — La Cour supérieure était-elle incompétente ratione materiae pour entendre la requête en recouvrement de biens? — La Cour supérieure a-t-elle commis une erreur en exerçant son pouvoir discrétionnaire pour refuser de renvoyer l'affaire? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-1, art. 187(7).

L'appelante est une société constituée sous le régime des lois du Delaware, offrant du capital de risque à partir de son bureau en Colombie-Britannique. En 1996, l'appelante et Eagle, une société ayant des bureaux au Québec, ont conclu une opération concernant le financement d'une mine d'or africaine. Les parties ont consigné leur entente dans une série de documents, dont chacun contenait une clause portant que le contrat était régi par les lois de la Colombie-Britannique. En septembre 1997, Eagle a été déclarée en faillite par la Cour supérieure du Québec siégeant en matière de faillite et la société intimée a été nommée syndic de la faillite. En janvier 1999, le syndic intimé a présenté une requête visant à « recouvrer » des biens de Eagle, y compris la valeur pécuniaire de nombreuses actions détenues ou contrôlées par l'appelante. L'appelante a alors présenté une requête sollicitant le renvoi de la requête en recouvrement de biens « à la Division des faillites de la Cour suprême de

Division of Vancouver". The appellant's motion was dismissed. The Court of Appeal unanimously upheld that decision.

Held: The appeal should be dismissed.

The bankruptcy petition was properly filed in the Quebec Superior Court sitting in bankruptcy. A creditor is required to file a bankruptcy petition in the court having jurisdiction in the judicial district of the locality of the debtor. Eagle carried on business in Quebec and its only connection to British Columbia was that the agreements between itself and the appellant referred to the law of that province. Nothing in the evidence suggested that the bankruptcy court in Quebec lacked subject matter jurisdiction over the petition or personal jurisdiction over Eagle when it made the receiving order. The bankruptcy court thereby acquired jurisdiction to deal with matters affecting the bankrupt estate arising in British Columbia. The *Bankruptcy and Insolvency Act* establishes a nationwide scheme for the adjudication of bankruptcy claims. Section 188(1) ensures that orders made by the bankruptcy court sitting in one province can and will be enforced across the country.

The bankruptcy court does not lack subject matter jurisdiction over the dispute because it is a contract case. While a trustee's claim in relation to a "stranger to the bankruptcy" or lacking the "complexion of a matter in bankruptcy" should be brought in the ordinary civil courts, if the contractual dispute properly relates to the subject matter of the bankruptcy proceedings, the fact it also has a property and civil rights aspect does not in any way impair the bankruptcy court's jurisdiction. Here, far from being a "stranger" to the bankruptcy, the appellant is potentially the most significant player in the role of either creditor or debtor, as the case may be. Further, while the bankruptcy court does not have the general jurisdiction of a civil court to award damages in breach of contract cases, the trustee's claim is not properly characterized as a claim in damages but as a claim to specific property of the bankrupt which is being wrongfully withheld by the appellant.

The *Bankruptcy and Insolvency Act prima facie* establishes one command centre or "single control" for all proceedings related to the bankruptcy. "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" under s. 187(7) to send the trustee scurrying to multiple jurisdictions. The

la Colombie-Britannique à Vancouver ». La requête de l'appelante a été rejetée. La Cour d'appel a confirmé cette décision à l'unanimité.

Arrêt : Le pourvoi est rejeté.

La requête en faillite a été déposée à bon droit devant la Cour supérieure du Québec siégeant en matière de faillite. Le créancier doit déposer une requête de mise en faillite auprès du tribunal compétent dans le district judiciaire de la localité du débiteur. Eagle faisait affaire au Québec et son seul lien avec la Colombie-Britannique tenait au fait que les contrats entre elle et l'appelante renvoyaient aux lois de cette province. Aucun élément de preuve ne laissait croire que le tribunal de faillite du Québec n'avait pas compétence *ratione materiae* sur la requête de mise en faillite et compétence *ratione personae* sur Eagle lorsqu'il a rendu l'ordonnance de séquestre. Le tribunal de faillite a ainsi acquis la compétence pour trancher les affaires touchant l'actif du failli qui ont pris naissance en Colombie-Britannique. La *Loi sur la faillite et l'insolvabilité* établit un régime national de règlement des demandes en matière de faillite. Le paragraphe 188(1) prévoit que les ordonnances du tribunal de faillite siégeant dans une province sont exécutoires et exécutées partout au pays.

Le tribunal de faillite ne perd pas compétence sur l'objet du litige parce qu'il s'agit d'une affaire contractuelle. Bien qu'une demande du syndic qui est dirigée contre un « étranger à la faillite » ou qui n'est pas de la « nature d'une affaire de faillite » doive être présentée aux tribunaux civils ordinaires, si le litige contractuel se rapporte bel et bien à la faillite, le fait que ce litige comporte également un aspect touchant la propriété et les droits civils n'écarte aucunement la compétence du tribunal de faillite. En l'espèce, loin d'être une « étrangère » à la faillite, l'appelante en est potentiellement le joueur le plus important, que ce soit en qualité de créancière ou de débitrice, selon le cas. De plus, même si le tribunal de faillite ne possède pas la compétence générale d'un tribunal civil pour accorder des dommages-intérêts à la suite de la rupture d'un contrat, on ne peut qualifier la demande du syndic de simple demande en dommages-intérêts, car il s'agit plutôt d'une demande de recouvrement de biens précis du failli que l'appelante retient sans droit.

La *Loi sur la faillite et l'insolvabilité* établit à première vue un centre de commandement ou un « contrôle unique » pour la totalité des procédures liées à la faillite. Le « contrôle unique » n'est pas nécessairement incompatible avec le renvoi de litiges particuliers à d'autres ressorts, mais le créancier (ou le débiteur) qui désire fragmenter les procédures et qui ne peut pas prétendre être un « étranger à la faillite » a le fardeau de démontrer l'existence d'un « motif suffisant » au sens du par.

motions judge was entitled to conclude that the facts of this case do not show "sufficient cause" to require the transfer to British Columbia.

The relevant agreements to which the appellant and Eagle were parties contained choice of law, not choice of forum provisions, and the Quebec courts are perfectly able to apply the law of British Columbia. Furthermore, arts. 3148 and 3135 of the *Civil Code of Québec* would only apply in bankruptcy court "[i]n cases not provided for in the Act or . . . Rules". Since s. 187(7) of the Act specifically provides that a transfer will not be ordered unless there is satisfactory proof that a proceeding will be "more economically administered" in another division or district or "for other sufficient cause", these particular provisions of the Code can have no application. Where, unlike in this case, a defendant has the benefit of a choice of forum clause, such a clause ought to be taken into careful consideration by a motions judge under s. 187(7) but it is not binding.

Cases Cited

Followed: *Stewart v. LePage* (1916), 53 S.C.R. 337; *In re Ireland* (1962), 5 C.B.R. (N.S.) 91; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90; **distinguished:** *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; **referred to:** *Attorney-General for Alberta v. Atlas Lumber Co.*, [1941] S.C.R. 87; *Boily v. McNulty*, [1928] S.C.R. 182; *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240; *Associated Freezers of Canada Inc. (Trustee of) v. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311; *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380; *In re Morris Lofsky* (1947), 28 C.B.R. 164; *Sigurdson v. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75; *Re Holley* (1986), 54 O.R. (2d) 225; *Falvo Enterprises Ltd. v. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336; *In re The Moratorium Act (Sask.)*, [1956] S.C.R. 31; *Union St. Jacques de Montreal v. Bélisle* (1874), L.R. 6 P.C. 31; *Ellis v. Silber* (1872), L.R. 8 Ch. App. 83; *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) v. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19; *In re Martin* (1953), 33 C.B.R. 163; *In re Reynolds* (1928), 10 C.B.R. 127; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143; *Mancini (Trustee of) v. Falconi* (1987), 65 C.B.R. 246; *Geoffrion v. Barnett*, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*, [1990] R.J.Q. 6; *Excavations Sanoduc inc. v. Morency*, [1991]

187(7), justifiant que le syndic doive accourir dans plusieurs ressorts. Le juge des requêtes pouvait conclure que les faits ne faisaient pas ressortir un « motif suffisant » pour renvoyer l'instance en Colombie-Britannique.

Les contrats pertinents auxquels l'appelante et Eagle étaient parties contenaient une clause exprimant le choix des lois applicables, et non une clause d'élection de for, et les tribunaux québécois sont parfaitement capables d'appliquer les lois de la Colombie-Britannique. Par ailleurs, les art. 3148 et 3135 du *Code civil du Québec* ne s'appliqueraient dans une instance devant le tribunal de faillite que « [d]ans les cas non prévus par la Loi ou les [. . .] règles ». Étant donné que le par. 187(7) de la Loi prévoit explicitement que le renvoi n'est ordonné que lorsqu'il est prouvé de façon satisfaisante qu'une instance sera « administré[e] d'une manière plus économique » dans une autre division ou dans un autre district ou « pour un autre motif suffisant », ces dispositions particulières du Code ne s'appliquent pas. Lorsqu'un défendeur, contrairement au défendeur en l'espèce, bénéficie d'une clause d'élection de for, le juge des requêtes doit examiner cette clause avec soin en application du par. 187(7), mais il n'est pas lié par elle.

Jurisprudence

Arrêts suivis : *Stewart c. LePage* (1916), 53 R.C.S. 337; *In re Ireland* (1962), 5 C.B.R. (N.S.) 91; *Holt Cargo Systems Inc. c. ABC Containerline N.V. (Syndics de)*, [2001] 3 R.C.S. 907, 2001 CSC 90; **distinction d'avec l'arrêt :** *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897; **arrêts mentionnés :** *Attorney-General for Alberta c. Atlas Lumber Co.*, [1941] R.C.S. 87; *Boily c. McNulty*, [1928] R.C.S. 182; *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240; *Associated Freezers of Canada Inc. (Trustee of) c. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311; *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380; *In re Morris Lofsky* (1947), 28 C.B.R. 164; *Sigurdson c. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75; *Re Holley* (1986), 54 O.R. (2d) 225; *Falvo Enterprises Ltd. c. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336; *In re The Moratorium Act (Sask.)*, [1956] R.C.S. 31; *Union St. Jacques de Montreal c. Bélisle* (1874), L.R. 6 P.C. 31; *Ellis c. Silber* (1872), L.R. 8 Ch. App. 83; *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) c. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19; *In re Martin* (1953), 33 C.B.R. 163; *In re Reynolds* (1928), 10 C.B.R. 127; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143; *Mancini (Trustee of) c. Falconi* (1987), 65 C.B.R. 246; *Geoffrion c. Barnett*, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*,

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[1990] R.J.Q. 6; *Excavations Sanoduc inc. c. Morency*, [1991] R.D.J. 423; *In re Atlas Lumber Co. c. Grier and Sons Ltd.* (1922), 3 C.B.R. 226; *In re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23; *Re Westam Developments Ltd.* (1967), 10 C.B.R. (N.S.) 61; *Re M. B. Greer & Co.* (1953), 33 C.B.R. 69; *Re M.P. Industrial Mills Ltd.* (1972), 17 C.B.R. 226; *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561; *Re Lions D'Or Ltée* (1965), 8 C.B.R. (N.S.) 171; *Re M. Pollack Ltée* (1979), 30 C.B.R. (N.S.) 256; *Bourque Consumer Electronics Inc. (Syndic de)*, J.E. 91-1040; *Sarabia c. « Oceanic Mindoro » (The)* (1996), 26 B.C.L.R. (3d) 143, autorisation de pourvoi refusée [1997] 2 R.C.S. xiv; *Volkswagen Canada Inc. c. Auto Haus Frohlich Ltd.*, [1986] 1 W.W.R. 380; *Ash c. Lloyd's Corp.* (1991), 6 O.R. (3d) 235, conf. par (1992), 9 O.R. (3d) 755, autorisation de pourvoi refusée [1992] 3 R.C.S. v; *Maritime Telegraph and Telephone Co. c. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471; *Industrial Packaging Products Co. c. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (1960); *In re Treco*, 239 B.R. 36 (1999), conf. par 240 F.3d 148 (2001); *Industrial Acceptance Corp. c. Lalonde*, [1952] 2 R.C.S. 109; *Coastal Steel Corp. c. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (1983); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (1987); *Hays and Co c. Merrill Lynch*, 885 F.2d 1149 (1989).

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POURVOI contre un arrêt de la Cour d'appel du Québec, [2000] R.J.Q. 392, [2000] Q.J. No. 417 (QL), rejetant l'appel interjeté par l'appelant

judgment of the Superior Court, [1999] R.J.Q. 1497. Appeal dismissed.

Yves Martineau, for the appellant.

Jean-Philippe Gervais, for the respondent.

The judgment of the Court was delivered by

1 BINNIE J. — The long arm of the Quebec Superior Court sitting in Bankruptcy reached out to the appellant in Vancouver, British Columbia, in respect of a claim for shares and warrants and other debts allegedly due to the bankrupt which the trustee in bankruptcy values in excess of $4.5 million. The appellant protested that the dispute, which involves the financing of an African gold mine, has nothing to do with Quebec. It argues that the claim of the respondent trustee in bankruptcy is an ordinary civil claim that rests entirely on agreements that are to be interpreted according to the laws of British Columbia. For this and other reasons of convenience and efficiency, the appellant says, the claim ought to proceed in British Columbia. The bankruptcy court and the Quebec Court of Appeal rejected these submissions and, in my view, the further appeal to this Court ought also to be dismissed.

I. Facts

2 The appellant Azco Mining Inc. ("Azco"), a company incorporated under the laws of Delaware, offered venture capital services from its office in Vancouver, British Columbia. In 1996 it was introduced to Eagle River International Limited and Eagle River Exchange and Financial Services Inc. (hereinafter collectively referred to as "Eagle"), with offices in Gatineau, Quebec. Eagle was in the process of trying to develop promising gold mining properties in a 500 square mile area of Mali, West Africa. A deal was struck whereby Eagle would continue to use its expertise to bring the mines to production through subsidiary companies in Mali, and Azco would provide the financing. The parties

à l'encontre d'un jugement de la Cour supérieure, [1999] R.J.Q. 1497. Pourvoi rejeté.

Yves Martineau, pour l'appelante.

Jean-Philippe Gervais, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE — La Cour supérieure du Québec siégeant en matière de faillite a le bras long au point d'avoir atteint l'appelante à Vancouver (Colombie-Britannique) concernant une demande d'actions, de bons de souscription et de paiement d'autres créances auxquels le failli prétend avoir droit et que le syndic de faillite évalue à plus de 4,5 millions de dollars. L'appelante a rétorqué que le litige, qui porte sur le financement d'une mine d'or en Afrique, n'a rien à voir avec le Québec. Elle prétend que la demande du syndic de faillite intimé constitue une demande civile ordinaire, entièrement fondée sur des contrats qui doivent être interprétés en conformité avec les lois de la Colombie-Britannique. Selon elle, ce motif et d'autres raisons de commodité et d'efficacité font en sorte que la demande devrait être entendue en Colombie-Britannique. Le tribunal de faillite et la Cour d'appel du Québec ont rejeté ces arguments et je suis d'avis que le pourvoi interjeté auprès de notre Cour devrait aussi être rejeté.

I. Les faits

L'appelante Azco Mining Inc. (« Azco »), une société constituée sous le régime des lois du Delaware, offrait du capital de risque à partir de son bureau de Vancouver (Colombie-Britannique). En 1996, on l'a mise en contact avec Eagle River International Limited et Eagle River Exchange and Financial Services Inc. (ci-après appelées collectivement « Eagle »), qui avaient des bureaux à Gatineau (Québec). Eagle faisait des démarches en vue d'exploiter des mines d'or prometteuses dans une région de 500 milles carrés située au Mali (Afrique occidentale). Il a été convenu que Eagle continuerait à mettre son expertise au profit de la mise en production de

reduced their agreement to a series of documents, each of which contained what the appellant contends is a choice of forum clause and the respondent argues is no more than a choice of law clause, as follows:

June 7, 1996 financing agreement

28. The agreement shall be governed by the law of British Columbia.

June 12, 1996 management services agreement

13. **Arbitration**: The Parties hereto agree that all questions or matters in dispute with respect to this Agreement shall be submitted to arbitration pursuant to the terms hereof.

. . .

20. **Applicable Law**: The situs of this Agreement is Vancouver, British Columbia, and, for all purposes this Agreement, will be governed exclusively by and construed and enforced in accordance with the laws prevailing in the Province of British Columbia.

In addition, Azco relies on the terms of the debenture entered into by Azco with Eagle's subsidiary company in Mali (called West African Gold & Exploration S.A.), as follows:

West African Gold & Exploration S.A. Debenture dated August 9, 1996

17. [The] situs of this Debenture is Vancouver, British Columbia, and for all purposes this Debenture will be governed exclusively by and construed and enforced in accordance with the laws prevailing in the Province of British Columbia. In addition, the Company hereby expressly acknowledges and agrees to forthwith execute any and all documentation which may be necessary in order to ensure both the enforceability of this Debenture and the valid registration thereof as against the Mortgaged Property under the laws prevailing in each of the Province of British Columbia and the Republic of Mali and, in addition, and without limiting the generality of the foregoing, to attorn, if required, to any courts of competent jurisdiction in the Province of British Columbia in order to either

ces mines par l'entremise de filiales au Mali et que Azco fournirait le financement. Les parties ont consigné leur entente dans une série de documents, dont chacun contenait l'une des dispositions suivantes que l'appelante qualifie de clauses d'élection de for, mais qui, selon l'intimée, exprimaient simplement leur choix quant aux lois applicables :

[TRADUCTION]

Contrat de financement conclu le 7 juin 1996

28. Le contrat est régi par les lois de la Colombie-Britannique.

Contrat de services de gestion conclu le 12 juin 1996

13. **Arbitrage** : Les parties conviennent de soumettre à l'arbitrage toute question litigieuse relative au présent contrat conformément à ses stipulations.

. . .

20. **Lois applicables** : Le présent contrat a été conclu à Vancouver (Colombie-Britannique); il est régi exclusivement et à tous égards par les lois en vigueur dans la province de la Colombie-Britannique, et il sera interprété et exécuté en conformité avec celles-ci.

Azco invoque en outre les stipulations suivantes du contrat d'emprunt sous forme de débenture qu'elle a conclu avec la filiale de Eagle au Mali (la West African Gold & Exploration S.A.) :

[TRADUCTION]

Contrat d'emprunt sous forme de débenture de West African Gold & Exploration S.A. conclu le 9 août 1996

17. Le présent contrat d'emprunt sous forme de débenture a été conclu à Vancouver (Colombie-Britannique); il est régi exclusivement et à tous égards par les lois en vigueur dans la province de la Colombie-Britannique, et il sera interprété et exécuté en conformité avec celles-ci. En outre, la société convient expressément de signer sans délai tous les documents nécessaires pour que le présent contrat d'emprunt sous forme de débenture devienne exécutoire et soit enregistré valablement à l'égard des biens grevés conformément aux lois en vigueur dans la province de la Colombie-Britannique et aux lois en vigueur dans la République du Mali; sans limiter la portée générale de ce qui précède, la société convient en outre de reconnaître, le cas échéant, la juridiction des tribunaux compétents de la province de la Colombie-Bri-

administer or interpret this Debenture in accordance with the laws prevailing in the Province of British Columbia.

4 It was envisaged that if the project were successful Azco would ultimately own a majority interest in what the trustee describes as a joint venture holding company, Sanou Mining Corporation ("Sanou"). Eagle was to be a minority partner.

5 During the period of May 16, 1996 and May 1, 1997, Azco paid Eagle a total of US$3,844,858. For each payment, Eagle executed a promissory note, undertaking to repay Azco if it failed to fulfill its contractual obligations.

6 On September 12, 1997, Eagle was adjudged bankrupt. The respondent firm was appointed trustee in bankruptcy. Despite Eagle's bankruptcy, the Mali project proceeded and, according to Azco, it is still underway. The trustee says that the appellant now controls the holding company Sanou and continues to withhold, wrongfully, the 3.5 million shares and 4 million warrants to which Eagle was (and is) entitled.

7 On January 18, 1999, the respondent trustee presented a petition to the Quebec Superior Court sitting in Bankruptcy ("the bankruptcy court") seeking to "recuperate the assets" of Eagle, including the monetary value of what it considers the wrongfully withheld property of the debtor, namely 125,000 shares of Azco itself and 3.5 million shares and 4 million warrants of Sanou. The respondent trustee values the Azco shares at CAN$337,500 and the Sanou interest at US$1,875,000. In addition the trustee advances some monetary claims for a variety of alleged debts.

8 On February 24, 1999, the appellant brought a motion to transfer the petition "to the Supreme Court of British Columbia, Bankruptcy Division of Vancouver". In support of its motion, the appellant stated that "it is a certainty that Azco will file a counterclaim for an amount in excess of $5,000,000 Cdn., based principally" on the financing agreements to recover about US$3.85 million in the

tannique pour l'application et l'interprétation du présent contrat d'emprunt sous forme de débenture en conformité avec les lois en vigueur dans la province de la Colombie-Britannique.

Il était prévu qu'en bout de ligne, en cas de succès du projet, Azco détiendrait une participation majoritaire dans la Sanou Mining Corporation (« Sanou »), que le syndic a qualifié de société de gestion en coentreprise et dans laquelle Eagle obtiendrait une participation minoritaire.

Entre le 16 mai 1996 et le 1er mai 1997, Azco a versé au total à Eagle la somme de 3 844 858 $US. Pour chaque versement, Eagle a signé un billet à ordre par lequel elle s'engageait à rembourser Azco si elle manquait à ses obligations contractuelles.

Le 12 septembre 1997, Eagle a été déclarée en faillite. La société intimée a été nommée syndic de la faillite. Malgré la faillite de Eagle, le projet du Mali s'est poursuivi et, selon Azco, il est toujours en cours. Le syndic affirme que l'appelante contrôle maintenant la société de gestion Sanou et retient illégalement les 3,5 millions d'actions et les 4 millions de bons de souscription auxquels Eagle avait droit — et auxquels elle a toujours droit.

Le 18 janvier 1999, le syndic intimé a présenté à la Cour supérieure du Québec siégeant en matière de faillite (le « tribunal de faillite ») une requête visant à « recouvrer des biens » de Eagle, y compris la valeur pécuniaire de 125 000 actions de Azco même, ainsi que de 3,5 millions d'actions et 4 millions de bons de souscription de Sanou, qu'il considère comme des biens du débiteur retenus illégalement. Le syndic intimé évalue les actions de Azco à 337 500 $CAN et la participation dans Sanou à 1 875 000 $US. Le syndic fait également valoir certaines demandes pécuniaires relativement à diverses créances alléguées.

Le 24 février 1999, l'appelante a présenté une requête sollicitant le renvoi de la requête en recouvrement de biens [TRADUCTION] « à la Division des faillites de la Cour suprême de la Colombie-Britannique à Vancouver ». À l'appui de sa requête, l'appelante a déclaré : [TRADUCTION] « Azco déposera assurément une demande reconventionnelle d'un montant de plus de 5 000 000 $CAN fondée

payments to Eagle mentioned above which, as stated, were secured by promissory notes. The contractual arrangement, says Azco, was that if certain conditions in the agreements were not met, the advances would be treated as a demand loan. Azco says the conditions were not met and that it is entitled to immediate repayment of all advances. Azco submitted that "[t]he Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco". Its position, as stated, was that the file should be transferred to the Bankruptcy Division of Vancouver.

Azco's Vice-President of Finance, Ryan Modesto, who lives in the United States, testified in support of the motion that Azco is a creditor in the bankruptcy:

Q. So is it Azco Mining's position that it is the creditor in that bankruptcy of Eagle River?

A. Yes, it is.

Q. For what amount?

A. For three million eight hundred forty-four thousand eight hundred and fifty-eight dollars ($3,844,858) plus accrued interest.

Q. That's U.S. currency?

A. That is U.S. currency.

Q. And you refer to interest. Are you referring to the interest referred to in the promissory note?

A. Exactly.

Azco's motion was dismissed by Isabelle J. of the Quebec Superior Court on May 6, 1999. That decision was upheld by the Quebec Court of Appeal on February 21, 2000.

II. Judicial History

A. *Quebec Superior Court*, [1999] R.J.Q. 1497

Isabelle J. held that the Quebec Superior Court sitting in Bankruptcy had jurisdiction to deal with

principalement » sur les contrats de financement en vue de recouvrer les versements susmentionnés d'environ 3 850 000 $US remis à Eagle, qui étaient garantis par des billets à ordre, comme je l'ai déjà expliqué. Azco a soutenu que, selon les contrats, en cas de non-respect de certaines conditions, les avances de fonds seraient considérées comme un prêt à demande. D'après elle, ces conditions n'ont pas été remplies et elle a droit au remboursement immédiat de toutes les avances de fonds. Azco a prétendu que [TRADUCTION] « [l]a division des faillites de la Cour supérieure de Hull n'a pas compétence pour entendre la présente demande contractuelle contre Azco ». Elle plaide que le dossier doit être renvoyé à la Division des faillites de Vancouver.

Le vice-président aux Finances de Azco, Ryan Modesto, qui vit aux États-Unis, a témoigné à l'appui de la requête en renvoi que Azco est un créancier de la faillite : 9

[TRADUCTION]

Q. Donc, Azco Mining plaide-t-elle qu'elle est le créancier dans le cadre de cette faillite de Eagle River?

R. Oui, c'est ça.

Q. Pour quel montant?

R. Pour trois millions huit cent quarante-quatre mille huit cent cinquante-huit dollars (3 844 858 $) plus les intérêts courus.

Q. C'est en devises américaines?

R. C'est en devises américaines.

Q. Et vous mentionnez les intérêts. Faites-vous référence aux intérêts stipulés dans le billet à ordre?

R. Exactement.

Le juge Isabelle de la Cour supérieure du Québec a rejeté la requête de Azco le 6 mai 1999. La Cour d'appel du Québec a confirmé cette décision le 21 février 2000. 10

II. Historique des procédures judiciaires

A. *Cour supérieure du Québec*, [1999] R.J.Q. 1497

Le juge Isabelle a conclu que la Cour supérieure du Québec siégeant en matière de faillite avait 11

the respondent's petition. The relevant provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "Act"), were clear and there was no need to refer to the *Civil Code of Québec*, S.Q. 1991, c. 64, or the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25.

12 Azco had not argued that the bankrupt's affairs could be more efficiently administered in British Columbia but rather that there were other "sufficient" reasons for transferring the proceeding to that province, including, in particular, certain clauses in the agreement (reproduced above) that Azco said required the dispute to be tried in British Columbia. Isabelle J. ruled that these clauses had to do with choice of law rather than choice of forum and in any event lacked an "imperative" character.

13 Isabelle J. accepted that he could transfer the proceeding to the Vancouver division of the Supreme Court of British Columbia sitting in Bankruptcy under s. 187(7) of the Act. There was no need to turn to the specific rules governing *forum non conveniens* set out in art. 3135 of the *Civil Code of Québec*. Having regard to all the circumstances, however, Isabelle J. did not think a transfer of proceedings would be justified. The legislator bestowed on the trustee the power to manage the affairs of the bankrupt in the most practical and economical manner possible. Vancouver may be convenient for the appellant, but the interests of all the creditors prevailed over the convenience of only one creditor. Accordingly, the appellant's motion was dismissed.

B. *Quebec Court of Appeal*, [2000] R.J.Q. 392

14 A unanimous Court of Appeal dismissed Azco's appeal. Robert J.A., concurred in by Proulx and Rousseau-Houle JJ.A., agreed that the Quebec Superior Court had jurisdiction over Eagle's bankruptcy, noting that the company was carrying on business in Quebec when the bankruptcy proceedings were initiated. The petition against Azco was authorized by s. 30(1)(*d*) of the Act which empow-

compétence pour entendre la requête en recouvrement de biens présentée par l'intimée. Les dispositions pertinentes de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (la « Loi »), étaient claires et il n'y avait pas lieu d'invoquer le *Code civil du Québec*, L.Q. 1991, ch. 64, ni le *Code de procédure civile* du Québec, L.R.Q., ch. C-25.

Azco n'a pas prétendu que les affaires du failli pouvaient être administrées d'une manière plus efficace en Colombie-Britannique. Il a plutôt soutenu qu'il y avait d'autres motifs « suffisants » de renvoyer l'instance dans cette province, notamment certaines clauses du contrat (reproduites précédemment) qui, selon Azco, exigeaient que le litige soit tranché en Colombie-Britannique. Le juge Isabelle a conclu qu'il s'agissait de clauses portant sur le choix des lois applicables plutôt que de clauses d'élection de for et que, de toute manière, elles n'avaient aucun caractère « impératif ».

Le juge Isabelle a reconnu qu'il pouvait renvoyer l'instance à la Division des faillites de la Cour suprême de la Colombie-Britannique à Vancouver en vertu du par. 187(7) de la Loi. Il n'était pas nécessaire d'appliquer les règles particulières régissant les situations de *forum non conveniens* édictées par l'art. 3135 du *Code civil du Québec*. Compte tenu de l'ensemble des circonstances, toutefois, le juge Isabelle a estimé que le renvoi de l'instance n'était pas justifié. Le législateur a conféré au syndic le pouvoir de gérer les affaires du failli de la façon la plus pratique et la plus économique possible. Vancouver pouvait être commode pour l'appelante, mais l'intérêt de l'ensemble des créanciers l'emportait sur ce qui était commode pour un seul créancier. La requête de l'appelante a donc été rejetée.

B. *Cour d'appel du Québec*, [2000] R.J.Q. 392

La Cour d'appel a rejeté à l'unanimité l'appel de Azco. Le juge Robert, avec l'appui des juges Proulx et Rousseau-Houle, a confirmé que la Cour supérieure du Québec avait compétence sur la faillite de Eagle, soulignant que la société faisait affaire au Québec lorsque la procédure de faillite a été engagée. La requête en recouvrement de biens présentée contre Azco était autorisée par l'al. 30(1)*d*) de la

ers a trustee to bring legal proceedings relating to the property of the bankrupt with the permission of the inspectors.

Robert J.A. agreed with the motions judge that it would be most efficient and equitable to have a single court oversee the administration of the bankrupt estate despite the fact that a centralized bankruptcy might present certain difficulties and inconveniences for parties residing in provinces far from the bankruptcy forum. However, like Isabelle J., he noted that the courts retain some discretion under s. 187(7) to transfer a case to another division where there is proof that the bankrupt's estate would be administered more economically or where some other sufficient reason exists. In the present case, Robert J.A. found that Azco had not demonstrated it would be more economical to proceed before the bankruptcy court in British Columbia. As to other circumstances, Robert J.A. ruled that the contractual terms that Azco characterized as choice of forum clauses did not bind the trustee in bankruptcy, who represented and acted for the benefit of all creditors. The clauses in question were not exclusive jurisdiction clauses but even if they were, the Act is a law of public order and its provisions must be rigorously applied given the consequences for the rights of both debtors and creditors.

Loi, qui confère au syndic le pouvoir d'intenter une procédure judiciaire se rapportant aux biens du failli avec la permission des inspecteurs.

15 Le juge Robert a convenu avec le juge des requêtes qu'il était plus efficace et équitable qu'un seul tribunal supervise l'administration de l'actif du failli malgré le fait que cette centralisation pouvait causer certaines difficultés et certains inconvénients aux parties résidant dans des provinces éloignées du lieu de la faillite. Toutefois, à l'instar du juge Isabelle, il a souligné le caractère discrétionnaire du pouvoir que le par. 187(7) confère aux tribunaux de renvoyer une affaire à une autre division lorsque la preuve établit que l'actif du failli y serait administré d'une façon plus économique ou qu'un autre motif suffisant le justifie. En l'espèce, le juge Robert a conclu que Azco n'avait pas démontré qu'il serait plus économique de s'adresser au tribunal de faillite de la Colombie-Britannique. Quant aux autres circonstances, le juge Robert s'est dit d'avis que les dispositions contractuelles que Azco avait qualifiées de clauses d'élection de for ne liaient pas le syndic de faillite, qui représente l'ensemble des créanciers et qui agit dans leur intérêt collectif. Les clauses en question ne constituaient pas des clauses attribuant une compétence exclusive. Même si tel avait été le cas, la Loi est une loi d'ordre public et ses dispositions doivent être appliquées rigoureusement compte tenu de leurs conséquences sur les droits des débiteurs et des créanciers.

III. Relevant Statutory Provisions

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

2. (1) In this Act,

. . .

"locality of a debtor" means the principal place

(*a*) where the debtor has carried on business during the year immediately preceding his bankruptcy,

(*b*) where the debtor has resided during the year immediately preceding his bankruptcy, or

III. Les dispositions législatives pertinentes

16 *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

« localité d'un débiteur » Le lieu principal où, selon le cas :

a) le débiteur a exercé ses activités au cours de l'année précédant sa faillite;

b) le débiteur a résidé au cours de l'année précédant sa faillite;

(*c*) in cases not coming within paragraph (*a*) or (*b*), where the greater portion of the property of the debtor is situated;

30. (1) The trustee may, with the permission of the inspectors, do all or any of the following things:

. . .

(*d*) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

43. . . .

(5) The petition shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor.

72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

183. (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

. . .

(*b*) in the Province of Quebec, the Superior Court;

(*c*) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

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.

188. (1) An order made by the court under this Act shall be enforced in the courts having jurisdiction in

c) se trouve la plus grande partie des biens de ce débiteur, dans les cas non visés aux alinéas *a*) ou *b*).

30. (1) Avec la permission des inspecteurs, le syndic peut :

. . .

d) intenter ou contester toute action ou autre procédure judiciaire se rapportant aux biens du failli;

43. . . .

(5) La pétition est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

72. (1) La présente loi n'a pas pour effet d'abroger ou de remplacer les dispositions de droit substantif d'une autre loi ou règle de droit concernant la propriété et les droits civils, non incompatibles avec la présente loi, et le syndic est autorisé à se prévaloir de tous les droits et recours prévus par cette autre loi ou règle de droit, qui sont supplémentaires et additionnels aux droits et recours prévus par la présente loi.

183. (1) Les tribunaux suivants possèdent la compétence en droit et en équité qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :

. . .

b) dans la province de Québec, la Cour supérieure;

c) dans les provinces de la Nouvelle-Écosse et de la Colombie-Britannique, la Cour suprême;

187. . . .

(7) Sur preuve satisfaisante que les affaires du failli peuvent être administrées d'une manière plus économique dans un autre district ou dans une autre division de faillite, ou pour un autre motif suffisant, le tribunal peut, par ordonnance, renvoyer des procédures, que prévoit la présente loi et qui sont pendantes devant lui, à un autre district ou à une autre division de faillite.

188. (1) Une ordonnance rendue par le tribunal, sous le régime de la présente loi, est exécutée dans les

bankruptcy elsewhere in Canada in the same manner in all respects as if the order had been made by the court hereby required to enforce it.

(2) All courts and the officers of all courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of one 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 its jurisdiction.

Bankruptcy and Insolvency General Rules, C.R.C., c. 368 (am. SOR/98-240)

3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

Civil Code of Québec, S.Q. 1991, c. 64

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 country are in a better position to decide.

. . .

3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where

. . .

(5) the defendant submits to its jurisdiction.

However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

IV. Analysis

Parliament has conferred on the bankruptcy court the capacity and authority to exercise "original,

tribunaux ayant juridiction en matière de faillite ailleurs au Canada, de la même manière, à tous les égards, que si l'ordonnance avait été rendue par le tribunal tenu par les présentes de l'exécuter.

(2) Tous les tribunaux, ainsi que les fonctionnaires de ces tribunaux, doivent s'entraider et se faire les auxiliaires les uns des autres en toutes matières de faillite; une ordonnance d'un tribunal demandant de l'aide, accompagnée d'une requête à un autre tribunal, est censée suffisante pour permettre au dernier tribunal d'exercer, en ce qui concerne les affaires prescrites par l'ordonnance, la juridiction que le tribunal qui a présenté la requête ou le tribunal à qui la requête a été présentée, pourrait exercer relativement à des affaires semblables dans sa juridiction.

Règles générales sur la faillite et l'insolvabilité, C.R.C., ch. 368 (mod. DORS/98-240)

3. Dans les cas non prévus par la Loi ou les présentes règles, les tribunaux appliquent, dans les limites de leur compétence respective, leur procédure ordinaire dans la mesure où elle est compatible avec la Loi et les présentes règles.

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

3135. Bien qu'elle soit compétente pour connaître d'un litige, une autorité du Québec peut, exceptionnellement et à la demande d'une partie, décliner cette compétence si elle estime que les autorités d'un autre État sont mieux à même de trancher le litige.

. . .

3148. Dans les actions personnelles à caractère patrimonial, les autorités québécoises sont compétentes dans les cas suivants :

. . .

5° Le défendeur a reconnu leur compétence.

Cependant, les autorités québécoises ne sont pas compétentes lorsque les parties ont choisi, par convention, de soumettre les litiges nés ou à naître entre elles, à propos d'un rapport juridique déterminé, à une autorité étrangère ou à un arbitre, à moins que le défendeur n'ait reconnu la compétence des autorités québécoises.

IV. Analyse

Le Parlement a conféré au tribunal de faillite la capacité et le pouvoir d'exercer « la juridiction

auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act" (s. 183(1)). On the face of it, the intent of this provision is to confer on the bankruptcy court powers and duties co-extensive with Parliament's jurisdiction over "Bankruptcy" under s. 91(21) of the *Constitution Act, 1867* except insofar as that jurisdiction has been limited or specifically assigned elsewhere by Parliament itself.

18 While the appellant's motion simply asked that the dispute be transferred to the Vancouver Division of the Supreme Court of British Columbia sitting in Bankruptcy (thereby appearing to concede that the dispute is properly dealt with as a bankruptcy matter), its motion also contended that the trustee's claims are "exclusively contractual" (para. 6) and that the "Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco" (para. 20). Moreover, much of its oral argument suggested that the dispute ought to be tried in the ordinary civil courts. In addition the appellant takes the position that Quebec is not the convenient forum to deal with this dispute, and that the Quebec Superior Court sitting in Bankruptcy lacks a sufficiently long arm to require Azco to take its witnesses east to litigate. The proper forum, it says, is British Columbia because there is no substantial connection at all between this case and the Province of Quebec.

19 It is convenient to address the legal issues raised by the appellant in the following order:

1. Was the bankruptcy petition properly filed in the Hull Division of the Quebec Superior Court sitting in Bankruptcy?

2. If so, did that court thereby acquire jurisdiction to deal with matters affecting the bankrupt estate arising in British Columbia?

de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi » (par. 183(1)). Il est évident que cette disposition vise à conférer au tribunal de faillite les pouvoirs et les obligations correspondant à la compétence qui appartient au législateur fédéral en matière de « faillite » en vertu du par. 91(21) de la *Loi constitutionnelle de 1867*, sauf dans la mesure où le législateur a lui-même limité la compétence du tribunal ou l'a expressément attribuée autrement.

Bien que l'appelante ait demandé simplement dans sa requête que le litige soit renvoyé à la Division de Vancouver de la Cour suprême de la Colombie-Britannique siégeant en matière de faillite (semblant ainsi reconnaître que le litige était considéré à bon droit comme une affaire de faillite), elle a aussi allégué que les demandes du syndic étaient [TRADUCTION] « de nature exclusivement contractuelle » (par. 6) et que la [TRADUCTION] « Division des faillites de la Cour supérieure de Hull n'a pas compétence pour entendre la présente demande de nature contractuelle contre Azco » (par. 20). De plus, une bonne partie des arguments avancés oralement par l'appelante laissaient entendre que le litige devait être tranché par les tribunaux civils ordinaires. L'appelante soutient en outre que le Québec n'est pas le lieu où il convient que ce litige soit tranché et que la Cour supérieure du Québec siégeant en matière de faillite n'a pas le bras suffisamment long pour contraindre Azco à amener ses témoins dans l'Est pour débattre du litige. Elle prétend que le lieu approprié est la Colombie-Britannique, car il n'existerait absolument aucun lien important entre la présente affaire et la province de Québec.

Il convient d'examiner dans l'ordre suivant les questions de droit que l'appelante a soulevées :

1. La requête de mise en faillite a-t-elle été déposée à bon droit devant la Division de Hull de la Cour supérieure du Québec siégeant en matière de faillite?

2. Dans l'affirmative, cette cour a-t-elle ainsi acquis la compétence pour trancher les affaires touchant l'actif du failli qui ont pris naissance en Colombie-Britannique?

3. If so, are contract claims nevertheless excluded from federal bankruptcy jurisdiction?

4. If not, does this particular contract claim come within the bankruptcy court's jurisdiction?

5. Even if fully clothed with jurisdiction to hear this case, should the bankruptcy court in Hull nevertheless have transferred the file to the court exercising counterpart bankruptcy jurisdiction in Vancouver?

1. *Was the Bankruptcy Petition Properly Filed in the Hull Division of the Quebec Superior Court Sitting in Bankruptcy?*

Parliament decided to utilize the superior courts of the provinces and territories to exercise bankruptcy jurisdiction (s. 183). It has long been established that, with respect to matters coming within the enumerated heads of s. 91 of the *Constitution Act, 1867*, "the Parliament of Canada may give jurisdiction to provincial courts and regulate proceedings in such courts to the fullest extent": *Attorney-General for Alberta v. Atlas Lumber Co.*, [1941] S.C.R. 87, *per* Rinfret J., at p. 100. The courts mentioned in s. 183 retain their character as superior courts of inherent jurisdiction, but will be referred to here, perhaps with some imprecision of language, as the bankruptcy courts.

A creditor who wishes to obtain a receiving order against a debtor is required to file a bankruptcy petition "in the court having jurisdiction in the judicial district of the locality of the debtor" (s. 43(5)).

The "locality of the debtor" is defined under s. 2(1) as the "principal place"

> (*a*) where the debtor has carried on business during the year immediately preceding his bankruptcy,

3. Dans l'affirmative, les demandes de nature contractuelle échappent-elles néanmoins à la compétence fédérale en matière de faillite?

4. Dans la négative, cette demande contractuelle particulière relève-t-elle de la compétence du tribunal de faillite?

5. Même s'il avait pleine et entière compétence pour entendre la présente affaire, le tribunal de faillite de Hull aurait-il dû renvoyer le dossier au tribunal ayant la même compétence en matière de faillite à Vancouver?

1. *La requête de mise en faillite a-t-elle été déposée à bon droit devant la Division de Hull de la Cour supérieure du Québec siégeant en matière de faillite?*

20 Le Parlement a décidé d'utiliser les cours supérieures des provinces et des territoires pour exercer sa compétence en matière de faillite (art. 183). Il est établi depuis longtemps que, dans les domaines relevant des chefs de compétence énumérés à l'art. 91 de la *Loi constitutionnelle de 1867*, [TRADUCTION] « le Parlement du Canada peut donner compétence aux cours provinciales et réglementer au maximum les procédures devant ces cours » : *Attorney-General for Alberta c. Atlas Lumber Co.*, [1941] R.C.S. 87, le juge Rinfret, p. 100. Les cours mentionnées à l'art. 183 conservent leur statut de cour supérieure de compétence inhérente, mais je les appellerai ici tribunaux de faillite, quoique cette expression soit quelque peu imprécise.

21 Le créancier qui désire obtenir une ordonnance de séquestre contre un débiteur doit déposer une requête de mise en faillite « auprès du tribunal compétent dans le district judiciaire de la localité du débiteur » (par. 43(5)).

22 Le paragraphe 2(1) définit la « localité du débiteur » comme le « lieu principal » où, selon le cas :

> *a*) le débiteur a exercé ses activités au cours de l'année précédant sa faillite;

(*b*) where the debtor has resided during the year immediately preceding his bankruptcy, or

(*c*) in cases not coming within paragraph (*a*) or (*b*), where the greater portion of the property of the debtor is situated;

23 Section 43(5) expresses a rule of jurisdiction that apportions among the courts named in s. 183(1) judicial power over the adjudication of bankruptcy petitions. The evidence was that Eagle carried on business in Quebec even though it had not obtained a licence to do so. The agreements between Azco and Eagle (and the promissory notes on which Azco's counterclaim is based) recite that Eagle has an office at 212 Labrosse Boulevard, Gatineau, Quebec. The same address appears on its corporate letterhead. Azco's Vice-President of Finance testified that his meetings with respect to the financing were held at that office. There is no suggestion that Eagle vacated the premises prior to its bankruptcy, or that it had any other offices in Canada.

24 It appears that Eagle's only connection to British Columbia is that the agreements mentioned above refer to the law of that province. It is clear that s. 43(5) would not have permitted the filing of the bankruptcy petition in British Columbia on such a ground. Nothing in the evidence, in my view, suggests that the bankruptcy court in Hull lacked subject matter jurisdiction over the petition and personal jurisdiction over Eagle when it made the receiving order on September 12, 1997.

2. *Did the Bankruptcy Court Thereby Acquire Jurisdiction to Deal With Matters Affecting the Bankrupt Estate Arising in British Columbia?*

25 The Act establishes a nationwide scheme for the adjudication of bankruptcy claims. As Rinfret J. pointed out in *Boily v. McNulty*, [1928] S.C.R. 182, at p. 186: [TRANSLATION] "This is a federal statute that concerns the whole country, and it considers territory from that point of view". The national implementation of bankruptcy decisions rendered by a court within a particular province is achieved

b) le débiteur a résidé au cours de l'année précédant sa faillite;

c) se trouve la plus grande partie des biens de ce débiteur, dans les cas non visés aux alinéas *a*) ou *b*).

Le paragraphe 43(5) exprime une règle de compétence qui attribue à l'un ou l'autre des tribunaux nommés au par. 183(1) le pouvoir judiciaire de statuer sur les requêtes de mise en faillite. La preuve a permis de constater que Eagle faisait affaire au Québec, même si elle n'avait pas obtenu de permis le lui permettant. Les contrats entre Azco et Eagle (ainsi que les billets à ordre fondant la demande reconventionnelle de Azco) précisent que Eagle a un bureau au 212, boulevard Labrosse, à Gatineau (Québec). Cette adresse figure dans l'en-tête de son papier à lettres. Le vice-président aux Finances de Azco a témoigné que les rencontres relatives au financement ont été tenues à ce bureau. Rien ne laisse entendre que Eagle ait quitté les lieux avant sa faillite, ni qu'elle ait eu d'autres bureaux au Canada.

Le seul lien apparent entre Eagle et la Colombie-Britannique tient au fait que les contrats susmentionnés renvoient aux lois de cette province. Il est clair que le par. 43(5) n'aurait pas permis le dépôt de la requête de mise en faillite en Colombie-Britannique pour un tel motif. J'estime qu'aucun élément de la preuve ne laisse croire que le tribunal de faillite à Hull n'avait pas compétence *ratione materiae* sur la requête de mise en faillite et compétence *ratione personae* sur Eagle lorsqu'il a rendu l'ordonnance de séquestre le 12 septembre 1997.

2. *Le tribunal de faillite a-t-il ainsi acquis la compétence pour trancher les affaires touchant l'actif du failli qui ont pris naissance en Colombie-Britannique?*

La Loi établit un régime national de règlement des demandes en matière de faillite. Comme le juge Rinfret l'a souligné dans l'arrêt *Boily c. McNulty*, [1928] R.C.S. 182, p. 186 : « Il s'agit d'une loi fédérale qui concerne tout le pays, et elle envisage le territoire à ce point de vue ». C'est par l'intermédiaire du réseau d'entraide des cours supérieures des provinces et des territoires prévu par l'art.

through the cooperative network of superior courts of the provinces and territories under s. 188: *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240 (Que. C.A.), *per* Rivard J.A., at p. 246, [TRANSLATION] "The *Bankruptcy Act* is federal and the orders of the Quebec Superior Court sitting as a bankruptcy court under that Act are enforceable in Ontario". See also: *Associated Freezers of Canada Inc. (Trustee of) v. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311 (N.S.C.A.), at p. 314, and *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380 (C.A.), at p. 1389.

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". *Stewart* dealt with the winding up of a federally incorporated trust company in British Columbia. As a result of the winding up, a client in Prince Edward Island instituted a proceeding in the superior court of that province for a declaration that certain moneys held by the bankrupt trust company were held in trust and that the bankrupt trust company should be removed as trustee. This Court held that the dispute, despite its strong connection to Prince Edward Island, could not be brought before the court of that province without leave of the Supreme Court of British Columbia. Anglin J. commented at p. 349:

> No doubt some inconvenience will be involved in such exceptional cases as this where the winding-up of the company is conducted in a province of the Dominion far distant from that in which persons interested as creditors or claimants may reside. But Parliament probably thought it necessary in the interest of prudent and economical winding-up that the court charged with that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be

188 que les décisions rendues par un tribunal siégeant dans une province donnée sont exécutées à l'échelle nationale : *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240 (C.A. Qué.), le juge Rivard, p. 246 : « La *Loi de faillite* est fédérale, et les ordonnances de la Cour Supérieure de la province de Québec, siégeant en vertu de cette loi comme Cour de Faillite, sont exécutoires [en] Ontario ». Voir également : *Associated Freezers of Canada Inc. (Trustee of) c. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311 (C.A.N.-É.), p. 314, et *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380 (C.A.), p. 1389.

Les syndics auront souvent (et peut-être de plus en plus) à composer avec des débiteurs et des créanciers résidant dans différentes régions du pays. Ils ne pourront pas s'acquitter efficacement de leurs fonctions, pour reprendre les mots du juge Idington dans l'arrêt *Stewart c. LePage* (1916), 53 R.C.S. 337, p. 345, [TRADUCTION] « si tous peuvent s'interposer et invoquer leurs propres perceptions de leurs droits quant à la présentation d'une demande en justice ». L'arrêt *Stewart* portait sur la liquidation d'une société de fiducie constituée sous le régime des lois fédérales en Colombie-Britannique. Par suite de la liquidation, un client de l'Île-du-Prince-Édouard a présenté devant la Cour supérieure de cette province une demande de jugement déclaratoire portant que certains des fonds détenus par la société de fiducie faillie étaient détenus en fiducie et que cette société devait être déchue de sa qualité de fiduciaire. Notre Cour a conclu qu'en dépit de son lien très étroit avec l'Île-du-Prince-Édouard, le litige ne pouvait pas être soumis à la cour de cette province sans l'autorisation de la Cour suprême de la Colombie-Britannique. Le juge Anglin a fait remarquer, à la p. 349 :

> [TRADUCTION] Il ne fait pas de doute que des inconvénients surgiront dans les cas exceptionnels où, comme en l'espèce, la liquidation de la société a lieu dans une province du Dominion très éloignée de la province de résidence des personnes intéressées en qualité de créancières ou de demanderesses. Mais le législateur a probablement jugé nécessaire dans l'intérêt d'une liquidation prudente et économique que la cour chargée de la liquidation ait le contrôle non seulement de l'actif et des biens se trouvant en la possession de la société mise en

involved. The great balance of convenience is probably in favour of such single control though it may work hardship in some few cases.

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. Section 188(1) ensures that orders made by a bankruptcy court sitting in one province can and will be enforced across the country.

28 I have concluded that the jurisdiction of the Quebec Superior Court sitting in Bankruptcy was properly invoked by the petitioning creditors in this case but counsel for the appellant company says that his client, with its office in British Columbia, is not within its reach. The argument, in part, is that whatever the power of Parliament to confer national jurisdiction on a provincial superior court, that court is nevertheless provincially constituted, and for service of process its long arm statute must be complied with. The factual record does not show precisely how service of the trustee's petition was effected on the appellant, but if the appellant had any concerns regarding the proprieties of service of the petition to initiate proceedings against it, such concerns were waived when Azco did not raise them in its motion brought in Hull. A good deal of time was occupied on the appeal with arguments about how a Quebec court could acquire *in personam* jurisdiction over a corporation resident in British Columbia, and whether the Quebec rules for service *ex juris* applied. The argument that the Quebec Superior Court sitting in Bankruptcy cannot exercise *in personam* jurisdiction over creditors in another province under the Act is rejected for the reasons of national jurisdiction already mentioned. Any objections regarding service of process are answered by the fact that Azco not only appeared in Quebec but invoked the jurisdiction of the Quebec Superior Court sitting in Bankruptcy to transfer the proceedings pursuant to s. 187(7) of the Act to the bankruptcy court sitting in Vancouver. Any remain-

liquidation, mais aussi de l'ensemble des litiges dans lesquels cette société pourrait être engagée. De façon générale, la prépondérance des inconvénients milite probablement en faveur de ce genre de contrôle unique, bien qu'il puisse comporter des désavantages dans certains cas.

Comme je l'ai mentionné, l'arrêt *Stewart* portait sur la liquidation d'une société, mais la politique législative favorisant le « contrôle unique » s'applique également en matière de faillite. Il y va du même intérêt public à la gestion expéditive, efficace et économique des retombées d'un effondrement financier. Par application du par. 188(1), les ordonnances du tribunal de faillite siégeant dans une province sont exécutoires et exécutées partout au pays.

J'ai conclu que les créanciers qui ont demandé la mise en faillite ont fait appel à bon droit à la compétence de la Cour supérieure du Québec siégeant en matière de faillite, mais l'avocat de l'appelante affirme que sa cliente, qui a un bureau en Colombie-Britannique, échappe à la compétence de cette cour. Il plaide, notamment que, quel que soit le pouvoir du Parlement de conférer une compétence nationale à la cour supérieure d'une province, il demeure que cette cour est constituée par la province et que la loi grâce à laquelle elle a le bras long doit être respectée en ce qui concerne la signification des actes de procédure. Les faits révélés par le dossier n'indiquent pas précisément de quelle manière la requête en recouvrement présentée par le syndic a été signifiée à l'appelante, mais si Azco avait des arguments à faire valoir relativement à la validité de la signification de cette requête introductive d'une instance contre elle, elle y a renoncé en ne les soulevant pas dans la requête qu'elle a présentée à Hull. En appel, une bonne partie de l'audience a été consacrée aux arguments portant sur la question de savoir comment un tribunal québécois pouvait acquérir la compétence *ratione personae* sur une société située en Colombie-Britannique et si les règles québécoises de signification *ex juris* s'appliquaient. Je rejette la prétention selon laquelle la Cour supérieure du Québec siégeant en matière de faillite ne peut exercer la compétence *ratione personae* sur les créanciers d'une autre province en vertu de la Loi, et ce pour les motifs déjà exposés qui tiennent à la compétence nationale de la cour. Aucune objection

ing issue with respect to *in personam* jurisdiction was thereby waived.

Azco did not, of course, waive its objection to jurisdiction over the subject matter of this particular dispute. That was a major point in its motion. I turn now to that issue.

3. *Are Contract Claims Nevertheless Excluded From Federal Bankruptcy Jurisdiction?*

The appellant's motion, as stated, argued that the trustee's claims against it are "exclusively contractual in nature" (para. 6) and that "[t]he Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco" (para. 20). The theory underlying these contentions seems to be that contract claims relate to "Property and Civil Rights" within the meaning of s. 92(13) of the *Constitution Act, 1867* and on that account lie outside the jurisdiction of the bankruptcy court. At para. 42 of its factum, for example, the appellant argues:

[TRANSLATION] Contrary to what the Court of Appeal affirms, the trustee's claim is therefore purely contractual in nature, under the civil law. It is not a remedy specifically provided for under the BIA such as the application to have preferential payments declared void (see sections 91 to 100 BIA). The mere fact that the plaintiff is a trustee does not alter the nature of the claim and does not turn it into a bankruptcy dispute.

Most bankruptcy issues, of course, present a property and civil rights aspect. It is true, however, that some of the decided cases which deny jurisdiction to the bankruptcy court do so on grounds that have a constitutional flavour, e.g., *In re Morris Lofsky* (1947), 28 C.B.R. 164 (Ont. C.A.), *per*

liée à la signification des actes de procédure ne saurait subsister, étant donné que Azco a non seulement comparu au Québec, mais aussi invoqué la compétence de la Cour supérieure du Québec siégeant en matière de faillite en lui demandant de renvoyer l'instance au tribunal de faillite siégeant à Vancouver par application du par. 187(7). Elle a ainsi renoncé à soulever toute question irrésolue concernant la compétence *ratione personae*.

Bien entendu, Azco n'a pas renoncé à contester la compétence *ratione materiae* sur l'objet du présent litige. Il s'agissait d'un élément prépondérant de sa requête. J'aborderai maintenant cette question.

3. *Les demandes de nature contractuelle échappent-elles néanmoins à la compétence fédérale en matière de faillite?*

Dans sa requête, l'appelante a prétendu que les demandes du syndic contre elle étaient [TRADUCTION] « de nature exclusivement contractuelle » (par. 6) et que la [TRADUCTION] « Division des faillites de la Cour supérieure de Hull n'a pas compétence pour entendre la présente demande de nature contractuelle contre Azco » (par. 20). La théorie qui sous-tend ces arguments est apparemment la suivante : comme les demandes contractuelles ont trait à « [l]a propriété et [aux] droits civils » au sens du par. 92(13) de la *Loi constitutionnelle de 1867*, ces actions en justice ne relèvent pas de la compétence du tribunal de faillite. Au paragraphe 42 de son mémoire, par exemple, l'appelante soutient que :

Contrairement à ce qu'affirme la Cour d'appel, le recours du syndic est donc une affaire purement contractuelle, de droit civil. Il ne s'agit pas d'un recours spécifiquement prévu par la LFI tel le recours en annulation de paiement préférentiel (voir articles 91 à 100 LFI). Le simple fait que le demandeur soit un syndic ne change pas la nature du recours et n'en fait pas un litige en matière de faillite.

Bien entendu, la plupart des questions liées à la faillite concernent de près ou de loin la propriété et les droits civils. Il est cependant vrai que certains des arrêts qui nient la compétence du tribunal de faillite s'appuient sur des motifs à connotation constitutionnelle, p. ex., *In re Morris Lofsky* (1947), 28 C.B.R.

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Roach J.A., at p. 167; *Sigurdson v. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75 (B.C.C.A.), at p. 102; *Re Holley* (1986), 54 O.R. (2d) 225 (C.A.); *In re Ireland* (1962), 5 C.B.R. (N.S.) 91 (Que. Sup. Ct.), *per* Bernier J., at p. 94, and *Falvo Enterprises Ltd. v. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336 (H.C.).

32 It is therefore necessary to come to an understanding of what is included in the subject matter of "Bankruptcy" within the meaning of s. 91(21) of the *Constitution Act, 1867*.

33 In *In re The Moratorium Act (Sask.)*, [1956] S.C.R. 31, it was stated by Rand J., at p. 46, that:

> Bankruptcy is a well understood procedure by which an insolvent debtor's property is coercively brought under a judicial administration in the interests primarily of the creditors.

34 The core concept of coercive administration appeared early in our bankruptcy jurisprudence. In *Union St. Jacques de Montreal v. Bélisle* (1874), L.R. 6 P.C. 31, Lord Selborne, speaking at p. 36 of general laws governing bankruptcy and insolvency, said: "The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation".

35 More helpful still was Lord Selborne L.C.'s description of bankruptcy in the context of the English Act in *Ellis v. Silber* (1872), L.R. 8 Ch. App. 83, at p. 86:

> That which is to be done in bankruptcy is the administration in bankruptcy. The debtor and the creditors, as the parties to the administration in bankruptcy, are subject to that jurisdiction. The trustees or assignees, as the persons intrusted with that administration, are subject to that jurisdiction. The assets which come to their hands and the mode of administering them are subject to that jurisdiction; and there may be, and I believe are, some special classes of transactions which, under special

164 (C.A. Ont.), le juge Roach, p. 167; *Sigurdson c. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75 (C.A.C.-B.), p. 102; *Re Holley* (1986), 54 O.R. (2d) 225 (C.A.); *In re Ireland* (1962), 5 C.B.R. (N.S.) 91 (C.S. Qué.), le juge Bernier, p. 94, et *Falvo Enterprises Ltd. c. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336 (H.C.).

Il faut donc se demander ce qu'englobe le terme « faillite » au sens du par. 91(21) de la *Loi constitutionnelle de 1867*.

Dans l'arrêt *In re The Moratorium Act (Sask.)*, [1956] R.C.S. 31, p. 46, le juge Rand a déclaré ce qui suit :

> [TRADUCTION] La faillite est une procédure bien connue par laquelle les biens d'un débiteur insolvable passent de façon coercitive sous administration judiciaire principalement dans l'intérêt des créanciers.

Ce concept-clé d'administration coercitive est apparu dès les premiers arrêts de notre jurisprudence en matière de faillite. Dans l'arrêt *Union St. Jacques de Montreal c. Bélisle* (1874), L.R. 6 P.C. 31, le lord Selborne a dit ce qui suit à la p. 36, en parlant des lois de portée générale régissant la faillite et l'insolvabilité : [TRADUCTION] « Les mots décrivent dans leur sens juridique connu les dispositions légales portant sur l'administration des biens des faillis et des personnes insolvables, conformément aux règles et aux définitions prescrites par la loi, y compris, bien sûr, les conditions d'application de la loi, sa procédure d'application et l'effet de son application ».

La description que lord chancelier Selborne a donnée de la faillite dans le contexte de la loi anglaise dans l'arrêt *Ellis c. Silber* (1872), L.R. 8 Ch. App. 83, p. 86, est encore plus utile :

> [TRADUCTION] Ce qu'il y a à faire en cas de faillite, c'est l'administration de la faillite. Le débiteur et les créanciers, en qualité de parties à l'administration de la faillite, sont assujettis à cette juridiction. Les syndics ou les cessionnaires, en qualité de personnes chargées de l'administration, sont assujettis à cette juridiction. Les éléments d'actif qui leur sont remis et leur mode d'administration sont assujettis à cette juridiction; et il peut exister, comme je le crois, des catégories particulières

clauses of the Acts of Parliament, may be specially dealt with as regards third parties. But the general proposition, that whenever the assignees or trustees in bankruptcy or the trustees under such deeds as these have a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy, appears to me to be a proposition entirely without the warrant of anything in the Acts of Parliament, and wholly unsupported by any trace or vestige whatever of authority. [Emphasis added.]

Despite the fact that England is a unitary state without the constitutional limitations imposed by our division of powers, the courts in Canada have generally hewn ever since 1874 to the basic dividing line between disputes related to the administration of the bankrupt estate and disputes with "strangers to the bankruptcy". The principle is that if the dispute relates to a matter that is outside even a generous interpretation of the administration of the bankruptcy, or if the remedy is not one contemplated by the Act, the trustee must seek relief in the ordinary civil courts. Thus in the Quebec case of *Re Ireland*, *supra*, the trustee brought proceedings to determine who had the right to proceeds of insurance policies taken out by the trustee on properties of the bankrupt estate. Bernier J. concluded that the Quebec Superior Court sitting in Bankruptcy lacked jurisdiction over the subject matter of the dispute. The controversy raised purely civil law questions and nothing in the Act conferred on the bankruptcy court a special jurisdiction to entertain these matters. Similar arguments prevailed in *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) v. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19 (Que. C.A.); *In re Martin* (1953), 33 C.B.R. 163 (Ont. S.C.), at p. 169; *In re Reynolds* (1928), 10 C.B.R. 127 (Ont. S.C.), at p. 131; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143 (Ont. S.C.); *Mancini (Trustee of) v. Falconi* (1987), 65 C.B.R. 246 (Ont. S.C.), and *Re Morris Lofsky*, *supra*, at p. 169.

The Quebec Court of Appeal has perhaps led the argument for a more expansive interpretation of what disputes properly come under the bankruptcy umbrella and can therefore properly be litigated in

d'opérations qui, en vertu de disposition législatives particulières, reçoivent un traitement particulier en ce qui a trait aux tiers. Mais la proposition générale selon laquelle c'est la Cour des faillites qui doit entendre les demandes que peuvent faire valoir en common law ou en equity, contre un étranger à la faillite, les cessionnaires ou syndics de faillite, ou les fiduciaires ainsi nommés par acte formaliste, me paraît dénuée de tout fondement légal et de toute trace de fondement jurisprudentiel. [Je souligne.]

Malgré le fait que l'Angleterre soit un État unitaire libre des restrictions constitutionnelles qu'impose notre partage des compétences, les tribunaux canadiens adhèrent généralement depuis 1874 à la division fondamentale entre les litiges liés à l'administration de l'actif du failli et les litiges impliquant des « étrangers à la faillite ». Le principe veut que si le litige a trait à une matière que même une interprétation généreuse de l'administration d'une faillite ne peut englober ou si la Loi ne prévoit pas la réparation visée, le syndic doit demander réparation aux tribunaux civils ordinaires. Ainsi, dans l'affaire québécoise *Re Ireland*, précitée, le syndic avait intenté une procédure pour faire décider qui avait droit au produit des polices d'assurance qu'il avait souscrites relativement à des biens faisant partie de l'actif du failli. Le juge Bernier a conclu que la Cour supérieure du Québec siégeant en matière de faillite n'avait pas compétence quant à l'objet du litige. Ce dernier soulevait purement des questions de droit civil et aucune disposition de la Loi ne conférait au tribunal de faillite une compétence spéciale lui permettant de trancher ces questions. Les tribunaux ont retenu des arguments similaires dans les décisions *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) c. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19 (C.A. Qué.); *In re Martin* (1953), 33 C.B.R. 163 (C.S. Ont.), p. 169; *In re Reynolds* (1928), 10 C.B.R. 127 (C.S. Ont.), p. 131; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143 (C.S. Ont.); *Mancini (Trustee of) c. Falconi* (1987), 65 C.B.R. 246 (C.S. Ont.), et *Re Morris Lofsky*, précitée, p. 169.

La Cour d'appel du Québec a peut-être pavé la voie à une interprétation plus large de ce qui constitue un litige relevant du droit de la faillite et ressortissant donc au tribunal de faillite : *Geof-*

the bankruptcy court: *Geoffrion v. Barnett*, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*, [1990] R.J.Q. 6; and *Excavations Sanoduc inc. v. Morency*, [1991] R.D.J. 423. See also the dissenting judgment of LeBel J.A., as he then was, in *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée*, *supra*, and *In re Atlas Lumber Co. v. Grier and Sons Ltd.* (1922), 3 C.B.R. 226 (Que. Sup. Ct.); but the push is not confined to Quebec: *In re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23 (N.S.S.C.); *Re Westam Developments Ltd.* (1967), 10 C.B.R. (N.S.) 61 (B.C.C.A.), at p. 65; *Re M. B. Greer & Co.* (1953), 33 C.B.R. 69 (Ont. S.C.), at p. 70; *Re M.P. Industrial Mills Ltd.* (1972), 17 C.B.R. 226 (Man. Q.B.).

38 It seems to me that the decided cases recognize that the word "Bankruptcy" in s. 91(21) of the *Constitution Act, 1867* must be given a broad scope if it is to accomplish its purpose. Anything less would unnecessarily complicate and undermine the economical and expeditious winding up of the bankrupt's affairs. Creation of a national jurisdiction in bankruptcy would be of little utility if its exercise were continually frustrated by a pinched and narrow construction of the constitutional head of power. The broad scope of authority conferred on Parliament has been passed along to the bankruptcy court in s. 183(1) of the Act, which confers a correspondingly broad jurisdiction.

39 There are limits, of course. If the trustee's claim is in relation to a stranger to the bankruptcy, i.e. "persons or matters outside of [the] Act" (*Re Reynolds*, *supra*, at p. 129) or lacks the "complexion of a matter in bankruptcy" (*Re Morris Lofsky*, *supra*, at p. 169) it should be brought in the ordinary civil courts and not the bankruptcy court. However, claims for specific property may clearly be advanced in the bankruptcy courts (*Re Galaxy Interiors*, *supra*, and *Sigurdson*, *supra*), as can claims for relief specifically granted by the Act (*Re Ireland*, *supra*, and *Re Atlas Lumber*, *supra*). That said, it is sometimes difficult to discern the particular "golden thread" running through the cases. L. W. Houlden and G. B. Morawetz observe:

frion c. Barnett, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*, [1990] R.J.Q. 6; et *Excavations Sanoduc inc. c. Morency*, [1991] R.D.J. 423. Voir aussi les motifs dissidents du juge LeBel, maintenant juge de notre Cour, dans l'arrêt *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée*, précité, et *In re Atlas Lumber Co. c. Grier and Sons Ltd.* (1922), 3 C.B.R. 226 (C.S. Qué.), mais cette tendance ne se manifeste pas uniquement au Québec : *In re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23 (C.S.N.-É.); *Re Westam Developments Ltd.* (1967), 10 C.B.R. (N.S.) 61 (C.A.C.-B.), p. 65; *Re M. B. Greer & Co.* (1953), 33 C.B.R. 69 (C.S. Ont.), p. 70; *Re M.P. Industrial Mills Ltd.* (1972), 17 C.B.R. 226 (B.R. Man.).

La jurisprudence semble reconnaître que le mot « faillite » figurant au par. 91(21) de la *Loi constitutionnelle de 1867* doit être interprété de façon large pour réaliser son objet. Une interprétation moins libérale compliquerait et entraverait inutilement la liquidation économique et expéditive de l'actif du failli. L'établissement d'une compétence nationale en matière de faillite se révélerait inutile si une interprétation étroite et restrictive de cette compétence constitutionnelle en entravait continuellement l'exercice. Par l'adoption du par. 183(1) de la Loi, le législateur fédéral a transmis au tribunal de faillite une vaste compétence équivalente à celle qu'il a reçue.

Il y a évidemment des limites. Si la demande du syndic est dirigée contre un étranger à la faillite, c.-à-d. [TRADUCTION] « des personnes ou des questions ne relevant pas de [la] Loi » (*Re Reynolds*, précité, p. 129), ou si elle n'est pas de la [TRADUCTION] « nature d'une affaire de faillite » (*Re Morris Lofsky*, précité, p. 169), elle doit être présentée aux tribunaux civils ordinaires, et non au tribunal de faillite. En revanche, on peut manifestement saisir le tribunal de faillite d'une demande de recouvrement d'un bien particulier (*Re Galaxy Interiors*, précité, et *Sigurdson*, précité) tout comme d'une demande sollicitant une réparation prévue par la Loi (*Re Ireland*, précité, et *Re Atlas Lumber*, précité). Cela dit, il est parfois difficile de percevoir le « fil d'or » particulier qui lie les décisions. L. W. Houlden et G. B. Morawetz font remarquer que :

There has been a great deal of litigation on this issue, and the cases are not always easy to reconcile. The difficulty flows from the division of constitutional powers in Canada, bankruptcy and insolvency being a federal power, and property and civil rights and the administration of justice being provincial powers.

(*Bankruptcy and Insolvency Law of Canada* (3rd ed. (looseleaf)), at I§4)

The short answer to the "property and civil rights" argument, however, is that the appellant poses the wrong question. The issue is whether the contractual dispute between it and the respondent trustee properly relates to the bankruptcy. If so, the fact it also has a property and civil rights aspect does not in any way impair the bankruptcy court's jurisdiction.

4. *Does This Particular Contract Claim Come Within the Bankruptcy Court's Jurisdiction?*

In this case, the respondent trustee, with the permission of the inspectors, is instituting a "legal proceeding" in the bankruptcy court under s. 30(1)(*d*) "relating to the property of the bankrupt". In addition to the Azco and Sanou shares, the trustee says the definition of "property" in s. 2 includes "things in action" which, it is argued, includes the trustee's monetary claims.

As to the shares and warrants, the trustee alleges in para. 108 of its petition that Azco is "acknowledged to be the nominal owner of 100% of Sanou Mining Corporation" which owns West African Gold & Exploration S.A., which in turn runs the mining concessions in Mali. The allegation, in effect, is that Azco holds the Sanou shares and warrants that rightfully belong to the bankrupt estate and is in a position to transfer them to the trustee if required to do so by the bankruptcy court.

As discussed above, it cannot plausibly be argued that the bankruptcy court lacks subject matter jurisdiction over the dispute because it is a contract case. The objection, more narrowly

[TRADUCTION] Il y a eu de nombreux litiges sur cette question et il n'est pas toujours facile de concilier les décisions. La difficulté découle du partage des compétences constitutionnelles au Canada, la faillite et l'insolvabilité étant de compétence fédérale et la propriété et les droits civils ainsi que l'administration de la justice étant de compétence provinciale.

(*Bankruptcy and Insolvency Law of Canada* (3e éd. (feuilles mobiles)), I§4)

En bref, toutefois, la réponse à l'argument fondé sur « la propriété et les droits civils » est que l'appelante pose la mauvaise question. La question est de savoir si le litige contractuel entre l'appelante et le syndic intimé se rapporte bel et bien à la faillite. Dans l'affirmative, le fait que ce litige comporte également un aspect touchant la propriété et les droits civils n'écarte aucunement la compétence du tribunal de faillite.

4. *Cette demande contractuelle particulière relève-t-elle de la compétence du tribunal de faillite?*

En l'espèce, le syndic intimé a intenté, avec la permission des inspecteurs, une « procédure judiciaire se rapportant aux biens du failli » devant le tribunal de faillite en vertu de l'al. 30(1)*d*). Le syndic prétend que, outre les actions de Azco et de Sanou, la définition de « biens » figurant à l'art. 2 inclut les « droits incorporels », ce qui, selon lui, englobe ses demandes pécuniaires.

Quant aux actions et aux bons de souscription, le syndic allègue au par. 108 de sa requête que Azco est [TRADUCTION] « reconnue comme la propriétaire nominale de 100 % de Sanou Mining Corporation », qui est propriétaire de West African Gold & Exploration S.A., laquelle exploite les concessions minières au Mali. En fait, le syndic prétend que Azco détient les actions et les bons de souscription de Sanou qui font partie à bon droit de l'actif du failli et que Azco est en mesure de les lui transférer si le tribunal de faillite l'exige.

Comme je l'ai mentionné, on ne peut pas sérieusement prétendre que le tribunal de faillite n'a pas compétence sur l'objet du litige parce qu'il s'agit d'une affaire contractuelle. De façon plus étroite,

defined, is whether the bankruptcy court lacks jurisdiction because (i) the appellant is properly considered a "stranger to the bankruptcy", or (ii) the bankruptcy court cannot award the remedy which the trustee seeks.

(i) Is the Appellant a "Stranger to the Bankruptcy"?

44 If a potential defendant is a "stranger" to the bankruptcy, the bankruptcy court may have no subject matter jurisdiction over the dispute (because it is not part of the bankruptcy) even though the "stranger" resides within the territorial jurisdiction of the court.

45 At the time of the trustee's petition, the appellant had filed no proof of claim in the bankruptcy. It seems to have adopted a "come and get me approach", that is to say, it would file a claim only if claimed against by the trustee. Eventually the trustee *did* claim against it by way of the January 18, 1999 petition and the appellant *did* give notice of its counterclaim in its February 24, 1999 motion, including the fact it held promissory notes for US$3,844,858 signed by the bankrupt, payable on demand, constituting potential obligations now inherited by the trustee.

46 In a decision released concurrently, *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90, we uphold a decision of the Federal Court of Canada to dispose of the claims of maritime lienholders against a ship whose owner was adjudged bankrupt after the ship was arrested but before the *in rem* action had proceeded to judgment. We concluded that the Federal Court did not lose subject matter jurisdiction by virtue of the subsequent bankruptcy of the shipowner. We held that the Federal Court *could* have stayed its proceedings in deference to the bankruptcy court but was not, in the circumstances, obliged to do so.

la question est de savoir si le tribunal de faillite n'a pas compétence (i) parce que l'appelante est à juste titre considérée comme une « étrangère à la faillite » ou (ii) parce que le tribunal de faillite ne peut pas accorder la réparation que le syndic sollicite.

(i) L'appelante est-elle une « étrangère à la faillite »?

Si un défendeur potentiel est un « étranger » à la faillite, il se peut que le tribunal de faillite n'ait pas compétence sur l'objet du litige (parce que celui-ci ne fait pas partie de la faillite) même si l'« étranger » réside dans le ressort du tribunal.

Au moment de la requête en recouvrement présentée par le syndic, l'appelante n'avait déposé aucune preuve de réclamation dans le cadre de la faillite. Elle semble avoir adopté une « attitude attentiste », c'est-à-dire qu'elle entendait déposer une réclamation seulement si le syndic déposait une demande contre elle. Le syndic *a* finalement *déposé* une demande contre elle, dans sa requête en recouvrement du 18 janvier 1999, et l'appelante lui *a donné avis* de sa demande reconventionnelle dans sa requête du 24 février 1999, et notamment du fait qu'elle détenait des billets à ordre d'une valeur de 3 844 858 $US signés par le failli et payables sur demande, lesquels constituaient des obligations éventuelles dont le syndic avait hérité.

Dans l'arrêt *Holt Cargo Systems Inc. c. ABC Containerline N.V. (Syndics de)*, [2001] 3 R.C.S. 907, 2001 CSC 90, rendu simultanément, nous avons confirmé la décision de la Cour fédérale du Canada de statuer sur les demandes des titulaires de privilèges maritimes grevant un navire dont le propriétaire avait été déclaré failli après la saisie du navire, mais avant qu'il soit statué sur l'action réelle. Nous avons conclu que la Cour fédérale n'avait pas perdu compétence sur l'objet du litige à la suite de la faillite du propriétaire du navire. Nous avons statué que la Cour fédérale *aurait pu* surseoir à l'instance par déférence envers le tribunal de faillite, mais qu'elle n'était pas obligée d'y surseoir dans les circonstances.

The issue here is somewhat different. The appellant is resisting a claim by the trustee in bankruptcy and threatening to bring a counterclaim against the bankrupt estate based on the same set of commercial agreements. The appellant sought only to have the proceedings transferred to a different division of the bankruptcy court within Canada.

In *Re Morris Lofsky*, *supra*, the Ontario Court of Appeal dealt with a case where the trustee sought a declaration that the transfer of an automobile from the bankrupt to his wife was fraudulent and void as against the trustee and that it formed part of the property of the bankrupt. The wife resisted the claim on the ground that the automobile never belonged to the bankrupt (even though it was registered in his name). Roach J.A., at p. 169, found the wife was a stranger to the bankruptcy:

> In my opinion, it must be concluded that the issue between the trustee and the appellant is not a matter in bankruptcy and that it is purely a matter of property and civil rights. It has none of the elements that would bring it within the former. No question as between debtor and creditor here arises in the distribution of a bankrupt estate. The appellant does not claim title to the automobile through the bankrupt. Indeed she says that the bankrupt never had title and that she was always the owner. I cannot think of any aspect of the issue that gives it the complexion of a matter in bankruptcy unless perhaps this, that the bankrupt pending the bankruptcy caused the new motor vehicle permit to be issued in her name. That does not make the issue one in bankruptcy when the sole question is who, as between the bankrupt and the appellant, was always the true owner.

See also *Re Reynolds*, *supra*, at p. 131.

On the record before us, however, the appellant takes the position that it is the largest creditor of the bankrupt estate and that it will "with certainty" counterclaim in answer to the trustee's petition. The trustee, for its part, regards the appellant as the biggest debtor of the bankrupt estate. Far from being a "stranger" to the bankruptcy, Azco is potentially the

47 La question en litige en l'espèce est quelque peu différente. L'appelante conteste une demande du syndic de faillite et menace de présenter contre l'actif du failli une demande reconventionnelle fondée sur la même série de contrats commerciaux. L'appelante a sollicité uniquement le renvoi de l'instance à une autre division du tribunal de faillite au Canada.

48 Dans l'arrêt *Re Morris Lofsky*, précité, la Cour d'appel de l'Ontario s'est penchée sur une affaire dans laquelle le syndic avait sollicité un jugement déclaratoire portant que la cession d'une automobile du failli à son épouse était frauduleuse et inopposable au syndic et que cette automobile faisait partie des biens du failli. L'épouse a contesté la demande en faisant valoir que l'automobile n'avait jamais appartenu au failli (même si elle était immatriculée au nom de ce dernier). À la page 169, le juge Roach a conclu que l'épouse était une étrangère à la faillite :

> [TRADUCTION] J'estime qu'on doit conclure que la question en litige entre le syndic et l'appelante n'est pas une affaire de faillite, mais bien une pure affaire de propriété et de droits civils. Elle ne comporte aucun élément susceptible d'en faire une affaire de faillite. Elle ne soulève aucune question opposant débiteur et créancier dans la répartition de l'actif du failli. L'appelante ne revendique pas le titre de l'automobile par l'entremise du failli. En effet, elle affirme que le failli n'a jamais détenu le titre et qu'elle en a toujours été la propriétaire. Je ne peux voir aucun aspect de la question qui lui conférerait la nature d'une affaire de faillite sauf, peut-être, le fait que le failli a fait immatriculer le véhicule au nom de l'appelante au cours de la faillite. Cette immatriculation ne transforme pas la question en affaire de faillite, la seule question se posant étant de savoir qui, du failli ou de l'appelante, a toujours été le véritable propriétaire.

Voir également l'arrêt *Re Reynolds*, précité, p. 131.

49 Dans le dossier qui nous est soumis, toutefois, l'appelante plaide qu'elle est la créancière la plus importante de l'actif du failli et qu'elle déposera « assurément » une demande reconventionnelle en réponse à la requête du syndic. Pour sa part, le syndic considère l'appelante comme la débitrice la plus importante de l'actif du failli. Loin d'être une

most significant player in the role of either creditor or debtor, as the case may be.

(ii) Does the Bankruptcy Court Have Jurisdiction to Grant the Remedy Sought by the Trustee?

50 It is well established that the bankruptcy court does not have the general jurisdiction of a civil court to award damages in breach of contract cases. It is restricted to the jurisdiction and remedies contemplated by the Act. In *Sigurdson*, *supra*, the trustee in bankruptcy sued two former directors of the bankrupt for fraud in the Supreme Court of British Columbia. During the course of its reasons on another point, the Court of Appeal remarked that if the trustee had sued in the bankruptcy court "he would have been in the wrong court" as "[h]e must use the ordinary civil courts to sue for damages" (p. 102). See also *Re Ireland*, *supra*.

51 In my view, however, the trustee's claim here is not properly characterized as a simple claim in damages, even though the trustee has attempted to place a monetary value on the shares which it says belong to the bankrupt estate but which the appellant, it says, wrongfully withholds. I do not think the bankruptcy court is precluded from considering an order that substitutes money for the claimed property in circumstances where the claimed property cannot be delivered up. The bulk of the trustee's claim, it will be recalled, is for 125,000 shares of Azco itself, plus 3.5 million shares of Sanou and 4 million warrants of Sanou, which the trustee says is wholly controlled by the appellant. The trustee's petition states in para. 65:

The Debtor/Company is also entitled to receive 3,500,000 shares of Sanou and 4,000,000 warrants of said Sanou, as per the terms of the Agreement, the whole as it has been acknowledged by the Respondent itself in their annual report to United States Securities and Exchange commission for the fiscal year ending June 30, 1997, filed as Exhibit R-24;

« étrangère » à la faillite, Azco en est potentiellement le joueur le plus important, que ce soit en qualité de créancière ou de débitrice.

(ii) Le tribunal de faillite a-t-il compétence pour accorder la réparation sollicitée par le syndic?

Il est bien établi que le tribunal de faillite ne possède pas la compétence générale d'un tribunal civil pour accorder des dommages-intérêts à la suite de la rupture d'un contrat. Sa compétence et son pouvoir de réparation se limitent à ce que prévoit la Loi. Dans *Sigurdson*, précité, le syndic de faillite avait poursuivi deux anciens administrateurs du failli pour fraude devant la Cour suprême de la Colombie-Britannique. Dans une partie de ses motifs portant sur un autre point, la Cour d'appel a fait remarquer que si le syndic avait intenté sa poursuite devant le tribunal de faillite, [TRADUCTION] « il se serait trouvé devant le mauvais tribunal » car « [i]l doit s'adresser aux tribunaux civils ordinaires pour engager une poursuite en dommages-intérêts » (p. 102). Voir également *Re Ireland*, précité.

Je suis toutefois d'avis qu'on ne peut pas, en l'espèce, qualifier la demande du syndic de simple demande en dommages-intérêts, même s'il a tenté de déterminer la valeur pécuniaire des actions qui, selon lui, reviennent à l'actif du failli et que l'appelante retient sans droit. Je ne pense pas qu'il soit interdit au tribunal de faillite d'envisager une ordonnance dans laquelle de l'argent serait substitué au bien revendiqué, lorsque celui-ci ne peut être remis. Il faut rappeler que le syndic réclame essentiellement 125 000 actions de Azco même, plus 3,5 millions d'actions et 4 millions de bons de souscription de Sanou, qu'il prétend contrôlée entièrement par l'appelante. La requête du syndic dit ce qui suit, au par. 65 :

[TRADUCTION] La société débitrice a également droit aux 3 500 000 actions et aux 4 000 000 bons de souscription de Sanou, conformément au contrat, comme l'a reconnu l'intimée elle-même dans son rapport annuel destiné à la *Securities and Exchange Commission* des États-Unis pour l'exercice financier se terminant le 30 juin 1997, déposé comme pièce R-24;

As to the Azco shares, the trustee states in para. 101 of its petition that it claims "125,000 shares of Azco Mining Corporation which had a value at 2.70$ Cdn dollars per share".

Equally significantly, the appellant acknowledges that the gist of the action against it is the delivery up of the shares. It says at para. 25 of its factum:

[TRANSLATION] It seems that the trustee's claim is a real action rather than a personal one since the trustee is primarily seeking the rights to 125,000 shares of Azco and 3,500,000 shares and 4,000,000 warrants of Sanou (see in particular paragraphs 95, 98, 99 and 102 of the trustee's petition).

The parties therefore seem to agree, despite some obfuscating language in the trustee's petition, that the bulk of the trustee's claim is properly characterized as a claim to specific property of the bankrupt which is being wrongfully withheld by the appellant. As such, the trustee is entitled to claim the shares and warrants (s. 17(1)) and, with the permission of the inspectors (which it obtained) to bring a legal proceeding in relation thereto in the bankruptcy court (s. 30(1)(*d*)). The trustee, relying on these statutory provisions and remedies, clearly brings its claim within the Act. See *Re Galaxy Interiors*, *supra*, *per* Houlden J., at p. 144; *Mancini*, *supra*, *per* Catzman J., at pp. 250-51; *Re Atlas Lumber*, *supra*, *per* Rinfret J., at p. 234.

It will be for the bankruptcy court in Hull to scrutinize the petition when the facts are known and the parties' positions on the issues are clarified to determine whether any particular element of the trustee's multiple claims falls outside its jurisdiction. For present purposes, it is sufficient to hold that the bulk of the trustee's claim is cognizable in bankruptcy for the reasons previously discussed. On the present state of the record (this being a preliminary motion), we can go no further.

Quant aux actions de Azco, le syndic déclare au par. 101 de sa requête qu'il réclame [TRADUCTION] « 125 000 actions de Azco Mining Corporation qui avaient une valeur de 2,70 $CAN l'action ». 52

Il est tout aussi important de noter que l'appelante reconnaît que l'action intentée contre elle vise essentiellement la remise des actions et déclare ce qui suit au par. 25 de son mémoire : 53

Il semble que le recours du syndic est une action réelle plutôt qu'une action personnelle puisque le syndic cherche principalement à se faire reconnaître des droits sur 125 000 actions d'Azco et 3 500 000 actions et 4 000 000 bons de souscription de la compagnie Sanou (voir notamment les paragraphes 95, 98, 99 et 102 de la requête du syndic).

Malgré l'emploi de termes qui laissent perplexe dans la requête du syndic, les parties semblent donc s'entendre pour dire que la demande du syndic doit essentiellement être qualifiée de demande de recouvrement de biens précis du failli que l'appelante retient sans droit. Par conséquent, le syndic a le droit de réclamer les actions et les bons de souscription (par. 17(1)) et, avec la permission des inspecteurs (qu'il a obtenue), d'intenter une procédure judiciaire se rapportant à ces biens devant le tribunal de faillite (al. 30(1)*d*)). En invoquant ces dispositions législatives et les réparations qu'elles prévoient, le syndic situe manifestement sa réclamation dans le cadre de la Loi. Voir *Re Galaxy Interiors*, précité, le juge Houlden, p. 144; *Mancini*, précité, le juge Catzman, p. 250-251; *Re Atlas Lumber*, précité, le juge Rinfret, p. 234. 54

Lorsque les faits seront connus et que la position des parties sur les questions en litige seront précisées, il incombera au tribunal de faillite de Hull d'examiner la requête en recouvrement de biens pour déterminer si un élément particulier des diverses demandes du syndic échappe à sa compétence. Pour le moment, il suffit de conclure que la demande du syndic se rapporte essentiellement à la faillite, pour les motifs que j'ai déjà exposés. Dans l'état actuel du dossier (il s'agit d'une requête préliminaire), nous ne pouvons aller plus loin. 55

5. *Even if Fully Clothed with Jurisdiction to Hear This Case, Should the Bankruptcy Court in Hull Nevertheless Have Transferred the File to the Court Exercising Counterpart Bankruptcy Jurisdiction in Vancouver?*

56 If persuaded that the affairs of the bankrupt could be (i) more economically administered in another bankruptcy district or division or (ii) for "other sufficient cause", the bankruptcy court is authorized to transfer "any proceedings" pending before it to the other bankruptcy district or division (s. 187(7)).

57 Section 187(7) provides a method for transferring proceedings between the various bankruptcy courts in Canada. As discussed below, it raises different issues than the specific international situation dealt with in *Holt Cargo Systems*, *supra*, released concurrently.

58 The motions judge exercised his discretion against making a transfer order in this case. The appellant must therefore show an error of law or principle or failure to take into consideration a major element in the determination of the case: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at p. 588. The scope of this discretion in bankruptcy cases was recognized in *Re Lions D'Or Ltée* (1965), 8 C.B.R. (N.S.) 171 (Que. Sup. Ct.), and *Re M. Pollack Ltée* (1979), 30 C.B.R. (N.S.) 256 (Que. Sup. Ct.).

59 The appellant says the courts below erred in both law and principle. They erred in law, it argues, because art. 3148 of the *Civil Code of Québec* required the bankruptcy court to decline jurisdiction in light of the "choice of forum" clauses, and they erred in principle because there is no substantial connection between the dispute and the Province of Quebec. In this regard, it relies on *Bourque Consumer Electronics Inc. (Syndic de)*, J.E. 91-1040 (Sup. Ct.), and *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897.

5. *Même s'il avait pleine et entière compétence pour entendre la présente affaire, le tribunal de faillite de Hull aurait-il dû renvoyer le dossier au tribunal ayant la même compétence en matière de faillite à Vancouver?*

Le tribunal peut, (i) s'il est convaincu que les affaires du failli peuvent être administrées d'une manière plus économique dans un autre district ou dans une autre division des faillites ou (ii) pour « un autre motif suffisant », renvoyer « des procédures » en cours devant lui à l'autre district ou division de faillite (par. 187(7)).

Le paragraphe 187(7) établit une méthode pour renvoyer des procédures entre différents tribunaux de faillite au Canada. On verra plus loin que ce paragraphe soulève des questions différentes de la situation internationale particulière en cause dans *Holt Cargo Systems*, précité, rendu simultanément.

Le juge des requêtes a exercé son pouvoir discrétionnaire en refusant d'ordonner le renvoi en l'espèce. L'appelante doit donc démontrer que cette décision est entachée d'une erreur de droit ou de principe ou de l'omission de prendre en considération un élément prépondérant : *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561, p. 588. Les décisions *Re Lions D'Or Ltée* (1965), 8 C.B.R. (N.S.) 171 (C.S. Qué.), et *Re M. Pollack Ltée* (1979), 30 C.B.R. (N.S.) 256 (C.S. Qué.), ont reconnu la portée de ce pouvoir discrétionnaire en matière de faillite.

L'appelante affirme que les cours d'instance inférieure ont commis une erreur, tant sur le plan du droit que sur celui des principes. Selon l'appelante, elles ont commis une erreur de droit parce que l'art. 3148 du *Code civil du Québec* obligeait le tribunal de faillite à se déclarer incompétent vu les clauses « d'élection de for ». Par ailleurs, elles ont commis une erreur de principe parce qu'il n'existe aucun lien important entre le litige et la province de Québec. À cet égard, l'appelante invoque les décisions *Bourque Consumer Electronics (Syndic de)*, J.E. 91-1040 (C.S.), et *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897.

(i) Choice of Forum Clause

The appellant's point is that the applicable rules are found in the *Civil Code of Québec*, and in particular art. 3148 which provides in part that:

> . . . a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

The choice of forum objection fails, with respect, both on the facts and on the law. In terms of facts, the only relevant agreements are those to which Eagle was a party. Clause 28 in the June 7, 1996 financing agreement and clause 20 of the management services agreement are both no more than choice of law provisions. The Quebec courts are perfectly able to apply the law of British Columbia. The import of clause 17 of the West African Gold & Exploration S.A. debenture of August 9, 1996 is more obscure, but as Azco is not a party to the debenture and therefore cannot be sued upon it, its terms are irrelevant.

As to the legal issue, the question is whether arts. 3148 or 3135 of the *Civil Code of Québec* have any application to this proceeding at all. These provisions will only apply in bankruptcy court "[i]n cases not provided for in the Act or these Rules" (*Bankruptcy and Insolvency General Rules*, s. 3). The fact is that s. 187(7) specifically provides that a transfer will be ordered only where there is satisfactory proof that a proceeding will be "more economically administered" in another division or district, which the appellant did not allege, or "for other sufficient cause". The appellant argues that such general words need to be "supplemented" by the more specific provisions of the *Civil Code of Québec*. But this is incorrect. Resort is to be had to the provincial rules only "[i]n cases not provided for". Here, provision has been made. The door is therefore not open to these particular provisions of the *Civil Code of Québec*. This interpretation of s. 3 is not only inevitable, it is desirable. The *Civil Code of Québec*

(i) La clause d'élection de for

60 L'appelante tente de démontrer que les règles applicables se trouvent dans le *Code civil du Québec*, notamment à l'art. 3148, qui prévoit en partie que :

> . . . les autorités québécoises ne sont pas compétentes lorsque les parties ont choisi, par convention, de soumettre les litiges nés ou à naître entre elles, à propos d'un rapport juridique déterminé, à une autorité étrangère ou à un arbitre, à moins que le défendeur n'ait reconnu la compétence des autorités québécoises.

61 L'argument fondé sur l'élection de for est malheureusement mal fondé, tant en fait qu'en droit. Pour ce qui est des faits, les seuls contrats pertinents sont ceux auxquels Eagle était partie. La clause 28 figurant au contrat de financement du 7 juin 1996 et la clause 20 du contrat de services de gestion ne constituent rien de plus que l'expression du choix des lois applicables. Les tribunaux québécois sont parfaitement capables d'appliquer les lois de la Colombie-Britannique. Le sens de la clause 17 du contrat d'emprunt sous forme de débenture de la West African Gold & Exploration S.A. conclu le 9 août 1996 est moins clair, mais, comme Azco n'y était pas partie et ne peut donc pas être poursuivie en vertu de ce contrat, ses stipulations ne sont pas pertinentes.

62 Pour ce qui est du droit, il s'agit de savoir si les art. 3148 ou 3135 du *Code civil du Québec* s'appliquent de quelque manière à la présente instance. Ces dispositions ne trouvent application dans une instance devant le tribunal de faillite que « [d]ans les cas non prévus par la Loi ou les présentes règles » (*Règles générales sur la faillite et l'insolvabilité*, art. 3). Le paragraphe 187(7) prévoit explicitement que le renvoi n'est ordonné que lorsqu'il est prouvé de façon satisfaisante qu'une instance sera « administré[e] d'une manière plus économique » dans une autre division ou dans un autre district, ce que l'appelante n'a pas soutenu, ou pour « un autre motif suffisant ». L'appelante prétend qu'il faut « préciser » ces mots de portée générale au moyen des dispositions plus particulières du *Code civil du Québec*. Mais, cela est inexact. Il faut recourir aux règles provinciales seulement « [d]ans les cas non prévus ». En l'espèce, le cas est prévu. On ne peut donc pas faire appel aux dispositions particulières

applies across a vast range of subjects. When s. 187(7) speaks of "sufficient cause", it does so in the specific context of bankruptcy.

63 Leaving aside, then, the inapplicable directives of the *Civil Code of Québec*, the question is whether a choice of forum clause would amount to "sufficient cause" for the purpose of s. 187(7) to the extent that it would be an error of law for the motions judge to have declined to give it effect in the circumstances of this case. In my view a choice of forum clause (where there really is one) ought to be taken into careful consideration by a motions judge but it is not binding: J.-G. Castel, *Canadian Conflict of Laws* (4th ed. 1997), at pp. 262-63. See *Sarabia v. "Oceanic Mindoro" (The)* (1996), 26 B.C.L.R. (3d) 143 (C.A.), *per* Huddart J.A., at p. 153 (leave to appeal refused, [1997] 2 S.C.R. xiv); *Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd.*, [1986] 1 W.W.R. 380 (Alta. C.A.), *per* Kerans J.A., at p. 381; *Ash v. Lloyd's Corp.* (1991), 6 O.R. (3d) 235 (Gen. Div.), aff'd (1992), 9 O.R. (3d) 755 (C.A.) (leave to appeal refused, [1992] 3 S.C.R. v); *Maritime Telegraph and Telephone Co. v. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471 (N.S.C.A.).

(ii) Public Policy Considerations

64 It could be argued that the public policy favouring a "single control" of bankruptcy proceedings and opposition to their fragmentation demands that a choice of forum clause receive lesser effect in bankruptcy than in the context of ordinary commercial litigation: *Industrial Packaging Products Co. v. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (Pa. 1960); *In re Treco*, 239 B.R. 36 (S.D.N.Y. 1999), aff'd 240 F.3d 148 (2d Cir. 2001).

65 In *Re Moratorium Act*, *supra*, Rand J. discussed important "public policy" objectives of bankruptcy legislation, at p. 46:

> To this proceeding not only a personal stigma may attach but restrictions on freedom in future business activity may

du *Code civil du Québec*. Cette interprétation de l'art. 3 est non seulement inévitable, mais souhaitable. Le *Code civil du Québec* s'applique à un vaste éventail de matières. Lorsque le par. 187(7) parle de « motif suffisant », il le fait dans le contexte particulier de la faillite.

Il faut donc laisser de côté la prescription inapplicable du *Code civil du Québec* et se poser la question de savoir si une clause d'élection de for constituerait un « motif suffisant » au sens du par. 187(7), de sorte que le juge des requêtes aurait commis une erreur de droit en ne lui donnant pas effet dans les circonstances. D'après moi, un juge des requêtes devrait examiner avec soin une clause d'élection de for (lorsqu'il en existe réellement une), mais il n'est pas lié par une telle clause : J.-G. Castel, *Canadian Conflict of Laws* (4e éd. 1997), p. 262-263. Voir *Sarabia c. « Oceanic Mindoro » (The)* (1996), 26 B.C.L.R. (3d) 143 (C.A.), le juge Huddart, p. 153, autorisation de pourvoi refusée, [1997] 2 R.C.S. xiv; *Volkswagen Canada Inc. c. Auto Haus Frohlich Ltd.*, [1986] 1 W.W.R. 380 (C.A. Alb.), le juge Kerans, p. 381; *Ash c. Lloyd's Corp.* (1991), 6 O.R. (3d) 235 (Div. gén.), conf. par (1992), 9 O.R. (3d) 755 (C.A.), autorisation de pourvoi refusée, [1992] 3 R.C.S. v; *Maritime Telegraph and Telephone Co. c. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471 (C.A.N.-É.).

(ii) Considérations d'intérêt public

Il serait possible de prétendre que le principe d'intérêt public favorisant le « contrôle unique » des instances en matière de faillite et s'opposant à leur fragmentation commande qu'on attribue moins de poids à une clause d'élection de for en matière de faillite que dans le contexte des litiges commerciaux ordinaires : *Industrial Packaging Products Co. c. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (Pa. 1960); *In re Treco*, 239 B.R. 36 (S.D.N.Y. 1999), conf. par 240 F.3d 148 (2d Cir. 2001).

Dans l'arrêt *Re Moratorium Act*, précité, le juge Rand a parlé des objectifs d'« ordre public » importants des dispositions législatives en matière de faillite, à la p. 46 :

> [TRADUCTION] À cette procédure peuvent se rattacher non seulement la stigmatisation de la personne mais des

result. The relief to the debtor consists in the cancellation of debts which, otherwise, might effectually prevent him from rehabilitating himself economically and socially.

See also *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109, at p. 120.

In his treatise on bankruptcy, Professor Albert Bohémier states on the purpose of the Act:

[TRANSLATION] The purpose of the *Bankruptcy Act* is to protect the debtor, his or her creditors and the public interest. These objectives have always been present but to varying degrees. It can be stated with certainty that the more a society promotes credit and therefore debt, the more the legislation will tend to give priority to alleviating the lot of honest and hapless debtors. A scheme based on debt must include a self-regulating system so that defaulting debtors may eventually be reintegrated into the system and become productive elements once again.

(*Faillite et insolvabilité* (1992), vol. 1, at p. 48)

The implementation of these public policies might be expected to take priority over private "choice of forum" agreements where the two come into conflict, as indeed Robert J.A. concluded in the Quebec Court of Appeal. A similar position is expressed in I. F. Fletcher, *Insolvency in Private International Law* (1999), at p. 47, fn. 73:

[P]rivate contractual arrangements between parties cannot prevail over the exercise of bankruptcy jurisdiction, which belongs to the realm of public policy, serving a wider spread of interests including, ultimately, those of society at large.

In the United States, however, there is a competing body of judicial opinion that a trustee in bankruptcy who sues on an agreement containing a forum selection clause should, as a general rule, be bound by that clause to the same extent as the parties thereto: see *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (3d Cir. 1983); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (3d Cir. 1987), and *Hays and Co. v. Merrill Lynch*, 885 F.2d 1149 (3d Cir. 1989).

contraintes restreignant sa liberté dans ses activités commerciales futures. La réparation pour le débiteur consiste à annuler ses dettes, qui pourraient autrement faire obstacle à sa réadaptation économique et sociale.

Voir aussi *Industrial Acceptance Corp. c. Lalonde*, [1952] 2 R.C.S. 109, p. 120.

66 Dans son traité sur la faillite, le professeur Albert Bohémier dit ce qui suit au sujet de l'objectif de la Loi :

La *Loi sur la faillite* a pour but de protéger le débiteur, ses créanciers et l'intérêt public. Ces objectifs ont toujours été présents, mais avec une intensité variable. On peut affirmer sans craindre de se tromper que plus une société favorise le crédit et donc l'endettement, plus la législation aura tendance à faire primer le souci d'atténuer le sort des débiteurs honnêtes et infortunés. Un régime qui repose sur l'endettement doit comporter un système auto-régulateur de sorte que les débiteurs défaillants puissent éventuellement être réintégrés dans le système et redevenir des éléments productifs.

(*Faillite et insolvabilité* (1992), vol. 1, p. 48)

67 En cas de conflit, on pourrait s'attendre à ce que la mise en œuvre de ces principes d'intérêt public ait priorité sur les conventions privées d'élection de for, comme l'a effectivement conclu le juge Robert de la Cour d'appel du Québec. Une opinion semblable est exprimée dans I. F. Fletcher, *Insolvency in Private International Law* (1999), p. 47, note 73 :

[TRADUCTION] [L]es arrangements contractuels privés entre les parties ne peuvent avoir préséance sur l'exercice de la compétence en matière de faillite, qui est du domaine de l'ordre public et sert une plus vaste gamme d'intérêts y compris, en bout de ligne, ceux de la société dans son ensemble.

Il existe toutefois aux États-Unis un courant jurisprudentiel contraire portant que, règle générale, un syndic de faillite qui engage un recours fondé sur une convention comportant une clause d'élection de for devrait être lié par cette clause dans la même mesure que les parties qui l'ont stipulée : voir *Coastal Steel Corp. c. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (3d Cir. 1983); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (3d Cir. 1987), et *Hays and Co. c. Merrill Lynch*, 885 F.2d 1149 (3d Cir. 1989).

68 In my view, for the reasons previously mentioned, the choice of forum clause would be a significant factor under s. 187(7) but not, in the context of the public policies expressed in the Act, a controlling factor.

69 In light of my conclusion that the appellant does not have the benefit of a "choice of forum" clause, I need not undertake the exercise of considering whether in this case there is any conflict between private choice and public interest, and if so, how "choice of forum" considerations should be balanced in this case against *Amchem*, *supra*, and public interest factors within the framework of s. 187(7) of the Act.

70 The bottom line is that the appellant is unable to show that the motions judge committed any error of law in declining to transfer the proceeding to Vancouver.

(iii) Error of Principle

71 The appellant, relying on *Amchem*, *supra*, argues that this dispute has its most real and substantial connection to British Columbia, and that the motions judge erred in principle in ignoring relevant factors in coming to the opposite conclusion.

72 Again, with respect, I do not think this position is sustainable on the law or the facts.

73 In the first place, as stated, the *Amchem* approach has to be applied here with full regard to the context of Canadian bankruptcy legislation. This appeal involves the allocation of a particular bankruptcy matter within a single national bankruptcy scheme created by the Act. As shown in *Holt Cargo Systems*, *supra*, consideration of the allocation of a matter having different aspects (e.g. maritime law and bankruptcy law), as between Canadian courts and foreign courts operating under quite different legislative or other schemes, may raise different problems.

Selon moi, pour les motifs déjà exposés, la clause d'élection de for constituerait un facteur important pour l'application du par. 187(7), mais il ne serait pas déterminant dans le contexte des principes d'intérêt public exprimés dans la Loi.

Vu ma conclusion que l'appelante ne bénéficie pas d'une clause d'élection de for en l'espèce, il n'y a pas lieu que j'entreprenne l'examen de la question de savoir s'il y a ici conflit entre le choix privé et l'intérêt public et, le cas échéant, quel poids doit être accordé à l'élection de for en regard des facteurs d'intérêt public énoncés dans *Amchem*, précité, dans le cadre du par. 187(7) de la Loi.

En bout de ligne, l'appelante est incapable de démontrer que le juge des requêtes a commis une erreur de droit en refusant de renvoyer l'instance à Vancouver.

(iii) L'erreur de principe

Se fondant sur l'arrêt *Amchem*, précité, l'appelante prétend que le litige actuel a son lien le plus réel et le plus important avec la Colombie-Britannique et que le juge des requêtes a commis une erreur de principe en ne prenant pas en considération certains facteurs pertinents pour tirer la conclusion inverse.

Encore une fois, j'estime que cette position est indéfendable en fait et en droit.

En premier lieu, comme je l'ai déjà dit, il faut appliquer en l'espèce la méthode suivie dans l'arrêt *Amchem* en tenant pleinement compte du contexte de la législation canadienne en matière de faillite. Le présent pourvoi porte sur l'attribution d'une affaire de faillite particulière à un tribunal à l'intérieur d'un seul régime national de faillite créé par la Loi. Comme le démontre l'arrêt *Holt Cargo Systems*, précité, l'examen de l'attribution d'une affaire comportant différents aspects (p. ex., un aspect de droit maritime et un aspect de droit de la faillite) entre les tribunaux canadiens et les tribunaux étrangers, assujettis à des régimes fort différents, notamment sur le plan législatif, peut soulever divers problèmes.

Secondly, *Amchem* and its progeny involved private litigation. Here, as explained in *Holt Cargo Systems*, *supra*, there is the important public interest aspect mentioned above. The Court looks not only at the *Amchem* factors, but must strive to give effect to Parliament's intent to create an economical and efficient national system for the administration of bankrupt estates, as evidenced in the Act.

It is in the public interest to facilitate the speedy resolution of the fallout from a financial collapse. This, as noted in *Holt Cargo Systems* was not present in the *Amchem* fact situation. In fact, there are stronger policy considerations here than in *Holt Cargo Systems*. That case dealt with a choice between a maritime law action in Halifax for the determination of claims of *secured* creditors that had already proceeded to default judgment and, as an alternative, the exercise of jurisdiction by the Quebec Superior Court sitting in Bankruptcy acting at the behest of the bankruptcy court in Belgium in a matter that was still in its early stages of organization. In those circumstances the Federal Court of Canada declined to stay the maritime law action, and its exercise of discretion was upheld by the Federal Court of Appeal and by this Court.

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

74 En deuxième lieu, l'arrêt *Amchem* et les arrêts qui l'ont suivi portaient sur des litiges privés. Le présent pourvoi, tout comme cela a été expliqué dans l'arrêt *Holt Cargo Systems*, précité, comporte l'aspect important de l'intérêt public mentionné précédemment. Notre Cour ne peut s'en tenir seulement aux facteurs énoncés dans *Amchem*; elle doit s'efforcer de donner effet à l'intention manifeste du législateur, exprimée dans la Loi, de créer un système national économique et efficace d'administration de l'actif des faillis.

75 Il est dans l'intérêt public de faciliter la résolution rapide des retombées d'un effondrement financier. Comme nous l'avons souligné dans l'arrêt *Holt Cargo Systems*, on ne retrouvait pas ce facteur dans la situation factuelle en cause dans *Amchem*. En fait, il existe des considérations de principe plus fortes en l'espèce que dans l'affaire *Holt Cargo Systems*. Dans cette affaire, il fallait choisir entre, d'une part, une action de droit maritime intentée à Halifax portant sur les réclamations de créanciers *garantis* qui avaient déjà obtenu un jugement par défaut et, d'autre part, l'exercice de sa compétence par la Cour supérieure du Québec siégeant en matière de faillite à la demande du tribunal de faillite de la Belgique, dans une affaire qui en était encore à ses étapes préliminaires. Dans ces circonstances, la Cour fédérale du Canada a refusé d'ordonner la suspension de la procédure de droit maritime et la Cour d'appel fédérale ainsi que notre Cour ont confirmé sa décision discrétionnaire.

76 En l'espèce, nous faisons face à une loi fédérale qui établit à première vue un centre de commandement ou un « contrôle unique » (*Stewart*, précité, p. 349) pour la totalité des procédures liées à la faillite (par. 183(1)). Le contrôle unique n'est pas nécessairement incompatible avec le renvoi de litiges particuliers à d'autres ressorts, mais le créancier (ou le débiteur) qui désire fragmenter les procédures et qui ne peut pas prétendre être un « étranger à la faillite » a le fardeau de démontrer l'existence d'un « motif suffisant », justifiant que le syndic doive accourir dans plusieurs ressorts. Le législateur a jugé que la preuve des faits visés par la définition de l'expression « localité d'un

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.

77 The "balancing test" advocated by the appellant based on the *Amchem* factors and general principles of private international law fails to take these important public policies into account. The Quebec Superior Court sitting in Bankruptcy is, in a very real sense, sitting as a national court.

78 Finally, in point of fact, even if the principles of private international law did apply without modification for the bankruptcy context, it is difficult to discern any connection at all between the dispute and Vancouver except that Eagle signed some agreements with a choice of law clause directed to the laws of that jurisdiction. The links between the appellant and Vancouver are not particularly strong. It has, amongst other offices, a Vancouver address, but the bulk of the activities at issue here occurred outside British Columbia. Its key employee, Mr. Ryan Modesto, resides in the United States. The management services agreement of June 12, 1996 recites that Azco's corporate office is in Arizona. Azco's press release of September 17, 1996, announcing this project to the world, was issued in Arizona. Moreover there is no juridical advantage to the appellant in proceeding under the same bankruptcy regime in Vancouver as in Hull. In either case, the law of British Columbia may be applied. Vancouver may be marginally more convenient for the appellant and some of its witnesses, but that is all that can be said for it. The trustee, for its part, complains that if the appeal succeeds, it would, on the same reasoning, be required to bring other actions (unrelated to Azco) in Chicoutimi, Toronto, Halifax, Winnipeg, Charlottetown and Calgary. The trial judge has much factual

débiteur » figurant au par. 2(1) établit un lien suffisamment important pour rattacher une instance de faillite à un district ou à une division en particulier. Le syndic de cette localité est chargé de « recouvrer » les biens, et c'est le tribunal de faillite de ce ressort qui contrôle les procédures connexes. La Loi vise l'économie de la liquidation des biens du failli, même au prix de frais additionnels pour les créanciers et les débiteurs.

Le « critère de la pondération » que l'appelante préconise en s'appuyant sur les facteurs énoncés dans *Amchem* et sur les principes généraux du droit international privé ne tient pas compte de ces importants principes d'intérêt public. La Cour supérieure du Québec siégeant en matière de faillite constitue un véritable tribunal national.

Enfin, sur le plan des faits, même si les principes du droit international privé s'appliquaient sans qu'il soit nécessaire de les adapter au contexte de la faillite, il est difficile de discerner quelque lien que ce soit entre le litige et Vancouver, sauf le fait que Eagle a signé certains contrats comportant une clause selon laquelle les lois applicables étaient celles de ce ressort. Les liens entre l'appelante et Vancouver ne sont pas particulièrement étroits. L'appelante a, parmi ses bureaux, une adresse à Vancouver, mais la plupart des activités en cause en l'espèce ont eu lieu à l'extérieur de la Colombie-Britannique. Son employé clé, M. Ryan Modesto, réside aux États-Unis. Le contrat de services de gestion du 12 juin 1996 précise que le siège social de Azco est situé en Arizona. Le communiqué de presse du 17 septembre 1996 par lequel Azco a annoncé ce projet à l'échelle mondiale émanait de l'Arizona. De plus, l'appelante n'a aucun avantage sur le plan juridique à exercer ses recours en vertu du même régime de faillite à Vancouver plutôt qu'à Hull. Dans un cas comme dans l'autre, les lois de la Colombie-Britannique peuvent être appliquées. Il serait peut-être légèrement plus commode pour l'appelante et pour certains de ses témoins que l'affaire soit entendue à Vancouver, mais c'est tout ce qu'on peut dire en faveur de ce lieu. De son côté, le syndic se plaint du fait que si le pourvoi est accueilli, il sera obligé, suivant le même raisonnement, d'intenter d'autres actions (sans lien avec Azco) à Chicoutimi,

support for his decision to retain the case in Hull.

I do not wish to be taken, however, as squeezing the life out of s. 187(7). While the facts in this case do not show "sufficient cause" to make the transfer to British Columbia, other cases may arise of course where the transfer is justifiable. Even in *Stewart*, *supra*, which established the "single control" paradigm, Anglin J. went out of his way to say that the case probably should have been heard in P.E.I. The claimants' problem in that case is that they failed to seek leave from the court in British Columbia before launching their case in P.E.I. Just before the "single control" passage previously cited, Anglin J. says (at p. 349):

> I decline to assume that upon its being shewn to the Supreme Court of British Columbia that the questions as to the existence of the trust alleged by the plaintiffs and the earmarking of certain property held by the liquidator as trust assets can be best inquired into in Prince Edward Island — as from what is now before us would seem to be the case — an order of transfer will not be made, preceded or accompanied by the necessary leave under section 22.

And Brodeur J. said this (at p. 352):

> In this case it looks to me as if the ends of justice would be better served by having the question raised in this proceeding disposed of by the courts of Prince Edward Island. However, it was the duty of the respondents to have the leave of the court of British Columbia which they did not secure.

The point is that it was up to Azco to demonstrate "sufficient cause" on the facts of *this* case, and it failed to do so.

V. Conclusion

I would dismiss the appeal with costs.

Toronto, Halifax, Winnipeg, Charlottetown et Calgary. De nombreux faits étayent la décision du juge de première instance de poursuivre l'instance à Hull.

Je ne veux toutefois pas que mes motifs soient interprétés comme rendant impossible toute application du par. 187(7). Les faits de l'espèce ne font pas ressortir un « motif suffisant » pour renvoyer l'instance en Colombie-Britannique, mais il peut évidemment surgir d'autres affaires dans lesquelles le renvoi sera justifiable. Même dans l'arrêt *Stewart*, précité, qui a établi le paradigme du « contrôle unique », le juge Anglin a pris la peine de dire que l'affaire aurait probablement dû être entendue à l'Île-du-Prince-Édouard. Le problème des parties demanderesses dans cette affaire tenait au fait qu'elles n'avaient pas demandé l'autorisation du tribunal de la Colombie-Britannique avant d'introduire l'instance à l'Île-du-Prince-Édouard. Juste avant le passage sur le « contrôle unique » déjà cité, le juge Anglin a affirmé ceci (à la p. 349) :

> [TRADUCTION] Je refuse de tenir pour acquis que la Cour suprême de la Colombie-Britannique ne rendra pas d'ordonnance de renvoi, précédée ou accompagnée de l'autorisation requise par l'art. 22, s'il lui est démontré — comme cela semblerait être le cas d'après les éléments qui nous ont été soumis — qu'il est possible d'instruire plus efficacement à l'Île-du-Prince-Édouard les questions portant sur l'existence de la fiducie alléguée par la partie demanderesse et sur l'affectation de certains biens détenus par le liquidateur à titre de biens de la fiducie.

Pour sa part, le juge Brodeur a dit ce qui suit (à la p. 352) :

> [TRADUCTION] Il me semble que l'intérêt de la justice serait mieux servi en l'espèce si les tribunaux de l'Île-du-Prince-Édouard statuaient sur la question soulevée en l'instance. Toutefois, il incombait aux parties intimées d'obtenir l'autorisation de la cour de la Colombie-Britannique, et elles ne l'ont pas obtenue.

Le fait est que Azco devait démontrer l'existence d'un « motif suffisant » à la lumière des faits de la *présente* affaire et elle n'y est pas parvenue.

V. Conclusion

Je suis d'avis de rejeter le pourvoi avec dépens.

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Appeal dismissed with costs.

Solicitors for the appellant: Stikeman Elliott, Montréal.

Solicitors for the respondent: Gervais & Gervais, Montréal.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante : Stikeman Elliott, Montréal.

Procureurs de l'intimée : Gervais & Gervais, Montréal.

ONGLET 3

Résumé

Parties
Montréal, Maine & Atlantic Canada Co./Montréal, Maine & Atlantique Canada Cie (Arrangement relatif à) *

Juridiction
Cour supérieure (C.S.), Saint-François (Sherbrooke)

Numéro de dossier
450-11-000167-134

Décision de
Juge Gaétan Dumas

Date de la décision
2013-10-09

Références
AZ-51011925
2013 QCCS 5194
2013EXP-3543
J.E. 2013-1922
Texte intégral : 8 pages (copie déposée au greffe)

Indexation
FAILLITE ET INSOLVABILITÉ — procédure — suspension des procédures — levée de la suspension — assureur — protocole d'insolvabilité internationale — jugement déclaratoire — requêtes identiques déposées au Québec et aux États-Unis — *forum non conveniens* — contrôle unique.
INTERNATIONAL (DROIT) — *forum non conveniens* — compétence internationale — tribunaux québécois — suspension des procédures — levée de la suspension — assureur — protocole d'insolvabilité internationale — jugement déclaratoire — requêtes identiques déposées au Québec et aux États-Unis.

La Dépêche

FAILLITE ET INSOLVABILITÉ : La requérante n'ayant pas démontré de motif justifiant le morcellement des juridictions, il n'y a pas lieu de lever la suspension des procédures pour lui permettre de présenter devant les tribunaux américains une requête en jugement déclaratoire que les tribunaux québécois sont aptes à trancher.

INTERNATIONAL (DROIT) : Les circonstances fondant la demande de l'assureur de la société ayant causé l'accident de Lac-Mégantic ne présentent pas le caractère exceptionnel requis pour que les tribunaux québécois acceptent de décliner compétence en faveur des tribunaux de l'État du Maine.

Résumé

Requête pour que soit levée la suspension des procédures. Rejetée.

La débitrice, la société ferroviaire ayant causé l'accident du mois de juillet 2013 à Lac-Mégantic, a obtenu la protection de la *Loi sur les arrangements avec les créanciers des compagnies*. Un protocole d'insolvabilité internationale a été approuvé par les tribunaux québécois et ceux de l'État du Maine afin d'assurer un traitement efficace du dossier. Se fondant sur ce protocole, la requérante, assureur de la débitrice et des entités situées aux États-Unis, a déposé des requêtes identiques devant les deux juridictions. Elle souhaite ainsi obtenir la levée de la suspension des procédures de façon à présenter, devant les tribunaux du Maine, une requête pour jugement déclaratoire visant à faire éclaircir une difficulté relative à la couverture de la police d'assurance. Elle soutient à cet égard que la prépondérance des inconvénients penche manifestement en faveur d'une audience devant les tribunaux américains. Selon le principal argument de la requérante, le droit régissant sa police d'assurance est celui de l'État du Maine.

Décision

Sans le dire, la requérante plaide la doctrine du *forum non conveniens*. À cet égard, pour reprendre les termes de la Cour d'appel dans *Stormbreaker Marketing and Productions Inc. c. Weinstock* (C.A., 2013-02-13), 2013 QCCA 269, SOQUIJ AZ-50936701 , 2013EXP-646, J.E. 2013-348, paragr. 100, «le critère de la loi applicable ne constitue pas en soi un facteur important». De plus, le fait que le tribunal étranger soit mieux à même de trancher le litige n'est que le premier critère de cette doctrine. Or, les circonstances fondant la demande en cause ne présentent pas le caractère exceptionnel requis pour que les tribunaux québécois acceptent de décliner compétence. Cela devrait clore le débat, mais il y a plus. En effet, en vertu du concept de «contrôle unique», la requérante, qui n'est pas une étrangère à la faillite, devait démontrer l'existence

d'un motif suffisant justifiant le morcellement des procédures dans plusieurs juridictions, tâche à laquelle elle a échoué. Par conséquent, elle n'a pas justifié la levée de la suspension des procédures à son égard.

Fascicule Express
EXP 2013, no 45
J.E. 2013, no 45

Historique

Suivi

Règlement hors cour (C.A., 2014-11-20), 500-09-023970-130

Législation citée

C.C.Q., art. 3150
Arrangements avec les créanciers des compagnies (Loi sur les), (L.R.C. 1985, c. C-36), art. 44

Jurisprudence citée

Applique | Explique | Distingue | Critique | N'applique pas | Mentionne | Citée(s) par les parties

Applique

Paragr. 24: *Sam Lévy & Associés inc. c. Azco Mining Inc.* (C.S. Can., 2001-12-20), 2001 CSC 92, SOQUIJ AZ-50108736, J.E. 2002-93, [2001] 3 R.C.S. 978, 30 C.B.R. (4th) 105, 207 D.L.R. (4th) 385, 280 N.R. 155, REJB 2001-27203
Paragr. 20, 22: *Stormbreaker Marketing and Productions Inc. c. Weinstock* (C.A., 2013-02-13), 2013 QCCA 269, SOQUIJ AZ-50936701, 2013EXP-646, J.E. 2013-348, EYB 2013-218059

Mentionne

Paragr. 20: *Droit de la famille — 132433* (C.A., 2013-09-12), 2013 QCCA 1529, SOQUIJ AZ-51001049, 2013EXP-3002, J.E. 2013-1634, EYB 2013-226560
Paragr. 27: *Société pétrochimique Kemtec inc. (Syndic de)* (C.S., 1994-05-25), SOQUIJ AZ-94021347, J.E.

94-930, [1994] R.J.Q. 1345, [1994] R.D.I. 501 (rés.), EYB 1994-84423
Paragr. 25: *Terre-Neuve-et-Labrador c. AbitibiBowater Inc.* (C.S. Can., 2012-12-07), 2012 CSC 67, SOQUIJ AZ-50919467, 2012EXP-4268, J.E. 2012-2270, [2012] 3 R.C.S. 443

Doctrine citée
Romaine, B.E.. «Reflections on Comity and Sovereignty — Ten Years Later», in Janis P. Sarra. *Annual Review of Insolvency Law 2012*. Toronto: Thomson Carswell, 2013. P. 1

Catégorie
02

Date du versement initial
2013-11-12

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2014-11-27

SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF SAINT-FRANÇOIS

No.: 450-11-000167-134

DATE: October 9, 2013

IN THE PRESENCE OF: THE HONOURABLE GAÉTAN DUMAS, J.S.C.

IN THE MATTER OF THE ARRANGEMENT RELATING TO:

MONTRÉAL, MAINE & ATLANTIC CANADA CO. / (MONTRÉAL, MAINE & ATLANTIQUE CANADA CIE)
Debtor/Respondent
And
MONTREAL MAINE & ATLANTIC RAILWAY LTD
And
LMS ACQUISITION CORPORATION
And
MONTRÉAL MAINE & ATLANTIC CORPORATION
Third parties
And
RICHTER ADVISORY GROUP INC.
Monitor
And
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA
Petitioner

JUDGMENT

JD 2364

[1] The Court is seized of a "motion to lift the stay of proceedings granted in favour of Montréal Maine & Atlantic Railway" (MMA).

[2] Said motion was heard jointly with an identical motion filed before Honorable Justice Louis Kornreich, Judge for the Maine Bankruptcy Court, who is in charge of the case of MMA's parent company located in the United States.

[3] By its motion, Travelers asks permission to file a motion for declaratory judgment before the "United States District Court of the District of Maine".

[4] This motion is contested by the trustee representing MMA in Canada and by the trustee representing MMR, MMA's parent company in the United States.

[5] The joint hearing was held under a cross-border insolvency protocol approved by the undersigned and Honorable Justice Kornreich on September 9, 2013.

[6] All are in agreement that the Québec courts have jurisdiction to hear the motion for declaratory judgment that Petitioner Travelers intends to file. Indeed, article 3150 of the *Civil Code of Québec* states:

> "Les autorités québécoises ont également compétence pour décider de l'action fondée sur un contrat d'assurance lorsque le titulaire, l'assuré ou le bénéficiaire du contrat a son domicile ou sa résidence au Québec, lorsque le contrat porte sur un intérêt d'assurance qui y est situé, ou encore lorsque le sinistre y est survenu.
>
> A Québec authority has jurisdiction to hear an action based on a contract of insurance where the holder, the insured or the beneficiary of the contract is domiciled or resident in Québec, the contract is related to an insurable interest situated in Québec or the loss took place in Québec."

[7] However, even though this court has jurisdiction to hear the motion for declaratory judgment, Travelers wants the Court to lift the stay of proceedings order to allow it to present its motion before the District Court of Maine.

[8] A dispute has arisen between Travelers and MMA regarding the coverage and the scope of the coverage granted to MMA under an insurance policy issued on April 19, 2013[1].

[9] The main dispute between the parties concerns insurance for lost profits which Travelers seemingly issued by mistake.

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[1] See exhibit C-1;

[10] Travelers pleads that, with the exception of MMA Canada, all of the insured parties under the American insurance policy have their places of business and their operations in the United States.

[11] However, notwithstanding the fact that the other companies covered by the insurance policy have their places of business in the United States, none of them have brought any claims against Travelers.

[12] Is any reminder needed that the facts leading to a motion being filed under the *Companies' Creditors Arrangement Act* (CCAA) concern a railway accident which occurred on July 6, 2013 in the Town of Megantic.

[13] According to MMA's own pleadings in its motion under the CCAA, this railway accident destroyed the downtown area of the Town of Megantic and caused the death of 47 people. MMA admits its responsibility for this tragic accident.

[14] Even though Travelers admits that Québec Superior Court has jurisdiction to hear its motion for declaratory judgment, it is pleading that the US District Court of Maine would be better placed to hear its motion. To this end, it is pleading that the balance of convenience sways in favour of a hearing before the District Court. In fact, without saying so, the petitioner is pleading the doctrine of *forum non conveniens*.

[15] It pleads, first of all, that the potential witnesses, including its own employees, reside in the United States. It also pleads that this court could not subpoena American witnesses, including its own employees, to force them to testify in Canada.

[16] This is a fairly minor problem. Indeed, the cross-border protocol stipulates that the US Bankruptcy Court could issue such subpoenas if needed. Moreover, during the hearing, Honorable Justice Kornreich confirmed that subpoenas could be issued rapidly and that they could also be executed promptly.

[17] The debtor's claim against Travelers is an asset of the debtor. Travelers pleads that it is the American parent company which would have had a loss of income, not the Canadian company. In so doing, Travelers is overlooking the fact that there is a significant difference between a loss of income and receivables which could be insured.

[18] Regardless of what MMA planned to do with its money, that contributes nothing to resolve the dispute. It was an insured party designated in the policy and it is the one which has suffered a loss.

[19] Moreover, the Court does not need to delve into the merits to decide on the present motion. MMA has a claim against Travelers. The Court does not need to ask whether the claim is well founded to decide whether it has jurisdiction.

[20] Travelers' main argument is that the legislation governing its insurance policy would be Maine law. But, as recently reiterated by the Court of Appeal[2]:

> "[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."

[21] This is why the Court of Appeal in the Stormbreaker decision instructs us:

> "[101] C'est l'opinion de Guillemard, Prujiner et Sabourin[22]
>
> > Il est surprenant que l'application d'une loi étrangère par le tribunal, qui est l'essence même du droit international privé, puisse justifier un déclinatoire de compétence au profit de l'autorité dont il s'agit d'appliquer la loi. D'autant plus que le Code civil du Québec a introduit des dispositions de nature à faciliter la preuve du droit étranger (voir l'article 2809 C.c.Q.) et que les droits dont il était question dans les décisions rapportées n'étaient guère exotiques.
>
> [22] *Supra*, note 12, p. 945."

[22] To this, it must also be added that even if the foreign court is able to rule on the dispute, that is not the first criterion for declining jurisdiction. For this reason, the Court of Appeal in Stormbreaker recalled:

> "[79] Cela ressort du texte même de l'article 3135 *C.c.Q.* et de l'enseignement de la Cour suprême dans Spar Aerospace Ltée c. American Mobile Satellite Corp. de 2002 :
>
> > 69 ...deux éléments essentiels ressortent du texte de l'art. 3135 : sa nature exceptionnelle et l'exigence qu'un autre État soit mieux à même de trancher le litige (voir E. Groffier, *La réforme du droit international privé québécois : supplément au Précis de droit international privé québécois* (1993), p. 130).
> >
> > 70 Ces deux caractéristiques de la doctrine du *forum non conveniens*, énoncées à l'art. 3135, sont conformes à l'exigence de common law énoncée par la Chambre des lords dans l'arrêt de principe *Spiliada Maritime Corp. c. Cansulex Ltd.*, [1987] 1 A.C. 460, p. 476, et par notre Cour dans les arrêts *Amchem*, précité, p. 919-921, et *Holt Cargo*, précité, par. 89. [...]

[2] Stormbreaker Marketing c. Weinstock, 2013 QCCA 269, cited in another recent decision of the Court of Appeal in Droit de la famille - 132433, 2013 QCCA 1529 (decision of 12 September 2013).

[80] Les auteurs sont du même avis.

[81] Prujiner, Guillemard et Sabourin font la réflexion suivante quant à l'interprétation que devrait recevoir l'article 3135 du *Code civil du Québec* :

> L'article 3135 du Code [...] fait de l'exigence « que les autorités d'un autre État [soient] mieux à même de trancher le litige » une condition nécessaire mais non suffisante pour un déclinatoire de compétence. Le seul fait que les tribunaux d'un autre État soient mieux placés à l'égard d'un litige donné n'a rien d'exceptionnel et se présente chaque fois que le Québec n'est pas le for naturel de litige. Décliner sa compétence sur cette seule base ignore donc l'exigence du Code « exceptionnellement ». [...]

(...)

[86] En bref, le Code civil ne permet au tribunal de décliner compétence qu' « exceptionnellement ». Comme toute décision, celle-ci doit être motivée, ce qui n'est pas le cas dans le jugement attaqué. Il y a donc lieu d'analyser les circonstances de l'affaire pour déterminer si cette seconde condition est satisfaite."

(footnotes omitted)

[23] This should put a definite end to the debate, but there is more.

[24] The observation of the Supreme Court in Sam Lévy & Associés inc. c. Azco Mining Inc.[3] must also apply under the CCAA :

> "76 En l'espèce, nous faisons face à une loi fédérale qui établit à première vue un centre de commandement ou un «contrôle unique» (Steward précité, p. 349) pour la totalité des procédures liées à la faillite (par. 183(1)). Le contrôle unique n'est pas nécessairement incompatible avec le renvoi de litiges particuliers à d'autres ressorts, mais le créancier (ou le débiteur) qui désire fragmenter les procédures et qui ne peut pas prétendre être un «étranger à la faillite» a le fardeau de démontrer l'existence d'un «motif suffisant», justifiant que le syndic doive accourir dans plusieurs ressorts.
>
> **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."

[3] 2001 3 R.C.S. 978.

[25] The Supreme Court reiterated this principle very recently in the AbitibiBowater[4] ruling, stating:

> "[21] Une des caractéristiques principales du régime créé par la *LACC* est de traiter la presque totalité des réclamations contre un débiteur suivant une procédure unique devant un même tribunal. En vertu de ce modèle, le tribunal peut ordonner la suspension de la plupart des mesures d'exécution engagées contre les actifs du débiteur de façon à maintenir le statu quo durant la négociation avec les créanciers. Lorsque la négociation réussit, les créanciers consentent habituellement à recevoir moins que le plein montant de leurs réclamations, lesquelles ne sont pas nécessairement exigibles ou liquidées dès le début des procédures d'insolvabilité. Ces réclamations doivent parfois être évaluées afin d'établir la valeur pécuniaire qui fera l'objet du compromis.
>
> **21** One of the central features of the *CCAA* scheme is the single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. Under this model, the court can stay the enforcement of most claims against the debtor's assets in order to maintain the *status quo* during negotiations with the creditors. When such negotiations are successful, the creditors typically accept less than the full amounts of their claims. Claims have not necessarily accrued or been liquidated at the outset of the insolvency proceeding, and they sometimes have to be assessed in order to determine the monetary value that will be subject to compromise."

[26] Consequently, the Court believes that Travelers has not satisfied its burden of demonstrating that the stay of procedures should no longer apply to it.

[27] Let us add that the Bankruptcy Court is a court of equity and that the notion of equity is interpreted as conferring on the Bankruptcy Court all powers to dispose of disputes or a difficulty even when the law contains no specific provision that is likely to apply[5].

[28] The case law cited by Travelers, which it wished to use by analogy, can be of no help to it.

[29] Indeed, these decisions dealt with lifting a stay to allow a third party to sue the bankrupt's insurer. In fact, they constitute a typical example of a motion to lift a stay of proceedings where a person wants to sue a bankrupt's insurer. In that situation, it is pointless for the case to proceed before the bankruptcy court because often that has no impact on the administration of the bankruptcy. In the present case, we deal with the contrary. It concerns a bankrupt's claim (via the trustee) against its insurance company.

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[4] Newfoundland and Labrador v. AbitibiBowater Inc., [2012] 3 S.C.R. 443.

[5] See re: La Société Pétrochimique Kemtec inc., 1994 R.J.Q. 1345.

Without the shadow of a doubt, this is an asset of the debtor over which the Bankruptcy Court has jurisdiction.

[30] As for Travelers' argument that the order pronounced by Justice Castonguay has no extraterritorial effect, this court does not accept it.

[31] We must first note that the Court does not have to decide whether the present judgment and that of Justice Castonguay are enforceable in the United States. That is not the question before the Court.

[32] However, we know that Québec courts have jurisdiction and that Travelers does business in Québec. It should also be noted that this question is somewhat theoretical, given that a cross-border protocol has been adopted by this Court and the US Bankruptcy Court.

[33] In the event of doubt regarding a stay of proceedings, this protocol would allow the US Bankruptcy Court to order a stay of proceedings, just as this Court would for the parent company if proceedings were brought against it in Canada.

[34] This would simply be an application of the legal courtesy (comity) recognized in both our countries[6].

[35] Even if the order pronounced by Justice Castonguay were not enforceable outside Québec, the fact remains that the decisions of Québec courts will be enforceable against Travelers. Indeed, according to the information given by its counsel, it also does business in Québec. The extraterritorial effect of Justice Castonguay's order is therefore immaterial to this case.

[36] Add to this the fact that the cross-border protocol stipulates:

> "Where an issue is to be addressed only to one Court, in rendering a determination in any cross-border matter, such Court may: (a) to the extent practical or advisable, consult with the other Court; and (b) in its sole discretion and bearing in mind the principles of comity, either (i) render a binding decision after such consultation; (ii) defer to the determination of the other Court by transferring the matter, in whole or in part to the other Court; or (iii) seek a joint hearing of both Courts."

[37] The US Bankruptcy Court is prepared to allow Travelers specific limited relief from stay so that the U.S. debtor may be a party to a declaratory judgment proceeding in this Court.

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[6] Reflections on Comity and Sovereignty – Ten years later, in *Janis P. SARRA, Annual Review of insolvency Law 2012*, Toronto, Carswell, a division of Thompson Reuters Canada Ltd, page 1.

[38] It seems to us that the present decision achieves the objective of section 44 of the CCAA, which states:

> "La présente partie a pour objet d'offrir des moyens pour traiter des cas d'insolvabilité en contexte international et de promouvoir les objectifs suivants :
>
> *a*) assurer la coopération entre les tribunaux et les autres autorités compétentes du Canada et ceux des ressorts étrangers intervenant dans de tels cas;
>
> *b*) garantir une plus grande certitude juridique dans le commerce et les investissements;
>
> *c*) administrer équitablement et efficacement les affaires d'insolvabilité en contexte international, de manière à protéger les intérêts des créanciers et des autres parties intéressées, y compris les compagnies débitrices;
>
> *d*) protéger les biens des compagnies débitrices et en optimiser la valeur;
>
> *e*) faciliter le redressement des entreprises en difficulté, de manière à protéger les investissements et préserver les emplois.
>
> The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote
>
> (*a*) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
>
> (*b*) greater legal certainty for trade and investment;
>
> (*c*) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
>
> (*d*) the protection and the maximization of the value of debtor company's property; and
>
> (*e*) the rescue of financially troubled businesses to protect investment and preserve employment."

FOR THESE REASONS, THE COURT:

[39] **DISMISSES** the motion filed by Travelers, entitled "*motion to lift the stay of proceedings*";

[40] **THE WHOLE WITH COSTS**.

GAÉTAN DUMAS, J.S.C.

Mail list lawyers

Date of hearing: October 1, 2013

COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE SAINT-FRANÇOIS

N° : 450-11-000167-134

DATE : 9 octobre 2013

SOUS LA PRÉSIDENCE DE : L'HONORABLE GAÉTAN DUMAS, J.C.S.

IN THE MATTER OF THE ARRANGEMENT RELATING TO :

MONTRÉAL, MAINE & ATLANTIC CANADA CO. / (MONTRÉAL, MAINE & ATLANTIQUE CANADA CIE)
Debtor/Respondent
And
MONTREAL MAINE & ATLANTIC RAILWAY LTD
And
LMS ACQUISITION CORPORATION
And
MONTRÉAL MAINE & ATLANTIC CORPORATION
Mises en cause
And
RICHTER ADVISORY GROUP INC.
Monitor
And
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA
Petitioner

VERSION FRANÇAISE DES MOTIFS DU JUGEMENT SIGNÉ CE JOUR

JD 2364

[1] Le tribunal est saisi d'une « *motion to lift the stay of proceedings granted in favour of Montréal Maine & Atlantic Railway* » (MMA).

[2] L'audition de ladite requête a eu lieu conjointement avec une requête identique déposée devant l'honorable Louis Kornreich, juge du Tribunal de faillite du Maine, responsable du dossier de la compagnie mère de MMA située aux États Unis.

[3] Par sa requête, Travelers demande qu'on lui permette de déposer une requête pour jugement déclaratoire devant le « *United States District Court of the District of Maine* ».

[4] Cette requête est contestée par le syndic représentant MMA au Canada ainsi que le syndic représentant MMR, la compagnie mère de MMA située aux États-Unis.

[5] L'audition commune a eu lieu en vertu d'un *cross-border insolvency protocol* approuvé par le soussigné et l'honorable juge Kornreich le 9 septembre 2013.

[6] Tous conviennent que les tribunaux du Québec ont juridiction pour entendre la requête pour jugement déclaratoire qu'entend présenter la requérante Travelers. En effet, l'article 3150 *Code civil du Québec* prévoit :

> « Les autorités québécoises ont également compétence pour décider de l'action fondée sur un contrat d'assurance lorsque le titulaire, l'assuré ou le bénéficiaire du contrat a son domicile ou sa résidence au Québec, lorsque le contrat porte sur un intérêt d'assurance qui y est situé, ou encore lorsque le sinistre y est survenu.
>
> A Québec authority has jurisdiction to hear an action based on a contract of insurance where the holder, the insured or the beneficiary of the contract is domiciled or resident in Québec, the contract is related to an insurable interest situated in Québec or the loss took place in Québec. »

[7] Or, malgré que le présent tribunal ait juridiction pour entendre la requête pour jugement déclaratoire, Travelers voudrait que le tribunal lève l'ordonnance de sursis des procédures afin de lui permettre de présenter sa requête devant le District Court du Maine.

[8] Un litige est apparu entre Travelers et MMA concernant la couverture et la limite d'assurance dont bénéficierait MMA suite à l'émission d'une police d'assurance émise le 19 avril 2013[1].

[9] Le principal litige entre les parties concerne l'assurance pour perte de profit que Travelers aurait émis par erreur.

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[1] Voir pièce C-1.

[10] Travelers plaide que, à l'exception de MMA Canada, tous les assurés sous la police d'assurance américaine, ont leur place d'affaires et leurs opérations aux États-Unis.

[11] Par contre, malgré que les autres compagnies couvertes par la police d'assurance ont leur place d'affaires aux États-Unis, celles-ci n'ont fait valoir aucune réclamation contre Travelers.

[12] Est-il nécessaire de rappeler que les faits ayant donné lieu au dépôt d'une requête en vertu de la *Loi sur les arrangements des créanciers des compagnies* (LACC) est un accident ferroviaire survenu le 6 juillet 2013 dans la Ville de Mégantic.

[13] Selon ce que MMA plaide elle-même dans sa requête en vertu de la LACC, cet accident ferroviaire a détruit le centre-ville de la Ville de Mégantic et a causé la mort de 47 personnes. MMA admet sa responsabilité pour ce tragique accident.

[14] Même si Travelers admet que la Cour supérieure du Québec a juridiction pour entendre sa requête pour jugement déclaratoire, elle plaide que le US District Court du Maine serait mieux placé pour entendre sa requête. Pour ce faire, elle plaide que la balance des inconvénients penche clairement en faveur d'une audition devant le District Court. En fait, sans le dire, la requérante plaide la théorie du forum *non conveniens*.

[15] Elle plaide tout d'abord que les témoins potentiels, incluant ses propres employés, résident aux États-Unis. Elle plaide également que le présent tribunal ne pourrait émettre de subpoenas à des témoins américains, incluant ses propres employés, pour les forcer à témoigner au Canada.

[16] Ce problème est plutôt mineur. En effet, le *cross-border protocol* prévoit que le *US Bankrupcy Court* pourra émettre de tels subpoenas si nécessaire. D'ailleurs lors de l'audition, l'honorable juge Kornreich a confirmé que des subpoenas pouvaient être émis rapidement et que ceux-ci pouvaient également être exécutés promptement.

[17] La réclamation de la débitrice face à Travelers est un bien de la débitrice. Travelers soulève que c'est la compagnie mère américaine qui aurait eu une perte de revenu et non pas la compagnie canadienne. Pour ce faire, Travelers fait abstraction du fait qu'il y a une différence notable entre une perte de revenu et des comptes recevables qui pourraient être assurés.

[18] Peu importe ce que MMA comptait faire de son argent, cela n'apporte rien à la solution du litige. Elle était une assurée désignée à la police et elle est celle qui a subi une perte.

[19] D'ailleurs, le tribunal n'a pas à entrer dans le fond du litige pour décider de la présente requête. MMA a une réclamation contre Travelers. Le tribunal n'a pas à se demander si elle est bien fondée pour décider s'il a juridiction.

[20] Le principal argument de Travelers est que la loi gouvernant sa police d'assurance serait la *Loi du Maine*. Or, comme nous le rappelait très récemment la Cour d'appel[2] :

> « [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. »

[21] C'est pourquoi, la Cour d'appel dans l'arrêt Stormbreaker nous enseigne :

> « [101] C'est l'opinion de Guillemard, Prujiner et Sabourin[22]
>
> > Il est surprenant que l'application d'une loi étrangère par le tribunal, qui est l'essence même du droit international privé, puisse justifier un déclinatoire de compétence au profit de l'autorité dont il s'agit d'appliquer la loi. D'autant plus que le Code civil du Québec a introduit des dispositions de nature à faciliter la preuve du droit étranger (voir l'article 2809 C.c.Q.) et que les droits dont il était question dans les décisions rapportées n'étaient guère exotiques.
>
> [22] *Supra*, note 12, p. 945. »

[22] À cela, il faut également ajouter que même si le tribunal étranger est à même de trancher le litige, cela n'est que le premier critère pour décliner compétence. C'est pourquoi la Cour d'appel dans Stormbreaker nous rappelait :

> « [79] Cela ressort du texte même de l'article 3135 *C.c.Q.* et de l'enseignement de la Cour suprême dans Spar Aerospace Ltée c. American Mobile Satellite Corp. de 2002 :
>
> > 69 ...deux éléments essentiels ressortent du texte de l'art. 3135 : sa nature exceptionnelle et l'exigence qu'un autre État soit mieux à même de trancher le litige (voir E. Groffier, *La réforme du droit international privé québécois : supplément au Précis de droit international privé québécois* (1993), p. 130).
> >
> > 70 Ces deux caractéristiques de la doctrine du *forum non conveniens*, énoncées à l'art. 3135, sont conformes à l'exigence de common law énoncée par la Chambre des lords dans l'arrêt de principe *Spiliada Maritime Corp. c. Cansulex Ltd.*, [1987] 1 A.C. 460, p. 476, et par notre

[2] Stormbreaker Marketing c. Weinstock, 2013 QCCA 269, citée dans un autre arrêt récent de la Cour d'appel dans Droit de la famille - 132433, 2013 QCCA 1529 (décision du 12 septembre 2013).

> Cour dans les arrêts *Amchem*, précité, p. 919-921, et *Holt Cargo*, précité, par. 89. [...]
>
> [80] Les auteurs sont du même avis.
>
> [81] Prujiner, Guillemard et Sabourin font la réflexion suivante quant à l'interprétation que devrait recevoir l'article 3135 du *Code civil du Québec* :
>
> > L'article 3135 du Code [...] fait de l'exigence « que les autorités d'un autre État [soient] mieux à même de trancher le litige » une condition nécessaire mais non suffisante pour un déclinatoire de compétence. Le seul fait que les tribunaux d'un autre État soient mieux placés à l'égard d'un litige donné n'a rien d'exceptionnel et se présente chaque fois que le Québec n'est pas le for naturel de litige. Décliner sa compétence sur cette seule base ignore donc l'exigence du Code « exceptionnellement ». [...]
>
> (...)
>
> [86] En bref, le Code civil ne permet au tribunal de décliner compétence qu' « exceptionnellement ». Comme toute décision, celle-ci doit être motivée, ce qui n'est pas le cas dans le jugement attaqué. Il y a donc lieu d'analyser les circonstances de l'affaire pour déterminer si cette seconde condition est satisfaite. »
>
> (notes de bas de page omises)

[23] Cela devrait clore le débat de façon définitive, mais il y a plus.

[24] Ce que nous mentionnait la Cour suprême dans Sam Lévy & Associés inc. c. Azco Mining Inc.[3] doit également recevoir application en vertu de la LACC :

> « En l'espèce, nous faisons face à une loi fédérale qui établit à première vue un centre de commandement ou un «contrôle unique» (Steward précité, p. 349) pour la totalité des procédures liées à la faillite (par. 183(1)). Le contrôle unique n'est pas nécessairement incompatible avec le renvoi de litiges particuliers à d'autres ressorts, mais le créancier (ou le débiteur) qui désire fragmenter les procédures et qui ne peut pas prétendre être un «étranger à la faillite» a le fardeau de démontrer l'existence d'un «motif suffisant», justifiant que le syndic doive accourir dans plusieurs ressorts.»

[25] La Cour suprême a réitéré ce principe très récemment dans l'arrêt AbitibiBowater[4] en mentionnant :

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[3] 2001 3 R.C.S. 978.

[4] Terre-Neuve-et-Labrador c. AbitibiBowater Inc., [2012] 3 R.C.S. 443.

> « [21] Une des caractéristiques principales du régime créé par la *LACC* est de traiter la presque totalité des réclamations contre un débiteur suivant une procédure unique devant un même tribunal. En vertu de ce modèle, le tribunal peut ordonner la suspension de la plupart des mesures d'exécution engagées contre les actifs du débiteur de façon à maintenir le statu quo durant la négociation avec les créanciers. Lorsque la négociation réussit, les créanciers consentent habituellement à recevoir moins que le plein montant de leurs réclamations, lesquelles ne sont pas nécessairement exigibles ou liquidées dès le début des procédures d'insolvabilité. Ces réclamations doivent parfois être évaluées afin d'établir la valeur pécuniaire qui fera l'objet du compromis. »

[26] En conséquence, le tribunal croit que Travelers n'a pas surmonté son fardeau de démontrer que le sursis des procédures ne devrait plus s'appliquer à elle.

[27] Ajoutons que la Cour de faillite est une Cour d'équité et que la notion d'équité est interprétée comme conférant à la Cour de faillite tous les pouvoirs pour disposer des litiges ou d'une difficulté même lorsque la loi ne contient aucune disposition particulière susceptible de recevoir application[5].

[28] La jurisprudence citée par Travelers qu'elle voulait utiliser par analogie ne peut lui être d'aucune aide.

[29] En effet, dans ces décisions, il s'agissait d'une levée du sursis pour permettre à un tiers de poursuivre l'assureur du failli. Il s'agit en fait d'un exemple type de requête pour levée de sursis des procédures lorsqu'une personne veut poursuivre l'assureur d'un failli. Il est alors inutile que sa procédure se fasse devant le tribunal de faillite puisque cela n'a souvent aucun impact sur l'administration de la faillite. En l'espèce, c'est le contraire qui se produit. Il s'agit d'une réclamation du failli (par l'entremise du syndic) contre sa compagnie d'assurance. Il s'agit sans l'ombre d'un doute d'un bien du failli sur lequel la Cour de faillite a juridiction.

[30] Quant à l'argument de Travelers que l'ordonnance rendue par le juge Castonguay n'a aucun effet extraterritorial. Le tribunal ne peut l'accepter.

[31] Nous devons d'abord notez que le tribunal n'a pas à décider si le présent jugement et celui du juge Castonguay est exécutoire aux États Unis. Ce n'est pas la question dont le tribunal est saisi.

[32] Par contre, on sait que les tribunaux québécois ont juridiction et que Travelers fait affaires au Québec. Il faut aussi noter que cette question est plutôt théorique puisqu'un protocole inter-frontalier a été adopté par le présent tribunal et la US Bankrupcy Court.

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[5] Voir re : La Société Pétrochimique Kemtec inc., 1994 R.J.Q. 1345.

[33] Ce protocole permettrait en cas de doute sur la suspension des procédures que la US Bankrupty Court ordonne le sursis des procédures tout comme le présent tribunal le ferait pour la compagnie mère si des procédures étaient intentées contre elle au Canada.

[34] Il ne s'agirait que d'une simple application de la courtoisie judiciaire (Comity) reconnue dans nos deux pays[6].

[35] Même si l'ordonnance rendue par le juge Castonguay n'avait pas d'effet à l'extérieur du Québec, il reste que les décisions des tribunaux québécois seront exécutoires contre Travelers. En effet, selon l'information donnée par ses procureurs, celle-ci fait également affaire au Québec. L'extraterritorialité de l'ordonnance du juge Castonguay n'a donc pas de conséquence en l'espèce.

[36] Ajoutons à cela que le *cross-border protocol* prévoit :

> « Where an issue is to be addressed only to one Court, in rendering a determination in any cross-border matter, such Court may: (a) to the extent practical or advisable, consult with the other Court; and (b) in its sole discretion and bearing in mind the principles of comity, either (i) render a binding decision after such consultation; (ii) defer to the determination of the other Court by transferring the matter, in whole or in part to the other Court; or (iii) seek a joint hearing of both Courts. »

[37] La U.S. Bankrupty Court est prête à accorder une levée limitée et particulière de la suspension des procédures afin de permettre que la compagnie mère américaine M.M.R. puisse être partie à une procédure pour jugement déclaratoire devant le présent tribunal.

[38] Il nous semble que la présente décision atteint l'objectif visé par l'article 44 LACC qui prévoit :

> « La présente partie a pour objet d'offrir des moyens pour traiter des cas d'insolvabilité en contexte international et de promouvoir les objectifs suivants :
>
> *a*) assurer la coopération entre les tribunaux et les autres autorités compétentes du Canada et ceux des ressorts étrangers intervenant dans de tels cas;
>
> *b*) garantir une plus grande certitude juridique dans le commerce et les investissements;

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[6] Reflections on Comity and Sovereignty – Ten years later, dans *Janis P. SARRA, Annual Review of insolvency Law 2012*, Toronto, Carswell, a division of Thompson Reuters Canada Ltd, page 1.

c) administrer équitablement et efficacement les affaires d'insolvabilité en contexte international, de manière à protéger les intérêts des créanciers et des autres parties intéressées, y compris les compagnies débitrices;

d) protéger les biens des compagnies débitrices et en optimiser la valeur;

e) faciliter le redressement des entreprises en difficulté, de manière à protéger les investissements et préserver les emplois.

The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

(*a*) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(*b*) greater legal certainty for trade and investment;

(*c*) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

(*d*) the protection and the maximization of the value of debtor company's property; and

(*e*) the rescue of financially troubled businesses to protect investment and preserve employment. »

POUR CES MOTIFS, LE TRIBUNAL ;

[39] **REJETTE** la requête de Travelers intitulée *« motion to lift the stay of proceeding »*;

[40] **LE TOUT AVEC DÉPENS**.

GAÉTAN DUMAS, J.C.S.

Mail list lawyers

Date d'audience : 1er octobre 2013

ONGLET 4

CITATION: Re Nortel Networks Corporation et al, 2015 ONSC 1354
COURT FILE NO.: 09-CL-7950
DATE: 20150304

SUPERIOR COURT OF JUSTICE – ONTARIO
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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION and NORTEL NETWORKS TECHNOLOGY CORPORATION

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: Newbould J.

COUNSEL: *Harvey G. Chaiton and George Benchetrit*, for SNMP Research International, Inc. and SNMP Research, Inc.

Joseph Pasquariello and Christopher G. Armstrong, for the Monitor, Ernst & Young Inc.

Alan Merskey and Vasuda Sinha, for the Nortel applicants

Scott A. Bomhoff, for the U.S. Debtors

Shayne Kukulowicz, for the US Unsecured Creditors' Committee

Jonathan Bell, for the Ad Hoc Group of Bondholders

Aubrey E. Kauffman, for Avaya Inc.

HEARD: February 27, 2015

RULING ON SNMPRI STAY MOTION

[1] SNMP Research International, Inc. and SNMP Research, Inc. moved for an order to lift the stay of proceedings contained in the Initial Order to permit an action in the United States to proceed against a number of Nortel entities, including NNC and NNL. At the conclusion of the hearing I dismissed the motion for reasons to follow. These are my reasons.

Background to this litigation

[2] SNMP Research, Inc. and SNMP Research International, Inc. (together "SNMPRI") are corporations in the business of producing and distributing software for the simple network management protocol ("SNMP"). The basic purpose of the SNMP is to manage and monitor network-attached devices.

[3] Prior to the commencement of the CCAA Proceedings on January 14, 2009, SNMPRI licensed its software to Nortel for use in a number of Nortel products and from which Nortel purchased SNMP technologies and products. This relationship was governed by a license agreement between Nortel Network Corporation and SNMP Research International, Inc. dated December 23, 1999 together with certain schedules.

[4] Following Nortel's insolvency filings, SNMPRI filed proofs of claim in the CCAA proceedings and the U.S Chapter 11 proceedings for pre-filing claims.

[5] In the spring of 2011, SNMPRI indicated that it also intended to file a complaint for alleged post-filing unauthorized use, distribution, license and sale of SNMPRI software by certain of the Nortel entities after January 14, 2009 (the "Complaint"). The Complaint also asserted claims against certain parties who purchased assets from Nortel in the CCAA and chapter 11 proceedings, including Avaya Inc. SNMPRI seeks to recover at least $86 million from the Canadian and U.S. Debtors on an "administrative expense" basis, including damages

based on the proceeds of the sales of certain Nortel lines of business approved by this Court and the U.S. Bankruptcy Court. By the administrative expense claim, SNMPRI seeks to collect 100 cents on the dollar as it is a post-filing claim.

[6] On September 21, 2011, SNMPRI filed this motion for relief from the stay imposed by the Initial Order to permit the Complaint to proceed in the U.S. Bankruptcy Court against the Canadian Debtors and the U.S. Debtors. In the circumstances, because there was some risk of the Complaint becoming statute barred, SNMPRI and Nortel entered into a letter agreement on October 25, 2011 under which Nortel permitted SNMPRI to initiate the Complaint in the U.S. Bankruptcy Court on the condition that the proceeding be immediately stayed. The letter agreement provided that the parties would mediate the issues in the SNMPRI claims and that the stay of proceedings would continue until the parties had completed mediation. It also provided that if the mediation was not successful, SNMPRI could not to proceed with its Complaint until its motion to lift the stay was decided. An order was made on consent permitting the stay in the Initial Order to be lifted for the limited purpose as agreed.

[7] On December 27, 2013, SNMPRI filed an amended complaint (the "First Amended Complaint") with the U.S. Bankruptcy Court. The First Amended Complaint contains additional allegations arising from the post-filing sales of Nortel's assets and of copyright infringement by Nortel.

[8] As with the original Complaint, in the First Amended Complaint SNMPRI seeks to pursue all of its claims, including those against the Canadian Debtors, by way of a jury trial in the U.S. Shortly before amending the Complaint, SNMPRI filed notice of its intent to "withdraw the reference" from the U.S. Bankruptcy Court, meaning that it would seek to have the Complaint heard not by the U.S. Bankruptcy Court but by the United States Court for the District of Delaware. Thus on this record, SNMPRI seeks a jury trial in the U.S. District Court for Delaware.

[9] The mediation failed. It concluded on March 14, 2014.

The SNMPRI claims

[10] In the SNMPRI claim made in this CCAA proceeding for pre-filing claims, SNMPRI claims:

(a) A claim for approximately $22,000 for certain stayed royalty payments owing for Q4 2008.

(b) A claim for $3.6 million for fees and pre-filing interest resulting from an alleged unauthorized and illegal usage by the Nortel debtors of SNMPRI's EMANATE software in its MG9000 software.

(c) A claim for $3.8 million for fees and pre-filing interest resulting from an alleged unauthorized and illegal usage by the Nortel debtors of SNMPRI's EMANATE software used in Nortel's Bay Software.

(d) SNMPRI claims further amounts to be determined under the U.S. Copyright Act, applicable trade secret law, and other intellectual property law for unauthorized use and distribution of SNMPRI software with the MG9000 software and Bay Software and other products of the Canadian Debtors.

[11] In the Complaint that SNMPRI filed in the U.S. Bankruptcy Court, SNMPRI sues to recover from the Canadian and U.S. Debtors damages and post-petition profits from Nortel's alleged unauthorized post-petition use, distribution, license or sale of SNMPRI software and Nortel's post-petition asset sale to Aveya. Pleaded is an alleged improper use by Nortel of SNMPRI's EMANATE software in Nortel's MG9000 software and in its MG9000 Bay Software. SNMPRI claims to recover from Aveya damages and profits from Aveya's alleged unauthorized possession, use, distribution, license or sale of SNMPRI software, including the SNMPRI Bay Software.

[12] The nub of the claims asserted in the Complaint is that Nortel post-filing improperly used or sold SNMPRI software that was not licensed to Nortel and that Aveya purchased a line of business which contained the SNMPRI software and has not paid anything for it. It is essentially a claim for the same alleged illegal activity as claimed in the pre-filing claim against the Canadian Debtors in this CCAA proceeding.

Analysis

[13] A court has wide powers under the CCAA. Section 11(1) of the CCAA provides that a court may make any order it considers appropriate in the circumstances. Section 11.02(1) and (2) grants jurisdiction in an Initial Order or a later order to stay any action already commenced against a debtor and to stay any proposed action for any period that the court considers necessary. It is a discretionary matter. The onus is on the party applying to lift the stay of proceedings.

[14] There is little authority in how the court's consideration of a request to lift a stay should be dealt with in a liquidating insolvency. In one such case, *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 33 C.B.R. (5th) 50 (Sask. C.A.), the supervising trial judge refused to lift the stay to permit an action to proceed against the debtor because the claimant failed to establish that it had a tenable claim. That order was upheld on appeal. In the Court of Appeal, Jackson J.A. stated that there ought not to be rigid requirements on how a supervising judge is to exercise his or her discretion. She stated:

> **66** Given the broad discretion granted to a supervisory judge under the *CCAA*, as well as the knowledge and experience he or she gains from the ongoing dealings with the parties under the proceedings, it would be contrary to the purpose of the *CCAA* for the law under it to develop in a restrictive way. Having regard for this, there ought not to be rigid requirements imposed on how a supervising *CCAA* judge must exercise his or her discretion with respect to lifting the stay.

[15] Jackson J.A. went on to discuss guidance from previous decisions. She stated:

> **68** In determining what constitutes "sound reasons," much is left to the discretion of the judge. However, previous decisions on this point provide some guidance as to factors that may be considered:
>
> (a) the balance of convenience;
>
> (b) the relative prejudice to the parties;
>
> (c) the merits of the proposed action, where they are relevant to the issue of whether there are "sound reasons" for lifting the stay (i.e., as was said in *Ma, Re*, if the action has little chance of success, it may be harder to establish "sound reasons" for allowing it to proceed).

[16] In this case, no one raises the point that the merits of the proposed action against the Canadian Nortel are so lacking that the motion should be decided on that ground. The issue is whether the action should proceed in this Court or in a U.S. court.

[17] SNMPRI contends that the parties agreed to a trial in the U.S., albeit Knoxville Tennessee. Section 9.11 of the License Agreement between Nortel and SNMPRI contains a forum and choice of law clause providing that New York law is to apply to the license and for disputes to be heard in Knoxville, Tennessee. It states:

> This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without reference to its choice of law provisions, and the federal laws of the United States applicable therein. The venue for any disputes arising under or in respect to this Agreement shall be Knoxville, Tennessee, U.S.A. All proceedings shall be conducted in English.

[18] SNMPRI contends that as the parties have agreed on a forum to resolve their disputes, the onus lies on the Monitor and the Canadian Nortel debtors to displace the forum chosen by the parties. It relies on *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450 as authority for

the proposition that to displace a forum selection clause in a commercial agreement, strong cause must be shown.

[19] SNMPRI also relies on a statement of Jurianz J.A. in *Expedition Helicopters Inc. v. Honeywell Inc.* (2010), 2010 ONCA 351 that a departure from a forum selection clause should only be permitted in exceptional circumstances. He went on to state:

> 24. A forum selection clause in a commercial contract should be given effect. The factors that may justify departure from that general principle are few. The few factors that might be considered include the plaintiff was induced to agree to the clause by fraud or improper inducement or the contract is otherwise unenforceable, the court in the selected forum does not accept jurisdiction or otherwise is unable to deal with the claim, the claim or the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause, the plaintiff can no longer expect a fair trial in the selected forum due to subsequent events that could not have been reasonably anticipated, or enforcing the clause in the particular case would frustrate some clear public policy. Apart from circumstances such as these, a forum selection clause in a commercial contract should be enforced.

[20] I note that included in the factors referred to by Jurianz J.A. that might justify a departure from a forum selection clause was if the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause or that enforcing the clause would frustrate some clear public policy.

[21] The Monitor and the Canadian Debtors say that because of the insolvency of Nortel, the onus lies on the SNMPRI to justify lifting the stay of proceedings. They say that all matters involving the Canadian Debtors should be dealt with in the CCAA court in Toronto. They rely on *Sam Lévy & Associés Inc v Azco Mining Inc*, [2001] 3 SCR 978. That case involved a Quebec bankrupt company under bankruptcy administration in Quebec. The Trustee commenced a petition in Quebec to recover assets against a British Columbia company, which moved to transfer the matter to B.C. under section 187(7) of the BIA which permitted the transfer if there was "sufficient cause". The B.C. company relied on a type of forum selection clause, although Binnie J. held it to be only a choice of law clause.

[22] In *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 that a choice of forum clause in an insolvency situation should be taken into account but it is not binding or controlling. He stated in particular:

> **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....
>
> **63** Leaving aside, then, the inapplicable directives of the Civil Code of Québec, the question is whether a choice of forum clause would amount to "sufficient cause" for the purpose of s. 187(7) to the extent that it would be an error of law for the motions judge to have declined to give it effect in the circumstances of this case. In my view a choice of forum clause (where there really is one) ought to be taken into careful consideration by a motions judge but it is not binding: [authorities omitted].
>
> **64** It could be argued that the public policy favouring a "single control" of bankruptcy proceedings and opposition to their fragmentation demands that a choice of forum clause receive lesser effect in bankruptcy than in the context of ordinary commercial litigation: Industrial Packaging Products Co. v. Fort Pitt Packaging International, Inc., 161 A.2d 19 (Pa. 1960); In re Treco, 239 B.R. 36 (S.D.N.Y. 1999), aff'd 240 F.3d 148 (2d Cir. 2001).
>
> **67** The implementation of these public policies might be expected to take priority over private "choice of forum" agreements where the two come into conflict, as indeed Robert J.A. concluded in the Quebec Court of Appeal. A similar position is expressed in I. F. Fletcher, *Insolvency in Private International Law* (1999), at p. 47, fn. 73:
>
> > [P]rivate contractual arrangements between parties cannot prevail over the exercise of bankruptcy jurisdiction, which belongs to the realm of public

> policy, serving a wider spread of interests including, ultimately, those of society at large.
>
> In the United States, however, there is a competing body of judicial opinion that a trustee in bankruptcy who sues on an agreement containing a forum selection clause should, as a general rule, be bound by that clause to the same extent as the parties thereto: see Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190 (3d Cir. 1983); In re Diaz Contracting, Inc., 817 F.2d 1047 (3d Cir. 1987), and Hays and Co. v. Merrill Lynch, 885 F.2d 1149 (3d Cir. 1989).
>
> **68** In my view, for the reasons previously mentioned, the choice of forum clause would be a significant factor under s. 187(7) but not, in the context of the public policies expressed in the Act, a controlling factor.

[23] Justice Binnie stated that a creditor who was not a stranger to the bankruptcy had the onus to establish that multiple jurisdictions should be available for claims. He said:

> **76** ...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....

[24] *Sam Lévy* involved a BIA proceeding. In it, Binnie J. referred to *Stewart*, 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 Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, it was noted that the CCAA offers more flexibility and greater judicial discretion than the rules-based mechanism under the BIA and the principle was enunciated 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.

[25] In *Century Cities,* nearly 10 years after *Sam Lévy*, Deschamps J. made clear why public policy prefers the resolution of all claims against a debtor to be determined in a single proceeding model. She stated:

> **22** While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:
>
> > They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]
>
> The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

[26] Justice Jurianz in *Expedition Helicopters* listed as one of the factors that might justify a departure from a forum selection clause is if the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause. The license agreement between SNMPRI and Nortel Networks Corporation was made on December 23, 1999. It is inconceivable that an insolvency of NNC, the parent company of all of the Nortel entities, was within the contemplation of the parties at that time. If it were, the license agreement presumably would not have been made. That is a significant change in circumstances.

[27] Another factor referred to by Justice Jurianz was if enforcing the forum selection clause would frustrate some clear public policy. I think it follows from *Sam Lévy* that public policy in this country at least precludes a forum selection clause from being controlling in an insolvency situation. A CCAA insolvency proceeding serves a wider spread of interests than the parties to the agreement, including in this case the interests of pension and other claims asserted by the

former employees of Nortel. A method that results in the most expeditious and fair determination of the claims of SNMPRI is clearly in the interests of all stakeholders in this CCAA process.

[28] It is to be noted that whereas the forum selection clause provides for Knoxville, Tennessee to be the venue for any dispute, SNMPRI has stated in its filings that it wishes a jury trial in Delaware. Thus SNMPRI is not following the clause. During argument counsel for SNMPRI said that if successful in having the case sent from the U.S. Bankruptcy Court to the Delaware District Court, it then might seek a transfer to Tennessee. Whether that could be done I do not know, but it would not bode well for a timely disposition of the action. The prospect of the Nortel Debtors being dragged around in different U.S. courts is not an appealing one. For them to become entangled in a drawn-out, foreign litigation process that will likely have no regard for the practical concerns of this insolvency, including the importance of resolving all remaining unresolved claims against the Canadian Debtors in a timely and efficient manner so that these proceedings, already pending for six years, can be brought to their conclusion, is a situation that should be avoided.

[29] So far as the forum selection clause providing that the license is to be governed by and construed in accordance with New York law and the federal laws of the United States applicable therein, no evidence has been filed as to what those laws are or to indicate that those laws are in any substantial way different from the laws of this country. Even if they were, Canadian courts can and often have applied foreign law. The recent UKPC claims against NNC and NNL is but one such example. I do not consider this much of a factor, if any, in favour of lifting the stay of proceedings.

[30] I also do not think that the location of witnesses in the U.S. or in Canada is a compelling factor, as contended for by SNMPRI. In any event, material was not provided in any detail as to expected witnesses and where they reside.

[31] SNMPRI says that the claims against the Canadian Debtors arise from common issues of fact and law as in the claim against the U.S. Debtors and against Aveya. Therefore SNMPRI

says these claims should be heard together in the U.S. with the claims against the U.S. Debtors and against Aveya. This is particularly so, it asserts, because of its right to a jury trial in the U.S. in its claim against Avaya.

[32] There would appear to be nothing to stop SNMPRI from claiming against the U.S. Debtors and Aveya in Canada, although it might be that Aveya would attempt to challenge the claim against it being tried in Canada. There would certainly be nothing to stop SNMPRI from claiming against the Canadian Debtors in this CCAA proceeding and against the U.S. Debtors in the U.S. Bankruptcy Court and having a joint trial under the protocols established between the two courts. SNMPRI could make Aveya a defendant in the action in the U.S. Bankruptcy Court, and Mr. Kauffman who appeared for Aveya said it would be content to have the claim against it dealt with in the U.S. Bankruptcy Court.

[33] I agree with all of those opposing SNMPRI's motion to lift the stay that the supposed difficulties that may be caused by its rights to a jury trial in its claim against Aveya are of its own choosing. SNMPRI may want to have the claim against Aveya tried together with the claims against Nortel, and try to have them all tried by a jury, but should that require the claim against the Canadian Debtors to be tried that way? It could be said, as one counsel did, that the tail is wagging the dog.

[34] If the claim against the Canadian Debtors for its post-filing conduct is tried in a separate U.S. jury proceeding, it means that there will be a multiplicity of proceedings against the Canadian Debtors. The pre-filing claim must be determined in the CCAA proceedings. The post-filing claims would be tried before a jury. It is quite evident that there is overlap between these claims. Indeed the issues are the same except as to the timing of the alleged unauthorized use of SNMPRI software, one claim being for pre-filing unauthorized use and the other being for post-filing unauthorized use. The risk of inconsistent findings of fact is obvious.

[35] A CCAA court should not lightly lose control of the process whereby claims against the debtor are to be determined. I agree that procedures should be imposed to ensure that the process

for resolving the Canadian SNMPRI claims does not become more expensive or complicated than the circumstances permit or the claims merit. Such an approach would be consistent with this Court's earlier orders in these proceedings. The allocation and inter-estate claims trials were, among other things, ordered to proceed on an accelerated timetable, with a controlled process for documentary and oral discovery. There is nothing in the materials that would indicate that a Delaware District Court would have any interest in a controlled process that would take into account the insolvency of the Canadian Debtors and the need for a timely resolution of all claims and preserving the debtors' resources as much as is reasonably possible.

[36] Is SNMPRI a stranger to the bankruptcy in the sense articulated by Binnie J. in *Sam Lévy*? I think not. SNMPRI has participated in and objected to the sales of Nortel's lines of business and it has filed a CCAA proof of claim against the Canadian Debtors. It has not met its burden of demonstrating sufficient reason to displace this Court's jurisdiction to keep all of the SNMPRI claims against the Canadian Debtors within a single proceeding. Even if the onus were on the Monitor and the Canadian Debtors to prevent the stay from being listed, I am of the view that they would have met that onus.

[37] In the circumstances, the motion by SNMPRI to lift the stay of proceedings to permit the post-filing claims against the Canadian Debtors to be tried in the U.S. was dismissed.

Newbould J.

Date: March 4, 2015

ONGLET 5

CITATION: Re: Essar Steel Algoma Inc. Et al, 2016 ONSC 595
COURT FILE NO.: 15-CV-0011169-00CL
DATE: 20160125

SUPERIOR COURT OF JUSTICE – ONTARIO
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 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

BEFORE: Newbould J.

COUNSEL: *Eliot Kolers, Maria Konyukhova and Yannick Katirai*, for the Applicants

Andrew Kent, Markus Koehnen and Jeffery Levine, for the the Moving Parties The Cleveland-Cliffs Iron Company, Cliffs Mining Company and Northshore Mining Company ("Cliffs")

Derrick Tay, Clifton Prophet and Nicholas Kluge, for the Monitor

L. Joseph Latham and Bradley Whiffen, for the Ad Hoc Committee of Noteholders

Natalie E. Levine, for the Ad Hoc Committee of senior and junior secured Noteholders

Sarah-Anne Van Allen, for Wilmington Trust, National Association,

Evan Cobb, for the directors of the applicants

Andrea Lockhart, for Deutsche Bank

Ronald Carr, for Her Majesty the Queen in right of Ontario

HEARD: January 14, 2016

ENDORSEMENT

[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 *Re SNV Group Ltd.*, 2001 BCSC 1644 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 [Century Services] Ltd., Re,* [2010] 3 S.C.R. 379 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

[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).

Century Services to make the procedural orders of the kind sought by Essar Algoma in this case. See also *Smokey 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 ["*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"...
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> **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*, 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. (4th) 264 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 *Montréal, Maine & Atlantic Canada Co. Re,* 2013 QCCS 5194, 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

[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.

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 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 (Attorney General) v. Rothmans Inc.*, 2013 ONCA 353 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 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,
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> (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 Communale Energia and Ambiente* (1999), 50 B.L.R. (2d) 33 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 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* 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 *Breeden v. Black*, [2012] 1 S.C.R. 666 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

[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 at paras. 103-104. In any event, his opinion was based on the assumption that Cliffs did not carry on business in Canada.

(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 Columbia*, 821 F. Supp. 2d 268 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:

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[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.

> 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 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.

Newbould J.

Date: January 25, 2016

ONGLET 6

Résumé

Parties
Lawrence Home Fashions Inc./Linge de maison Lawrence inc. (Syndic de)

Juridiction
Cour supérieure (C.S.), Montréal

Numéro de dossier
500-11-042396-123

Décision de
Juge Mark Schrager

Date de la décision
2013-07-05

Références
AZ-50983224
2013 QCCS 3015
2013EXP-2383
J.E. 2013-1290
Texte intégral : 5 pages (copie déposée au greffe)

Indexation
FAILLITE ET INSOLVABILITÉ — procédure — changement de district — transfert de dossier dans une autre province — motifs suffisants — clause d'élection de for — choix de la loi applicable — principe du «contrôle unique» — intérêt public — compétence des tribunaux québécois.
INTERNATIONAL (DROIT) — compétence des tribunaux — tribunaux québécois — faillite — action sur compte — clause d'élection de for — contrat régi par le droit ontarien — changement de district.

La Dépêche

FAILLITE ET INSOLVABILITÉ : La présence d'une clause d'élection de for dans le contrat intervenu entre la requérante et la faillie n'est pas, en soi, un motif suffisant, au sens de l'article 187 de la *Loi sur la faillite et l'insolvabilité*, pour ordonner le transfert en Ontario de l'action sur compte entreprise au Québec par le syndic.
INTERNATIONAL (DROIT) : Lorsqu'un tribunal est saisi d'une requête pour renvoi dans une autre division en vertu de l'article 187 (7) de la *Loi sur la faillite et l'insolvabilité*, il n'y a pas lieu de recourir aux articles 3135 et 3148 C.C.Q. afin de trancher les questions de compétence et d'élection de for.

Résumé

Requête pour le transfert d'un dossier dans un autre district judiciaire. Rejetée.

Le syndic, au nom de la faillie, a entrepris au Québec une action sur compte à l'encontre de la requérante. Cette dernière soutient que cette action devrait être transférée en Ontario étant donné la présence d'une clause d'élection de for dans le contrat intervenu entre elle et la faillie, lequel est en outre régi par le droit ontarien. Elle demande donc le transfert du dossier dans cette province, soutenant qu'elle serait autrement privée d'un moyen de défense prévu par la common law et qu'elle subirait un préjudice du fait d'avoir à faire voyager ses témoins de Toronto à Montréal.

Décision

D'une part, dans le contexte d'une demande formulée en vertu de l'article 187 (7) de la *Loi sur la faillite et l'insolvabilité*, le fait que les parties aient prévu une clause d'élection de for, bien qu'il soit pertinent, n'est pas déterminant. D'autre part, la requérante ne convainc pas le tribunal que la question du choix de la législation applicable fondait à s'écarter du principe d'intérêt public voulant que les procédures en faillite fassent l'objet d'un «contrôle unique». En effet, les tribunaux québécois sont compétents pour trancher une question de droit étranger dans la mesure où une preuve appropriée leur est présentée. Quant au déplacement des témoins, il ne s'agit pas d'une contrainte excessive étant donné que les représentants de la requérante appelés à témoigner sont encore à son service. En somme, il n'y a pas de «motif suffisant» au sens de l'article 187 (7) de la loi pour faire droit à la demande de la requérante.

Fascicule Express
EXP 2013, no 29
J.E. 2013, no 29

Législation citée

C.C.Q., art. 1672 et ss. , 3135 , 3148

Faillite et l'insolvabilité (Loi sur la), (L.R.C. 1985, c. B-3), art. 2 «locality of a debtor», 183, 187 (6), 187 (7), 243

Jurisprudence citée

Applique | Explique | Distingue | Critique | N'applique pas | Mentionne | Citée(s) par les parties

Mentionne

Paragr. 7: *D.I.M.S. Construction inc. (Syndic de) c. Québec (Procureur général)* , (C.S. Can., 2005-10-06), 2005 CSC 52, SOQUIJ AZ-50335870, J.E. 2005-1804, D.T.E. 2005T-918, [2005] 2 R.C.S. 564, EYB 2005-95484, 2005 CarswellQue 7955

Paragr. 18: *Groupe Mount Real Vest (Syndic de)* (C.S., 2010-05-13), 2010 QCCS 1881, SOQUIJ AZ-50635837, 2010EXP-1991, J.E. 2010-1090, EYB 2010-173859

Paragr. 9, 18: *Sam Lévy & Associés inc. c. Azco Mining Inc.* (C.S. Can., 2001-12-20), 2001 CSC 92, SOQUIJ AZ-50108736, J.E. 2002-93, [2001] 3 R.C.S. 978, 30 C.B.R. (4th) 105, 207 D.L.R. (4th) 385, 280 N.R. 155, REJB 2001-27203

Catégorie

02

Date du versement initial

2013-07-24

Date de la dernière mise à jour

2014-11-27

SUPERIOR COURT
Commercial Division

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
N°: 500-11-042396-123

DATE : July 5, 2013

PRESIDING : THE HONOURABLE MARK SCHRAGER, J.S.C.

IN THE MATTER OF THE BANKRUPTCY OF:

LAWRENCE HOME FASHIONS INC./
LINGE DE MAISON LAWRENCE INC.
Debtor

-and-

LE GROUPE FULLER LANDAU INC.
Trustee

-and-

SEARS CANADA INC.
Respondent-Petitioner

JUDGMENT

JS 1319

[1] Is a trustee in bankruptcy bound by the choice of forum clause contained in the bankrupt's contract giving rise to the accounts receivable which the trustee seeks to collect?

FACTS

[2] Lawrence Home Fashions Inc. (the "Bankrupt") filed a voluntary assignment in bankruptcy on May 28, 2012 in the hands of Le Groupe Fuller Landau Inc. (the "Trustee"). The latter acts as trustee and as receiver named under Section 243 of *The Bankruptcy Insolvency Act* [1] ("B.I.A.") by judgment of the Registrar dated May 30, 2012.

[3] The Trustee has initiated proceedings before this Court sitting in bankruptcy matters in Montréal, Québec, claiming from Sears Canada Inc. ("Sears") $371,129.00 representing goods sold and delivered by the Bankrupt to Sears.

[4] Sears has filed a motion invoking Section 187(7) B.I.A. for the transfer of the proceedings to the Ontario Superior Court of Justice sitting in Toronto, Ontario, and having jurisdiction in bankruptcy matters. Section 187(7) B.I.A. reads as follows:

> "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."

[5] Sears pleads that the "sufficient cause" to transfer the proceedings to Ontario is contained in clause 17.6 of the Supply Contract (the "Contract") between it and the Bankrupt.

> "Submission to Jurisdiction. Supplier and Sears hereby consent to attorn to the jurisdiction of the courts of the Province of Ontario and agree that the proper and exclusive venue for any dispute concerning this UTC, Related Agreement and any Purchase Order shall be in such courts. All objections to such jurisdiction or venue are hereby waived."

[6] According to Sears, since the Trustee steps into the shoes of the Bankrupt, the Trustee is bound by this clause to litigate in Ontario.

[7] Moreover, Sears pleads that the Bankrupt and Sears contracted that Ontario law would apply to any dispute. Sears intends to invoke the doctrine of equitable set-off as a defence. While there exists the concept of set-off in Québec law, called "compensation", equitable set-off does not exist. [2] Thus,

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[1] R.S.C., 1985, c. B-3.

[2] *Attorney General of Québec, Commission de la construction du Québec and Commission de la santé et de la sécurité du travail vs. Raymond Chabot Inc., ès qualité Trustee in the matter of the Bankruptcy of D.I.M.S. Construction Inc.*, [2005] 2 S.C.R. 564.

Sears concludes that it would be prejudiced if forced to defend the case in Montréal and prove through expert testimony, the Ontario law relating to equitable set-off.

[8] Sears adds that it will also suffer prejudice because it will be obligated to bring to Montréal witnesses from Toronto.

DISCUSSION

[9] In *Azco Mining Inc. vs. Sam Lévy and Associates Inc.* [3] the Supreme Court of Canada, on appeal from the Québec Court of Appeal, in a bankruptcy matter, held that the B.I.A. establishes as a principle the "single control" doctrine for all proceedings related to a given bankruptcy. This is a matter of public policy to allow for the efficient administration of bankruptcy estates [4].

[10] Thus, in principle, where the trustee seeks to recover assets (including money) of the bankrupt, proceedings are properly brought before the court in the place where the bankruptcy has been filed which will generally correspond to the court having jurisdiction under Section 183 B.I.A. in the "locality of the debtor" (as defined in Section 2 B.I.A.). In the present case, such court is the Superior Court of Québec, sitting in bankruptcy matters in the District of Montréal. Any judgment obtained, by a court having jurisdiction in bankruptcy matters, is enforceable throughout Canada (Section 187(6) B.I.A.).

[11] Section 187(7) B.I.A. provides, by way of exception, that a proceeding may be transferred, as Sears has requested. As an exception, it is Sears' burden to demonstrate that a transfer is appropriate. [5]

[12] In the unanimous judgment in the *Azco Mining case*, Binnie, J., stated clearly that under Section 187(7) B.I.A., a motions judge is to take a choice of forum clause into "careful consideration" [6] in determining whether "sufficient cause" pursuant to Section 187(7) B.I.A. exists to transfer a proceeding. Binnie, J., added that 187(7) B.I.A. stands on its own and the Court should not consider Articles 3148 and 3135 of the Civil Code of Québec ("C.C.Q.") dealing with jurisdiction and choice of law. [7] A contractual choice of law clause is not a controlling factor under Section 187(7) B.I.A. as would be the case in a purely private matter under the C.C.Q. [8]

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[3] *Azco Mining Inc. vs. Sam Lévy and Associates Inc.*, [2001] 3 S.C.R. 978.
[4] *Ibid.*, paragraphs 26 and 27.
[5] *Ibid.*, paragraph 76.
[6] *Ibid.*, paragraph 63.
[7] *Ibid.*, paragraph 62.
[8] *Ibid.*, paragraph 68.

[13] Binnie, J. while setting down the analytical framework was not required to :

> " [...] undertake the exercise of considering whether in this case, there is any conflict between private choice and public interest and, if so, how "choice of forum" considerations should be balanced [...] ". [9]

because he found that no choice of forum clause existed in the contract in the *Azco Mining* case.

[14] In the case at bar, there is clearly a contractual choice of forum in favour of Ontario. The Trustee did not allege the contract and sought to avoid the choice of forum clause on such basis. That is clearly incorrect. The goods sold and delivered by the Bankrupt to Sears for which the Trustee claims payment appear clearly to be governed by the contract and thus, the choice of forum clause.

[15] However, Sears' arguments that in this case the private interest of the choice of law prevail over the public interest of the single control doctrine are not convincing.

[16] The Motion supported by affidavit evidence filed by Sears states merely that Sears is :

> "[...] currently in the process of assessing its rights with respect to possible claims based on the rules of set-off."

Thus, there is no clear assertion that the defence based on set-off, equitable or otherwise, will be pleaded.

[17] Moreover, clause 15 of the Contract referring to Sears' right of set-off, on its face, could give rise to a set-off other than equitable set-off – i.e. a set-off reconcilable with the Québec doctrine of compensation foreseen by Articles 1672 and following C.C.Q.

[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. [10] Indeed, this is a frequent occurrence particularly in insolvency matters. [11]

[19] With regard to the availability of witnesses, the Court notes from the affidavit evidence that Sears' employees who signed the Contract and dealt with

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[9] *Ibid.*, paragraph 69.
[10] *Ibid.*, paragraph 78.
[11] *Group Mount Real Vest and Raymond Chabot Inc., and Thomas Weisel Partenaires Canada Inc.*, 2 010 QCCS 1881 (Jean-Yves Lalonde, j.c.s).

the account remain in its employ. Travel from Toronto to Montréal is not seen by the undersigned as an undue hardship. On the other hand, should the Trustee require former employees of the Bankrupt to testify, it is reasonable to imagine that such individuals will have to be summoned by *subpoena* and in all likelihood reside in closer proximity to Montréal than to Toronto.

[20] Consequently, the undersigned has not been convinced by Sears that there exists in this case, by reason of the choice of law clause in the Contract, or otherwise, "sufficient cause" within the meaning of Section 187(7) B.I.A. to transfer the Trustee's proceedings to recover sums from Sears to the Ontario Superior Court.

FOR ALL OF THE ABOVE REASONS, THE COURT:

[21] **DISMISSES** the Motion of Sears Canada Inc. for the transfer of proceedings, dated May 30, 2013, plumitif no 51;

[22] **THE WHOLE** with costs.

MARK SCHRAGER, J.S.C.

Me Jean-François Gauvin
Miller Thomson, s.e.n.c.r.l.
Attorneys for Trustee/Petitioner

Me Stéphanie La Rocque
De Grandpré Chait, s.e.n.c.r.l./LLP
Attorneys for Respondent-Petitioner

Date of Hearing: June 28, 2013

N° : 500-11-048114-157

COUR SUPÉRIEURE
District de Montréal

Dans l'affaire de la loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, Ch. c-36, telle qu'amendée :
BLOOM LAKE GENERAL PARTNER LIMITED, ET ALS

Débitrices

et
SOCIÉTÉ EN COMMANDITE MINE DE FER DU LAC BLOOM, ET ALS

Mises-en-cause

et
FTI CONSULTING CANADA INC.

Contrôleur

et

SYNDICAT DES MÉTALLOS S.L. 6254 ET AL.

Mis en cause

ARGUMENTATION ÉCRITE DES MIS EN CAUSE SYNDICAT DES MÉTALLOS, SECTIONS LOCALES 6254 ET 6285 SUR LA JURIDICTION DE LA COUR QUANT À LA REQUÊTE DU CONTRÔLEUR INTITULEE MOTION BY THE MONITOR FOR DIRECTIONS WITH RESPECT TO PENSION CLAIMS

ORIGINAL

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