TAB F

Indexed as:

Scotia Realty Ltd. v. Olympia & York SP Corp.

Re Scotia Realty Ltd. and Olympia & York SP Corporation and Campeau Corporation

[1992] O.J. No. 811

9 O.R. (3d) 414

9 C.P.C. (3d) 339

33 A.C.W.S. (3d) 325

Action No. B229/91

Ontario Court (General Division),

Dennis Lane J.

April 22, 1992

Counsel:

R.A. Smith, Q.C., and G.A. Hainey, for applicant.

B. Chernos, Q.C., and R.A. Watson, for respondent, Olympia & York SP Corporation.

John W. Brown, Q.C., and J.A. Prestage, for respondent, Campeau Corporation.

---

1 **DENNIS LANE J.**:--The applicant, Scotia Realty Limited (Scotia), is the landlord and the respondents are the current tenants under a land lease dated December 1, 1985 of the lands in Toronto upon which the Scotia Plaza stands. Scotia is entitled to a fixed basic annual rent plus annual participation rent calculated as a percentage of gross revenue as defined in the lease. Participation rent did not begin until the fourth quarter of 1989. In the spring of 1989 Scotia obtained from Campeau a forecast dated May 10, 1989 of the probable amount of such rent. Scotia questioned the basis upon which gross revenue was calculated by Campeau. The parties held discussions and exchanged correspondence. Scotia says that the correspondence constitutes an agreement resolving most of the

disputed points in its favour. It applies for a determination of the rights arising from the alleged agreement and a declaration that the respondents are bound by the alleged agreement not to deduct or exclude from gross revenue certain tenant inducements such as free rent, lease takeovers and cash payments to tenants. If granted, such a declaration would determine the issue for the whole of the term of the lease to March 31, 2079.

2 The respondents deny that the correspondence constitutes an agreement. They say the discussions and correspondence were all without prejudice with a view to settlement of the dispute. They say that the resolution of any one issue was not final unless and until all issues were resolved. It is common ground that some of the disputed issues have not been resolved. They further say that an application is not an appropriate procedure under rule 14.05(3)(d), (g) and (h) of the Rules of Civil Procedure, O. Reg. 560/84, because the dispute is not about rights arising under an agreement but about whether an agreement exists at all. Further, the respondents say the lease requires disputes of this nature to be determined by arbitration. Accordingly the respondents cross-apply to stay the application, thus requiring the parties to proceed by arbitration. In the alternative they move for summary judgment dismissing the application or for an order that the application proceed as an action.

3 While the discussions between the parties were taking place, the participation rent commenced and the first monthly payment became due on November 27, 1989. The lease requires the tenants to provide Scotia with a statement for each lease year certified by the tenants' auditor verifying the calculation of annual participation rent. The first relevant lease year ended on December 20, 1989 and in the fall of 1990 the required statement was sent by the tenants. It was prepared and certified by Messrs. Peat Marwick Thorne (PMT). It showed that the tenants had excluded from gross revenue for the 1989 year the sum of $505,571 on the basis that rental income received representing the amortization of the cost of leasehold improvements was appropriately excluded under the definition of gross revenue in the lease. This was a reaffirmation of the position taken by the tenants in the discussions with Scotia. The PMT report also showed that the tenants had not excluded from gross revenue certain other tenant inducement items which had originally been excluded in the May 10, 1989 forecast. These are the items as to which Scotia claims a binding agreement exists preventing the tenants from excluding them.

4 The lease provides that Scotia has the right to have its own accountants audit the records of the tenants to verify the participation rent calculation. Ernst & Young were engaged to do so and delivered their report on the 1989 year in January 1991 concluding that the participation rent was understated by the exclusion of rental [income] received representing amortization of the cost of leasehold improvements. On February 5, 1991, Scotia notified the tenants of the deficiency and demanded payment. After unsuccessful discussions Scotia acted under the arbitration provisions of the lease and delivered a notice of arbitration on June 18, 1991 as follows:

> TAKE NOTICE Scotia Realty Limited ("Scotia") hereby notifies Campeau Corporation ("Campeau") and Olympia & York SP Corporation ("O&Y") of its desire to arbitrate a dispute in respect of the proper interpretation of paragraph 1.01(nn)(v) of the Land Lease dated as of December 1, 1985, between Scotia and Campeau, as amended and assumed to date.

5 Paragraph 1.01(nn)(v) of the lease is part of the lease definition of gross revenue. The whole clause reads:

(nn) "Gross Revenue" means for any period all revenues received (without duplication) by or on behalf of the Lessee from or in respect of the Project in such period or amounts received in lieu thereof, but excluding:

(i) non-cash items including depreciation or amortization;

(ii) monies recovered from tenants representing the cost of taxes and operating costs;

(iii) monies recovered from tenants representing the cost of utilities consumed by tenants or representing additional services which are not part of the tenants' base annual rental;

(iv) rental derived from the BNS Building Retail Area; and

(v) rental received representing amortization of the cost of leasehold improvements installed for a tenant;

less:

(vi) any management fee or equivalent paid to Citicom pursuant to the Parking Management Agreement.

If rental is derived from parties not acting at arms' length to the Lessee or any Member of a Development Group, or if rental is reduced because of agreement with the tenant respecting premises leased elsewhere or services provided, or if rental is reduced other than bona fide in accordance with general industry practices, such rental will be adjusted, for purposes of calculation of Gross Revenue, to rental that would be payable in an arms' length transaction or as if no such other agreement existed or as if no reduction is made. If the Lessee subleases the Leasehold Estate or any part of it to a corporation or other entity for the purposes of operating the same, and such sublease is approved by the Lessor in accordance with Section 16.05, Gross Revenue shall include (without duplication) all such revenues received by such sublessee.

6 It is apparent that the Scotia notice of arbitration involves arbitration of a very specific question -- the interpretation of subpara. (v) -- and not of the whole definition. It does not on its face confine the arbitration to a single lease year.

7 On June 27, 1991, the tenants delivered to Scotia a notice of arbitration as follows:

NOTICE OF ARBITRATION

TAKE NOTICE that Campeau Corporation ("Campeau") and Olympia & York SP Corporation ("O & Y") hereby notify Scotia Realty Limited ("Scotia Realty") of the desire of Campeau and O & Y to arbitrate a dispute in respect of the proper interpretation in its entirety of paragraph 1.01(nn) of the Land Lease dated as of December 1, 1985, between Scotia Realty and Campeau, as amended and assumed to date.

8 Dated at Toronto June 27, 1991.

9 This notice is likewise not on its face limited to a single year. It involves arbitration of the interpretation of the whole of para. 1.01(nn), a much broader question which would include all of

the matters which Scotia contends were settled in its favour by the agreement it alleges arises from the meetings and correspondence referred to earlier.

10 At the same time as they delivered their notice of arbitration, the tenants delivered a statement of annual participation rent for the lease year ended December 20, 1990 (the 1990 year) certified by PMT. This statement shows that the tenants have deducted from gross revenue the very items that Scotia contends have been settled. Scotia's accountants had not, as of the hearing before me in February 1992, completed their audit of the tenants' rental records. Consequently, Scotia contends that no arbitrable dispute has yet arisen regarding the 1990 year. The only arbitrable dispute that now exists, Scotia says, is the narrow one raised by its notice. Nor will the broader issues be arbitrable when the 1990 year audit is completed, Scotia contends, because the alleged agreement precludes the tenants from arbitrating the issues covered by that agreement.

11 The lease is designed to refer disputes regarding participation rent to arbitration. Paragraphs 3.04 and 3.05 deal, respectively, with the calculation of participation rent during periods of restoration of the building after destruction or damage and during periods of redevelopment. Each contains a broad clause referring any dispute as to participation rent arising during such periods to arbitration. By paras. 3.03 and 3.07 the more normal situation is covered by the scheme referred to earlier: the presentation by the tenants of a certified statement of annual participation rent accompanied by payment and the right of Scotia to its own audit. Paragraph 3.07 concludes:

> Any dispute arising as a result of any such audit shall be resolved by arbitration in accordance with Article 19.

Article 19 is the general provision as to arbitration. It provides by para. 19.01(g) what is known as a "Scott v. Avery" clause [see Scott v. Avery (1856), 25 L.J. Exch. 308, 5 H.L.C. 811, 10 E.R. 1121]:

> (g) Where arbitration is required by this Lease, commencement and completion of such arbitration in accordance with this Lease shall be a condition precedent to the commencement of an action at law or in equity in respect of the matter required to be arbitrated.

There is no language limiting the nature of the issues with which the arbitrator is to deal.

12 In my opinion the scheme of the lease contemplates that all disputes as to participation rent will be arbitrated. Although the right of Scotia to have its own audit is set out in permissive terms, the only way in which an obligation to pay participation rent beyond the amount certified by the tenants' accountant can be created is through the landlords audit and a demand for any deficiency revealed. The lease does not contemplate litigation of the sort commenced by Scotia in these proceedings. If Scotia chooses to assert an agreement supplementing or refining the terms of para. 1.01(nn), thus affecting the amount of participation rent, it will so instruct its accountants. The alleged agreement will be reflected in Scotia's accountant's report and can be arbitrated. Simply because Scotia has so far chosen not to exercise its audit rights does not leave the dispute as to how the participation rent is to be calculated for the 1990 year open to be litigated. As Scotia's counsel put it in the factum (para. 21), as a result of Scotia not having exercised its audit rights "no dispute has yet arisen as a result of the audit". I quite agree but, in my view, that only means that a notice of arbitration in respect of the 1990 year is premature. It does not mean that one party can have the heart of the potential dispute resolved in the courts.

13 Scotia argues that it seeks to resolve its rights under an agreement that is separate and apart from the lease and that arbitration is not therefore required. I do not agree. It is artificial to present the correspondence as a free-standing agreement. It is, if it is an agreement at all, an agreement as to what some of the words of the lease mean, in effect an amendment to the lease. It is impossible to imagine an agreement more closely tied to the lease. To accept this argument is to open the door to evasion of arbitration provisions every time parties discuss the interpretation of language in the lease. The language of the arbitration provisions is broad enough to include an issue of whether or not a particular interpretation has been agreed to. All such matters should be presented to the arbitrator by way of the two competing accountants' reports, each accountant relying on the interpretation of the language (including correspondence) put forward by its client.

14 In my view the scheme of this lease is to require all matters relating to participation rent to be arbitrated in the manner just outlined. The courts have long acted with caution in interfering with arbitration.

15 In Toronto General Trusts Corp. v. McConkey (1917), 41 O.L.R. 314 (H.C.J.), Middleton J. declined to determine questions of the interpretation of a lease containing an arbitration clause, leaving the parties to their remedies in the arbitration. In Stokes-Stephens Oil Co. v. McNaught (1918), 57 S.C.R. 549, 44 D.L.R. 682, the Supreme Court of Canada upheld a stay of an action in favour of arbitration. Anglin J. said (p. 559 S.C.R., pp. 689-90 D.L.R.):

> Once the conclusion is reached that the agreement for arbitration is wide enough to embrace the claims presented in the action, it is the prima facie duty of the court to allow the agreement to govern and the onus of shewing that the case is not a fit one for arbitration is thrown on the person opposing the stay of proceedings.

(Citations omitted)

The motion for a stay is not to be decided merely upon the balance of convenience; strong reasons are needed to show that it would not be reasonable or just to hold the parties to the bargain they made to arbitrate: "Sea Pearl" (The) v. Seven Seas Dry Cargo Shipping Corp. , [1983] 2 F.C. 161, 139 D.L.R. (3d) 669 (F.C.A.), per Pratte J., at p. 176 F.C., p. 681 D.L.R.

16 The Arbitration Act, 1991, S.O. 1991, c. 17, came into force on January 1, 1992. It provides by s. 2(2) that it applies to an arbitration agreement made before the day the Act came into force if the arbitration is commenced after that day and by s. 2(4) that the former Act applies to arbitrations already commenced. By s. 23 an arbitration is commenced, inter alia, by service of a notice demanding arbitration. For the 1989 lease year such notices were served by both parties in June 1991. Thus the 1989 year arbitration is governed by the former Arbitration Act, R.S.O. 1990, c. A.24. Section 7 of that Act provides that the court may stay litigation in favour of arbitration "if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission". This legislation is in all material respects identical to the Nova Scotia Act which was the subject of consideration in Deuterium of Canada Ltd. v. Burns & Roe Inc. , [1975] 2 S.C.R. 124, 44 D.L.R. (3d) 693, where the arbitration agreement also contained a Scott v. Avery clause. At p. 147 S.C.R., p. 709 D.L.R., Laskin J. said that Scott v. Avery:

> . . . has been taken in a succession of later cases, including cases in this Court, as enabling parties to a contract validly to make a reference to arbitration of all disputes thereunder, whether involving questions of law or not, and an award thereon a condition precedent to resort to the Courts . . .

(Citations omitted)

Scotia submitted that the application should not be stayed because the question to be arbitrated involves a question of law, namely the interpretation of documents. Scotia relied on four authorities, all decisions at first instance and, so far as the reports reveal, none involving a Scott v. Avery clause. They were M. Loeb Ltd. v. Harzena Holdings Ltd. (1980), 18 C.P.C. 245 (Ont. H.C.J.); Jussem v. Nissan Automobile Co., [1973] 1 O.R. 697, 32 D.L.R. (3d) 167 (H.C.J.); Re Rootes Motors (Canada) Ltd., [1952] O.W.N. 553, [1952] 4 D.L.R. 300 (H.C.J.), and Shell Canada Ltd. v. Vector Energy Inc. (1989), 46 B.L.R. 126, 101 A.R. 221 (Q.B.).

17 In Deuterium, Laskin J. commented (at p. 148 S.C.R., pp. 709-10 D.L.R.):

> The position in Nova Scotia . . . is to deprive the Courts of jurisdiction over the merits of a commercial dispute where arbitration and award are a condition precedent to action and to leave to them only the jurisdiction to review the award. This is not because of legislation which alone compels this result (as is the case in labour-management relations) but because of the acceptance of a broad view of Scott v. Avery as not being contrary to any public policy respecting the jurisdiction of the ordinary Courts.
>
> In the face of arbitration statutes which, like that in Nova Scotia and others elsewhere in Canada, are designed to place private arbitration on a regulated footing, I am not prepared at this date to revert to a common law policy of jealous reaction to the attempted supersession of the original jurisdiction of the ordinary Courts.

18 In the light of the passages from Deuterium I have quoted, the fact that the issue to be arbitrated is the interpretation of the lease is not a sufficient reason to refuse the requested stay.

19 Since the application in effect seeks to pre-empt an arbitration for the 1990 year which would hereafter be conducted under the Arbitration Act, 1991, it is useful to note that s. 7(1) of that Act provides that litigation in respect of a matter subject to an arbitration agreement "shall" be stayed and enumerates in s. 7(2) five very narrow grounds of exception none of which would apply in the instant case. Section 8(2) provides that the arbitrator may determine questions of law. This enactment gives effect to the view of Laskin J. in Deuterium that there should be no return to the jealous guarding of the court's jurisdiction against encroachment by arbitration.

20 A further reason put forward by Scotia for refusing the stay is that an arbitration decision would lack the permanent effect of a court decision. The award, it is argued, deals with one year only and would not bind the parties in subsequent years or their successors in title. The issue would

be arbitrated every year. The factum is devoid of authority for these propositions and Mr. Chernos disputed them. In my view the authorities indicate that the principles of res judicata apply to arbitration decisions.

> "Where the construction of a contract has been referred to an arbitrator, his award thereon is conclusive as to its construction in a subsequent action between the same parties for other breaches of the contract": Russell on the Law of Arbitration , 20th ed. (1982), p. 347, citing Gueret v. Audouy (1893), 62 L.J.Q.B. 633 (C.A.). Similarly in Fidelitas Shipping Co. v. V/O Exportchleb, [1966] 1 Q.B. 630, [1965] 2 All E.R. 4 (C.A.), the court held that the principles of issue estoppel apply to arbitration as much as to litigation. Diplock L.J. said at p. 643 Q.B., p. 10 All E.R.: "Issue estoppel applies to arbitration as it does to litigation. The parties having chosen the tribunal to determine the dispute between them as to their legal rights and duties are bound by the determination by that tribunal of any issue which is relevant to the decision of any dispute referred to that tribunal." Lord Denning M.R. said at p. 640 Q.B., p. 9 All E.R., that barring special circumstances the law was that "once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again". He went on to say that this principle applied to arbitration.

21 An award is binding upon those who claim through or under the parties to the submission: Russell on the Law of Arbitration, supra, at p. 351, citing Martin v. Boulanger (1883), 8 App. Cas. 296 (P.C.).

22 Since these authorities show that the arbitrator's decision will have the same binding effect as a court decision there is no reason to prefer the latter to the former.

23 The final reason advanced for refusing the stay is that any notice of arbitration in respect of the 1990 year is premature because there is as yet no landlord's audit report. I agree, but as noted earlier, the result of this is not to open the issue to litigation but rather that the parties must proceed as they have agreed to do, and so Scotia's accountants should deliver their audit statement. The argument that they cannot do so until the court decides upon the correct interpretation of para. 1.01(nn) and the associated correspondence begs the question. The landlord's accountants are not deciding the issue. They are presenting the position as they see it based upon GAAP and the interpretation of para. 1.01(nn) favoured by their client in order that the arbitrator may decide. The prematurity of an arbitration as to the 1990 year is not a sufficient ground to refuse a stay.

24 In summary, no sufficient ground has been advanced to justify a refusal to grant the stay requested. This application is therefore stayed in order that the parties may proceed to arbitration under the lease.

25 In view of this decision it is unnecessary for me to deal with the other issues argued so thoroughly and ably by all counsel.

26 Costs were not argued and may be spoken to.

Order accordingly.

TAB G

BUTTERWORTHS COMMON LAW SERIES

Spencer Bower and Handley

Res Judicata

Fourth Edition

The Honourable Mr Justice KR Handley
Officer of the Order of Australia,
BA, LLB, LLD (Honoris Causa) (Sydney),
Honorary Bencher of Lincoln's Inn,
Visiting Fellow, Wolfson College, Cambridge
A Judge of the Court of Appeal of New South Wales

Series editor

Andrew Grubb MA (Cantab), LLD (Lond), FMedSci
Senior Immigration Judge, Asylum and Immigration Tribunal; Visiting Professor of Law, Cardiff Law School, Cardiff University

LexisNexis®

Members of the LexisNexis Group worldwide

United Kingdom	LexisNexis, a Division of Reed Elsevier (UK) Ltd, Halsbury House, 35 Chancery Lane, London, WC2A 1EL, and London House, 20–22 East London Street, Edinburgh EH7 4BQ
Australia	LexisNexis Butterworths, Chatswood, New South Wales
Austria	LexisNexis Verlag ARD Orac GmbH & Co KG, Vienna
Benelux	LexisNexis Benelux, Amsterdam
Canada	LexisNexis Canada, Markham, Ontario
China	LexisNexis China, Beijing and Shanghai
France	LexisNexis SA, Paris
Germany	LexisNexis Deutschland GmbH, Munster
Hong Kong	LexisNexis Hong Kong, Hong Kong
India	LexisNexis India, New Delhi
Italy	Giuffrè Editore, Milan
Japan	LexisNexis Japan, Tokyo
Malaysia	Malayan Law Journal Sdn Bhd, Kuala Lumpur
New Zealand	LexisNexis NZ Ltd, Wellington
Poland	Wydawnictwo Prawnicze LexisNexis Sp, Warsaw
Singapore	LexisNexis Singapore, Singapore
South Africa	LexisNexis Butterworths, Durban
USA	LexisNexis, Dayton, Ohio

Published by LexisNexis

This is a Butterworths title

A CIP Catalogue record for this book is available from the British Library.

ISBN 978 1 4057 2673 3

ISBN 978-1-4057-2673-3

9 781405 726733

Typeset by Letterpart Ltd, Reigate, Surrey

Printed in the UK by CPI William Clowes Beccles NR34 7TL

Visit LexisNexis at www.lexisnexis.co.uk

ARBITRATION

8.27 An award in arbitration proceedings can create an issue estoppel[1]. The parties having chosen the tribunal, or been compelled by statute to resort to it, are bound by its determinations on any issue fundamental to the award.

1 *Fidelitas* [1966] 1 QB 630 CA, 643; *Aegis* [2003] 1 WLR 1041 PC, 1048.

FOREIGN JUDGMENTS

8.28 *The Sennar* established that foreign judgments can create issue estoppels and the same principles apply. Lord Diplock said[1]:

> 'It is far too late ... to question that issue estoppel can be created by the judgment of a foreign court if that court is recognised in English private international law as being a court of competent jurisdiction.'

Issue estoppels created by foreign judgments extend to questions that a party should have raised but did not[2]. It is not clear whether these principles apply to the full extent to foreign default judgments[3].

1 [1985] 1 WLR 490 HL, 493; *Carl-Zeiss* (*No 3*) [1970] Ch 506. *The Irina A* (*No 2*) [1999] 1 Lloyds Rep 189 (judgment of Togo Court).
2 *Henderson* (1843) 3 Hare 100; *Godard v Gray* (1870) LR 6 QB 139; *Ellis v M'Henry* (1871) LR 6 CP 228; *Re Trufort* (1887) 36 Ch D 600.
3 A foreign judgment created a cause of action estoppel in *Henderson* (1843) 3 Hare 100 although the defendant did not appear at the trial, on the taking of the accounts, or on further consideration; paras 7.03, 7.14; *Carl-Zeiss* (*No 2*) [1967] 1 AC 853, 918, 925–926, 948–949.

WHAT MATERIALS MAY BE CONSIDERED

8.29 The court can consider for this purpose any relevant material including the court's reasons[1]. In *DPP v Humphrys*[2] Lord Hailsham said: 'The court will inquire into realities, and not mere technicalities', and in *Rogers v R*[3] Brennan J said that the court could look at 'any material that shows what issues were raised and decided.' The point is now assumed. In *Thrasyvoulou*[4] the House of Lords considered the reports of planning inspectors. Since an issue estoppel can be excluded in special circumstances the Court must be able to consider all relevant material.

1 *Carl-Zeiss* (*No 2*) [1967] 1 AC 853, 946, 965; *Tagore v Secretary of State for India* (1888) LR 15 Ind App 186, 192–193; *Sri Raja Rao v Sri Raja Inuganti* (1898) LR 25 Ind App 102, 108: 'In order to see what was in issue in the suit, or what has been heard and decided the [reasons for] judgment must be looked at'; *Hook v Administrator-General of Bengal* (1921) LR 48 Ind App 187; *Ord* [1923] 2 KB 432 CA; *Diamond v Western Realty Co* [1924] 2 DLR 922 SC, 929; *Blueberry River Indian Band v Canada* (2001) 201 DLR (4th) 35, 51 FCA; *O'Donel* (1938) 59 CLR 744, 758; *Marginson* [1939] 2 KB 426 CA, 437; *Jackson v Goldsmith* (1950) 81 CLR 446, 467; *Somodaj v Australian Iron and Steel Ltd* (1963) 109 CLR 285, 299; *Jenkins v Tileman (Overseas) Ltd* [1967] NZLR 484; *Nesbitt Thompson Deacon Inc v Everett* (1989) 37 BCLR 2d 341 CA, 347–349.
2 [1977] AC 1, 41.
3 (1994) 181 CLR 251, 263.
4 [1990] 2 AC 273.
5 *Arnold* [1991] 2 AC 93; *Watt* [2008] 1 AC 696, 708.

TAB H

Four Embarcadero Center Venture et al. v. Mr. Greenjeans Corp. et al. *
Indexed as: Four Embarcadero Center Venture v. Mr. Greenjeans Corp.
(H.C.J.)

64 O.R. (2d) 746

[1988] O.J. No. 210

Ontario
High Court of Justice

Henry J.

March 4, 1988.

* An application to quash the appeal from the following judgment of Henry J. to the Ontario Court of Appeal (Brooke, Blair and McKinlay JJ.A.) was allowed April 11, 1988. See 65 O.R. (2d) 160.

Conflict of laws -- Foreign judgments -- Finality -- Money judgment obtained by default in foreign court -- Judgment under appeal and regarded as pending under law of jurisdiction where judgment granted -- Action on judgment maintainable in Ontario -- Judgment res judicata in that issues decided by foreign court may not be reopened except by order of appeal court.

The plaintiffs obtained a judgment by default in California. The defendants appealed the judgment. Under California law, the appeal did not stay the execution of the judgment. The plaintiffs brought an action in Ontario to enforce the judgment debt. The defendants moved to strike out the statement of claim, arguing that the judgment was not final while under appeal nor was it res judicata between the parties under California law, and therefore it was not enforceable in Ontario.

Held an action on the California judgment was maintainable in Ontario.

A foreign money judgment was enforceable if the judgment was beyond the reach of the court that made it in respect of all issues except enforcement. A default judgment was to be treated the same way as one rendered after a trial on the merits. The judgment was enforceable under California law and there was no reason why it should not be enforced in Ontario. The defendants' rights were safeguarded by a stay of execution of the judgment obtained in Ontario until the outcome of the appeal in California was finally determined.

Bank of Bermuda Ltd. v. Stutz, [1965] 2 O.R. 121; Lear v. Lear, [1973] 3 O.R. 935, 38 D.L.R. (3d) 655, 13 R.F.L. 27; revd on another point 5 O.R. (2d) 572, 51 D.L.R. (3d) 56, 17 R.F.L. 136; Pan American World Airways Inc. v. Varghese (1984), 45 O.R. (2d) 645, 7 D.L.R. (4th) 499; affd 49 O.R. (2d) 608n, 15 D.L.R. (4th) 768n, folld

Nouvion v. Freeman (1889), 15 App. Cas. 1; affg 37 Ch. D. 244; revg 35 Ch. D. 704; Scott v. Pilkington (1862), 2 B. & S. 11, 121 E.R. 978; Eastern Trust Co. v. MacKenzie Mann & Co. (1916), 10 O.W.N. 445; McGuire v. McGuire (1921), 50 O.L.R. at p. 100, 64 D.L.R. at p. 180; vard 50 O.L.R. 100, 64 D.L.R. 180; Davis v. Williams, [1938] O.W.N. 504, apld

McIntosh v. McIntosh, [1942] O.R. 574, [1942] 4 D.L.R. 70; Ashley v. Gladden, [1954] 4 D.L.R. 848; affg loc. cit. at p. 849, distd

Other cases referred to

Four Embarcadero Center Venture v. Mr. Greenjeans Corp. (1987), 59 O.R. (2d) 229, 16 C.P.C. (2d) 205; Four Embarcadero Center Venture v. Kalen (1987), 59 O.R. (2d) 236; Colt Industries Inc. v. Sarlie (No. 2), [1966] 3 All E.R. 85; Aldrich v. Aldrich (1893), 24 O.R. 124; Lee v. Lee (1895), 27 O.R. 193; Boyle v. Victoria Yukon Trading Co. (1902), 9 B.C.R. 213; Woodbury v. Bowman, 13 Cal. 634 (1859); Agarwal v. Johnson, 25 Cal. (3d) 932 (1979); Carl-Zeiss-Stiftung v. Rayner and Keeler, Ltd. (No. 2), [1966] 2 All E.R. 536

Statutes referred to

California Code of Civil Procedure, ss. 916, 917.1(a), 1049

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rules 14.01(4), 20.01, 21.01(1)(a), (2)

MOTION by the defendants for an order striking out a statement of claim.

B.H. Kellock, Q.C., and J. Richler, for plaintiffs.

M. Teplitsky, Q.C., and Wailan Low, for defendants.

HENRY J.:-- This motion raises the broad issue whether an action is maintainable in Ontario upon a money judgment obtained in the courts of California, which is under appeal and is regarded by the Code of Civil Procedure of that state as still pending and not final.

This action, together with four other actions commenced in Ontario, seeking similar relief, arises out of a series of judgments obtained in the courts of the State of California against (variously) Mr. Greenjeans Corporation, Mr. Greenjeans Galleria Corporation, Mr. Greenjeans Embarcadero Corporation, Resemp Corporation, Maury Kalen and Mark Bromberg; these parties are collectively referred to as the Greenjeans parties.

The plaintiffs were parties (variously) in six actions in the Superior Court for the State of California for the City and County of San Francisco; they obtained judgment against one or more of the

Greenjeans parties in each of those actions. Those judgments have been appealed by the Greenjeans parties.

The background of these proceedings is fully set out in two reported decisions of Reid J. in Four Embarcadero Center Venture v. Mr. Greenjeans Corp. (1987), 59 O.R. (2d) 229, 16 C.P.C. (2d) 205, and Four Embarcadero Center Venture v. Kalen (1987), 59 O.R. (2d) 236, in which motions to dismiss or stay the Ontario actions pending disposition of the California appeals were in the result adjourned on consent, so far as the corporate defendants are concerned.

The plaintiffs Four Embarcadero Center Venture (Venture) and Embarcadero Center Ltd. are partnerships incorporated under the laws of California and Prudential is incorporated under the laws of New Jersey. The corporate defendants Mr. Greenjeans Corporation, Mr. Greenjeans Galleria Corporation and Resemp are incorporated under the laws of Ontario, with head offices in Toronto; Resemp is the parent of the other two.

Having obtained judgment for a money payment in the California court the plaintiffs commenced five actions in Ontario which are briefly identified as follows:

Ontario	California
Action No.	Action
	Plaintiffs
	Defendants
6045/85	alter-ego
	Venture, Center
	Kalen and Bromberg
	and Prudential
6046/85	alter-ego
	Center, Venture
	Mr. Greenjeans Corp.,
	and Prudential

Galleria and Resemp

6047/85 fraud

Venture

Kalen and Bromberg

6048/85 fraud

Venture

Mr. Greenjeans Corp.

and Galleria

6049/85 guarantee

Venture

Galleria

The motions before me are brought in the three actions, Nos. 6046/85 (the alter ego action), 6048/85 (the fraud action), and 6049/85 (the guarantee action). The motion in action No. 6046/ 85 was fully argued before me, it being agreed by counsel that my decision on this motion will govern the outcome of the other two.

Objection is made by counsel for the plaintiffs that the substance of these motions as now asserted is an abuse of process because it ought to have been raised at an earlier stage, when the parties were before Reid J., and the defendants are now estopped from doing so. The defendants in the Ontario actions brought motions before Reid J. on September 10th and 11th, and November 19, 1986, inter alia, to strike out or stay action Nos. 6046/85, 6048/85 and 6049/85. On September 11th, the corporate Greenjeans parties by their counsel consented to an order adjourning those parties' motions sine die on terms that should the Embarcadero parties succeed in obtaining judgment, executions would not issue until such motions were disposed of by Reid J.; they also consented to an order giving effect to letters rogatory which required representatives of those parties to attend on examinations in aid of execution of the judgments in the fraud, guarantee and alter-ego actions. The actions against the individual defendants Kalen and Bromberg do not concern us here, the motions of those defendants being dismissed: see Four Embarcadero Center Venture v. Mr. Greenjeans Corp., supra, and Four Embarcadero Center Venture v. Kalen, supra.

In the three actions before me, the motions to strike out or stay therefore stand adjourned sine die. Thereafter the defendants delivered statements of defence and counterclaim in the actions; the counterclaims advanced by the corporate Greenjeans parties seek essentially the same relief and rely on essentially the same facts as in the California actions. On October 15, 1987, the defendants appeared before me and consented to an order providing that no steps be taken in their counterclaim pending resolution of the appeals in California.

It is Mr. Kellock's position that the substance of the motions now before me ought to have been asserted before Reid J. and that it is now too late to do so. I have however decided that I ought to dispose of the matter on its merits.

The motions now made before me by the corporate Greenjeans parties in the three actions (of which No. 6046/85 is the governing case as agreed) are for an order striking out the statement of claim; for summary judgment dismissing the action; and for the determination of a point of law raised on the pleadings pursuant to rules 20.01 and 21.01 of the Rules of Civil Procedure. The notice of motion sets out the grounds of the motion as follows:

> The Statement of Claim discloses no reasonable cause of action existing at the date of the issuance of the claim and as of the date of this motion. The judgment upon which the Plaintiffs bring action in Ontario is not final and conclusive and res judicata as between the Plaintiffs and Defendants.

The question of law submitted under rule 21.01(1)(a) is:

> Must all the facts necessary to constitute the plaintiff's claim be in existence at the date of issuance of the Statement of Claim?

In this action, S.C.O. No. 6046/85, the plaintiffs plead in the statement of claim, issued September 19, 1985, that in the California action No. 816561 in the Superior Court for the State of California for the City and County of San Francisco, in which the plaintiffs and defendants were all parties by claim or cross-claim, the Greenjeans parties who were defendants and cross-claimants failed to appear at trial which took place on June 3, 1985, although they had defended and cross-claimed, thereby attorning to the jurisdiction of the court. Judgment was rendered on the same date in the California action (alter ego action) as follows:

1. Plaintiff Four Embarcadero Center Venture have judgment on its complaint against defendants Mr. Greenjeans Embarcadero Corporation, Mr. Greenjeans Corporation, Mr. Greenjeans Galleria and Resemp Corporation.

. . . . .

3. Cross-complainants Four Embarcadero Center Venture, Embarcadero Center, Ltd. and Prudential Insurance Company of America have judgment on their cross-complaint against Mr. Greenjeans Corporation, Mr. Greenjeans Galleria Corporation, Resemp Corporation, Maury Kalen and Mark Bromberg.
4. Four Embarcadero Center Venture, Embarcadero Center, Ltd. and Prudential Insurance Company of America recover from Mr. Greenjeans Embarcadero Corporation, Mr. Greenjeans Corporation, Mr. Greenjeans Galleria Corporation, Resemp Corporation,

Maury Kalen and Mark Bromberg, jointly and severally, the sum of $4,007,586.77 in compensatory damages, attorneys' fees and expenses in the amount of $692,978.61. To prevent a double recovery, attorneys' fees and expenses pursuant to this judgment will not be recoverable to the extent that such fees are recovered and collected under the judgments in Action Nos. 798933, 802729 and 804082.

5. Furthermore, Four Embarcadero Center Venture, Embarcadero Center, Ltd. and Prudential Insurance Company of America recover exemplary damages from Mr. Greenjeans Embarcadero Corporation, Mr. Greenjeans Corporation, Mr. Greenjeans Galleria Corporation, Resemp Corporation and Maury Kalen, jointly and severally, in the sum of $2,000,000.00, and from Mark Bromberg in the sum of $400,000.00.

It is further pleaded in the statement of claim in this action (S.C.O. No. 6046/85) that the defendants have appealed this judgment but that pursuant to the laws of California the appeal does not stay execution of the judgment unless the judgment debtors give an undertaking or file an appeal bond; it is pleaded that none of the defendants has complied with these conditions and accordingly the judgment appealed from is in full force and effect. It is further pleaded that none of the defendants has made any payment on the California judgment. The total claimed is $6,700,565.38 together with prejudgment interest and costs.

The statement of defence pleads, inter alia, that:

(a) The plaintiffs have no cause of action on the California judgment No. 816151 which is unenforceable;
(b) The judgment has been appealed to the Court of Appeals in the State of California and the judgment is not final while under appeal nor is it res judicata between the parties according to the laws of the State of California;
(c) A judgment which is neither final nor res judicata by the law of the jurisdiction in which it was issued is not enforceable, according to conflict of laws principles;
(d) The judgment was not a judgment on the merits, but issued as a result of an order of a reference striking out defendants' claims and defences; the striking of the defendants' pleadings and entry of judgment was contrary to natural justice and is unenforceable, and
(e) The judgment ought not to be enforced as it is founded on a cause of action and a punitive award which it is contrary to the public interest in this jurisdiction to enforce.

The defendants ask that the action be dismissed. The two Greenjeans corporations (not Resemp) have made a counterclaim against the plaintiffs and others, which the plaintiffs say raises issues already raised in the California proceedings.

The plaintiffs' statement of claim does not expressly plead that the California judgment which founds the Ontario action is final and res judicata; that issue is raised by the statement of defence; in their reply however, the plaintiffs put that matter in issue, pleading in para. 24 that the judgments in the California actions are final.

I interject to say that the moving parties' (defendants) submissions before me focused on the proposition that this Ontario action is premature, in that no action lies upon the California judgment which they submit is neither final nor res judicata. No judgment was addressed to the other grounds of defence raised in the defendants' pleadings. The question of law submitted is significant because if I should find that the action is premature on the ground that the California judgment is not "final"

and therefore cannot at this stage give rise to a cause of action in Ontario, the judgment would later become final if the appeal is decided by the California court in favour of the Embarcadero plaintiffs; in that event the question is whether the Ontario action can stand and the fact of finality established by the outcome of the appeal be added as a necessary element in the statement of claim at that time to perfect the action.

The finality of the California judgment

The moving parties assert the position that the California judgment, according to the law of California is not final, and is not res judicata, while it is under appeal and therefore no cause of action has as yet accrued upon which to recover the judgment debt in Ontario.

The plaintiffs' position is that the judgment became final so as to found this action at the time when the California Superior Court disposed of the issues and no jurisdiction remained in that court to rescind or vary it; in their submission the pending appeal has no bearing on the question of finality for purposes of enforcing it in the Ontario action.

The general rule in Anglo-Canadian law is that in order to found an action on a foreign money judgment the foreign judgment must be final and conclusive as to the existence of the debt in the court in which it was pronounced. This principle derives from the leading English decision in Nouvion v. Freeman (1889), 15 App. Cas. 1 (H.L.), in which Lord Herschell used the following language at pp. 8-9:

> But it was conceded, and necessarily conceded, by the learned counsel for the appellant, that a judgment, to come within the terms of the law as properly laid down, must be a judgment which results from an adjudication of a Court of competent jurisdiction, such judgment being final and conclusive. I shall of course have something to say upon the meaning which must be given to those words, but the general proposition in that form is not disputed by the learned counsel for the appellant.

And further at p. 9:

> My Lords, I think that in order to establish that such a judgment has been pronounced it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties.

Where counsel for the plaintiffs and the defendants on this motion differ is upon the meaning of that concept. Simply put, counsel for the defendants, moving parties, submit that according to the laws and procedures of California, the judgment pronounced by the Superior Court of California is neither final nor res judicata while it is under appeal. Conversely, counsel for the plaintiffs submit that the judgment of that court, which awards the payment of money, is, according to the law and procedure of California, final and conclusive and is res judicata between the parties because, notwithstanding the appeal, it cannot be rescinded or varied as, by reason of the municipal rules, it has now passed beyond the reach of the court that pronounced it.

The onus of establishing the proposition for which the plaintiffs contend is, in the first instance at least, upon the plaintiffs who assert it. The law and practice of California is applicable in this respect, and that law and practice must be proved as a fact by evidence in the Ontario action.

Affidavit evidence as to the laws of California was introduced for both plaintiffs and defendants. In conformity with rule 21.01(2) I admit it. There has been no cross-examination on the two affidavits proffered but I do not find them to be in conflict -- rather they proceed on parallel lines.

The affidavit of Otto Michael Kaus, a member of the California Bar who has also formerly been a judge of the Superior Court, the Court of Appeal and the Supreme Court of California, among other notable qualifications, I accept as expert evidence. Mr. Kaus addresses three questions of California law:

(a) Is a California judgment under appeal final?
(b) Is a California judgment under appeal res judicata?
(c) Are the answers different if the judgments are obtained by default or by way of pleadings having been struck out?

As to the first question, he deposes that the word "final" is used in two senses which must be distinguished, appealability and res judicata; California law, apart from certain exceptions, permits an appeal only from a final judgment; here the word "final" merely imports that the judgment must not be interlocutory, but this sense says nothing about the finality of the judgment as res judicata.

As to the second question, he is emphatic in deposing that a California judgment under appeal is not res judicata. In this he says that California law differs from the federal rule which also applies in a majority of states. He canvasses the line of judicial decisions which establish this principle, commencing with the earliest Supreme Court case, Woodbury v. Bowman, 13 Cal. 634 (1859), and concluding with the latest statement of the rule in Agarwal v. Johnson, 25 Cal. (3d) 932 (1979).

The effect of the judicial decisions is that an appeal suspended the operation of the judgment for all purposes, that in the California courts it is not admissible in evidence in other proceedings and that an action that invokes it pending the resolution of the appeal is premature, not res judicata and cannot be pleaded by way of estoppel.

He further deposes that by 1893 the legislature enacted the Code of Civil Procedure. Section 1049 confirmed the case-law as follows:

> An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.

He further deposes and concludes:

> That section which confirmed the law as expressed in earlier cases, is now the statutory basis for the California rule that a judgment is not res judicata until it is decided on appeal or until the time for appeal has expired.

. . . . .

> In sum, exhaustive research of California law on the subject gives one no reason to doubt the continued validity of the rule first stated in Woodbury v. Bowman 128 years ago: a California judgment is not res judicata while an appeal is pending.

As to the third question, on the basis of authorities cited, he deposes that from the very earliest days of California jurisprudence default judgments are as appealable as any other judgment: "A judgment arising from default and under appeal is therefore no more final for res judicata purposes than a judgment after a contested trial."

For completeness Mr. Kaus adds that if the res judicata effect of a judgment rendered by a federal court or a court of a sister state is called in question before a California court, the California court will apply the federal rule or that of the sister state even if it differs from the California rule. Conversely, in like circumstances a federal court will apply the California rule.

The plaintiffs' expert, Roderick A. McLeod, is an attorney admitted to practice before the bars of the Supreme Court of the State of California and various lower trial and intermediate appellant courts. He was called to the bar in 1982 and is at present associated with the firm of Brobeck, Phleger & Harrison, attorneys for the plaintiffs in the Greenjeans actions. No objection was taken to his qualifications or status. I admit his expert evidence.

Mr. McLeod in his affidavit addresses the second question in Judge Kaus' affidavit respecting the res judicata effect of the California judgment herein and the provisions of California law that are material to issues raised in the motions before me.

He deposes that the summaries of the authorities set out in Mr. Kaus' affidavit are essentially correct; he says however that Mr. Kaus' affidavit does not address the right to enforce money judgments pending appeal or the rights that the Greenjeans parties once had to have the trial court rehear the issues in the actions or to have the trial court amend the judgment now under appeal.

First he deposes that by reason of s. 917.1 of the California Code of Civil Procedure at all material times and at present, the judgment is fully enforceable. Section 917.1 provides in part:

> (a) The perfecting of an appeal shall not stay the enforcement of the judgment or order in the trial court if the judgment or order is for money or directs the payment of money ...

Second he deposes that, notwithstanding the authorities cited by Mr. Kaus, the California judgments are final in the sense that:

> (a) the trial court no longer has any jurisdiction to re-hear or otherwise deal with the merits of the issues raised in the California actions; and
> (b) the Greenjeans parties failed to invoke the jurisdiction of the trial court to re-hear or otherwise deal with those issues during the limited period of time that such jurisdiction existed.

He then summarizes the remedies that the Greenjeans parties could have attempted to invoke. I need not elaborate except to say that provision is made for the granting of a new trial, or to vary or correct the judgment, or to relieve a party from a judgment obtained through his mistake, inadvertence or excusable neglect, or to modify, amend or revoke the judgment on the grounds of alleged differences in the state of facts. These remedies are subject to limitation periods or other conditions

which now place the Greenjeans parties beyond their availability, no attempt having been made to invoke them, but instead they have elected to file their appeals.

Moreover, by s. 916 of the Code the perfecting of the appeal stays proceedings in the trial court upon the judgment appealed from upon the matters embraced therein or affected by it including enforcement. An exception is found in s. 917.1 which provides that the perfecting of the appeal does not stay enforcement of the judgment in the trial court if it is a judgment for money or for the payment of money, unless an undertaking is given by the defendant to pay double the amount of the judgment or provide a bond by a surety insurer for one and one-half times the amount of the judgment. (It is common ground that the Greenjeans parties have given neither an undertaking nor an appeal bond and that under California law the judgment is at present enforceable although otherwise stayed. It is also common ground as is asserted in the affidavits of Franklin Brockway Gowdy that the Greenjeans parties applied to the Court of Appeal for a writ of supersedeas and a stay of enforcement which was denied on October 17, 1986.)

In summary, under the law of California the trial court no longer has jurisdiction to reopen the judgment; enforcement of the judgment may however proceed because no undertaking or appeal bond has been provided by the defendants and the Court of Appeal has refused a writ of supersedeas and a stay.

Accepting the evidence of Mr. Kaus (although I am invited by Mr. Kellock to explore certain clinks in his armour), I find the law of California to be as Mr. Kaus states it, with which Mr. McLeod does not disagree in principle, that the judgments in the three actions here concerned are not final, conclusive or res judicata while the appeals are pending; they are however at present enforceable.

That however does not end the matter because in the final analysis resort must be had to the state of the law of Ontario which in my opinion reflects a somewhat different principle.

The starting point is the leading case in England to which I have already referred in the decision of the House of Lords in Nouvion v. Freeman, which ever since it was decided in 1889 has been applied both in England and in Canada. The principle there applied is as I have said that a foreign money judgment, to be enforced by action, must be a judgment of a court of competent jurisdiction that is final and conclusive and is res judicata between the parties. No submission is made that the California court is not a court of competent jurisdiction or that the parties are not the same. The defendants' position in attacking the Ontario action is simply that it is not final and res judicata according to the law of California.

In Nouvion the plaintiffs obtained a judgment in the Spanish courts for recovery of the balance of the purchase price of certain mining property. They sought to enforce the judgment by action in England. The statement of defence pleaded, inter alia, that the Spanish judgment was not final so as to sustain the action to enforce it, and a trial of an issue was directed on this point, which was heard by North J. [35 Ch. D. 244]. The evidence was that the Spanish judgment was a remate or executive judgment of a summary nature and was in law final unless reversed on appeal; it was such however that the unsuccessful party might take further proceedings in the same court, directed to the adjudication of the same issues (called plenary proceedings), and resulting in a further judgment which rendered the remate proceedings inoperative. The remate judgment could however under Spanish law be enforced so long as an appeal or plenary proceedings were only pending.

North J. found that the plaintiffs could sustain their claim as a judgment creditor upon the remate judgment. The Court of Appeal reversed this decision and held the remate judgment to be not final and conclusive [37 Ch. D. 244]; the House of Lords affirmed the decision of the Court of Appeal, holding that as the remate judgment did not finally and conclusively establish the existence of a debt no action could be brought upon it in England.

Lord Herschell, in the passage I have already cited in part, said at pp. 9-10:

> My Lords, I think that in order to establish that such a judgment has been pronounced it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties. If it is not conclusive in the same Court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that Court, and upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our Courts for the payment of that debt.
>
> The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a Court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that Court be disputed, and can only be questioned in an appeal to a higher tribunal. In such a case it may well be said that giving credit to the Courts of another country we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation.
>
> Lord Watson wrote to a similar effect at p. 13:
>
> In order to its receiving effect here, a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher Court; but it must be final and unalterable in the Court which pronounced it; and if appealable the English Court will only enforce it, subject to conditions which will save the interests of those who have the right of appeal.

The decision of the House of Lords, in determining the finality of the foreign money judgment for the purpose of sustaining an action by the judgment creditor in England to recover the judgment debt, focuses on the finality of the judgment in the sense that the court pronouncing it has no further jurisdiction to rehear the issues or to vary or rescind the judgment. Where the court that pronounced it has ceased to have such jurisdiction, the judgment is final for this purpose in the concept of English law. The existence of a pending appeal does not destroy the finality of the judgment so long as

it stands unreversed in the Court of Appeal. The plaintiff need only show that the action has moved beyond the reach of the foreign court that pronounced it.

The relevancy of the pending appeal in determining finality was also emphasized in the earlier decision in Scott v. Pilkington (1862), 2 B.& S. 11, 121 E.R. 978. The protection of the court and the judgment debtor against abuse of process lies in a stay of execution pending the final outcome of the appeal: see Colt Industries Inc. v. Sarlie (No. 2), [1966] 3 All E.R. 85 (C.A.).

The principle of Nouvion v. Freeman as to what constitutes a final judgment for the purposes of founding an action for its enforcement by the judgment creditor has been applied in Ontario.

In Eastern Trust Co. v. MacKenzie Mann & Co. (1916), 10 O.W.N. 445 (H.C.J.), Kelly J. in respect of the enforcement of a money judgment recovered in the Supreme Court of Nova Scotia applied the test that the Nova Scotia court had no power to set aside or vary it; it was thus final and the proper subject of an action in Ontario notwithstanding that an appeal had been taken.

In McGuire v. McGuire (1921), 50 O.L.R. at p. 100, 64 D.L.R. at p. 180 (H.C.), the court entertained an action to enforce a judgment for alimony pronounced in a Minnesota court. Mulock C.J. Ex., the trial judge, found that under the law of Minnesota the court that made the order for alimony retained jurisdiction to vary it. Relying on Nouvion v. Freeman he invoked the test in that decision, at p. 101:

> Thus it appears that the District Court is still seised of the case to the extent that it may revise its order or decree ...
>
> When it is sought to enforce in this Court a foreign judgment ordering payment of a sum of money, it must appear that the foreign Court has finally established the existence of the debt in question so as to make it res judicata ...

The action was therefore dismissed although all that was sought in the Ontario action was arrears of alimony.

The appeal to the Appellate Division [50 O.L.R. 101, 64 D.L.R. 181] was dismissed on this point (Meredith C.J.C.P. dissenting). Middleton J. stated the law as follows, at p. 103:

> The fundamental principle is most clearly stated in Williams v. Jones (1845), 13 M. & W. 628, 633:--
>
> "Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained."
>
> This is explained by what is said in Nouvion v. Freeman, 15 App. Cas. 1, at p. 9:--
>
> "In order to establish that such a judgment has been pronounced it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt which it is sought to be made conclusive evidence in

> this country, so as to make it res judicata between the parties. If it is not conclusive in the same Court which pronounced it ... then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt."
>
> It is there pointed out that the existence of a right of appeal has never been deemed to prevent a judgment from being regarded as final and conclusive for the purpose under discussion. The question is whether the judgment is final and conclusive so far as the tribunal which pronounced it is concerned. Can it thereafter ordain that there is no obligation and no debt? If it can, the element of finality is lacking.
>
> It will also be observed that there is no distinction between an action upon a foreign and upon a domestic judgment. A lack of finality is fatal in either case.

He also commented upon the "full faith and credit" clause in the United States Constitution, and the varying laws of the several states, with respect to alimony judgments. For example, in New York the settled doctrine is that no power existed to modify the judgment so as to affect past due instalments. In some states the matter is governed by statute. A judgment may also in fact not purport to be final by its terms, because there is power to vary it according to ongoing change in circumstances. He also referred to the situation in Ireland and in England. In the result the court upheld the trial decision with respect to the alimony payments in view of the Minnesota statute law which expressly provided that the court that made the order or decree for alimony retained power to revise and alter the order or decree respecting the amount and payment thereof. The matter of costs was different and the judgment to this extent was enforced in the Ontario action.

I add that the court considered two earlier Ontario decisions since Nouvion in Aldrich v. Aldrich (1893), 24 O.R. 124, and Lee v. Lee (1895), 27 O.R. 193, to the same effect. Meredith C.J.C.P. in a strong dissent distinguished Nouvion and as a matter of justice would have enforced the Minnesota judgment for both arrears and costs.

In Davis v. Williams, [1938] O.W.N. 504 (H.C.), Master Barlow dismissed a motion to strike out the special endorsement on the writ of summons in an action on a money judgment obtained in the Superior Court of California. It was argued that an appeal was pending and not yet heard, and that there had been no final adjudication. On the material it appeared that no stay of execution had been obtained and that the plaintiff could levy execution notwithstanding the pending appeal. The Master, applying Nouvion v. Freeman, sustained the plaintiffs' action in Ontario as on a final judgment of the California court. He cited the judgment of Middleton J.A. in McGuire v. McGuire, supra, to the effect that, in Nouvion v. Freeman: "It is there pointed out that the existence of a right of appeal has never been deemed to prevent a judgment from being regarded as final and conclusive for the purpose under discussion" [at p. 505 O.W.N.].

McIntosh v. McIntosh, [1942] O.R. 574, [1942] 4 D.L.R. 70 (C.A.), commenced the enforcement of a Quebec judgment by action in Ontario. The judgment was for alimony and was expressed to be provisional and reserved the right of the plaintiff to apply for a reduction of the monthly allowance. The action in Ontario was to recover the arrears, under the provisional (i.e., interim) order, the Quebec action not having as yet been tried. Hogg J. gave judgment for the plaintiff. The Court of Appeal ordered a new trial.

The judgment of the Court of Appeal was delivered by Robertson C.J.O. who stated the principle at p. 579:

> It is not disputed that an action upon a foreign judgment to recover money that it orders to be paid, will not lie in this Province if the foreign Court whose judgment is sued upon retains power to vary its judgment in respect of the sums sued for. Such a judgment is not strictly a final judgment. To establish that the foreign judgment is final, "it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties." Nouvion v. Freeman et al. (1889), 15 App. Cas. 1 at p. 9, per Lord Herschell.

He said that the question whether the provisional nature of the Quebec order constituted a debt which could be recovered by the creditor was a matter to be determined by Quebec law. In this respect the evidence as to that law was unsatisfactory, partly because the expert witness cited no authorities to support his opinion.

The principle again came before the Ontario Court of Appeal in Ashley v. Gladdon, [1954] 4 D.L.R. 848 (C.A.). The headnote reads in part:

> To be enforceable, however, a foreign judgment (or the part thereof sought to be enforced) must, amongst other requirements, be final and conclusive of the matter in issue so as to make it res judicata between the parties, and if it does not comply with this condition it is unnecessary to consider whether it is otherwise enforceable.

This again concerned a foreign judgment for child maintenance pronounced in a divorce action by a court in Vermont, and the action in Ontario was to recover arrears under that judgment. Danis J. tried the action [[1954] 4 D.L.R. at p. 849]. The plaintiff, in reliance on the Vermont judgment, argued that the defendant husband having attorned to the jurisdiction of the Vermont court, was estopped from denying its jurisdiction, which was disputed because the mother and child were domiciled and resided in Vermont. Danis J. dismissed the action, relying on the passage in Lord Herschell's judgment in Nouvion above. He found that under the law of Vermont, the court that rendered the judgment, "could change, vary or modify the order of maintenance", that is it could vary the amount past due and therefore it was not res judicata between the parties [at p. 852]. The Court of Appeal affirmed the decision on the ground that the Vermont judgment was not "final".

In Bank of Bermuda Ltd. v. Stutz, [1965] 2 O.R. 121, Wilson J. refused leave to appeal from an order of Jessup J. who dismissed an application to dismiss an action on a foreign money judgment. The judgment arose out of proceedings in the Supreme Court of Bermuda. The defendant failed to comply with an order of the court to produce documents as a result of which his defence was struck out and judgment was pronounced against him for the payment of money on a contract of guarantee.

The motion before Jessup J. was to strike out the special endorsement as disclosing no reasonable cause of action under Rule 126. He refused to do so for the reason given by Hunter C.J.B.C. in Boyle v. Victoria Yukon Trading Co. (1902), 9 B.C.R. 213, as well as Nouvion v. Freeman. In the Boyle case the plaintiff's action was on a judgment of the Yukon Territorial Court which went by default. The trial judge gave judgment for the plaintiff who appealed. One of the grounds for the appeal advanced by Mr. Duff was that a judgment obtained by default is not enforceable as a for-

eign judgment. The Court of Appeal disagreed. Hunter C.J. considered the decision in Nouvion v. Freeman not to support Mr. Duff's proposition and cited the language of Lord Herschell as to the test to which I have alluded. While the default judgment might have been set aside by the court that made it, Hunter C.J. extracted the principle that it remains final and conclusive until it is set aside, and is sufficient to found an action for default in British Columbia. This decision was the basis of the decision of Jessup J. referred to. On a motion for leave to appeal his order, Wilson J. on this point adopted the test of Lord Herschell and applied it to the default judgment, refusing leave to appeal.

In Lear v. Lear, [1973] 3 O.R. 935, 38 D.L.R. (3d) 655, 13 R.F.L. 27 (H.C.J.), Lacourciere J. tried an action in Ontario to enforce arrears of alimony under a New Jersey decree of divorce. He dismissed the action. In so doing he stated the principle thus at pp. 937-8, in characteristically learned and thorough reasons:

> To be enforceable in Ontario, the judgment nisi of the Superior Court of New Jersey must be final and conclusive. The leading case is Nouvion v. Freeman (1889), 15 App. Cas. 1, wherein the House of Lords decided that a judgment obtained in Spain, summary or "executive" proceedings was not enforceable in the English Courts despite the fact that such judgment was final in those proceedings unless reversed or varied on appeal, because the unsuccessful party could then take "plenary" proceedings in respect of the same matter, in which proceedings the whole merits of the matter were investigated and the earlier judgment could not be set up as res judicata. The law concerning the enforceability of foreign judgments is stated in Nouvion v. Freeman by Lord Herschell at pp. 8-9 as follows:
>
> "... a judgment, to come within the terms of the law as properly laid down, must be a judgment which results from an adjudication of a Court of competent jurisdiction, such judgment being final and conclusive. ...
>
> "My Lords, I think that in order to establish that such a judgment has been pronounced it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties. If it is not conclusive in the same Court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that Court, and upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our Courts for the payment of that debt."
>
> Lord Watson, at p. 13, stated: "... no decision has been cited to the effect that an English Court is bound to give effect to a foreign decree which is liable to be abrogated or varied by the same Court which issued it".

> These statements are regarded as establishing that, to be final, the judgment must be treated by the foreign Court as res judicata between the parties, and that the possibility of variation or abrogation of the judgment of the Court which issued it, is fatal to its enforceability.

He added that Nouvion v. Freeman has been consistently followed in Ontario and other Canadian provinces, notwithstanding the strong dissent of Meredith C.J.C.P. in Maguire v. Maguire, and he referred to a number of subsequent decisions of Ontario courts. He then summarized as follows, at p. 941:

> It seems to me therefore that the cases support the following propositions:
>
> (1) Ontario courts will enforce collection of arrears of alimony under a foreign judgment in respect of which the foreign tribunal has no powers of variation;
> (2) arrears under a foreign alimony judgment in respect of which a foreign tribunal has jurisdiction to vary arrears will not be enforced in Ontario, and
> (3) the onus is on the plaintiff to establish as a matter of fact -- by a preponderance of acceptable expert evidence -- the effect of the foreign law, in the present case as to the finality and conclusiveness of the alimony award: McIntosh v. McIntosh, [1934] N.Z.L.R. Supp. 132; Beatty v. Beatty, [1924] 1 K.B. 807.

He found that the expert evidence of the New Jersey attorney to be unsatisfactory because he cited opinion only, with no authorities in support. On consent he referred directly to case-law in New Jersey and concluded at pp. 943-4:

> Thus it would seem that a judgment for alimony granted by the Courts of New Jersey is not a final decree, but may be modified at any time by the Court with retroactive effect, and that execution does not issue for arrears as of right, but only with the leave of Chancery.
>
> In Madden v. Madden (1945), 136 N.J.Eq. 132 at p. 136, Herr, A.M., of the Court of Errors and Appeals, stated: "In this state arrearages of alimony do not become vested in the former wife or take on the attributes of a judgment for the payment of a fixed sum until this court so orders. No such order was made in this case."
>
> . . . . .
>
> Having been referred to this case by consent, and in view of the wording of the attorney's affidavit, I am clearly of opinion that the plaintiff has failed to satisfy the onus upon her of establishing the finality or conclusiveness of the New Jersey decree: the foreign expert's evidence does not meet the minimum requirements set out by the Court of Appeal in the McIntosh case, supra, and will not be accepted for the purpose of laying a foundation for this Court's jurisdiction under Nouvion v. Freeman (1889), 15 App. Cas. 1. In the absence of acceptable expert evidence, the law of New Jersey must

> be presumed to be similar to the law of Ontario, wherein judgments for alimony and maintenance, although final in the sense that leave to appeal would not be required (McCart v. McCart and Adams, [1946] O.R. 729, [1946] 4 D.L.R. 568), are nevertheless not final for the purpose of affording a cause of action outside the jurisdiction ...

Finally, in Pan American World Airways Inc. v. Varghese (1984), 45 O.R. (2d) 645, 7 D.L.R. (4th) 499 (H.C.J.), a recent judgment of this court, Gray J. followed the Nouvion principle, citing at length the judgments of Lord Herschell and Lord Watson as to the test for finality of the judgment. The headnote sets out the point as follows:

> A judgment obtained in a foreign court is final although there is a right of appeal from such judgment. Similarly, where the plaintiff has obtained a final judgment and there are parallel proceedings in which the plaintiff is a defendant and a possibility of a retrial of such proceedings, there is no basis upon which to refuse to enforce the plaintiff's judgment as a final judgment.

At this point I conclude that the law of Ontario defining the conditions upon which a foreign judgment for the payment of money to the plaintiffs may found an action to recover the judgment debt, has adopted the rule in Nouvion v. Freeman, and has applied it to both judgments adjudicated upon the merits and to judgments by default. Under the law of Ontario the question to be asked is: "What are the characteristics of the foreign judgment that enable the judgment debt to be recovered by action in Ontario?" The answer is: "A judgment that, under the laws of the jurisdiction where it was made, is final between the parties in the sense that under the foreign law the court that made it has no jurisdiction or residual power to abrogate or vary it or to retry the issue that it has decided. The fact that an appeal is pending which may result in its being rescinded or varied does not deprive the judgment of its finality in the sense mentioned."

It is also said that as part of the required test or characteristic of the judgment it must also be res judicata between the parties. That doctrine is also an aspect of finality -- indeed Ms. Low, of counsel for the defendants, submits that both aspects must be present to found the action in Ontario. The point is troublesome because to embellish "finality" (in the sense of the judgment having ceased to be within the reach of the court that pronounced it) by adding the aspect of res judicata imports a second principle -- that of estoppel. In a different context this was discussed at some length in Carl-Zeiss-Stiftung v. Rayner and Keeler, Ltd. (No. 2), [1966] 2 All E.R. 536.

The law of California as I find, unlike most other states, regards the judgment in this and other actions as not final or res judicata. The perfection of the appeal deprives the trial court of further jurisdiction which in any event it lacks, because further remedies in that court originally available are now beyond the reach of the defendants by lapse of time and other conditions. In any event, also under the Code of Civil Procedure, the proceedings in the trial court are stayed by the appeal.

The matter has therefore gone beyond the reach of the trial court except for enforcement. By reason of ss. 916 and 917.1 of the California Code of Civil Procedure, which apply to a money judgment, enforcement of the judgment is not stayed by the appeal unless the defendants give an undertaking or post an appeal bond as described; or the Court of Appeal has issued a writ of supersedeas and a stay. None of these conditions has occurred.

There is here a certain anomaly -- the action by California statute law is still "pending" and in that sense is neither final nor res judicata; yet it is a final judgment for purposes of appeal because it is

not interlocutory, there being no further judicial action required by the trial court to determine the rights of the parties. It is also final in the sense that it is at present enforceable in California, by statute.

In my opinion, notwithstanding the statutory rule that while the appeal is pending the action is also deemed to be pending, in the eyes of Ontario law it is final because it meets the test that the court that made it no longer has jurisdiction to abrogate or vary it, and moreover it is enforceable in California as a judgment debt.

The question remaining therefore is whether the aspect that it is not regarded as res judicata under California law bars the Ontario action. In my opinion it does not. A close reading of the language of Lord Herschell in Nouvion v. Freeman, suggests that he used the expression res judicata with respect to further proceedings in the same court, and the reasons of the other Law Lords are to the same effect.

It must be appreciated that the House of Lords in Nouvion was dealing with a unique jurisdictional situation in which the same court that gave judgment in the remate (executive) action was empowered in future again to try and give judgment on the same issues in later (plenary) proceedings. It was in that context that the idea of res judicata was coupled with finality. The concept of estoppel in collateral proceedings was not addressed except with respect to the same court. Indeed the proceedings, so far as Ontario enforcement is concerned, cannot conceptually be res judicata until all grounds of appeal from the judgment have been concluded and adjudicated. The ordering of a new trial by the appellate courts for example would reopen the issues in the original court. But the Anglo-Canadian case-law consistently holds that the pendency of an appeal does not alter the finality of the judgment pronounced. The possibility that on appeal the judgment may be vacated or varied is recognized by the power of the Ontario court to stay execution pending the outcome of the appeal. This latter rule is part of Ontario law and is of importance in the whole concept of enforcement of foreign money judgments by action in Ontario to recover the judgment debt. It is self-evident that, from a practical standpoint, any judgment for the payment of money is not "final" in the sense that if an appeal is pending, it may be varied or set aside by the appellate court. Anglo-Canadian law nevertheless treats it as final, for purposes of enforcement by action, of the debt or money judgment. Recognition of the defendants' potential success on appeal which may vacate or vary the judgment, is a factor that the Ontario court will take into account in the final disposition of the Ontario action at the conclusion of the trial, if the appeal in the foreign courts has not been determined, to protect the rights of the defendant-appellant by staying execution of the judgment until the outcome of the appeal is known; or alternatively, if the appeal succeeds, to conform to the final disposition in the foreign appellate court. Prejudice to a judgment debtor who is ultimately successful in his appeal is a matter to be compensated in costs.

In my opinion, that is the concept in Anglo-Canadian law of the doctrine of res judicata as contemplated by the decision in Nouvion, i.e., that the issues decided by the trial court may not, in accordance with the law of the foreign court, be reviewed or reopened, and the judgment abrogated or varied by that court, unless by order of the Court of Appeal. The judicial decisions canvassed by Mr. Kaus in his evidence, together with provisions of the Code of Civil Procedure, reflect the law of California to the effect that the action continues to be pending and is not res judicata until the appeal is determined. That philosophy as reflected in his evidence appears to me to refer to the principle that the judgment under appeal cannot be invoked in collateral proceedings in another court by way of estoppel or bar to the proceedings in the other court. But that is not the situation in the case at

bar, which is simply an action to enforce the judgment debt, which according to the expert evidence can also be enforced at present in California. The combination of the judgment now being beyond the reach of the court that made it, together with the preservation of its enforceability under California law, in my opinion, gives it characteristics sufficient to make it eligible to found the action in Ontario. I find nothing in this conclusion that does violence to the principle of deference to the law of California.

I recapitulate what I believe to be the proper principles applicable in this jurisdiction:

First The proper criteria for determining whether an action will lie on a foreign money judgment are whether or not the judgment may be abrogated or varied, or the issues reheard, by the court that pronounced it; whether the judgment represents an adjudication on the rights of the parties, and whether it is conclusive as to the amounts payable. It is not necessary for the plaintiff to show that the judgment cannot be varied or retried by any other means -- including on appeal.

Second A foreign judgment that has gone by default is no less final or enforceable than a judgment rendered after a full trial on the merits; indeed according to the law introduced into Ontario in Bank of Bermuda Ltd. v. Stutz even though the judgment can be varied, it is enforceable by action until it is set aside.

Third An action may be commenced in Ontario to enforce a foreign money judgment that is final in the above sense, notwithstanding that it is under appeal where there is no stay of enforcement so that under the foreign law it may be enforced notwithstanding pendency of an appeal. The preservation of enforceability of the judgment in the foreign jurisdiction, notwithstanding a pending appeal, is an additional important and relevant, but not essential, factor. If the judgment may be enforced in the foreign jurisdiction there is no sound reason of justice why it should not be enforced in Ontario; to do so in this jurisdiction requires the judgment creditor to proceed by action, whatever may be his procedural recourse in the foreign country.

Fourth The safeguard of the rights of a judgment debtor in such circumstances is to stay execution of the judgment obtained in the Ontario action until the outcome of the appellate proceedings is finally determined.

This is sufficient to dispose of the motion before me. This action No. 6046/85 is proper and ought to proceed to trial in the ordinary course with due regard to the outcome of the appeal. The order of Reid J. at present safeguards the rights of the defendants by staying execution, if judgment is obtained for the debt, until the defendants' adjourned motion is dealt with by the court. The foundation for the action came into existence when the California Superior Court ceased to have jurisdiction to rescind, vary or reopen the judgment.

In view of my decision on the substantive issue, it is unnecessary for me to deal with the procedural objections made by the plaintiffs' counsel. As to the question of law, the answer is "no", by reason of new rule 14.01(4), which provides:

> 14.01(4) A party may rely on a fact that occurs after the commencement of a proceeding, even though the fact gives rise to a new claim or defence, and, if necessary, may move to amend an originating process or pleading to allege the fact.

The motion in this action and in action Nos. 6048/85 and 6049/85 are therefore dismissed. Costs may now be spoken to as agreed, in writing if counsel prefer.

Motion dismissed.

\\apps1\users\creerym\Postmedia\Four_Embarcadero_Center_Venture_et_al._v._Mr.DOC

TAB I

Case Name:

Sanofi-Aventis Canada Inc. v. Novopharm Ltd.

Between
Sanofi-Aventis Canada Inc., Appellant (Applicant), and
Novopharm Limited and the Minister of Health,
Respondents (Respondents), and
Schering Corporation, Respondent (Respondent/Patentee)

[2007] F.C.J. No. 548

[2007] A.C.F. no 548

2007 FCA 163

2007 CAF 163

[2008] 1 F.C.R. 174

[2008] 1 R.C.F. 174

282 D.L.R. (4th) 476

364 N.R. 325

59 C.P.R. (4th) 416

157 A.C.W.S. (3d) 85

Docket A-413-06

Federal Court of Appeal
Toronto, Ontario

Nadon, Sexton and Sharlow J.A.

Heard: January 9, 2007.
Judgment: April 23, 2007.

(120 paras.)

Intellectual property law -- Patents -- Related legislation -- Federal statutes -- Application -- Claims -- Miscellaneous -- Procedure -- Applications -- Striking out -- Frivolous, vexatious, abuse of process -- Appeal by Sanofi-Aventis from a decision allowing the respondent's appeal of a prothonotary's decision -- The prothonotary had dismissed the respondent's motion for summary dismissal of an application brought by the appellant regarding the appellant's notice of allegation sent to the appellant by the respondent -- Appeal dismissed -- Application constituted abuse of process under the Regulations in that appellant sought to re-litigate the same allegation of invalidity as another generic company -- Patented Medicines (Notice of Compliance) Regulations, s. 6(5)(b).

Appeal by Sanofi-Aventis from a decision allowing the respondent's appeal of a prothonotary's decision. The prothonotary had dismissed the respondent's motion for summary dismissal of an application brought by the appellant regarding the appellant's notice of allegation sent to the appellant by the respondent. The prothonotary dismissed the motion on the basis that the application of the doctrines of res judicata, issue estoppel, and abuse of process required that there be a final decision and that a decision was only final and binding when all available reviews had been exhausted or abandoned. In her analysis, a prior decision respecting another notice of allegation was not final because the Supreme Court of Canada had not finally disposed of that case. The court disagreed with the prothonotary's assessment that the decision was not final and in any event noted that there was no longer any doubt as to whether the decision was final because the Supreme Court had finally disposed of the case by refusing leave to appeal.

HELD: Appeal dismissed. The court agreed that an application would be dismissed as abusive under para. 6(5)(b) if it was one that was "so clearly futile that is ha[d] not the slightest chance of success" or if it was one in which it was "plain and obvious" that the applicant would not succeed. In its view, that test was satisfied on the facts of the case. The allegations in the NOAs were similar in all material respects and the prior decision would be binding on the judge hearing the present application regardless of the fact that the appellant had attempted to adduce new evidence. The court did not err in holding that the appellant had no chance of success and therefore that its application was an abuse of process.

Statutes, Regulations and Rules Cited:

Federal Court Rules, C.R.C. 1978, c. 663, Rule 419

Federal Court Rules, SOR/98-106, Rule 221

Patented Medicines (Notice of Compliance) Regulations, SOR/93-133, s. 5(3)(a), s. 6(1), s. 6(5)(b)

Appeal From:

Appeal from an order of the Honourable Madam Justice Tremblay-Lamer dated september 25, 2006, No. T-1965-05, [2006] F.C.J. No. 1431.

Counsel:

Gunars A. Gaikis, J. Sheldon Hamilton and Mark Biernacki, for the Appellant (Applicant).

Jonathan Stainsby and Mark Davis, for the Respondent (Respondent), Novopharm Limited.

Anthony Creber, for the Respondent (Respondent/Patentee) Schering Corporation.

[Editor's note: An amendment was released by the Court on July 4, 2007. The changes were not indicated. This document contains the amended text.]

Reasons for judgment by: Sexton J.A. Concurred in by: Sharlow J.A. Dissenting reasons by: Nadon J.A.

1 SEXTON J.A.:-- The principal issue in this case relates to the scope of the abuse of process provision in paragraph 6(5)(*b*) of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 (the "*NOC Regulations*") and specifically whether the holder of a pharmaceutical patent, having failed to establish that an allegation of invalidity made by one generic drug manufacturer is justified, abuses the NOC process by seeking to relitigate the same allegation of invalidity when it is made by a second generic company.

2 This is an appeal from the decision of Tremblay-Lamer J. of the Federal Court in *Sanofi-Aventis Canada Inc. v. Novopharm Limited et al.*, [2006] F.C.J. No. 1431, 2006 FC 1135. In the court below, Novopharm Limited ("Novopharm") sought to appeal an order of Prothonotary Milczynski dated May 8, 2006 wherein she dismissed Novopharm's motion for summary dismissal of an application brought by Sanofi-Aventis Canada Inc. ("Sanofi-Aventis") regarding a notice of allegation ("NOA") sent to Sanofi-Aventis by Novopharm in respect of Canadian Patent No. 1,341,206 (the "'206 patent") for the drug ramipril. Tremblay-Lamer J. reversed the Prothonotary's decision and granted the motion for dismissal.

3 The appellant in this appeal is Sanofi-Aventis. In addition, although Schering Corporation ("Schering") is listed as a respondent, it is the owner of the '206 patent and its interests are aligned with those of Sanofi-Aventis. Sanofi-Aventis and Schering argue that Tremblay-Lamer J. erred in dismissing the application on the basis that it is an abuse of process.

4 For the reasons that follow, this appeal will be dismissed.

BACKGROUND

5 The NOA at issue in these proceedings is not the first to target the '206 patent. On June 20, 2003, Apotex Inc. ("Apotex") served an NOA on Sanofi-Aventis (the "Apotex NOA") alleging that the '206 patent was invalid on a number of grounds, including that the inventors could not have soundly predicted that the compounds claimed in the patent would be useful for the stated purpose. Sanofi-Aventis responded to this NOA by bringing an application in accordance with subsection 6(1) of the *NOC Regulations* before Mactavish J., but was unsuccessful in persuading Justice Mactavish that the allegations in the Apotex NOA were unjustified (*Aventis Pharma Inc. v. Apotex Inc. et al.* (2005), 43 C.P.R. (4th) 161, 2005 FC 1283 ("*Apotex* "). On appeal, Mactavish J.'s decision was upheld by this Court (*Aventis Pharma Inc. v. Apotex Inc.* (2006), 46 C.P.R. (4th) 401, 2006 FCA 64).

6 Prior to the conclusion of the proceedings concerning the Apotex NOA, Novopharm sent its own NOA to Sanofi-Aventis (the "Novopharm NOA"), which, like the Apotex NOA, alleged that the '206 patent was invalid on the basis of lack of sound prediction. Sanofi-Aventis then initiated a

second application pursuant to subsection 6(1) of the *NOC Regulations* seeking an order that the allegations in the Novopharm NOA were not justified. In response, Novopharm brought a motion under paragraph 6(5)(*b*) of the *NOC Regulations* to dismiss the application on the ground that it was redundant, scandalous, frivolous or vexatious or otherwise an abuse of process by virtue of the dismissal of the earlier application against Apotex. It is this motion that is the subject of this appeal.

DECISIONS BELOW

7 Prothonotary Milczynski dismissed the motion on the basis that the application of the doctrines of *res judicata*, issue estoppel and abuse of process require that there be a final decision and that a decision is only final and binding when all available reviews have been exhausted or abandoned. In her analysis, the Apotex decision was not final because the Supreme Court of Canada had not finally disposed of the case.

8 Tremblay-Lamer J. disagreed with the Prothonotary's assessment that the decision was not final and in any event noted that there was no longer any doubt as to whether the decision was final because the Supreme Court had finally disposed of the case by refusing leave to appeal. She therefore reviewed the matter *de novo*. In my view, she was correct to do so. She held that an application would be dismissed as abusive under paragraph 6(5)(*b*) if it is one that is "so clearly futile that it has not the slightest chance of success" or if it is "plain and obvious" that the applicant will not succeed. In her view, this test was satisfied on the facts of the present case. She held that the allegations in the Apotex and Novopharm NOAs were similar in all material respects and that Mactavish J.'s decision in the Apotex proceeding would be binding on the judge hearing the present application, regardless of the fact that Sanofi-Aventis and Schering had attempted to adduce new evidence not before Mactavish J. Accordingly, Justice Tremblay-Lamer concluded that Sanofi-Aventis had no chance of success and therefore that its application was an abuse of process.

9 Tremblay-Lamer J. also held that Sanofi-Aventis' application was an inefficient use of judicial resources, undermined the integrity of the justice system and threatened the principle of finality that is crucial to the proper administration of justice. In addition, she emphasized that one of the purposes of the *NOC Regulations* is to curb unnecessary litigation. To allow repetitious litigation such as that attempted by Sanofi-Aventis would, in her opinion, be contrary to this objective. Tremblay-Lamer J. thus granted the motion and dismissed Sanofi-Aventis's application.

REGULATORY REGIME

10 This appeal concerns the requirements set out in the *Patented Medicines (Notice of Compliance) Regulations*, S.O.R./93-133 (the "*NOC Regulations*"). The relevant sections of the *NOC Regulations* are as follows:

> 5. (1) Where a person files or has filed a submission for a notice of compliance in respect of a drug and compares that drug with, or makes reference to, another drug for the purpose of demonstrating bioequivalence on the basis of pharmaceutical and, where applicable, bioavailability characteristics and that other drug has been marketed in Canada pursuant to a notice of compliance issued to a first person and in respect of which a patent list has been submitted, the person shall, in the submission, with respect to each patent on the register in respect of the other drug,
>
> ...

(*b*) allege that

(i) the statement made by the first person pursuant to paragraph 4(2)(*c*) is false,
(ii) the patent has expired,
(iii) the patent is not valid, or
(iv) no claim for the medicine itself and no claim for the use of the medicine would be infringed by the making, constructing, using or selling by that person of the drug for which the submission for the notice of compliance is filed.

...

(3) Where a person makes an allegation pursuant to paragraph (1)(b) or (1.1)(*b*) or subsection (2), the person shall

(*a*) provide a detailed statement of the legal and factual basis for the allegation;

...

6. (1) A first person may, within 45 days after being served with a notice of an allegation pursuant to paragraph 5(3)(*b*) or (*c*), apply to a court for an order prohibiting the Minister from issuing a notice of compliance until after the expiration of a patent that is the subject of the allegation.

(2) The court shall make an order pursuant to subsection (1) in respect of a patent that is the subject of one or more allegations if it finds that none of those allegations is justified.

...

(5) In a proceeding in respect of an application under subsection (1), the court may, on the motion of a second person, dismiss the application

...

(*b*) on the ground that the application is redundant, scandalous, frivolous or vexatious or is otherwise an abuse of process.

* * *

5. (1) Lorsqu'une personne dépose ou a déposé une demande d'avis de conformité pour une drogue et la compare, ou fait référence, à une autre drogue pour en démontrer la bioéquivalence d'après les caractéristiques pharmaceutiques et, le cas échéant, les caractéristiques en matière de biodisponibilité, cette autre drogue ayant été commercialisée au Canada aux termes d'un avis de conformité délivré à

la première personne et à l'égard de laquelle une liste de brevets a été soumise, elle doit inclure dans la demande, à l'égard de chaque brevet inscrit au registre qui se rapporte à cette autre drogue :

[...]

b) soit une allégation portant que, selon le cas :

(i) la déclaration faite par la première personne aux termes de l'alinéa 4(2)*c*) est fausse,
(ii) le brevet est expiré,
(iii) le brevet n'est pas valide,
(iv) aucune revendication pour le médicament en soi ni aucune revendication pour l'utilisation du médicament ne seraient contrefaites advenant l'utilisation, la fabrication, la construction ou la vente par elle de la drogue faisant l'objet de la demande d'avis de conformité.

[...]

(3) Lorsqu'une personne fait une allégation visée aux alinéas (1)*b*) ou (1.1)*b*) ou au paragraphe (2), elle doit :

a) fournir un énoncé détaillé du droit et des faits sur lesquels elle se fonde;

[...]

6. (1) La première personne peut, dans les 45 jours après avoir reçu signification d'un avis d'allégation aux termes des alinéas 5(3)*b*) ou *c*), demander au tribunal de rendre une ordonnance interdisant au ministre de délivrer un avis de conformité avant l'expiration du brevet visé par l'allégation.

(2) Le tribunal rend une ordonnance en vertu du paragraphe (1) à l'égard du brevet visé par une ou plusieurs allégations si elle conclut qu'aucune des allégations n'est fondée.

[...]

(5) Lors de l'instance relative à la demande visée au paragraphe (1), le tribunal peut, sur requête de la seconde personne, rejeter la demande si, selon le cas :

[...]

b) il conclut qu'elle est inutile, scandaleuse, frivole ou vexatoire ou constitue autrement un abus de procédure.

In these Reasons, I rely upon the version of the *NOC Regulations* in force prior to their amendment in October 2006. The motions judge apparently relied on these former provisions, her decision hav-

ing been issued on September 25, 2006. Likewise, the parties appear to have relied on the former provisions and made no argument that the new version of the regulations should apply. In any event, the amendments do not appear to make a material difference for the purposes of this case.

ISSUES

11 This appeal raises the following four issues:

1. What is the standard of review?
2. Was Novopharm required to allege abuse of process and the factual basis for that allegation in its NOA?
3. Is there a material difference between the legal and factual basis of the allegations in the Novopharm NOA as compared with the Apotex NOA?
4. Is the application initiated by Sanofi-Aventis in respect of the Novopharm NOA redundant, scandalous, frivolous or vexatious or otherwise an abuse of process within the meaning of paragraph 6(5)(*b*) of the *NOC Regulations*?

ANALYSIS

1) Standard of Review

12 In appellate review, the nature of the questions at issue determines the applicable standards of review. Generally, questions of law are reviewable on a standard of correctness (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 at paragraph 8 ("*Housen*")), and findings of fact will be set aside only for palpable and overriding error (*Housen* at paragraph 10). For questions of mixed fact and law, the standard of palpable and overriding error applies unless the lower court judge wrongly characterized the correct legal standard or failed to apply the correct standard, in which case a standard of correctness applies (*Housen* at paragraph 37).

13 A decision to dismiss a proceeding as an abuse of process is a discretionary one. Such a decision will not be reversed on appeal unless there is an error of law or principle, or a failure to exercise the discretion judicially: *Elders Grain Co. v. M/V Ralph Misener (The)* (C.A.), [2005] F.C.J. No. 612, [2005] 3 F.C. 367 at paragraph 13; *AB Hassle v. Apotex Inc. (C.A.)*, [2006] 4 F.C.R. 513, at paragraph 27.

2) Sufficiency of the NOA

14 The first ground on which Sanofi-Aventis argues Tremblay-Lamer J. erred was in failing to dismiss Novopharm's motion for summary dismissal on the basis that Novopharm did not allege *res judicata*, issue estoppel or abuse of process in its NOA. I cannot agree.

15 I agree with Sanofi-Aventis that subparagraph 5(3)(*a*) requires the generic drug manufacturer to provide a detailed statement of the legal and factual basis of the allegations made in the NOA. However, the types of allegations that must be described in the detailed statement are those relating to the patent in issue, not to potential procedural bars that the patent holder may raise in argument. The types of allegations requiring specification are listed in paragraph 5(1)(*b*) of the *NOC Regulations*:

> 5. (1) Where a person files or has filed a submission for a notice of compliance in respect of a drug and compares that drug with, or makes reference to, another

drug for the purpose of demonstrating bioequivalence on the basis of pharmaceutical and, where applicable, bioavailability characteristics and that other drug has been marketed in Canada pursuant to a notice of compliance issued to a first person and in respect of which a patent list has been submitted, the person shall, in the submission, with respect to each patent on the register in respect of the other drug,

...

(*b*) allege that

(i) the statement made by the first person pursuant to paragraph 4(2)(*c*) is false,
(ii) the patent has expired,
(iii) the patent is not valid, or
(iv) no claim for the medicine itself and no claim for the use of the medicine would be infringed by the making, constructing, using or selling by that person of the drug for which the submission for the notice of compliance is filed.

* * *

5. (1) Lorsqu'une personne dépose ou a déposé une demande d'avis de conformité pour une drogue et la compare, ou fait référence, à une autre drogue pour en démontrer la bioéquivalence d'après les caractéristiques pharmaceutiques et, le cas échéant, les caractéristiques en matière de biodisponibilité, cette autre drogue ayant été commercialisée au Canada aux termes d'un avis de conformité délivré à la première personne et à l'égard de laquelle une liste de brevets a été soumise, elle doit inclure dans la demande, à l'égard de chaque brevet inscrit au registre qui se rapporte à cette autre drogue :

[...]

b) soit une allégation portant que, selon le cas :

(i) la déclaration faite par la première personne aux termes de l'alinéa 4(2)*c*) est fausse,
(ii) le brevet est expiré,
(iii) le brevet n'est pas valide,
(iv) aucune revendication pour le médicament en soi ni aucune revendication pour l'utilisation du médicament ne seraient contrefaites advenant l'utilisation, la fabrication, la construction ou la vente par elle de la drogue faisant l'objet de la demande d'avis de conformité.

16 Once an NOA is delivered by the generic drug manufacturer, it is the patent holder that may launch an application for an order that the allegations in the NOA are not justified (subsection 6(1)).

Only then may the generic ask the court to dismiss the application under paragraph 6(5)(*b*) on the grounds that it is redundant, scandalous, frivolous or vexatious or is otherwise an abuse of process:

> (5) In a proceeding in respect of an application under subsection (1), the court may, on the motion of a second person, dismiss the application
>
> ...
>
> (*b*) on the ground that the application is redundant, scandalous, frivolous or vexatious or is otherwise an abuse of process.
>
> (5) Lors de l'instance relative à la demande visée au paragraphe (1), le tribunal peut, sur requête de la seconde personne, rejeter la demande si, selon le cas :
>
> [...]
>
> *b*) il conclut qu'elle est inutile, scandaleuse, frivole ou vexatoire ou constitue autrement un abus de procédure.

17 At the NOA stage, the generic drug manufacturer cannot possibly know whether the patent holder will initiate prohibition proceedings, or on what grounds. It makes no sense to require the generic to anticipate procedural remedies that may be open to it when the patent holder initiates a prohibition application, and there is no basis in the *NOC Regulations* for concluding that the NOA must do so.

3) Similarity of the Allegations in the Novopharm and Apotex NOAs

18 The next submission made by Sanofi-Aventis and Schering is that the motions judge was wrong to conclude that the Apotex and Novopharm NOAs contain similar allegations and consequently there is no basis for concluding that the present application is redundant or otherwise an abuse of process. Tremblay-Lamer J. found that the Novopharm NOA was in all material respects the same as the Apotex NOA, allowing her to conclude that all of the same issues would be relitigated should Sanofi-Aventis' application be allowed to proceed. Sanofi-Aventis and Schering challenge this conclusion, arguing that there are a number of different factual and legal bases for the allegations made in the Novopharm NOA. Specifically, they claim that while sound prediction is alleged in the Novopharm NOA, as it was in the Apotex NOA, the basis for this claim is not identical to that previously alleged. They maintain, therefore, that the Sanofi-Aventis application would not involve a relitigation of the issues decided by Mactavish J. and accordingly, the application would not be an abuse of process. I do not agree.

19 After comparing the Apotex and Novopharm NOAs, as well as reviewing the reasons of Mactavish J., I am satisfied that the Novopharm NOA contains the allegations that were critical to Mactavish J.'s finding that Schering's inventors did not have a sound basis for predicting the utility of their invention and therefore see no reason for departing from the conclusion of Tremblay-Lamer J. on this issue.

20 The allegations in the Novopharm NOA relating to sound prediction are undoubtedly longer, more detailed and more specific than those in the Apotex NOA, which contains only two para-

graphs directed to the issue of sound prediction and couches its allegations in broad language. However, both NOAs suggest that the inventors of the compounds claimed in the '206 patent lacked a sufficient basis for predicting that their invention would have the requisite level of activity or would be useful for therapeutic administration.

21 Sanofi-Aventis and Schering argue that the detailed allegations in the Novopharm NOA are narrower than those in the Apotex NOA, and that the Novopharm NOA raises several matters not advanced in the Apotex NOA, including the issue of the stereochemistry of the bridgehead carbons. Tremblay-Lamer J. found no merit to these arguments, and I see no basis for interfering with that conclusion. Mactavish J.'s holding that the invention disclosed by the '206 patent lacked sound prediction turned on her finding that as of the relevant date, it would not have been possible for Schering inventors to predict the impact of chirality of the bridgehead carbons of the bicyclic ring system (*Apotex* at paragraphs 140-143). The contention of Sanofi-Aventis and Schering that this issue was not raised in the Apotex NOA is a collateral attack on the decision of Mactavish J. because she already fully considered and rejected that argument in a decision that was upheld by this Court. It is therefore not open to Sanofi-Aventis and Schering to argue in these proceedings that the Apotex NOA did not encompass an allegation that the inventors of the '206 patent could not have soundly predicted the stereochemistry of the bridgehead carbons like the one advanced in the Novopharm NOA.

4) Is Sanofi-Aventis' Application an Abuse of Process?

a) Introduction

22 Accepting the conclusion of Tremblay-Lamer J. that the allegations in the Apotex and Novopharm NOAs are the same in their material respects, it is necessary to consider whether Sanofi-Aventis' attempt to relitigate these allegations amounts to an abuse of process. Paragraph 6(5)(*b*) of the *NOC Regulations* permits a second person, usually a generic, to bring a motion to dismiss an application by a first person in respect of an NOA "on the ground that it is redundant, scandalous, frivolous or vexatious or is otherwise an abuse of process in respect of one or more patents."

b)Arguments of the Parties

23 Sanofi-Aventis and Schering contend that the issue of whether an invention has been soundly predicted is a question of fact and that unlike questions of law, one court's finding of fact is not binding on another judge considering a similar issue. Rather, Sanofi-Aventis and Schering emphasize that each trier of fact must assess the evidence before her and make her own findings. In oral argument, Schering stressed that new evidence has been adduced in this application that mandates a different conclusion from that reached by Mactavish J. in the Apotex proceeding.

24 Moreover, Sanofi-Aventis and Schering contend that relitigation alone is not an abuse of process. In their view, for conduct to be abusive, there must be some other additional element of misconduct such as a collateral attack on the earlier decision, dishonesty, or unjust harassment. None of these factors, they say, is present in this case. Sanofi-Aventis and Schering also argue that relitigation is permissible within the scheme of the regulations. They highlight the fact that although the drafters of the *NOC Regulations* contemplated that more than one generic could file an NOA with substantially the same allegations, there is no provision allowing for a second generic to rely on the successful NOA of the first. Had the Governor in Council intended to create an *in rem* finding of invalidity for the purposes of the *NOC Regulations*, they say, it would have done so expressly.

25 Novopharm, on the other hand, argues that Tremblay-Lamer J.'s order is consistent with the purposes behind the *NOC Regulations*, which, in part, are to promote fairness and effectiveness, and to reduce unnecessary litigation. Novopharm also emphasizes that if patentees are allowed to relitigate issues already judicially decided, there is a risk of different courts reaching inconsistent results in respect of the same issues, which threatens the integrity of the judicial process. Likewise, Novopharm stresses that relitigation is an inefficient use of judicial resources and threatens the principle of finality. In addition, Novopharm points to the fact that the *NOC Regulations* do not remove any of the patentee's rights under the *Patent Act*, nor is a proceeding under the *NOC Regulations* dispositive of the issues in a patent infringement action. Lastly, Novopharm notes that it would be unfair to allow an innovator to relitigate with respect to issues it previously lost, thereby permitting it to improve its argument on the second attempt, particularly where the facts required to resolve the issues are in the exclusive knowledge of the innovator.

26 I am persuaded that the position of Novopharm is the most consistent with the scheme of the *NOC Regulations* and the guidance from the Supreme Court of Canada on the doctrine of abuse of process. Permitting the same innovator to relitigate the same issues repeatedly poses a severe threat to the integrity of the adjudicative process, the principle of finality, and the efficiency of the judicial system. In my view the Governor in Council recognized this threat and enacted paragraph 6(5)(*b)* of the *NOC Regulations* to allow for the early dismissal of proceedings like the one at issue.

c) Abuse of Process in Paragraph 6(5)(b)

27 Subsection 6(5) was introduced during 1998 amendments to the *NOC Regulations* to give generic manufacturers, referred to in the regulations as "second persons," an opportunity to seek early dismissal of a patentee's case in certain circumstances. Paragraph 6(5)(*b)* allows for the dismissal of an application when it is an abuse of process:

> (5) In a proceeding in respect of an application under subsection (1), the court may, on the motion of a second person, dismiss the application
>
> ...
>
> (*b*) on the ground that the application is redundant, scandalous, frivolous or vexatious or is otherwise an abuse of process.
>
> * * *
>
> (5) Lors de l'instance relative à la demande visée au paragraphe (1), le tribunal peut, sur requête de la seconde personne, rejeter la demande si, selon le cas :
>
> [...]
>
> *b*) il conclut qu'elle est inutile, scandaleuse, frivole ou vexatoire ou constitue autrement un abus de procédure.

28 At paragraphs 23-24 of her Reasons, Tremblay-Lamer J. identified that two similar tests have generally been applied by the Federal Court to dismiss proceedings under paragraph 6(5)(*b*):

> [23] **This Court has generally held that in order to strike out a proceeding for being redundant, scandalous, frivolous, vexatious or otherwise an abuse of process, the moving party must show that the case is "so clearly futile that it has not the slightest chance of success"**. This test has been applied several times in s. 6(5)(b) cases: *Pfizer Canada Inc. v. Apotex Inc.* (1999), 1 C.P.R. (4th) 358 (F.C.T.D.) at paras. 28-32; *Bayer Inc. v. Apotex Inc.* (1998), 85 C.P.R. (3d) 334 (F.C.T.D.) at paras. 23-24; *AB Hassle v. Apotex Inc.*, 2001 FCT 530, (2001), 12 C.P.R. (4th) 289 (F.C.T.D.) at para. 28; *AstraZeneca AB v. Apotex Inc.* 2002 FCT 1249, (2002), 23 C.P.R. (4th) 213 (F.C.T.D.) at para. 11.
>
> [24]**When dealing with a paragraph 6(5)(b) motion, the courts have also applied the "plain and obvious" test such that an application will be dismissed where it is "plain and obvious" that the applicant has no chance of success**: *Apotex Inc. v. Merck Frosst Canada Inc.* (1999), 87 C.P.R. (3d) 30 (F.C.A.) at paras. 5-6; *GlaxoSmithKline Inc. v. Apotex Inc.*, 2003 FC 1055, (2003), 29 C.P.R. (4th) 350 (F.C.) at paras. 12-13. [Emphasis added.]

29 In Tremblay-Lamer J.'s view, any court hearing Sanofi-Aventis' present application would be bound by Mactavish J.'s decision in the Apotex case. She therefore concluded the application was an abuse of process because it was "clearly futile" and that it was "plain and obvious" that it would have no chance of success.

30 While I agree with the motions judge that Sanofi-Aventis' application is an abuse of process, I must respectfully disagree with her conclusion that the reason for this finding is that Mactavish J's decision, which was upheld by the Court of Appeal, would be binding on the applications judge. The issue in this case, as in the proceeding before Mactavish J., is whether the invention in the '206 patent was soundly predicted. Sound prediction is a question of fact (Apotex *Inc. v. Wellcome Foundation Ltd.*, [2002] 4 S.C.R. 153, 2002 SCC 77 at paragraph 71). Factual questions are to be determined by triers of fact based on the evidence before them. Unlike questions of law, in regards to which lower courts are bound by the conclusions of appellate courts, questions of fact must be resolved based on the information adduced before each trier of fact. This principle was explained by this Court in *J.M. Voith GmbH v. Beloit Corp.* (1991), 36 C.P.R. (3d) 322 at 330 as follows:

> While a finding of fact in another proceeding, approved by an appellate court whose judgments are binding, may call for particular reflection before a contrary finding is made, it remains that the question is whether the second finding is supportable on the evidence properly before the second trial judge.

31 Mactavish J.'s holding would therefore not be binding on the proceedings respecting the Novopharm NOA. Consequently, it cannot be said that the application, if allowed to proceed, would be "clearly futile" or that it is "plain and obvious" that it would have no chance of success. Nevertheless, I think Sanofi-Aventis' application must be held to be an abuse of process within the meaning of paragraph 6(5)(*b*) of the *NOC Regulations*.

32 The "clearly futile" and "plain and obvious" tests found their way into the context of the *NOC Regulations* before paragraph 6(5)(*b*) was enacted. At that time there was no rule allowing for the dismissal of a notice of application and accordingly, in *Pharmacia Inc. v. Canada (Minister of National Health and Welfare)* (1994), 58 C.P.R. (3d) 209 at 217 (F.C.A.), this Court suggested that

judicial review proceedings could be summarily dismissed in exceptional cases by analogy to Rule 419 of what were then the *Federal Court Rules*, C.R.C. 1978, c. 663 for striking out pleadings in an action:

> For these reasons we are satisfied that the trial judge properly declined to make an order striking out, under Rule 419 or by means of the gap rule, as if this were an action.**This is not to say that there is no jurisdiction in this court either inherent or through Rule 5, by analogy to other rules, to dismiss in summary manner a notice of motion which is so clearly improper as to be bereft of any possibility of success**: see, for example, *Cynamid Agricultural de Puerto Rico Inc. v. Commissioner of Patents* (1983), 74 C.P.R. (2d) 133 (F.C.T.D.); and the discussion in *Vancouver Island Peace Society v. Canada*, [1994] 1 F.C. 102 at pp. 120-21, 64 F.T.R. 127, 19 Admin. L.R. (2d) 91 (T.D.). **Such cases must be very exceptional and cannot include cases such as the present where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion**. [Emphasis added.]

33 Paragraph 6(5)(*b*) was added to the *NOC Regulations* in 1998 bearing similar language to that employed in the former Rule 419 of the *Federal Court Rules* and that in Rule 221 of the current *Federal Courts Rules*, SOR/98-106. Accordingly, the Federal Court adopted the principles that had been developed under Rule 419 for striking out pleadings in an action, as explained by Lemieux J. in *Pfizer Canada Inc. v. Apotex Inc.* (1999), 1 C.P.R. (4th) 358 at paragraphs 29-30 (F.C.T.D.):

> [28] Paragraph 6(5)(*b*) of the Regulations has its source in paragraphs (*b*), (*c*) and (*f*) of Rule 221 of the *Federal Court Rules*, 1998, SOR/98-106, which themselves were based on similar paragraphs of Rule 419 of the old *Federal Court Rules*, C.R.C. 1978, c. 663, which concerned actions rather than applications.
>
> [29] Counsel for Apotex argued Pfizer's application was scandalous, frivolous and vexatious within the meaning of those words in paragraph 6(5)(*b*) of the Regulations. The test Apotex had to meet has been set out in a consistent line of cases interpreting former rule 419(1)(*c*).
>
> [30] In *R. v. Creaghan*, [1972] F.C. 732 (T.D.), Pratte J. (as he then was), said this about that aspect of Rule 419 (page 736):
>
> Finally, in my view, a statement of claim should not be ordered to be struck out on the ground that it is vexatious, frivolous or an abuse of the process of the Court, for the sole reason that in the opinion of the presiding judge, plaintiff's action should be dismissed. **In my opinion, a presiding judge should not make such an order unless it be obvious that the plaintiff's action is so clearly futile that it has not the slightest chance of succeeding, whoever the judge may be before whom the case could be tried**. It is only in such a situation that the plaintiff should be deprived of the opportunity of having "his day in Court". [Emphasis in original.]

34 Likewise, the Federal Court has on several occasions invoked the following principle from the Supreme Court of Canada's decision in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, to strike out a notice of application under paragraph 6(5)(*b*) where it is "plain and obvious" the patentee has no chance of success:

> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the *British Columbia Rules of Court* is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, **is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat"**. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the *British Columbia Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a). [Emphasis added.]

(See *e.g. Bayer Inc. v. Apotex Inc.* (1998), 85 C.P.R. (3d) 334 at paragraph 23; *Hoffman-La Roche Ltd. v. Canada (Minister of Health and Welfare)* (1999), 87 C.P.R. (3d) 251 at paragraph 2; *GlaxoSmithKline Inc. v. Apotex Inc.* (2003), 29 C.P.R. (4th) 350 at paragraphs 12-13)

35 Despite these authorities, this Court's analysis with respect to abuse of process must now be informed by the principles enunciated by the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 ("*C.U.P.E.*"). In *C.U.P.E.*, Arbour J. provided a thorough explanation of the doctrine of abuse of process as it relates to attempts by parties to relitigate issues already adjudicated. She held that relitigation of an issue can constitute abuse of process and stressed that the key concern motivating the doctrine of abuse of process is preserving the integrity of the adjudicative process:

> In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
>
> > The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute**. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.** See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).)...

...The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

...

Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality. [Emphasis in original.]

36 Proceedings in which the case for the patent holder is clearly futile or plainly has no chance of success because of an earlier, binding authority continue to be impermissible as abuses of process because such proceedings will waste judicial resources and impose hardship on generic drug manufacturers without any corresponding benefit such as a more accurate result. However, applying the principles outlined by Arbour J., it is evident that the types of proceedings that constitute abuses of process go beyond those that are clearly futile to include cases such as the one at present. Many of the concerns raised by Arbour J. are applicable to this appeal. Allowing Sanofi-Aventis to proceed

with its application will give rise to the possibility of inconsistent judicial decisions, with one judge holding that the inventors of the '206 patent lacked a sound basis for predicting the utility of their invention and another holding that there was sound prediction. Thus one generic would receive an NOC because of invalidity based on lack of sound prediction while another would be refused an NOC even though its NOA raised the same allegation. As Arbour J. identified, permitting that type of inconsistency would threaten the credibility of the adjudicative process. Likewise, as Arbour J. noted, there is no reason to think that a second proceeding under section 6 of the *NOC Regulations* will lead to a more accurate result than the first. This scenario is in contrast to an action for a declaration of patent invalidity, where because the parties have the benefit of a full trial and all the attendant procedural safeguards, a more accurate result may arise. That is why the courts have on numerous occasions stated the principle that decisions rendered under the *NOC Regulations* are not binding on actions for patent infringement or to declare a patent invalid (see *e.g. Pharmacia Inc. v. Canada (Minister of National Health and Welfare)* (1994), 58 C.P.R. (3d) 209; *Novartis A.G. v. Apotex Inc.*, [2002] F.C.J. No. 1551, 2002 FCA 440 at paragraph 9; *Pfizer Canada Inc. et al. v. Apotex Inc. et al.* (2001), 11 C.P.R. (4th) 245 at paragraph 25).

37 In the context of the *NOC Regulations*, encouraging the efficient use of scarce judicial resources is also of particular concern. Judicial resources are already taxed considerably by the voluminous proceedings brought under the regulations. An attempt to further strain the resources of parties and of the courts through repetitious litigation without any compelling justification strongly favours a finding of abuse of process.

38 Therefore, despite the fact that Mactavish J.'s decision would not dictate the outcome of the present application and consequently, that it is not possible to say that Sanofi-Aventis has no chance of success, I nevertheless am compelled to hold that the application in respect of the Novopharm NOA is an abuse of process and therefore should be dismissed.

39 In *C.U.P.E.* at paragraphs 52-53, Arbour J. noted that there may be situations where fairness dictates that a duplicitous proceeding should not be held to be abusive:

> In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. **It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context**. This was stated unequivocally by this Court in *Danyluk, supra*, at para. 80.
>
> The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of

> res judicata or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk, supra*, at para. 51; *Franco, supra*, at para. 55). [Emphasis added.]

40 While it is important in each case to ensure the application of the doctrine of abuse of process does not give rise to unfairness in the circumstances, in my view, no such unfairness would result in the present case. Prohibition proceedings under the *NOC Regulations* do not prevent patentees from enforcing their patent rights through actions for patent infringement in accordance with the *Patent Act*. Moreover, the findings from any such prohibition proceedings have no bearing on patent infringement actions.

41 Sanofi-Aventis and Schering argue that a finding of abuse of process is inappropriate in this case because relitigation alone is insufficient to give rise to abuse of process, because they have adduced new evidence in these proceedings not before Mactavish J. that warrants a different result, and because the scheme of the *NOC Regulations* permits repetitive applications against different generics. I am not persuaded by these submissions.

42 Sanofi-Aventis and Schering first challenged the test laid out above for dismissing an application under paragraph 6(5)(*b*). They argue that relitigation alone can never be enough to give rise to abuse of process. Rather, they say that there must be some additional element of misconduct before a court will render a proceeding abusive. For this proposition they cite the following passage from the English Court of Appeal's decision in *Bradford & Bingley Building Society v. Seddon*, [1999] 1 W.L.R. 1482 at 1492-1493 (C.A.) ("*Bradley*"):

> **In my judgment, mere "re"-litigation, in circumstances not giving rise to cause of action or issue estoppel, does not necessarily give rise to abuse of process**. Equally, the maintenance of a second claim which could have been part of an earlier one, or which conflicts with an earlier one, should not, per se, be regarded as an abuse of process. Rules of such rigidity would be to deny its very concept and purpose. As Kerr LJ and Sir David Cairns emphasised in *Bragg v. Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1982] 2 Lloyd's Rep. 132, 137, 138-139 respectively, the courts should not attempt to define or categorise fully what may amount to an abuse of process; see also *per* Stuart-Smith LJ in *Ashmore v. British Coal Corporation* [1990] 2 Q.B. 338, 352. Sir Thomas Bingham MR underlined this in *Barrow v. Bankside Agency Ltd.* [1996] 1 W.L.R. 257, stating, at 263B, that the doctrine should not be "circumscribed by unnecessarily restrictive rules" since its purpose was the prevention of abuse and it should not endanger the maintenance of genuine claims; see also *per* Saville LJ at 266D-E.
>
> **Some additional element is required, such as a collateral attack on a previous decision** (see e.g. *Hunter v. Chief Constable of the West Midlands Police*

> [1982] A.C. 529; *Bragg's* case [1982] 2 Lloyd's Rep. 132, *per* Kerr LJ and Sir David Cairns, at pp. 137 and 139 respectively; and *Ashmore's* case [1990] 2 Q.B. 338), **some dishonesty** (see e.g. *per* Stephenson LJ *Bragg's* case, at p. 139; and Potter L.J. in *Morris v. Wentworth-Stanley* [1999] 2 W.L.R. 470, 480 and 481; **or successive actions amounting to unjust harassment** (see e.g. *Manson v. Vooght*, The Times, 20 November 1998; Court of Appeal (Civil Division) Transcript No. 1610 of 1998, *per* May LJ). [Emphasis added.]

43 However, in *C.U.P.E.*, Arbour J. considered whether there was a collateral attack on the earlier judgment. She found that there was no such collateral attack. Furthermore, in the *C.U.P.E.* case, although Arbour J. noted that it was important to take into account such considerations as judicial economy, consistency, finality and the integrity of the administration of justice, she found no additional element of misconduct so as to come within the requirements of *Bradley*. Nevertheless, Arbour J. found there to be abuse of process. Consequently it cannot be said that any additional element of misconduct is required to find abuse of process in Canada.

44 In my view, even if the requirement of an element additional to relitigation was required in Canada, it does not lie in the mouths of Sanofi-Aventis and Schering to suggest that they have not attempted to attack collaterally the decision of Mactavish J. and the approval of that decision by the Court of Appeal. In oral argument, Schering counsel stressed that Sanofi-Aventis' application was not an abuse of process because in these proceedings Sanofi-Aventis and Schering have tendered evidence that was not before Mactavish J. in the Apotex proceeding and that would lead a trier of fact to reach the opposite conclusion on the issue of sound prediction. Sanofi-Aventis and Schering say that in the previous proceeding, they were not put on notice that Apotex would be challenging the predictability of the chirality of the bridgehead carbons in the compounds covered by the '206 patent, an issue that became a critical factor in Mactavish J.'s conclusion that the compounds disclosed in the '206 patent were not soundly predicted. Consequently, they say it would be unjust to prevent them from tendering additional evidence on that issue in the present proceedings. In their view, the additional evidence adduced in these proceedings establishes that the chirality of the bridgehead carbons was soundly predicted and accordingly, the patent is not invalid for lack of sound prediction.

45 This argument is itself a collateral attack on Justice Mactavish's decision. In the Apotex case, the parties fully argued whether the Apotex NOA was sufficient with respect to the issue of sound prediction. Mactavish J. concluded that it was and went on to dispose of the case based on the allegations made in the NOA. Sanofi-Aventis and Schering attempted to challenge Mactavish J.'s conclusion as to the sufficiency of the Apotex NOA on appeal to this Court and their argument was rejected. On this issue, Mactavish J. held as follows at paragraphs 102-108:

> [102] Aventis asserts that Apotex's NOA is deficient as it relates to the issue of sound prediction. Aventis says that the sum total of Apotex's argument that Schering did not have a sound basis for its prediction as contained in its NOA was its assertion that Schering failed to provide test data. According to Aventis, subsequent to serving the NOA, Apotex amplified its argument to argue that Schering should have demonstrated utility by testing in order to establish matters such as potency, toxicity, bioavailability, selectivity and so on.
>
> ...

> [105] A review of Apotex's NOA reveals that Apotex put Aventis on notice that it would be arguing that Schering failed to conduct the tests necessary to establish that the compounds covered by the '206 patent possessed the requisite level of activity and the requisite pharmacological and toxicological profile. What do these terms mean? Clearly the 'level of activity' relates to the potency of the compounds in question. The use of the phrase 'toxicological profile' clearly puts Aventis on notice that the issue of toxicity was in issue. Finally, the 'requisite pharmacological profile' can be reasonably understood to relate to issues such as bioavailability and selectivity.
>
> [106] Moreover, a review of Aventis' Notice of Application reveals that it understood Apotex's position in relation to these issues, as it responds to it.
>
> [107] Finally, it should be noted that no affidavit was filed on behalf of Aventis asserting that it was not in a position to decide whether to challenge Apotex's NOA in relation to this issue because of the statement's lack of specificity: see *Astrazeneca AB and Astrazeneca Canada Inc. v. Apotex Inc. and the Minister of Health*, [2005] F.C.J. No. 842, 2005 FCA 183, _ 13.
>
> [108] In these circumstances, I am therefore satisfied that Aventis was sufficiently aware of the basis on which Apotex was claiming that the '206 patent was invalid as it related to the first two elements of the test for sound prediction

46 On appeal, Chief Justice Richard stated the following at paragraphs 11-17:

> [11] Aventis/Schering contend that Justice Mactavish erred by finding that Apotex's NOA, with respect to sound prediction, was legally sufficient.
>
> [12] I am satisfied that Justice Mactavish properly determined the claim of sufficiency of Apotex's NOA, based on the jurisprudence of this Court and on the evidentiary record.
>
> ...
>
> [16] Aventis/Schering specifically focus on the words "requisite level of activity" in the NOA. Justice Mactavish determined that "level of activity" relates to the potency of the compounds in question and therefore whether the compounds lacked any activity at all. In addition, Justice Mactavish considered the lack of an affidavit filed on behalf of Aventis with respect to the alleged lack of specificity in the Apotex NOA to be telling, as per *AstraZeneca AB*.
>
> [17] The decision of Justice Mactavish was supported by the evidentiary record. As Justice Mactavish made no palpable and overriding error, her determination with respect to the sufficiency of Apotex's NOA should not be interfered with.

47 In any event, the additional evidence adduced by Sanofi-Aventis and Schering in these proceedings does not change the fact that in the circumstances, they cannot attempt to relitigate a claim they have already made. Sanofi-Aventis and Schering were required to put their best foot forward in the earlier proceedings. They can have no relief in these new proceedings for having failed to do so. The doctrine of abuse of process calls for the innovator to bring forth all its evidence on each ground of invalidity raised. It should not be allowed to hold back evidence and then use that as a ground for allowing a second application to proceed. Even though in *Glaxo Group Ltd. v. Canada (Minister of Health)*, [2001] F.C.J. No. 159, 2001 FCT 16 at paragraph 16 (F.C.T.D.) the two cases involved the same parties, nevertheless the quote of Hansen J. is apposite:

> In *Hofffman-LaRoche, supra*, the factors that led Rothstein J. to conclude there was an abuse of process are analogous to the facts before me. The applicants and the patents are the same in both proceedings, the Notices of Allegation are in all material respects identical, and the issues were fully litigated in the first proceeding. The only distinguishing aspect between the first and current applications is that Glaxo believes it has a better evidentiary basis on which to litigate the issues. **Litigants who have already litigated a matter, but lost, should not be permitted to re-litigate because they have acquired new evidence. This, in my view, is an abuse of the Court's process**. [Emphasis added.]

48 Another argument relied upon by Sanofi-Aventis and Schering is that the scheme of the *NOC Regulations* suggests that generics are not entitled to rely upon prior findings of justified allegations in respect of NOAs previously issued by other generics. Had the drafters of the regulations intended to bar duplicative proceedings, Sanofi-Aventis and Schering argue, they would have included a scheme under which later generics could rely on successful allegations made previously by other generics, such as by de-listing the patent. In making this argument, what Sanofi-Aventis and Schering fail to appreciate is that the *NOC Regulations* have provided a way for subsequent generics to rely on the successful NOAs of earlier generics. By enacting paragraph 6(5)(*b*), the Governor in Council has signaled the importance of curtailing redundant proceedings that threaten the integrity of the adjudicative process. Generics can invoke this provision where other generics have successfully made allegations the subsequent generics seek to make.

49 Sanofi-Aventis and Schering also emphasize that proceedings under the *NOC Regulations* are of a preliminary nature and are accompanied by limited procedural safeguards. While this argument may be sufficient to establish that decisions made in the context of the *NOC Regulations* should not be binding on judges adjudicating actions for patent infringement or declarations of patent invalidity, it does not change the fact that relitigation by a first person of an issue already decided against it within the context of the *NOC Regulations* is generally not permissible. As I have already said, the possibility of different judges adjudicating equivalent proceedings concerning the same issue reaching different results threatens the integrity of the adjudicative process. The nature of the proceedings does not change this reality.

50 Finally, Sanofi-Aventis and Schering argue that a finding of abuse of process in this case will lead to unfairness. They say that while first persons will not be permitted to defend against allegations by subsequent generics after the same allegation made by an earlier generic has been found to be justified, subsequent generics will be permitted to repeat allegations already made earlier by other generics even if the earlier allegations were found to be unjustified. However, there is no unfairness in this scenario. All parties are held to the same standard: they must each put forward

their entire case, complete with all relevant evidence, at first instance. The innovator is prevented from relitigating an issue already decided in a proceeding to which it was a party with the aid of additional evidence it chose not to adduce in the earlier proceedings. Generics likewise must put forward their full case at the first opportunity. Multiple NOAs issued by the same generic relating to a particular drug and alleging invalidity of a particular patent will generally not be permitted, even if different grounds for establishing invalidity are put forward in each. However, where one generic has made an allegation but has failed to put forward the requisite evidence and argument to illustrate the allegation is justified, it would be unjust to preclude a subsequent generic, who is apprised of better evidence or a more appropriate legal argument, from introducing it. Although this situation may give rise to the possibility of an inconsistent result, this concern is overridden by the potential for unfairness to the generic that is barred from bringing forward its case simply because another generic's approach was inadequate. In each situation, it is necessary to balance the effect of a proceeding on the administration of justice against the unfairness to a party from precluding it from bringing forward its case.

CONCLUSION

51 For the foregoing reasons, I would dismiss the appeal with costs.

SEXTON J.A.
SHARLOW J.A.:-- I agree

52 NADON J.A. (dissenting):-- I cannot agree with Sexton J.A. that the appellant's application for an order prohibiting the Minister of Health (the "Minister") from issuing a Notice of Compliance (a "NOC") to the respondent Novopharm Limited (the "respondent") constitutes an abuse of process. As a result, I would allow the appeal.

53 The relevant facts and the proceedings below are carefully reviewed by Sexton J.A. in his Reasons and I need not refer to them, except to make clear one matter. As Sexton J.A. explains at paragraph 3 of his Reasons, the appellant herein is Sanofi-Aventis Canada Inc. and the owner of the patent at issue, named as a respondent, is Schering Corporation. Since Schering's interests in this appeal are the same as those of Sanofi-Aventis, I will, for ease of reference, simply refer to these parties as "the appellant".

54 As Sexton A.J. makes clear at the outset of his Reasons, the issue before us arises by reason of paragraph 6(5)*(b)* of the *Patented Medicines (Notice of Compliance) Regulations*, SOR93-133 (the "NOC Regulations"), which allows a second person, i.e. a generic drug manufacturer, to seek the dismissal of a patentee's application for an order of prohibition on the ground that the application is, *inter alia*, an abuse of process.

55 In seeking to obtain such an order against the appellant, the respondent says that the allegations of invalidity, i.e. that the inventors did not have a sound basis for predicting the utility of their invention, concerning the appellant's patent 1,341,206 (the "'206 patent") found in its Notice of Allegation ("NOA") are, for all intents and purposes, indistinguishable from those made by Apotex Inc. which Mactavish J., in *Aventis Pharma Inc. v. Apotex*, (2005), 43 C.P.R. (4th) 161, 2005 FC 1283, found to be justified. Mactavish J.'s decision was upheld by this Court in *Aventis Pharma Inc. v. Apotex Inc.* (2006), 46 C.P.R. (4th) 401, 2006 FCA 64.

56 At paragraph 1 of his Reasons, Sexton J.A. frames the issue as being "whether the holder of a pharmaceutical patent, having failed to establish that an allegation of invalidity made by one ge-

neric drug manufacturer [Apotex] is justified, abuses the NOC process by seeking to relitigate the same allegation of invalidity when it is made by a second generic company [the respondent Novopharm]".

57 The appellant frames the question in a different manner at paragraph 1 of its Memorandum of Fact and Law:

> 1. This appeal raises the novel question of whether a finding that one generic's allegation of invalidity is justified bars litigation of the same allegation against all other generic manufacturers, thereby exhausting a first person's rights under the *Patented Medicines (Notice of Compliance) Regulations* ("*Regulations*") and effectively delisting the patent at issue.

58 I begin by setting out those points in regard to which I am in agreement with Sexton J.A.

59 First, I am in agreement with Sexton J.A. that the NOC Regulations do not require a second person to allege, in its NOA, the issues of *res judicata*, issue *estoppel* or abuse of process.

60 Second, I am satisfied that the respondent's NOA and that of Apotex in *Aventis Pharma, supra*, contain similar allegations with respect to the validity of the '206 patent. I would, however, add that the evidence on which the appellant relies in the present matter is, in some respects, different from that adduced before Mactavish J. in *Aventis Pharma, supra.*

61 Third, I am also of the view that Tremblay-Lamer J. erred in concluding that she was bound by the decision of Mactavish J. in *Aventis Pharma, supra.* In disposing of this issue, Sexton J.A., at paragraphs 30 and 31 of his Reasons, makes the following remarks:

> [30] While I agree with the motions judge that Sanofi-Aventis' application is an abuse of process, I must respectfully disagree with her conclusion that the reason for this finding is that Mactavish J.'s decision, which was upheld by the Court of appeal, would be binding on the applications judge. The issue in this case, as in the proceeding before Mactavish J., is whether the invention in the '206 patent was soundly predicted. Sound prediction is a question of fact (*Apotex Inc. v. Wellcome Foundation Ltd.*, [2002] 4 S.C.R. 153, 2002 SCC 77 at paragraph 71). Factual questions are to be determined by triers of fact based on the evidence before them. Unlike questions of law, in regards to which lower courts are bound by the conclusions of appellate courts, questions of fact must be resolved based on the information adduced before each trier of fact. This principle was explained bky this Court in *J.M. Voith GmbH v. Beloit Corp.* (1991), 36 C.P.R. (3d) 322 at 330 as follows:
>
> > While a finding of fact in another proceeding, approved by an appellate court whose judgments are binding, may call for particular reflection before a contrary finding is made, it remains that the question is whether the second finding is supportable on the evidence properly before the second trial judge.
>
> [31] **Mactavish J.'s holding [in *Aventis Pharma v. Apotex*] would therefore not be binding on the proceedings respecting the Novopharm NOA. Conse-**

> **quently, it cannot be said that the application, if allowed to proceed, would be "clearly futile" or that it is "plain and obvious" that it would have no chance of success.** Nevertheless, I think Sanofi-Aventis' application must be held to be an abuse of process within the meaning of paragraph 6(5)*(b)* of the *NOC Regulations*.
>
> [Emphasis added]

62 Although he concludes that Tremblay-Lamer J. was wrong in holding that the appellant's application was an abuse of process because it was "clearly futile" and that it was "plain and obvious" that it could not succeed, Sexton J.A. nonetheless concludes, on other grounds, that the appellant's application "...must be held to be an abuse of process within the meaning of paragraph 6(5)*(b)* of the *NOC Regulations*".

63 Sexton J.A. reaches this conclusion after a careful review of the Supreme Court of Canada's decision in *Toronto (City) v. CUPE Local 79*, [2003] 3 S.C.R. 77. Specifically, Sexton J.A. takes note of paragraphs 37 and 51 of the Supreme Court's decision, emphasizing those passages where Arbour J., writing for the Court, opined that abuse of process was a flexible doctrine, not restricted by concepts such as issue estoppel, and that one of the circumstances where the doctrine had been applied was where proceedings constituted an attempt to relitigate a point already decided by the courts.

64 Applying these principles to the matter before us leads Sexton J.A. to the conclusion that the appellant's application falls within the ambit of the doctrine of abuse of process. First, my colleague points to the real possibility of inconsistent decisions with regard to whether the inventors of the '206 patent lacked a sound basis for predicting the utility of the invention. Thus, should conflicting decisions be rendered by the Court, notwithstanding the similarity of the allegations found in the respective NOA's, the Minister would issue a NOC to one generic drug manufacturer but would refuse it to another. Hence, in Sexton J.A.'s view, such a scenario would threaten the credibility of the judicial process.

65 Sexton J.A. then goes on to say that, in such circumstances, allowing a second application for an order of prohibition to proceed to a hearing does not constitute an efficient use of scarce judicial resources. He makes the point that disposing of the appellant's application in the manner which he proposes does not bring about unfairness to the appellant, as the NOC Regulations do not prevent it from enforcing its rights by way of an action for infringement against either Apotex or another generic drug manufacturer.

66 At paragraphs 44 to 47 of his Reasons, Sexton J.A. dismisses an argument by the appellant to the effect that since part of the evidence adduced in these proceedings was not before Mactavish J. in *Aventis Pharma, supra*, which evidence could lead a trier of fact to a conclusion different from that reached by the learned Judge, there is no basis for the application of the doctrine of abuse of process.

67 In dismissing the appellant's argument, my colleague remarks that such additional evidence is of no help to the appellant because it cannot relitigate a claim already decided by the courts. In his view, the appellant was bound to make its best case with respect to the issue of the validity of the '206 patent in *Aventis Pharma, supra*, and that it cannot now attempt to improve its lot by commencing a new application for prohibition. At paragraph 46, Sexton J.A. says:

> The doctrine of abuse of process calls for the innovator to bring forward all its evidence on each ground of invalidity raised. It should not be allowed to hold back evidence and then use that as a ground for allowing a second application to proceed.

68 Finally, in Sexton J.A.'s view, the appellant's application herein amounts to a collateral attack on Mactavish J.'s decision in *Aventis Pharma, supra.*

69 Before setting out my specific reasons for dissent and before addressing Sexton J.A.'s grounds for concluding in favour of the application of the doctrine of abuse of process, a brief review of the principles enunciated by the courts with respect to that doctrine will be helpful. I accept, as I must, the guidelines given by the Supreme Court in *CUPE, supra*, and particularly those that Sexton J.A. has reproduced in his Reasons, namely, paragraphs 37, 51, 52 and 53 of Arbour J.'s Reasons.

70 The common law doctrines of abuse of process and collateral attack are interrelated and in many cases more than one doctrine may support a particular outcome. However, although a collateral attack may properly be viewed as a particular application of a broader doctrine of abuse of process, the two are not always entirely interchangeable (See: *CUPE, supra*, paragraph 22).

71 The doctrine of abuse of process seeks to prevent relitigation in situations where the strict requirements of issue estoppel are not met, but where permitting the litigation to proceed would be contrary to the integrity of the court's process and to the good administration of justice (See: Doherty J.A.'s Reasons in *CUPE v. Toronto (City)* (2003), 55 O.R. (3d) 541 at paragraph 65; *Demeter v. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249 (Ont. H.C.) at page 264, aff'd (1984), 48 O.R. (2d) 266 (C.A.); *Hunter v. Chief Constable of the West Midlands Police*, [1982] A.C. 529 (H.L.) at page 536; *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. V. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.)).

72 The concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (See: *R. v. Power*, [1994] 1 S.C.R. 601, at page 616) and as "oppressive treatment" (See: *R. v. Conway*, [1989] 1 S.C.R. 1659, at page 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at page 1007:

> Abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and (2) **violate the fundamental principles of justice underlying the community's sense of fair play and decency.**
>
> [Emphasis added]

73 In *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, the Supreme Court held, at paragraph 80, that there may be instances where relitigation will enhance rather than impeach the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the

new context. Those discretionary factors apply to prevent the doctrine of abuse of process from operating in an unjust or unfair way.

74 Because the main purpose of the doctrine of abuse of process is focused on the integrity of the adjudicative process, the motive or interest of the party who seeks to relitigate, whether as a plaintiff or a defendant, cannot be decisive factors in determining if relitigation should be be permitted.

75 I now turn to a brief review of English case law which, in my view, provides helpful guidance in resolving the issue before us. In *Johnson (AP) v. Gore Wood & Co (A Firm)*, [2001] 2 W.L.R. 72, the House of Lords thoroughly reviewed the doctrine of abuse of process as enunciated and applied by English courts. At paragraph 46 of his Reasons, Lord Bingham of Cornhill, with whom the other law lords agreed on this point, summarized the doctrine in the following terms:

> It may very well be, as has been convincingly argued (Watt, "The Danger and Deceit of the Rule in *Henderson v. Henderson*: A new approach to successive civil actions arising from the same factual matter", 19 Civil Justice Quarterly, July 200, page 287), that what is now taken to be the rule in *Henderson v. Henderson* has diverged from the ruling which Wigram V-C made, which was addressed to *res judicata*. But *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. **The underlying public interest is the same, that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole.** The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional elements such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and **there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust treatment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merit-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.** Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised

> then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.
>
> [Emphasis added]

76 One of the cases reviewed by Lord Bingham in *Johnson (AP), supra*, is the English Court of Appeal's decision in *Bradford & Bingley Building Society v. Seddon*, [1999] 1 W.L.R. 1482, to which Sexton J.A. makes reference at paragraph 42 of his Reasons. Specifically, my colleague quotes the remarks which Auld L.J. made at pages 1492 and 1493 to the effect that abuse of process does not arise by reason of mere litigation where the circumstances of the case do not give rise to cause of action or issue estoppel. In such circumstances, according to Auld L.J., "[S]ome additional element is required, such as a collateral attach on the previous decision ... some dishonesty ... or successive actions amounting to harassment ...".

77 In making these remarks in *Bradford & Bingley, supra*, Auld L.J. refers with approval to the following words of Sir David Cairns found at pages 138 and 139 of his Reasons in *Bragg v. Oceanus Mutual Underwriting Association (Bermuda) Ltd.*, [1982] 2 Lloyd's Rep. 132, C.A.:

> **I do not accept the proposition advanced by Counsel for the appellant Heath that when an issue has already been decided in proceedings between A and B it is prima facie an abuse of the process of the Court for B to seek to have the issue decided afresh in proceedings between himself and C** and that in such circumstances there is an onus on B to show some special reason why he should be allowed to raise the issue against C.
>
> On the contrary, I consider that it is for him who contends that the retrial of the issue is an abuse of process to show some special reason why it is so. **Since the cases in which the retrial of an issue (in the absence of an estoppel) has been disallowed as an abuse of process are so few in number, it would be dangerous to attempt to define fully what are the circumstances which should lead to a finding of abuse of process.** Features tending that way clearly include the fact that the first trial was before the most appropriate tribunal or between the most appropriate parties for the determination of the issue, or that the purpose of the attempt to have it retried is not the genuine purpose of obtaining the relief sought in the second action, but some collateral purpose.
>
> **It would in my judgment be a most exceptional course to strike out the whole or part of a defence in a commercial action, or to refuse leave to amend a defence in such an action, simply because the issue raised or sought to be raised had been decided in another commercial action brought against**

> **the same defendant by a difference plaintiff. The facts that the first action had been fairly conducted and that the issue had been the subject of lengthy evidence and argument would not, in my view, be sufficient in themselves to deprive the defendant of his normal right to raise any issue which he is not estopped from raising.**
>
> If further the defendant was at some disadvantage in the earlier proceedings from which he would be free in the later ones, that is a positive reason why he should not be deprived of the opportunity of raising the issue afresh.

[Emphasis added]

78 In his separate Reasons in *Bragg, supra*, Stephenson L.J. also concluded that the attempt by one of the defendants to put forward amendments to its defence before trial did not constitute an abuse of process. At page 139, he states:

> It would be a strong thing for a Judge to refuse to allow a party to put forward by amendment before trial a clearly arguable defence to a plaintiff's claim, and to refuse it as an abuse of the process of the Court on the single ground that it had already been litigated and decided against the party in earlier proceedings brought by another plaintiff. It would be a still stronger thing for an appeal Court to reverse a Judge's decision, in the exercise of his discretion to allow amendments, that the defendant was not abusing the process of the Court.
>
> Yet it is the duty of the Judge and the Court of Appeal to shut out the defence if it is an abuse of the Court's procedure to repeat it, in accordance with decisions of this Court... Every repetition of a defence (or claim) may be said to amount to a collateral attack on a previous judicial decision, and to invite those derogatory references to "a side wind" or "Aa back door" which are in favour with advocates whose clients are not open to a frontal attack. **But in my judgment it is only those defences (or claims) that are sham and not honest and not bona fide which abuse the process of the Court and call for the exercise of its inherent jurisdiction to prevent such abuse ...**

[Emphasis added]

79 The third member of the *Bragg, supra*, panel, Kerr L.J., at page 137, summed up the authorities as follows:

> To take the authorities first, it is clear that an attempt to religitate in another action issues which have been fully investigated and decided in a former action *may* constitute an abuse of process, quite apart from any question of *res judicata* or issue estoppel on the ground that the parties or their privies are the same. It would be wrong to attempt to categorize the situations in which such a conclusion would be appropriate. However, it is significant that in the cases to which we were referred, where this conclusion was reached, the attempted relitigation had no other purpose than what Lord Diplock described as:

> ... mounting a collateral attack upon a final decision ... which has been made by another court of competent jurisdiction in previous proceedings in which ... (the party concerned) had a full opportunity of contesting the decision of the court by which it was made.

80 What clearly stands out from the authorities is that there is no hard and fast rule for the application of the doctrine of abuse of process. Whether or not the doctrine will find application in a given case depends on the particular facts of that case. I would, however, add that the remarks of Auld L.J. in *Bradford & Bingley, supra* -- to the effect that "mere relitigation, in circumstances not giving rise to cause of action or issue estoppel, does not necessarily give rise to abuse of process" (p. 1492) and that "[S]ome additional element is required, such as a collateral attack on a previous decision" (p. 1493) B must be correct.

81 Needless to say, courts must be cautious in concluding that relitigation constitutes an abuse of process. At page 1496 in *Bradford & Bingley, supra*, Auld L.J. dealt with that point in the following terms:

> The need for caution
>
> A further pointer in the direction of requiring the party raising the issue of abuse to establish it, and against that of obligating the claimant to persuade the court that there are Aspecial circumstances for his "re"-litigation, is the need for caution before striking out claims without a full hearing on their merits and demerits. May L.J. said in *Manson v. Vooght* that "it is axiomatic that the court will only strike out a claim as an abuse after most careful consideration." The following passage from Drake J.'s judgment in *North West Water Ltd. Binnie & Partners*, [1990] 3 All E.R. 547, 561 is to like effect:
>
> > I find it unreal to hold that the issues raised in two actions arising from identical facts are different *solely* because the parties are different or because the duty of care owed to different persons is in law different. However, I at once stress my use of the word "solely." **I think that great caution must be exercised before shutting out a party from putting forward his case on the grounds of issue estoppel or abuse of process.** Before doing so the court should be quite satisfied that there is no real or practical difference between the issues to be litigated in the new action and that already decided, and the evidence which may properly be called on those issues in a new action.
>
> [Emphasis added]

82 The question is then whether, in the circumstances of this case, the appellant should be stopped in its tracks. As the question cannot be answered without taking a close look at the NOC Regulations, I now move on to that task.

83 As the appellant suggests B correctly, in my view B the NOC Regulations have features which distinguish them from other proceedings and, in particular, from actions on infringement or actions seeking a declaration that a patent is invalid. Proceedings under the NOC Regulations pro-

ceed by way of a Notice of Application. Discovery, either oral or documentary, is not available nor is *viva voce* evidence admissible. The NOA served upon the patentee by the generic manufacturer defines and limits the issues which will be before the Court.

84 Another relevant feature of the NOC Regulations is the fact that a patentee has only forty-five (45) days from service of the NOA to commence its application for an order of prohibition and that the matter must be concluded within 24 months thereof. Further, the patentee has no right to file reply evidence, which approach is substantially different from that prevailing in infringement proceedings, where the party alleging invalidity has the burden of proof.

85 Hence, under the NOC Regulations, the Court must decide, on a summary basis, whether the Minister should be prohibited from issuing a NOC to a particular generic manufacturer for a particular product. That is precisely the order which Mactavish J. rendered in *Pharma Aventis, supra.* She did not finally decide the issue of the validity of the '206 patent.

86 It is of interest to point out that pursuant to paragraph 7(2)*(b)* of the NOC Regulations, where a declaration of non-infringement or invalidity is granted, the statutory stay is terminated. Thus, although the NOC Regulations recognize the link between proceedings under the NOC Regulations and those under an action, they are silent with respect to the consequences of a decision which allows a generic company to obtain a NOC. Accordingly, even if the Court concludes that an allegation of invalidity by a generic is justified, the NOC Regulations do not provide for nor permit the delisting of the patent. Furthermore, the NOC Regulations do not contain any provision permitting a generic to allege invalidity in its NOA on the ground that a similar allegation by another generic has been found to be justified.

87 This Court, on a number of occasions, has held that a decision under the NOC Regulations does not finally determine the issues of the validity of the patent or the infringement thereof. In *Pharmacia Inc. v. Canada (Minister of National Health and Welfare)* (1994), 58 C.P.R. (3d) 209, Strayer J.A., writing for the Court, remarked as follows at page 217:

> ... It will be noted that the regulations nowhere create or abolish any rights of action between the parties; instead they confer a right on the patentee to bring an application for prohibition against the Minister of National Health and Welfare. That is, the regulations pertain to public law, not private rights of action. Of course the real adversary in such a prohibition proceeding is the generic company which served the notice of allegation.
>
> If the Governor in Council had intended by the regulations to provide for a final determination of the issues of validity or infringement, a determination which would be binding on all private parties and preclude future litigation of the same issues, it surely would have said so. This court is not prepared to accept that patentees and generic companies alike have been forced to make their sole assertion of their private rights through the summary procedure of a judicial review application. **As the regulations direct that such issues as may be adjudicated at this time must be addressed through such a process, this is a fairly clear indication that these issues must be limited or preliminary in nature**. If a full trial of validity or infringement issues is required this can be obtained in the usual way of commencing an action.

> [Emphasis added]
>
> (See also the authorities referred to by Sexton J.A. at paragraph 36 *infine* of his Reasons).

88 In this regard, it is interesting to note that recently in *Janssen-Ortho v. Novopharm*, [2006] F.C.J. No. 1535, 2006 FC 1234; Hughes J. of the Federal Court concluded that the patent at issue was valid, notwithstanding that in the context of the NOC Regulations, Mosley J. (in *Janssen-Ortho Inc. v. Novopharm Ltd.* (2005), 35 C.P.R. (4th) 353, 2004 FC 1631) had held that the generic manufacturer's allegations of invalidity regarding the same patent were justified. More particularly, in *Janssen-Ortho, supra*, Mr. Justice Hughes, at paragraph 116, made the following remarks:

> [116] I appreciate that this finding is different than that arrived at by my brother, Mosley J., in the earlier NOC proceeding between these parties. He did not have the benefit of the extensive evidence that I now have before me, nor of seeing and hearing the witnesses in person ...

89 That is the context in which the appellant's application finds itself. In stating why I believe this case is not one where the doctrine of abuse of process should apply, I will deal with the grounds put forward by my colleague in reaching a different conclusion.

90 It is not disputed that there is no *res judicata*, cause of action or issue estoppel in the present matter. Further, as my colleague says in his Reasons, the issue in this case is that of sound prediction, i.e. a question of fact. As a result, should this matter go to a hearing on the merits, the trier of fact would not be bound by the decision of Mactavish J. in *Pharma Aventis, supra*, and consequently, could conclude in favour of the appellant. As this Court stated in *J.M. Voith GmbH v. Beloit Corp.* (1991), 36 C.P.R. (3d) 322 at 330:

> While a finding of fact in another proceeding, approved by an appellate court whose judgments are binding, may call for particular reflection before a contrary finding is made, it remains that the question is whether the second finding is supportable on the evidence properly before the second Trial Judge.

91 My review of the authorities satisfies me that the relitigating of an issue with a different party is not, *per se*, an abuse of process. There must be, in the words of Auld L.J. in *Bradford & Bingley, supra*, "some additional element". In my view, there is no such element present in this case.

92 First, let me give two examples of what courts have found to be the "additional element" sufficient to bring about the application of the doctrine of abuse of process where a party was attempting to relitigate an issue. In *CUPE, supra*, the issue before the Supreme Court was whether a labour arbitrator could, in the context of a grievance, reconsider the issue of guilt of a person convicted of sexual assault and, as a result, dismissed from his employment. In concluding that the person's guilt could not be relitigated, the Supreme Court applied the doctrine because Mr. Oliver, a recreation instructor employed by the City of Toronto who hade been found guilty of sexually assaulting a boy under his supervision, was attempting to adduce before the arbitrator evidence proving his innocence with respect to the charges for which he had been convicted to 15 months in prison.

93 After a careful review of the relevant case law on abuse of process, Arbour J. held at paragraph 54 of her Reasons that the considerations which arise in the case law "... are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter." She goes on to say at paragraphs 56 to 58:

> 56 ... **I am of the view that the facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. The grievor was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects.** Yet as pointed out by Doherty J.A. (at para. 84):
>
> > Despite the arbitrator's insistence that he was not passing on the correctness of the decision made by Ferguson J., that is exactly what he did. One cannot read the arbitrator's reasons without coming to the conclusion that he was convinced that the criminal proceedings were badly flawed and that Oliver was wrongly convicted. This conclusion, reached in proceedings to which the prosecution was not even a party, could only undermine the integrity of the criminal justice system. **The reasonable observer would wonder how Oliver could be found guilty beyond a reasonable doubt in one proceeding and after the Court of Appeal had affirmed that finding, be found in a separate proceeding not to have committed the very same assault.** That reasonable observer would also not understand how Oliver could be found to be properly convicted of sexually assaulting the complainant and deserving of 15 months in jail and yet also be found in a separate proceeding not to have committed that sexual assault and to be deserving of reinstatement in a job which would place young persons like the complainant under his charge.
>
> 57 **As a result of the conflicting decisions, the City of Toronto would find itself in the inevitable position of having a convicted sex offender reinstated to an employment position where he would work with the very vulnerable young people he was convicted of assaulting. An educated and reasonable public would presumably have to assess the likely correctness of one or the other of the adjudicative findings regarding the guilt of the convicted grievor. The authority and finality of judicial decisions are designed precisely to eliminate the need for such an exercise.**
>
> 58 In addition, the arbitrator is considerably less well equipped than a judge presiding over a criminal court C or the jury C, guided by rules of evidence that are sensitive to a fair search for the truth, an exacting standard of proof and expertise with the very questions in issue, to come to a correct disposition of the matter. Yet the arbitrator's conclusions, if challenged, may give rise to a less searching standard of review than that of the criminal court judge. **In short, there is nothing in a case like the present one that militates against the application of the doctrine of abuse of process to bar the relitigation of the grievor's criminal conviction.** The arbitrator was required as a matter of law to give full effect to

> the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. **Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the City of Toronto had established just cause for Oliver's dismissal.**
>
> [Emphasis added]

94 In my view, there is simply no possible comparison between the circumstances which led the Supreme Court in *CUPE, supra*, to conclude that the doctrine of abuse of process applied and the circumstances in the present matter. In *CUPE, supra*, the Supreme Court found that the arbitrator was bound, as a matter of law, to give effect to the criminal conviction. Hence, the arbitrator could not conclude that Mr. Oliver had not been dismissed for just cause. Further, Arbour J. at paragraph 56 of her Reasons, cited with approval the words of Doherty J.A. of the Ontario Court of Appeal to the effect that the "reasonable observer" would find it odd that Mr. Oliver could be found guilty beyond a reasonable doubt in a criminal proceeding but found to be innocent in a labour arbitration of having committed the very act which led to his conviction.

95 It is thus clear, in my view, on the facts which prevailed in *CUPE, supra*, that no other conclusion was possible. The Supreme Court could not allow a finding by the arbitrator that Mr. Oliver had not committed the acts in respect of which he had been convicted in a criminal court.

96 My second example is that found in *Hoffman-La Roche Ltd. v. Canada (Minister of National Health and Welfare*, 87 C.P.R. (3d) 251, where Sharlow J. (as she then was) dismissed, as an abuse of process, a patentee's application for an order of prohibition.

97 Before Sharlow J., the generic drug manufacturer argued that the patentee's application was futile on the ground that on four prior occasions, on facts undistinguishable from those in the case before her, the patentee had failed to obtain an order of prohibition from the Court. On three of these attempts, the application was dismissed after a hearing on the merits. On the fourth one (See: *Hoffmann-La Roche v. Canada (Minister of Health & Welfare)*, 85 C.P.R. (3d) 50)), the application was dismissed by Rothstein J. (as he then was), whose view it was that the application was an abuse of process. At paragraph 14 of his Reasons, Rothstein J. remarked as follows:

> 14 In view of the prior decisions involving Nu-Pharm and Apotex and the fact that the evidence filed by the applicants in this application adds nothing new to assist in the construction of the relevant words of the patent, the issue in this litigation is the exact same issue as in the Nu-Pharm and Apotex cases. The applicants for prohibition are the same, the patent at issue is the same, and the notice of allegations are virtually identical. **This litigation is an abuse of the process in that it attempts to retry the same issue which has already been determined in three separate proceedings against the applicants.**
>
> [Emphasis added]

98 It is important to note that Rothstein J. dismissed the patentee's application because the issue raised by the application was identical to the one raised in three prior matters in regard to which the evidence adduced "adds nothing new to the construction of the relevant words of the patent ...". Not

only was the issue before the Court one of law, i.e. patent construction, but the application constituted the patentee's fourth attempt to relitigate the same issue.

99 It is therefore not surprising that Sharlow J. concluded that the patentee's further application was abusive. I do not believe that it was possible for Sharlow J., on the facts before her, to reach any other conclusion.

100 Other examples could be given to show that there must be more than just relitigation of the same issue to lead to a conclusion of abuse of abuse. In my view, however, these two examples are sufficient to show that relitigation, *per se*, does not attract the application of the doctrine.

101 I now proceed to address the grounds upon which Sexton J.A. relies to conclude that the application is an abuse of process. The grounds put forward by my colleague are the following:

a. the possibility of inconsistent decisions will threaten the credibility of the judicial process;
b. the result in the second proceeding will be no more accurate than that reached in the first one;
c. allowing the appellant, and patentees in general, to relitigate an issue fought in a first proceeding will use judicial resources already taxed by "voluminous proceedings brought under the regulations";
d. the appeal is a collateral attack on Mactavish J's decision in *Aventis Pharma, supra*;
e. the appellant was obliged to submit all of its evidence regarding the allegations of invalidity of its patent in the first proceeding and cannot now be allowed to adduce additional or different evidence;
f. concluding that the application is an abuse of process does not cause any unfairness to the appellant because it is open to it to commence an infringement action against Apotex or other generic manufacturers who obtain a Notice of Compliance from the Minister.

102 I begin with the possibility of conflicting decisions. It cannot be denied that this is a real possibility and, in fact, there have already been conflicting decisions of the Federal Court on issues of infringement and validity where a patentee, in the context of the NOC Regulations, has litigated the same patent against different generics (See, for example: *AB Hassle v. Canada (Minister of National Health and Welfare)* (2001), 16 C.P.R. (4th) 21 (F.C.T.D.), aff'd 22 C.P.R. (4th) 1 (F.C.A.); *A.B. Hassle v. RhoxalPharma Inc.* (2002), 21 C.P.R. (4th) 298 (F.C.T.D.)).

103 There is the further fact that patentees and generic manufacturers are not bound by the decisions rendered in the context of the NOC Regulations as concerns the validity of the patents or the infringement thereof.

104 In my view, conflicting decisions have arisen and will arise on occasion because of the regulatory scheme in place. Under that scheme, judges of the Federal Court are asked to determine, on a summary basis, whether the Minister should be prohibited from issuing a NOC to a generic manufacturer for a specific product. On the evidence adduced in that context, the judge will either prohibit the Minister from issuing the NOC or he will refuse to do so. As a result, the generic manufacturer may or may not obtain an NOC. Such a decision will not, however, determine any other rights or questions. Further, as I pointed out earlier, the NOC Regulations do not allow a ge-

neric manufacturer to take advantage of another generic's successful litigation with respect to the same patent.

105 Be that as it may, the real question, in my view, is whether the possibility of conflicting decisions, in the words of MacLachlin J., in *R. v. Scott, supra* , "... violates the fundamental principles of justice underlying the community's sense of fair play and decency" (page 1007). This statement is in line with that made by Doherty J.A., quoted by Arbour J. at paragraph 56 of her Reasons in *CUPE, supra*, where he states that the "reasonable observer" would not likely understand how it could be that Mr. Oliver could be reinstated by a labour arbitrator after having been found guilty beyond a reasonable doubt in criminal proceedings. If I have properly understood what the Supreme has said in *CUPE, supra*, the labour arbitrator could not be allowed to consider Mr. Oliver's evidence concerning the commission of the acts in regard to which he was found guilty because that "would violate the community's sense of fair play and decency."

106 With respect to the contrary opinion, I cannot see how one could come to a similar conclusion in the present matter, considering that the true cause of the occurrence of conflicting decisions is the regulatory scheme itself. I am therefore satisfied that the possibility of conflicting decisions in the present matter does not and will not threaten the credibility of the judicial process.

107 The second ground relied upon by my colleague is that there is no likelihood that the second decision will be more accurate than the first one. In my view, that is not a relevant consideration. The second proceeding is litigation between parties which are not the same as in the first proceeding and the trier of fact will decide the issues on the basis of the evidence before him. The fact that the second decision might not be more accurate than the first one does not render the proceedings oppressive or vexatious and will not offend the community's sense of fair play and decency.

108 The next ground pertains to the use of scarce judicial resources. My first remark is that the "voluminous proceedings" referred to by Sexton J.A. at paragraph 37 of his Reasons are a consequence of the regulatory scheme and not the result of misbehaviour on the part of patentees who are seeking to assert their rights under the NOC Regulations. As a result, I have difficulty with my colleague's proposal that we must stop patentees from relitigating an issue fought against a different generic manufacturer because it will drain our resources. Even if that were the case, it cannot justify a conclusion of abuse of process when the proceedings are those which the NOC Regulations expressly provide for. Simply put, the NOC Regulations allow patentees to challenge a generic manufacturer's NOA and unless the exercise of their rights amounts to an abuse of process, they should be entitled to have their day in court.

109 The next ground is that of collateral attack. In my view, the appellant's application does not constitute a collateral attack on the decision of Mactavish J. in *Aventis Pharma, supra*. It must not be forgotten that the order made by Mactavish J. is the dismissal of the order of prohibition sought by the appellant with respect to the obtention by Apotex of a NOC from the Minister. The learned Judge did not dispose of the issues of the patent's validity or of its infringement.

110 It cannot be said, in my view, that the appellant's application is an attempt to circumvent Mactavish J.'s decision in *Aventis Pharma, supra*. At paragraph 34 of her Reasons in *CUPE, supra*, Arbour J. defined a prohibited collateral attack in the following terms:

> [34] Prohibited (collateral) attacks are abuses of the Court's process. However, in light of the focus of the collateral attack rule on attacking the order itself and its

legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

111 I am satisfied that Arbour J. disposed of the issue in *CUPE, supra*, on the ground of abuse of process because of her view that Mr. Oliver's attempt to introduce evidence of his innocence before the labour arbitrator did not constitute a collateral attack on the criminal court's decision.

112 In the present matter, the appellant does not seek either a reversal, a variation or an annulment of Mactavish J.'s decision. Should this matter go to a hearing on the merits, a successful result for the appellant will not in any way impact on Mactavish J.'s decision which, I again point out, does not have any effect regarding the issues of validity and infringement.

113 The next ground is that the patentee was obliged to adduce all of its evidence on the issues raised by Apotex's NOA in the first proceeding and that, as a result, it cannot be allowed to relitigate these issues, even on the basis of additional or different evidence, in a second proceeding. In support of that assertion, Sexton J.A. relies on Hansen J.'s decision in *Glaxo Group Ltd. v. Canada (Minister of Health)*, 2001 FCT 16, where the learned Judge held that parties should not be allowed to relitigate an issue by reason of new evidence. In Hansen J.'s view, such an attempt constitutes an abuse of process.

114 First, I do not believe that Hansen J.'s decision is relevant to the issue before us in this appeal since the parties before her were Glaxo and Apotex, the same parties who had litigated the same issue on a previous occasion (See O'Keefe J.'s decision in *Glaxo Group Ltd. v. Canada (Minister of National Health and Welfare)*, [2000] F.C.J. No. 585; aff'd by the Federal Court of Appeal in [2001] F.C.J. No. 524 (Q.L.)). Thus, in that context, I have no difficulty in accepting Hansen J.'s proposition that Glaxo, having litigated a first time the issue against Apotex, should not, as a matter of principle, be allowed to relitigate the same issue on a second occasion.

115 With respect, however, I do not believe that Hansen J.'s assertion is a correct one where, as here, the parties are not the same as in the first proceeding. If Hansen J.'s view were correct with respect to the situation herein, it would mean that once a party has litigated an issue with A, it could never litigate that issue with B, C or D. That, in my view, cannot be correct.

116 I now turn to the last ground, i.e. that the dismissal of its application will not cause any unfairness to the appellant. I cannot agree with that view.

117 First, the appellant will be deprived of the right given to it under the NOC Regulations to oppose and challenge the respondent's NOA. Second, I do not think that I can be accused of speculating when I say that there is a real possibility that the appellant has or will be commencing proceedings against Apotex with respect to the infringement of the '206 patent. Consequently, there will ultimately be a decision by the Federal Court, after a trial on the merits, with respect to the issues of infringement and validity. I cannot say whether the appellant will succeed or not, but that possibility exists. Hence, there may well be, in the near future, a declaration by the Federal Court that patent '206 is valid. Should that situation occur, would this Court still be of the view that the appellant's attempt to obtain an order prohibiting the Minister from issuing a NOC to a generic drug manufacturer in respect of the '206 patent amounts to abuse of process? With respect, I do not think so.

118 Further, should the appellant succeed on an action for infringement against Apotex, it will have been deprived in the interval, by reason of the order which Sexton J.A. proposes we make, of

its right to challenge NOA's received from generic drug manufacturers, including the one made by Novopharm.

119 To sum up, I conclude that this is not a case where the doctrine of abuse of process should be applied. First, the parties to the proceedings herein are not the same as those that were before Mactavish J. in *Sanofi Aventis, supra*. Second, the issue herein and that before Mactavish J. is primarily one of fact and, as a result, it would be open to the trier of fact in this proceeding to come to a different conclusion. Third, the appellant, in seeking to prohibit the Minister from issuing a NOC to Novopharm, is simply exercising its rights under the NOC Regulations which, as I have explained, do not expressly or implicitly prevent a patentee from relitigating an issue previously litigated against another generic drug manufacturer. Fourth, there is no "additional element" in the present matter which would make of the appellant's application an abuse of process. Contrary to the situation in *Hoffmann-La Roche, supra*, it cannot be said that in litigating a second time the issue which it litigated against Apotex in *Aventis Pharma, supra*, the appellant's conduct calls for the application of the doctrine of abuse of process. Fifth, it cannot be concluded that the proceedings commenced by the appellant, following service of Novopharm's NOA, are either oppressive or vexatious.

120 For these reasons, I would allow the appeal, set aside the decision of the Federal Court dated September 25, 2006 and I would reinstate the order of Prothonotary Milczynski dated May 8, 2006 which dismissed Novopharm's motion for summary dismissal of the appellant's application for an order of prohibition. I would also allow the appellant (Sanofi-Aventis Canada Inc. and Schering Corporation) its costs on this appeal and in the proceedings below.

NADON J.A.

cp/e/qlecl/qlmxt/qltxp

TAB J

2000 CarswellAlta 1145, 2000 ABCA 285, 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352, [2000] A.J. No. 1232

2000 CarswellAlta 1145, 2000 ABCA 285, 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352, [2000] A.J. No. 1232

Blue Range Resource Corp., Re

In the matter of the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as amended; and in the matter of Blue Range Resources Corporation; Enron Canada Corp., and the Creditor's Committee (Appellants/Appellants) and National Oil-well Canada Ltd. et al. (Respondents/Respondents)

Alberta Court of Appeal

Russell, Sulatycky, Wittmann JJ.A.

Heard: June 15, 2000
Judgment: October 24, 2000
Docket: Calgary Appeal 99-18564, 99-18565, 99-18566, 99-18567, 99-18568, 99-18569, 99-18570, 99-18571, 99-18802

Proceedings: affirmed *Blue Range Resource Corp., Re* (1999), 1999 CarswellAlta 1053, 251 A.R. 1 (Alta. Q.B.)

Counsel: *A. Robert Anderson* and *Scott J. Burrell*, for Enron Canada Corp. and Creditors' Committee.

S. Collins, for TransAlta Utilities Corporation.

D.W. Dear, for Rigel Oil & Gas Ltd.

D. Mann, for Barrington Petroleum Ltd. and PetroCanada Oil & Gas.

K.E. Staroszik, for Founders Energy Ltd.

J.N. Thom, for National-Oilwell Canada Ltd. and Campbell's Industrial Supply Ltd.

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

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

Monitor appointed by court obtained order establishing procedure to determine claims of creditors of corporation — Claims bar date was set during which creditors could prove claims — Notices of claim filed after claims bar date by certain creditors were disallowed by monitor — Partial distribution was made by court — Late-filing creditors applied to court for permission to file or amend claims after expiry of claims bar date — Applications

were allowed on basis that same test should apply to late-filing creditors under Companies' Creditors Arrangement Act (CCAA) as under Bankruptcy and Insolvency Act (BIA) — Creditor EC Corp. and creditors committee appealed — Appeal dismissed — Claims bar orders setting out claims procedure ought not to purport to extinguish debt, but simply set deadline for obtaining remedy — Inadvertence alone can be basis for permitting late filing, provided claimant can show it acted in good faith and not in effort to manipulate its position — Any prejudicial effect of permitting claim is relevant factor, as is availability of means to alleviate prejudice — All creditors had acted in good faith and existing creditors suffered no prejudice as result of late filings or amendments — Existing creditors were aware of potential for further claims and that these might be permitted by court — No evidence existed to suggest that existing creditors would have voted differently on plan of arrangement had late-filing creditors filed in time — Value of claims of late-filing creditors was less than one per cent of total of claims filed in time — Fact that existing creditors might receive less money if late claims allowed did not constitute prejudice, since policy of CCAA depends on all legitimate creditors being able to participate in available proceeds — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

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

Monitor appointed by court obtained order establishing procedure to determine claims of creditors of corporation — Claims bar date was set during which creditors could prove claims — Notices of claim filed after claims bar date by certain creditors were disallowed by monitor — Partial distribution was made by court — Late-filing creditors applied to court for permission to file or amend claims after expiry of claims bar date — Applications were allowed on basis that same test should apply to late-filing creditors under Companies' Creditors Arrangement Act (CCAA) as under Bankruptcy and Insolvency Act (BIA) — Creditor EC Corp. and creditors committee appealed — Appeal dismissed — Claims bar orders setting out claims procedure ought not to purport to extinguish debt, but simply set deadline for obtaining remedy — Inadvertence alone can be basis for permitting late filing, provided claimant can show it acted in good faith and not in effort to manipulate its position — Any prejudicial effect of permitting claim is relevant factor, as is availability of means to alleviate prejudice — All creditors had acted in good faith and existing creditors suffered no prejudice as result of late filings or amendments — Existing creditors were aware of potential for further claims and that these might be permitted by court — No evidence existed to suggest that existing creditors would have voted differently on plan of arrangement had late-filing creditors filed in time — Value of claims of late-filing creditors was less than one per cent of total of claims filed in time — Fact that existing creditors might receive less money if late claims allowed did not constitute prejudice, since policy of CCAA depends on all legitimate creditors being able to participate in available proceeds — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by *Wittmann J.A.*:

Allen v. Sir Alfred McAlpine & Sons Ltd., [1968] 2 Q.B. 229, [1968] 1 All E.R. 543 (Eng. C.A.) — applied

Cohen, Re (1956), 19 W.W.R. 14, 3 D.L.R. (2d) 528, 36 C.B.R. 21 (Alta. C.A.) — considered

Hogan v. Kolisnyk, [1983] 3 W.W.R. 481, 25 Alta. L.R. (2d) 17, 43 A.R. 17 (Alta. Q.B.) — considered

Kuziw v. Kucheran Estate, 2000 ABCA 226 (Alta. C.A.) — considered

Lethbridge Motors Co. v. American Motors (Can.) Ltd. (1987), 53 Alta. L.R. (2d) 326, 20 C.P.C. (2d) 11, 79 A.R. 321, 40 D.L.R. (4th) 544 (Alta. C.A.) — considered

Lindsay v. Transtec Canada Ltd. (1994), 28 C.B.R. (3d) 110, 5 C.C.P.B. 219, [1995] 2 W.W.R. 404, 99 B.C.L.R. (2d) 73 (B.C. S.C.) — distinguished

Mount James Mines (Que.) Ltd., Re (1980), 28 O.R. (2d) 271, 33 C.B.R. (N.S.) 227, 110 D.L.R. (3d) 80 (Ont. Bktcy.) — considered

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) — considered

Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership (1993), 507 U.S. 380, 113 S. Ct. 1489 (U.S. Tenn.) — considered

Smoky River Coal Ltd., Re, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94 (Alta. C.A.) — considered

Specialty Equipment Cos. Inc., Re (1993), 159 B.R. 236 (U.S. Bankr. N.D. Ill.) — considered

W. Schoeler Trucking Ltd. v. Markel Insurance Co. of Canada (1979), 9 Alta. L.R. (2d) 232, 19 A.R. 196, [1980] I.L.R. 1-1210 (Alta. Dist. Ct.) — considered

312630 British Columbia Ltd. v. Alta Surety Co., 30 C.C.L.I. (2d) 165, 10 B.C.L.R. (3d) 84, [1995] 10 W.W.R. 100, 23 C.L.R. (2d) 273, 61 B.C.A.C. 208, 100 W.A.C. 208 (B.C. C.A.) — applied

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 11 — referred to

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

Generally — considered

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

Generally — considered

s. 6 — considered

s. 12(2)(a)(iii) — referred to

Insurance Act, R.S.A. 1980, c. I-5

s. 205 — referred to

s. 211 — referred to

s. 385 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

Generally — considered

R. 244(4) [en. Alta. Reg. 234/94] — considered

Federal Rules of Bankruptcy Procedure (U.S.)

Generally — referred to

R. 9006(b)(1) — considered

APPEAL by creditor EC Corp. and creditors committee from judgment reported at (1999), 251 A.R. 1 (Alta. Q.B.), permitting creditors to file notices of claim, or amended claims, after expiry of claims bar date.

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

Introduction

1 The *Companies' Creditors Arrangement Act*, R.S.A. 1985, c. C-36, as amended ("*CCAA*"), permits the compromise and resolution of claims of creditors against an insolvent corporation. In this appeal, as part of the ongoing resolution of the insolvency of Blue Range Resources Corporation ("Blue Range"), this Court has been asked to state the applicable criteria in considering whether to allow late claimants to file claims after a stipulated date in an order ("claims bar order").

2 In his decision below, the chambers judge determined that in the circumstances of this case it was appropriate to allow the respondents ("late claimants") to file their claims thus entitling them to participate in the *CCAA* distribution.

Facts

3 Blue Range sought and received court protection from its creditors under the *CCAA* on March 2, 1999. The claims procedure established by PriceWaterhouse Coopers Inc. ("the Monitor"), and approved by the court in a claims bar order, fixed a date of May 7, 1999 at 5:00 p.m. by which all claims were to be filed. Due to difficulties in obtaining the appropriate records, the date was extended in a second order to June 15, 1999 at 5:00 p.m., for the joint venture partners. The relevant orders stated that claims not proven in accordance with the set procedures "shall be deemed forever barred" (A.B.P.01, A.B.P.06). Under this procedure $270,000,000 in claims were filed.

4 The respondent creditors in this appeal fall into two categories: first, those who did not file their Notices of Claim before the relevant dates in the claims bar orders, and second, those who filed their initial claims in time but sought to amend their claims after the relevant dates. All of these creditors applied to the chambers judge for relief from the restriction of the date in the claims bar orders and to have their late or amended claims accepted for consideration by the Monitor.

5 The chambers judge allowed the late and amended claims to be filed. The appellants, Enron Capital Corp. ("Enron") and the Creditor's Committee, seek to have that decision overturned. I granted leave to appeal on January 14, 2000 on the following question:

> What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result? (A.B.928).

Judgment Below

6 The chambers judge found that the applicable section of the *CCAA*, s. 12(2)(iii) did not mandate a claims procedure. He stated that preserving certainty in the *CCAA* process was not a sufficient reason to deny the late claimants a second chance. In his view, taking a strict reading of the claims bar orders would have the effect of denying creditors, who have a logical explanation for their non- compliance with the order, any recovery. While the chambers judge noted that compromise is required by creditors in a *CCAA* proceeding, he did not think it fair that these late claimants be required to compromise 100 per cent of their legitimate claims. In addition, the chambers judge was of the view that process required flexibility and should avoid pitting creditors against one another.

7 Having decided that flexibility in the process was required, the chambers judge then considered an appropriate test for allowing the filing of late claims. Although encouraged by the appellants to adopt an approach similar to that contained in the *United States Bankruptcy Code, Federal Rules of Bankruptcy Procedure*, for Chapter 11 Reorganization Cases, ("*U.S. Bankruptcy Rules*") the chambers judge chose to incorporate the test in place under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Specifically, he found that because the situation of Blue Range was essentially a liquidation, the approach used in the *BIA* was appropriate. Under the *BIA*, late claims are permitted under almost any circumstance provided no injustice is done to other creditors. A late filing creditor under the *BIA* may only share in undistributed assets. Therefore, the chambers judge found that the creditors should be allowed to file late claims, or to amend existing claims late.

Standard of Review

8 It has been recently held by this court that decisions of a *CCAA* supervising judge should only be interfered with in clear cases. Deference to a *CCAA* supervising judge is generally appropriate where the questions before the court deal with management issues and are of necessity matters which must be decided quickly. This issue was addressed by Macfarlane, J.A. in *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) (cited with approval by Hunt, J.A. in *Smoky River Coal Ltd., Re* (1999), 237 A.R. 326 (Alta. C.A.)) as follows at 272:

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

The chambers judge was exercising his discretion under the *CCAA* in granting an extension of the claims bar dates. However, the criteria upon which that discretion is to be exercised is a matter of legal principle, and therefore on that issue, the standard of review is correctness.

Analysis

9 As a preliminary matter I wish to comment on the nature of the order granted and the notices sent out to the individual creditors. The order dated April 6, 1999 stated in paragraph 2:

> Claims not proven in accordance with the procedures set out in Schedules "A" and "B" shall be deemed forever barred and may not thereafter be advanced as against Blue Range in Canada or elsewhere. (A.B.P.01)

The first page of Schedule "A" stated in part:

> A Claims' Bar Date of 5:00 p.m. Calgary time on May 7, 1999 has been set by the Alberta Court of Queen's Bench. All claims received by the monitor or postmarked after the Claims' Bar Date will be forever extinguished, barred and will not participate in any voting or distributions in the CCAA proceedings.
>
> [Emphasis added] (A.B.P.03).

The language used in Schedule "A" goes beyond the text of the order. Although it may not be of practical significance, barring the right of a claimant to a remedy is fundamentally different from erasing the debt. The court under the *CCAA* has powers to compromise and determine, but only in accordance with the process prescribed in the statute.

10 It was urged before the court in oral argument by counsel for the appellants that the purpose of the wording of the claims bar orders was to "smoke out" the creditors. I am dubious that the severe wording of the claims bar orders is effective to "smoke out" the creditor who may otherwise lie dormant. The objective of making certain that all legitimate creditors come forward on a timely basis has to be balanced against the integrity and respect for the court process and its orders. Courts should not make orders that are not intended to be enforced in accordance with their terms. All counsel conceded that the court had authority to allow late filing of claims, and that it was merely a matter of what criteria the court should use in exercising that power. It necessarily follows that a claims bar order and its schedule should not purport to "forever bar" a claim without a saving provision. That saving provision could be simply worded with a proviso such as "without leave of the court", which appears to be not only what was contemplated, but what in fact occurred here.

The Appropriate Criteria

11 The appellants advocated the adoption of the criteria under the *U.S. Bankruptcy Rules*, Chapter 11, while the respondents favoured either the application of the tests under the *BIA* or some blending of the two standards.

12 Rule 9006 of the *U.S. Bankruptcy Rules* deals with the extension of time in these circumstances. The relevant portion of the Rule states:

> 9006 (b)(1) ... when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request is made before the expiration of

> the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

The key phrase in this section is "excusable neglect". In *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489 (U.S. Tenn. 1993) the U.S. Supreme Court dealt with the interpretation of this phrase. In *Pioneer*, the creditor's attorney, due to disruptions in his legal practice and confusion over the form of notice, failed to file a Notice of Claim in time. The U.S. Supreme Court noted that excusable neglect may extend to "inadvertent delays" (at pg 391) and went on to identify the relevant considerations when determining whether or not a delay is excusable. The Court said at 395:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable", we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

The American authorities also seem to reflect that the burden of meeting all of these elements, including showing the absence of prejudice, lies with the party seeking to file the late claim: e.g. *Specialty Equipment Cos. Inc., Re*, 159 B.R. 236 (U.S. Bankr. N.D. Ill. 1993).

13 The Canadian approach under the *BIA* has been somewhat different. Canadian courts have been willing to allow the filing of late or amended claims under the *BIA* when the claims are delayed due to inadvertence, (which would include negligence or neglect), or incomplete information being available to the creditors, see: *Mount James Mines (Que.) Ltd., Re* (1980), 110 D.L.R. (3d) 80 (Ont. Bktcy.). The Canadian standard under the *BIA* is, therefore, less arduous than that applied under the *U.S. Bankruptcy Rules*.

14 I accept that some guidance can be gained from the *BIA* approach to these types of cases but I find that some concerns remain. An inadvertence standard by itself might imply that there need be almost no explanation whatever for the failure to file a claim in time. In my view inadvertence could be an appropriate element of the standard if parties are able to show, in addition, that they acted in good faith and were not simply trying to delay or avoid participation in *CCAA* proceedings. But I also take some guidance from the *U.S. Bankruptcy Rules* standard because I agree that the length of delay and the potential prejudice to other parties must be considered. To this extent, I accept a blended approach, taking into consideration both the *BIA* and *U.S. Bankruptcy Rules* approaches, bolstered by the application of some of the concepts included in other areas, such as late reporting in insurance claims, and delay in the prosecution of a civil action.

15 In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.), the applicant was an unsecured creditor of Alberta Pacific Terminals Ltd. ("APCL"). Transtec Canada Ltd. was indebted to the applicant and APCL had guaranteed the obligation. APCL sought protection under the *CCAA*. Through oversight, the applicant Lindsay was not sent the relevant *CCAA* materials by APCL and was not included in the *CCAA* proceedings. He did not, therefore, have the opportunity to vote on the plan of arrangement. It is clear, however, that Lindsay at some point during the *CCAA* proceedings became aware of them, and at various stages had his lawyers contact APCL's lawyers to inquire about the process. Despite this knowledge he did not pursue the matter. Lindsay then came to the court seeking permission to sue APCL as a guarantor, potentially recovering consider-

ably more than those creditors who participated in the *CCAA* process.

16 After reviewing all of the facts, Huddart, J. found that "Lindsay (or solicitors on his behalf) made considered, deliberate, decisions not to notify Alberta-Pacific of his claim until after the approval order and then not until after the closing of the share purchase agreement" (para 19). She then went on to conclude that Lindsay preferred not to participate in the *CCAA* process and chose to take his chances later on.

17 In deciding how to exercise her discretion, Huddart, J. applied the following factors: "the extent of the creditor's actual knowledge and understanding of the proceedings; the economic effect on the creditor and debtor company; fairness to other creditors; the scheme and purpose of the *CCAA* and the terms of the plan" (para 56). On these criteria, Huddart, J. found that it would not be equitable to allow Lindsay to pursue a claim as he was well aware of what was going on in the *CCAA* proceedings, chose not to participate, and his late action would cause serious prejudice both to the debtor company and to the other creditors.

18 While *Lindsay* is clearly distinguishable on its facts from the within appeal, the case does highlight the issues of the conduct of the late claimants and the potential prejudice to other creditors and the debtor. Lindsay was the classic creditor "lying in the weeds", waiting for the appropriate moment to pounce. He did not act in good faith and his conduct was potentially prejudicial to other creditors and the debtor company. By avoiding the *CCAA* proceedings, Lindsay was attempting to gain an advantage not available to other creditors.

19 There is further support for a blended approach in several other areas of the law where courts have had to deal with the impact of delays and late filings. In particular, I have considered the courts' treatment of delays in the prosecution of actions and the late filing of notices of claim to insurers.

20 In *Lethbridge Motors Co. v. American Motors (Can.) Ltd.* (1987), 53 Alta. L.R. (2d) 326 (Alta. C.A.) the court had to decide whether or not to allow an action to continue where no steps had been taken by the plaintiff for five years. In deciding that the action could continue, Laycraft, C.J.A. relied on the following test from the English Court of Appeal in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543 (Eng. C.A.) where Salmon L.J. said at 561:

> In order for the application to succeed the defendant must show:
>
> (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.
>
> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
>
> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

Relying on this test, as well as additional refinements, the Court found that the fundamental rule was that it was

"necessary for a defendant to show serious prejudice before the court will exercise its jurisdiction to strike out an action for want of prosecution" (at pg. 331). The onus of showing serious prejudice has now been substantially altered as the result of amendments to the *Alberta Rules of Court* in 1994. Rule 244(4) now states that proof of inordinate and inexcusable delay constitutes *prima facie* evidence of serious prejudice: *Kuziw v. Kucheran Estate*, 2000 ABCA 226 (Alta. C.A.).

21 Similar questions can arise in an insurance context where an insured is required to file a proof of loss or other notice of claim within a certain time period under a contract of insurance. For example, s. 205 of the *Insurance Act*, R.S.A. 1980, c. I-5 states:

> 205 [w]here there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to by done or omitted by the insured with respect to the loss and the consequent forfeiture or avoidance of the insurance in whole or in part and the Court considers it inequitable that the insurance should be forfeited or avoided on that ground, the Court may relieve against forfeiture or avoidance on such terms as it considers just.

22 Similar wording is also found in ss. 211 and 385 of the *Insurance Act* and similar legislation exists throughout the common law provinces.

23 When deciding whether to grant relief from forfeiture in an insurance context the Alberta courts have generally adopted a two part test, see: *Hogan v. Kolisnyk* (1983), 25 Alta. L.R. (2d) 17 (Alta. Q.B.). In *Hogan* the court found it appropriate to look first at the conduct of the insured to determine whether the insured is guilty of fraud or wilful misconduct. Second, the court considered whether the insurer had been seriously prejudiced by the imperfect compliance with the statutory provision (at 35). The "noncomplying" party can show that there was no prejudice by showing that the innocent party had actual knowledge of the events in question and was thereby able to investigate the situation.

24 Considering whether the insurer has suffered any prejudice, the court in *Hogan* quoted from a decision of Stevenson, D.C.J. in *W. Schoeler Trucking Ltd. v. Markel Insurance Co. of Canada* (1979), 9 Alta. L.R. (2d) 232 (Alta. Dist. Ct.) at 237 where Stevenson, D.C.J. said "[t]he root of the question is whether or not it (the insurer) would have acted any differently if it had been given notice of the loss when it should have been given notice". In *312630 British Columbia Ltd. v. Alta Surety Co.* (1995), 10 B.C.L.R. (3d) 84 (B.C. C.A.) the B.C. Court of Appeal set out a more recent formulation of the test, namely whether the insurer by reason of the late notice had lost a realistic opportunity to do anything that it might otherwise have done.

25 These authorities arise in a clearly different context from that which I am dealing with in this case, but they demonstrate that there is a somewhat consistent approach in a variety of areas of the law when dealing with the impact of late notice or delays in particular processes.

26 Therefore, the appropriate criteria to apply to the late claimants is as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permit-

ting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

27 In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.

National-Oilwell Canada Ltd. ("National")

28 National, and National as the successor in interest to Dosco Supply, a division of Westburne Industrial Enterprises Ltd. ("Dosco") indicate that their claims were filed late due to the unexpected illness and resulting lengthy absence of their credit manager who was in charge of the Blue Range accounts receivable. National submitted the National and Dosco notices of claims on June 7, 1999 (AB V, pgs 538 and 542). National's claim is $58,211.00 and Dosco's claim is $390,369.13. National and Dosco clearly acted in good faith and provided the Notices of Claim as soon as the relevant personnel became aware of the situation.

Campbell's Industrial Supply Ltd. ("Campbell's")

29 Campbell's initial claim in the amount of $14,595.22 was filed prior to the date in the relevant claims bar order. Campbell's then amended its claim on June 25, 1999 and again on July 8, 1999 to $23,318.88. The claim was amended after the relevant date as a result of a representative from Blue Range informing Campbell's that its claim should include invoices sent to Trans Canada Midstream, Berkley Petroleum, Big Bear Exploration and Blue Range Resources Corporation (A.B. 495-496). In addition, there appears to have been some delay due to the Notices of Claim not being sent to the correct Campbell's office. Campbell's acted in good faith throughout and it is in fact arguable that any delay in the proper filing of its claims was actually due to errors on the part of Blue Range rather than its own doing.

TransAlta Utilities Corporation ("TransAlta")

30 TransAlta did not comply with the dates in the claims bar orders. It contends that it did not receive the claims package prior to the relevant dates. It is apparent from the evidence that the claims package was sent to TransAlta at its accounts receivable office, rather than the registered office for service (A.B.432-434). TransAlta was permitted to file its total claim of $120,731.00 by order of the chambers judge dated September 7, 1999. There is no evidence that TransAlta was attempting to circumvent the *CCAA* process. On the contrary, as soon as the appropriate personnel became aware of the situation, TransAlta took the necessary steps to have its Notice of Claim filed.

Petro-Canada Oil and Gas ("PCOG")

31 PCOG filed extensive claims material with the Monitor prior to the relevant dates showing several unsecured claims. The Monitor's draft third interim report indicated that four of PCOG's claims should properly have been classified as secured. The mistake by PCOG was the result of a misapprehension of how operator's liens functioned under the CAPL Operating Procedures incorporated into the contracts giving rise to the claims. PCOG then sought to amend its claims and have them changed from unsecured to secured status (A.B. 554), on July 7, 1999. The change in status would result in claims of $137,981.30 being amended from unsecured to se-

cured. There was no lack of good faith.

Barrington Petroleum Ltd. ("Barrington")

32 Barrington was acquired by Sunoma Energy Corp ("Sunoma") in about September, 1998. An affidavit filed by Sunoma's controller indicates that the financial records of Barrington were found to have been in complete disarray. Barrington's initial Notice of Claim in the amount of $223,940.06 was submitted prior to the relevant date. Barrington received a Notice of Dispute of Claim which approved the claim to the extent of $57,809.37, but disputed the remainder. On reviewing the issue, Barrington's controller determined that Blue Range was correct, but at the same time she identified additional invoices of which she had been unaware (A.B.549-551). On discovering the additional invoices, Barrington then submitted an amended Notice of Claim on July 22, 1999 and an objection to the Notice of Dispute of Claim. Barrington acted in good faith.

Rigel Oil & Gas Ltd. ("Rigel")

33 The full amount of Rigel's Notice of Claim was $146,429.68. This Claim was filed prior to the relevant date and the amount was approved by Blue Range. After the relevant date, on August 12, 1999, Rigel moved to amend and to allege that, despite Blue Range's claims to the contrary, its claim was secured, rather than unsecured. The only issue for Rigel on appeal is if their claim is properly secured can it be accepted because it was not claimed as secured until August 12, 1999.

Halliburton Group Canada Inc. ("Haliburton")

34 Halliburton was in the process of attempting to collect on accounts receivable owed by Big Bear Exploration Ltd. through May and June, 1999. They subsequently became aware, after the relevant date, that a claim in the amount of $11,309.90 was in fact against Blue Range, and should properly have been filed as a Notice of Claim in the *CCAA* proceedings (A.B. 497-499). On making this discovery, Halliburton wrote to the Monitor on July 14, and July 26, 1999 requesting that its claim be included in the *CCAA* proceeding. The Monitor disputed this claim as having been filed too late (A.B. 498). It appears that Halliburton acted in good faith.

Founders Energy Ltd. ("Founders")

35 Founders filed its claim prior to the relevant date, but, due to an oversight, claimed as an unsecured rather than a secured creditor. After filing its initial Notice of Claim, Founders received a Notice of Dispute from Blue Range. Within the 15 day appeal period, but outside the claims bar date, Founders then filed an amended Notice of Claim claiming a secured interest in the sum of $365,472.39, on July 26, 1999.

Prejudice

36 The timing of these proceedings is a key element in determining whether any prejudice will be suffered by either the debtor corporation or other creditors if the late and late amended claims are allowed. The total of all late and amended claims of the late claimants, secured and unsecured, is approximately $1,175,000. As set out above, in the initial claims bar order, the relevant date was 5:00 p.m. May 7, 1999. This date was extended for joint venture partners to 5:00 p.m. on June 15, 1999. The Plan of Arrangement, sponsored by Canadian Natural Resources Ltd. ("CNRL"), was voted on and passed on July 23, 1999. Status as a creditor, the classification as secured or unsecured, and the amount of a creditor's claim, are relevant to voting: s.6 *CCAA*.

37 Enron and the Creditor's Committee claim that they would be prejudiced if the late claims were allowed

because, had they known late claims might be permitted without rigorous criteria for allowance, they might have voted differently on the Plan of Arrangement. Enron in particular submits that it would have voted against the CNRL Plan of Arrangement, thus effectively vetoing the plan, if it had known that late claims would be allowed. This bald assertion after the fact was not sufficient to compel the chambers judge to find this would in fact have been Enron's response. Nowhere else in the evidence is there any indication that late claimants being allowed would have impacted the voting on the different proposed Plans of Arrangement. In addition, materiality is relevant to the issue of prejudice. The relationship of $1,175,000 (which is the total of late claims) to $270,000,000 (which is the total of claims filed within time) is .435 per cent.

38 Also, the contrary is indicated in the Third Interim Report of the Monitor where it is shown in Schedule D-1 (A.B.269) that $2 million was held as an estimate of unsecured disputed claims. Therefore, when considering which Plan of Arrangement to vote for, Enron, and all of the creditors, would have been aware that $2 million could still be legitimately allowed as unsecured claims, and would have been able to assess that potential effect on the amount available for distribution.

39 Further, the late claimants were well known to the Monitor and all of the other creditors. The evidence discloses that officials at Enron received an e-mail from the Monitor on May 18, 1999 indicating that there were several creditors who had filed late, after the first deadline of May 7, and the Monitor thought that even though they were late the court would likely allow them (A.B.1040). Finally, all of the late claimants were on the distribution list as having potential claims. (A.B. 9-148). It cannot be said that these late claimants were lying in the weeds waiting to pounce. On the contrary, all parties were fully aware of who had potential claims, especially Enron and the Creditors Committee.

40 In a *CCAA* context, as in a *BIA* context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the *CCAA* involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: *Cohen, Re* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in *312630 British Columbia Ltd.* It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

Summary of Criteria

41 In considering claims filed or amended after a claims bar date in a claims bar order, a *CCAA* supervising judge should proceed as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

Conclusion

42 Applying the criteria established, I find that the conclusion reached by the chambers judge ought not to be disturbed, and the late claims filed by the respondents should be permitted under the *CCAA* proceedings. The appeal is dismissed.

Appeal dismissed.

END OF DOCUMENT

TAB K

2007 CarswellBC 2518, 2007 BCSC 1553, 37 C.B.R. (5th) 253, [2008] B.C.W.L.D. 510

West Bay SonShip Yachts Ltd., Re

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

And In the Matter of the Business Corporations Act S.B.C. 2002, c. 57

And In the Matter of West Bay SonShip Yachts Ltd. (Petitioner)

British Columbia Supreme Court [In Chambers]

Williamson J. for Ross J.

Oral reasons: May 3, 2007
Judgment: May 3, 2007
Docket: Vancouver L053049

Proceedings: allowed leave to appeal *West Bay SonShip Yachts Ltd., Re* (2007), 60 C.C.E.L. (3d) 21, 35 C.B.R. (5th) 104, 2007 CarswellBC 1868, 2007 BCCA 419 (B.C. C.A. [In Chambers])

Counsel: S.M. Forestall for Gerald Esau

K.S. Robertson for Petitioner, West Bay SonShip Yachts Ltd.

J.I. McLean for Creditor, Monitor

H. Ferris for Creditor, Butterfields

W.G. Wharton for Creditor, Vessel Owners

Subject: Insolvency; Civil Practice and Procedure

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Employee worked for insolvent company — Company entered arrangement under Companies' Creditors Arrangement Act — Company gave employee and others working notice — Employee's notice was extended, employee later rejected second extension — Company stated it could not enter into one year employment contract as employee wished, due to terms of arrangement — Employee was unsatisfied with notice and brought action for wrongful dismissal — Company took position that action was barred by stay implemented under arrange-

ment — Company brought application for declaration that employee's claim was barred by arrangement — Application granted — Action was stayed due to operation of agreement — Claim was "prefiling" claim under terms of arrangement — Employee was aware of restructuring and in fact participated in restructuring — Employee did not file proof of claim before approval of plan, despite making several demands on company — Entitlement to severance accrued since employee began work several years before arrangement, although obligation crystalized at termination — Court should not exercise discretion to allow late filing of claim — Employee was not inadvertent in bringing claim — Prejudice would result if claim allowed to continue — Proceedings were almost at end and employee's claim was causing delay.

Cases considered by *Williamson J. for Ross J.*:

Blue Range Resource Corp., Re (2000), 2000 ABCA 285, [2001] 2 W.W.R. 477, (sub nom. *Enron Canada Corp. v. National-Oilwell Canada Ltd.)* 193 D.L.R. (4th) 314, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352, 2000 CarswellAlta 1145 (Alta. C.A.) — referred to

British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of) (1996), 40 C.B.R. (3d) 25, [1996] 7 W.W.R. 652, 21 B.C.L.R. (3d) 91, 1996 CarswellBC 527 (B.C. S.C.) — considered

Ontario v. Canadian Airlines Corp. (2000), 2000 CarswellAlta 1336, (sub nom. *Canadian Airlines Corp., Re)* 276 A.R. 273 (Alta. Q.B.) — referred to

Rizzo & Rizzo Shoes Ltd., Re (1991), 11 C.B.R. (3d) 246, 6 O.R. (3d) 441, 92 C.L.L.C. 14,013, 1991 CarswellOnt 159 (Ont. Gen. Div.) — considered

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006 (S.C.C.) — referred to

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 3780, 23 C.C.P.B. 196 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — referred to

s. 121(2) — referred to

s. 135 — referred to

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

Generally — referred to

Employment Standards Act, R.S.B.C. 1996, c. 113

Generally — referred to

APPLICATION by company for declaration that claim was barred by agreement under *Companies' Creditors Arrangement Act*.

Williamson J. for Ross J.:

1 What I propose to do is give very brief reasons telling you what I have decided with the understanding that if the reasons are ordered, they will be enlarged and fleshed out accordingly. The reasons now reflect that process of editing.

2 This is an application that has been brought by the petitioner, West Bay, for an order: (a) that the claim of Gerald Esau for damages arising from the termination of his employment, which is the subject of an action that has been commenced in the Vancouver registry, action number S067248, is a prefiling claim as defined in the Plan of Arrangement and is a claim that is compromised by the Plan; (b) staying that action with respect to the petitioner, West Bay, and as well with respect to Mr. Vermeulen, who is a director of the petitioner; and (c) that the time for Mr. Esau to file a proof of claim for these damages be extended to permit a claim now to be filed.

3 With respect to the last order that is sought, the petitioner, although including it in the notice of motion, takes no position as to whether or not the Court should exercise its discretion in this way. The petitioner, obviously, takes the position that the claim does fall within the scope of the Plan of Arrangement and that it is compromised by the Plan. This application was heard in the context of another application by which the Court granted approval of the settlement of the claims of the owners and so we are now, but for this issue, very close to seeing the end of these proceedings and the distribution of funds to creditors.

4 Counsel for the owners took the position, first, that the claim was a claim that is a prefiling claim compromised by the Plan, and second, that the Court should not exercise its discretion to permit late filing. First, because this late filing was not the result of inadvertence; second, because there is prejudice, and third, because of a perception of unfairness which arises from the fact that Mr. Esau was employed as a vice president of the petitioner, and was someone who swore affidavits on behalf of the petitioner in relation to these proceedings. He was, in that sense, an insider.

5 Mr. Esau was employed by the petitioner, West Bay Sonship Yachts Ltd. ("West Bay"), from June 24, 1991 to July 13, 2006, at which time he refused to accept a further offer of employment from West Bay and elected to no longer be employed by West Bay during these restructuring efforts. By declining a further fixed term of offer of employment, Mr. Esau effectively "resigned" from his employment with West Bay.

6 As an incident of his acceptance of employment on June 24, 1991, and thereafter during his length of service as an employee of West Bay up to December 16, 2005, Mr. Esau accrued a right of "severance notice" or entitlement to be terminated only on adequate notice or payment of wages in lieu thereof ("severance pay"). As an incident of the length of service, such notice or payment of wages in lieu thereof was accruing in accordance with the law of British Columbia.

7 Concurrent with his common law entitlement to severance notice or severance pay, Mr. Esau enjoyed statutory entitlement to severance pursuant to the provisions of the ***Employment Standards Act***, R.S.B.C. 1996, c. 113.

8 As of December 15, 2006 Mr. Esau was entitled to severance notice in the event of termination of his employment commensurate with having worked for West Bay for some 14 years.

9 On December 16, 2005 West Bay filed for protection under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36 (the "***CCAA***") and thereafter with approval of the Court sought to devise a means by which it could stabilize its operations with a view to the completion of the five yachts (the "Owners' Yachts") that were then under production.

10 Between December 16, 2005 and January 15, 2006 West Bay developed the costing projections to complete the Owners' Yachts and devised a business plan that would permit it to continue in operations, continue the employment of its employees and complete the Owners' Yachts. Mr. Esau was instrumental in the preparation of the costing summaries that formed the basis for the business plan to complete the Owners' Yachts and he actively worked with most senior management to give effect to the business plan that ultimately resulted in the ability of West Bay to complete the Owners' Yachts.

11 An important element of the overall interim business plan of West Bay during the ***CCAA*** protection period was the continued employment of the employees of West Bay on the basis that when they were recalled from temporary lay-off, they would be given letters of notice of termination with a fixed date so that they would have "working notice" of termination of their employment. In this way West Bay maintained the continued employment and production of the employees yet reduced the statutory and common law severance claims that the employees could otherwise make against West Bay. Notices of termination were delivered to the bulk of the employees of West Bay on January 17, 2006 with varying termination dates depending on the nature of the work performed by the employee.

12 A notice of termination effective June 6, 2006 was delivered to Mr. Esau by letter dated January 17, 2006.

13 Mr. Esau continued to work under the terms of his working notice and he maintained his job coordinating the completion of the Owners' Yachts. Mr. Esau played an important role in drafting the Employee Retention Plan benefits for the employees who were provided incentives thereunder, including himself.

14 Through subsequent extension letters, Mr. Esau's notice date was extended to July 14, 2006, at which time a further fixed term extension was offered but not accepted by him. In this respect, Mr. Esau made certain demands for either a guarantee of one year of employment or the payment of an additional 36 weeks' severance plus any entitlement under the Employee Retention Plan before he would accept any further fixed term employment contract. The petitioner took the position that it could not enter into any such arrangement given the ***CCAA*** proceedings and orders pronounced therein and West Bay and Mr. Esau did not enter into a new contract of employment beyond that date. Mr. Esau ceased to work at West Bay thereafter.

15 On August 9, 2006, Mr. Esau's counsel issued a demand letter claiming damages and satisfaction. By letter dated September 22, 2006 counsel for West Bay notified Mr. Esau's counsel that such a claim was improper, that Mr. Esau's claims for severance were compromised under the Plan of Arrangement, which by that time had been approved by this Court and fully implemented, and that no proceedings could be taken against either West Bay or Ben Vermeulen.

16 On November 8, 2006, Mr. Esau filed an action claiming Wrongful Dismissal Damages relating to his employment with West Bay.

17 While Mr. Esau was apprised of the ***CCAA*** restructuring and participated in it to a significant degree, including filing an affidavit in support of the application for Court approval of the Employee Retention Plan, he did not file a Proof of Claim therein, despite the fact that he had made substantial demands as against West Bay prior to the date upon which the Plan of Arrangement was implemented.

18 The petitioner acknowledges that no Proof of Claim package was delivered personally to Mr. Esau. The petitioner submits that West Bay was not aware that Mr. Esau would be advancing a claim against it within the time first limited for the filing of Proofs of Claim. However, the petitioner asserts that delivery of the Proof of Claim package was substitutionally served on him and carried out in accordance with the Claims Process Order by delivering the Proof of Claim package to all known creditors, and by publication in the Vancouver Sun. The Proof of Claim Package was also made available on the Monitor's website: www.kpmg.ca/westbay.

19 The fundamental question is with respect to the construction of the orders and the plan. The appropriate place to start is with respect to the order that was made on December 16, 2005. In particular, I have been directed to paragraph 5 and paragraph 6(b) of that order, which clearly contemplate that such claims will be provided for and dealt with pursuant to the Plan of Arrangement:

> 5. THIS COURT FURTHER ORDERS that all obligations incurred by the Petitioner after the Filing Date, including without limitation, all obligations to persons who advance or supply goods or services to the Petitioner after the Filing Date (including those under purchase orders outstanding at the Filing Date but excluding any interest on the Petitioner's existing obligations incurred prior to the Filing Date) shall be paid or otherwise satisfied by the Petitioner and, without limiting the generality of the foregoing, that the Petitioner shall pay all wages, source deductions, benefits (including long and short term disability payments), expenses, omissions, vacation pay, and other monies owing to or in respect of its employees (including any independent contractor providing employment related services to the Petitioner) irrespective of whether such obligations arose or were earned before or after the Filing Date but not including any amounts that are due on account of severance pay arising at law or under Statute (hereinafter collectively referred to as "Wages").
>
> 6. (b) it shall have the right without further Order of this Court, but subject to the consent of the Monitor, to proceed with an orderly disposition of such of its Assets outside of the ordinary course of its business as it deems appropriate in order to facilitate the downsizing of its business and operations ("Downsizing"), including:
>
> (i) terminating the employment of such of its employees or temporarily laying off such of its employees, as it deems appropriate;
>
> (ii) terminating such of its supplier arrangements or agreements as it deems appropriate;
>
> (iii) abandoning such leases of real property or equipment as it deems to be unnecessary for its business or terminating the operations of its U.S. incorporated sales subsidiaries and affiliates; and
>
> (iv) pursuing offers for its Assets, in whole or in part,
>
> all without interference of any kind from third parties, including its landlords and notwithstanding the provisions of any. lease, mortgage other instrument or law affecting or limiting the rights of the Petitioner to move or liquidate Assets from leased premises, and may take any Downsizing steps at any

time after the Filing Date irrespective of whether or not payments have been made subsequent to the Filing Date under any lease or mortgage, provided that the financial obligations, if any, of the Petitioner to creditors affected by such Downsizing shall be provided for and dealt with in the Plan of Arrangement to be filed by the Petitioner.

20 The definition of "claim" within the plan of arrangement itself, in addition, in my view, captures the claim that is being advanced by Mr. Esau.

> **"Claim"** means a claim for an amount alleged by a person to be owed to it by the Company, or a claim in relation to any obligation, enforceable right, duty or liability, contingent, accrued, vested or otherwise, (including any claim whether contingent or accrued on behalf of Her Majesty the Queen in right of the Dominion of Canada or any Province or any municipality) against the Company which was in existence in whole or in part as of the Filing Date, including any claim in relation to any liability, loss or damage arising from any such claim after the Filing Date, or any cause of action against the Company or its assets and property calculated either as at the Filing Date, or, in the case of claims under executory contracts arising subsequent to the Filing Date as a result of the termination of such contracts in accordance with an order of the Court made prior to the date of the Meeting, as at the date of such termination, either:
>
> (a) as set forth in a Proof of Claim which has either:
>
> (i) been admitted by the Company pursuant to the Plan for all purposes; or
>
> (ii) been determined by a Court of competent jurisdiction to be a proper obligation of either or both of the Company; or
>
> (b) for which a valid Proof of Claim could have been filed with the Company, but which Proof of Claim was not so filed prior to the Claims Bar Date;
>
> provided that a Claim shall not include the amount due or accruing due to a Post Filing Creditor in respect of Post Filing Creditor Claims, nor shall the Claim include interest for the period subsequent to the Filing Date.

21 Counsel on behalf of Mr. Esau submitted that, in fact, this claim is as a post-filing creditor pursuant to that definition. In my view, the most that could be said in that respect is that with respect to severance issues that arose in relation to services subsequent to the filing date, Mr. Esau could be considered to be a post-filing creditor, but certainly not with respect to the services from June 24, 1991, to the time of the filing date.

22 In my view, the claim for damages for wrongful dismissal is a claim that is caught by the plan. It is therefore compromised by virtue of clause 3.8 and 7.4 of the Plan of Arrangement.

23 Provable claims within the meaning of ***CCAA*** are determined having regard to claims that are provable under the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3 (the "***BIA***"). Section 121(2) of the ***BIA*** provides that contingent and unliquidated claims are to be determined in accordance with s. 135 of the ***BIA***. Unliquidated claims for breach of an employment contract constitute a provable debt (See Houlden & Morawetz, ***Annotated Bankruptcy and Insolvency Act*** (Toronto: Carswell) at G§29(6) and G§75.2).

24 Mr. Esau's entitlement to a claim for wrongful dismissal damages arose as an incident of his employment by West Bay and accrued from June 1991, when his employment commenced.

25 The contingency whereby Mr. Esau's accruing claim gave rise to a right to enforce his claim arose when notice of termination was given on January 17, 2006, effective June 6, 2006.

26 Mr. Esau could not enforce that claim by action on January 17, 2006 by reason of the stay of proceedings that had been ordered. Mr. Esau elected to continue working under the "working notice" regime that was put in place for all employees and by reason of it, West Bay's liability, if any, to pay severance was mitigated and reduced.

27 The statutory obligation to pay severance was fully discharged during that term and to the extent that Mr. Esau was entitled to common law damages for severance, his entitlement was reduced by some six months of wage payments.

28 In *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 21 B.C.L.R. (3d) 91, [1996] 7 W.W.R. 652 (B.C. S.C.), the Court stated the proposition as follows:

> 23 In my view, this severance pay claim can be made against the estate as it arose as the result of a contractual obligation that the employer had assumed long before the business went into bankruptcy (namely, it arose in exchange for the services and labour supplied by the employees during their period of employment). Upon the termination of the employment by the employer without cause and without notice (which I have concluded occurred as a consequence of the voluntary assignment into bankruptcy), the severance pay became payable. That is, the obligation of the employer to pay severance pay upon the happening of specified events was incurred before the bankruptcy and therefore constitutes a debt or liability to which the employer was subject on the day on which it became bankrupt or at the very least to which it may become subject before it is discharged. (See ***Re Valewood Products Ltd.*** (1975), 64 D.L.R. (3d) 396 (O.S.C. — In Bankruptcy) for an analogous situation.)
>
> [Emphasis added.]

29 Similarly, in *Rizzo & Rizzo Shoes Ltd., Re* (1991), 6 O.R. (3d) 441 (Ont. Gen. Div.), aff'd, [1998] 1 S.C.R. 27 (S.C.C.), Mr. Justice Farley confirmed that a severance obligation is a contingent liability and obligation that exists from the employment contract, not from the termination itself:

> [19] Even if, in this case, the employment of the employees did not terminate upon the happening of the bankruptcy, it would appear to me that termination pay and severance pay were liabilities to which the bankrupt became subject by reason of obligations incurred prior to the date of the bankrupty. Section 7(5) of the ESA deems every employment contract to include a provision to pay such following the termination of employment. In this case right after the bankruptcy PML as receiver took possession of the bankrupt's property and it had liquidated that property within several months, employing a significant number of the bankrupt's employees to assist it in doing so. If the bankruptcy did not terminate the employment relationship, it is clear that the subsequent action did as the undertaking of the company was sold. The contractual element of the employment relationship, therefore, included a provision concerning the contingency of the employees' employment being terminated involuntarily on their part. This would give them a contingent claim by reason of the obligation having been incurred prior to the date of the bankruptcy: see ss.2(2) and 7(5) of the ESA and s. 121(1), (2) of the BA; also *Re Waltson Properties Ltd.* (1978), 27 C.B.R. (N.S.) 156 (Ont. Bkcy.), aff'd (1978), 28 C.B.R. (N.S.) 223 (Ont. Bkcy.), and *Re Valewood Products Ltd.* (1975), 10 O.R.

(2d) 672, 64 D.L.R. (3d) 396 (Bkcy).

[Emphasis added.]

30 Thus, while the claim itself was not crystallized until the January 17, 2006 notice of termination was given, the obligation of the petitioner to pay any severance or damages arising from the termination of his employment, which obligation is denied by the petitioner, was in existence "in whole or in part" as of the Filing Date, and was "in relation to liability, loss or damage arising from any such claim after the Filing Date".

31 The Plan specifically contemplates and provides that any claims that arise before the Filing Date, but are not crystallized until after, are compromised claims. As such, the claim for wrongful dismissal damages is compromised under the Plan.

32 That then leads to the next question of whether the Court should exercise its discretion to permit a claim to be filed. The factors to be considered in the decision of a supervisory judge whether to exercise the discretion to allow the filing of a claim after a claims bar date include:

> (a) was the delay caused by inadvertence, and if so, did the claimant act in good faith;
>
> (b) what is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay;
>
> (c) if relevant prejudice is found, can it be alleviated by altering appropriate conditions; and
>
> (d) if relevant prejudice is found that cannot be alleviated, are there any other considerations which warrant an order to permit late filing.

See Vern DaRe, *The Treatment of Late Claims under the CCAA* (2001), 26 C.B.R. (4th) 142; *Blue Range Resource Corp., Re* (2000), 193 D.L.R. (4th) 314, 2000 ABCA 285 (Alta. C.A.); *Ontario v. Canadian Airlines Corp.* (2000), 276 A.R. 273 (Alta. Q.B.); *Royal Oak Mines Inc., Re* [1999 CarswellOnt 3780 (Ont. S.C.J. [Commercial List])], (September 20, 1999), unreported; and *Re T. Eaton Co.*, (December 1, 2000) (Ont. S.C.J.), unreported.

33 The first factor that the cases have suggested should be considered by the Court is whether the delay was caused by inadvertence.

34 Here, it is clear that this was not inadvertence in the sense of carelessness, negligence, accident, or something that was unintentional in view of the correspondence that passed between counsel in the summer. Some of this exchange has been put before the Court in a series of affidavits, and so certainly at the latest in September of 2006, it was absolutely clear that the position was being taken by the petitioner that this was a matter that fell within the scope of the Plan. From that point forward, then, in my view, it cannot be said that failure to take steps to seek the Court to exercise a discretion could be the result of inadvertence.

35 There is, in my view, prejudice in the sense that this has been a long process and we are finally at the point, but for this claim, where the process may be brought to an end. So there is an issue of delay. In addition, this is a disputed claim and the very substantial claims of the owners were settled on the basis of representations with respect to the financial state of affairs as they existed. Dealing with this claim would change that state of

affairs. This is a claim in the order of possibly $100,000, I am advised. That is before one looks at the professional fees in relation to dealing with it, and while that may be *de minimus* in the sense of the overall magnitude of all of the claims put together, it is not inconsequential in the sense of the delicate negotiations that have gone on to bring us to the place where we are today with the settlement of the other claims.

36 So, in my view, there is prejudice, and it is not a prejudice that I can see any reasonable way of alleviating. In addition, this is delay that is substantial. I may have had a very different view with respect to the exercise of discretion if we were dealing with this matter last September. That would have been before the settlement of the claims and very shortly after the situation had arisen, but we are now many months down the river and so I have concluded that I am not going to exercise my discretion to permit a late filing with respect to this claim.

37 Now, ordinarily, I would give all this bundle of stuff back, but I am going to keep it in the event that I am required to provide my reasons.

38 MS. ROBERTSON: My Lady, can I just clarify that that's as against — that the claim's compromised as against West Bay and Mr. Ben Vermeulen as released parties as defined in the plan?

39 THE COURT: Yes.

Application granted.

END OF DOCUMENT

2009 CarswellBC 139, 2009 BCCA 31, [2009] B.C.W.L.D. 1229, [2009] B.C.W.L.D. 1230, 71 C.C.E.L. (3d) 45, 49 C.B.R. (5th) 159, [2009] 4 W.W.R. 415, 89 B.C.L.R. (4th) 82, 265 B.C.A.C. 203, 446 W.A.C. 203, 306 D.L.R. (4th) 294

2009 CarswellBC 139, 2009 BCCA 31, [2009] B.C.W.L.D. 1229, [2009] B.C.W.L.D. 1230, 71 C.C.E.L. (3d) 45, 49 C.B.R. (5th) 159, [2009] 4 W.W.R. 415, 89 B.C.L.R. (4th) 82, 265 B.C.A.C. 203, 446 W.A.C. 203, 306 D.L.R. (4th) 294

West Bay SonShip Yachts Ltd., Re

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

And In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57

West Bay SonShip Yachts Ltd. (Respondent / Petitioner) and Gerald Esau (Appellant / Respondent)

British Columbia Court of Appeal

Rowles, Levine, Groberman JJ.A.

Heard: October 8, 2008
Judgment: January 30, 2009
Docket: Vancouver CA035080

Counsel: S. Kent for Appellant

R.A. Millar for Respondent

Subject: Insolvency; Civil Practice and Procedure

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Employee worked for insolvent company — Company entered arrangement under Companies' Creditors Arrangement Act — Company gave employee and others working notice — Employee's notice was extended, employee later rejected second extension — Company stated it could not enter into one year employment contract as employee wished, due to terms of arrangement — Employee was unsatisfied with notice and brought action for wrongful dismissal — Company took position that action was barred by stay implemented under arrangement — Company's application for declaration that employee's claim was barred by arrangement was granted — Trial judge found Action was stayed due to operation of agreement — Trial judge found that claim was contingent claim — Employee appealed — Appeal dismissed — Liability to pay damages if employment contract breached is not contingent liability — Existence of contractual obligation and corresponding potential claim for damages is not contingent liability — No injury arose until termination without reasonable notice — Possibility

of breach did not give rise to contingent liability — Claim did not accrue from outset of employment and was not pre-filing claim on basis of contingency — Contract of employment was executory contract, as obligations existed on both sides which had yet to be performed — As executory contract, claim was subject to terms of arrangement — American definition of executory contract, as contract so far under performed by both parties that each breach excused other, was not applicable to case at bar — Trial judge acted properly in not extending time to file proof of claim.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Employee worked for insolvent company — Company entered arrangement under Companies' Creditors Arrangement Act — Company gave employee and others working notice — Employee's notice was extended, employee later rejected second extension — Company stated it could not enter into one year employment contract as employee wished, due to terms of arrangement — Employee was unsatisfied with notice and brought action for wrongful dismissal — Company took position that action was barred by stay implemented under arrangement — Company's application for declaration that employee's claim was barred by arrangement was granted — Trial judge found Action was stayed due to operation of agreement — Trial judge found that claim was contingent claim — Trial judge found court should not exercise discretion to allow late filing of claim — Trial judge found that delay was significant and not caused by inadvertence — Trial judge found prejudice would result if claim allowed to continue — Employee appealed — Appeal dismissed — Employee did not file proof of claim — Trial judge acted properly in not extending time to file proof of claim.

Cases considered by *Levine J.A.*:

Blue Range Resource Corp., Re (**2000**), **2000 ABCA 285, 2000 CarswellAlta 1145**, [**2001**] **2 W.W.R. 477**, *(* **sub nom.** ***Enron Canada Corp. v. National-Oilwell Canada Ltd.)*** **193 D.L.R.** (**4th**) **314**, **271 A.R. 138**, **234 W.A.C. 138**, **87 Alta. L.R.** (**3d**) **352** (Alta. C.A.) — considered

British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of) (1996), 40 C.B.R. (3d) 25, [1996] 7 W.W.R. 652, 21 B.C.L.R. (3d) 91, 1996 CarswellBC 527 (B.C. S.C.) — distinguished

Climatrol Industries, Inc. v. Fedders Corp. (1986), 149 Ill. App. 3d 533, 501 N.E.2d 292, 103 Ill. Dec. 271 (U.S. Ill. Ct. App. 1 Dist.) — considered

Colak v. UV Systems Technology Inc. (2007), 57 C.C.E.L. (3d) 210, 2007 C.L.L.C. 210-020, 240 B.C.A.C. 21, 398 W.A.C. 21, 2007 CarswellBC 779, 2007 BCCA 220, 66 B.C.L.R. (4th) 373 (B.C. C.A.) — referred to

Crabtree (Succession de) c. Barrette (1993), 47 C.C.E.L. 1, 10 B.L.R. (2d) 1, *(*sub nom. *Barrette v. Crabtree (Succession de))* 53 Q.A.C. 279, *(*sub nom. *Barrette v. Crabtree (Succession de))* 150 N.R. 272, *(*sub nom. *Barrette v. Crabtree Estate)* 101 D.L.R. (4th) 66, *(*sub nom. *Barrette v. Crabtree Estate)* [1993] 1 S.C.R. 1027, 1993 CarswellQue 25, 1993 CarswellQue 155 (S.C.C.) — considered

Grant-Howard Associates v. General Housewares Corp. (1984), 472 N.E.2d 1, 63 N.Y.2d 291, 482 N.Y.S.2d 225 (U.S. N.Y. Ct. App.) — referred to

Kary Investment Corp. v. Tremblay (2005), 2005 ABCA 273, 2005 CarswellAlta 1145, 371 A.R. 339, 354

W.A.C. 339, 55 Alta. L.R. (4th) 251, 8 B.L.R. (4th) 40 (Alta. C.A.) — considered

Levy-Russell Ltd. v. Shieldings Inc. (2004), 48 B.L.R. (3d) 28, 2004 CarswellOnt 4263 (Ont. S.C.J. [Commercial List]) — referred to

McLarty v. R. (2008), [2008] 4 C.T.C. 221, (sub nom. *McLarty v. Minister of National Revenue)* 374 N.R. 311, (sub nom. *Canada v. McLarty)* [2008] 2 S.C.R. 79, 46 B.L.R. (4th) 1, (sub nom. *McLarty v. Canada)* 293 D.L.R. (4th) 659, 2008 CarswellNat 1380, 2008 CarswellNat 1381, 2008 SCC 26, (sub nom. *R. v. McLarty)* 2008 D.T.C. 6366 (Fr.), (sub nom. *R. v. McLarty)* 2008 D.T.C. 6354 (Eng.) (S.C.C.) — considered

Mueller v. Coronation Insurance Co. (1995), 1995 CarswellBC 562, 12 B.C.L.R. (3d) 90, 63 B.C.A.C. 47, 104 W.A.C. 47 (B.C. C.A.) — referred to

Rizzo & Rizzo Shoes Ltd., Re (1991), 11 C.B.R. (3d) 246, 6 O.R. (3d) 441, 92 C.L.L.C. 14,013, 1991 CarswellOnt 159 (Ont. Gen. Div.) — distinguished

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006 (S.C.C.) — referred to

Royal Trust Co. v. H.A. Roberts Group Ltd. (1995), 1995 CarswellSask 7, 17 B.L.R. (2d) 263, 31 C.B.R. (3d) 207, 44 R.P.R. (2d) 255, 129 Sask. R. 161, [1995] 4 W.W.R. 305 (Sask. Q.B.) — considered

Rupert Title Search Ltd., Re (2003), 2003 CarswellBC 3812 (B.C. Empl. Stnds. Trib.) — considered

Sitter, Re (2000), 2000 CarswellBC 3122 (B.C. Empl. Stnds. Trib.) — considered

Skeena Cellulose Inc., Re (2002), 5 B.C.L.R. (4th) 193, 2002 CarswellBC 2032, 2002 BCSC 1280, 43 C.B.R. (4th) 178 (B.C. S.C.) — referred to

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

Taylor, Re (2003), 2003 CarswellBC 3813 (B.C. Empl. Stnds. Trib.) — referred to

West Bay SonShip Yachts Ltd., Re (2007), 37 C.B.R. (5th) 253, 2007 BCSC 1553, 2007 CarswellBC 2518 (B.C. S.C. [In Chambers]) — referred to

Winter v. Inland Revenue Commissioners (1961), [1963] A.C. 235, [1961] 3 All E.R. 855 (U.K. H.L.) — considered

Statutes considered:

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

Generally — referred to

Employment Standards Act, R.S.B.C. 1996, c. 113

Generally — referred to

APPEAL by employee from judgment reported at *West Bay SonShip Yachts Ltd., Re* (2007), 37 C.B.R. (5th) 253, 2007 BCSC 1553, 2007 CarswellBC 2518 (B.C. S.C. [In Chambers]), allowing application by employer for declaration that claim by employee was barred by proposal.

***Levine J.A.*:**

Introduction

1 The appellant, Gerald Esau, appeals from the order of a Supreme Court chambers judge made May 3, 2007, in the course of proceedings involving the respondent, West Bay SonShip Yachts Ltd., under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Mr. Esau claims, among other grounds of appeal, that the chambers judge erred in ruling that he was a creditor subject to the terms of the Plan of Arrangement (the "Plan").

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

Background

Facts

3 On December 16, 2005, West Bay filed for protection under the *CCAA*. Mr. Esau had been an employee of West Bay since 1991. On January 17, 2006, he received notice that his employment in the position of Vice President, Production, would be terminated, effective June 6, 2006. Mr. Esau sued West Bay for damages for wrongful dismissal, but did not file a Proof of Claim in the *CCAA* restructuring. West Bay sought a declaration that Mr. Esau's claim was compromised by the Plan, and an order that the wrongful dismissal action be stayed.

The CCAA Proceedings

4 In the initial order in the *CCAA* proceedings, made on December 16, 2005 (the "Filing Date"), the court imposed a stay of proceedings against West Bay, including any proceeding pursuant to labour or employment standards legislation (s. 2(c)). The initial order provided for West Bay to continue to pay obligations incurred by it after the Filing Date, including wages and "other monies owing to or in respect of its employees", but expressly prohibited the payment of "any amounts that are due on account of severance pay arising at law or under Statute" (s. 5). The order permitted West Bay to downsize its operations and terminate its employees. The financial consequences of downsizing were to be dealt with in the Plan to be filed (s. 6):

> 5. THIS COURT FURTHER ORDERS that all obligations incurred by the Petitioner after the Filing Date, including without limitation, all obligations to persons who advance or supply goods or services to the Petitioner after the Filing Date (including those under purchase orders outstanding at the Filing Date but excluding any interest on the Petitioner's existing obligations incurred prior to the Filing Date) shall be paid or otherwise satisfied by the Petitioner and, without limiting the generality of the foregoing, that the Petitioner shall pay all wages, source deductions, benefits (including long and short term disability payments), expenses, omissions, vacation pay, and other monies owing to or in respect of its employees (including any independent contractor providing employment related services to the Petitioner) irrespective of whether such

obligations arose or were earned before or after the Filing Date but not including any amounts that are due on account of severance pay arising at law or under Statute (hereinafter collectively referred to as "Wages").

6. THIS COURT FURTHER ORDERS that, subject to the terms of this Order, the Petitioner shall remain in possession of its undertaking, property and assets, wherever situate (collectively, the "Assets") with full power and authority to relocate to British Columbia those Assets currently situated within other jurisdictions including, without limitation, the State of California, the State of Florida and the State of Washington and shall continue to carry on its business in the ordinary course, provided that:

. . . . .

(b) it shall have the right without further Order of this Court, but subject to the consent of the Monitor, to proceed with an orderly disposition of such of its Assets outside of the ordinary course of its business as it deems appropriate in order to facilitate the downsizing of its business and operations ("Downsizing"), including:

(i) terminating the employment of such of its employees or temporarily laying off such of its employees, as it deems appropriate;

. . . . .

all without interference of any kind from third parties, including its landlords and notwithstanding the provisions of any lease, mortgage other instrument or law affecting or limiting the rights of the Petitioner to move or liquidate Assets from leased premises, and may take any Downsizing steps at any time after the Filing Date irrespective of whether or not payments have been made subsequent to the Filing Date under any lease or mortgage, provided that the financial obligations, if any, of the Petitioner to creditors affected by such Downsizing shall be provided for and dealt with in the Plan of Arrangement to be filed by the Petitioner.

[Emphasis added]

5 By final order in the *CCAA* proceedings, pronounced June 23, 2006, the court approved West Bay's Plan. All claims falling within the definition of "Claim" in Article 1.1 of the Plan were compromised as against West Bay and others:

"Claim" means a claim for an amount alleged by a person to be owed to it by the Company, or a claim in relation to any obligation, enforceable right, duty or liability, contingent, accrued, vested or otherwise, (including any claim whether contingent or accrued on behalf of Her Majesty the Queen in right of the Dominion of Canada or any Province or any municipality) against the Company which was in existence in whole or in part as of the Filing Date, including any claim in relation to any liability, loss or damage arising from any such claim after the Filing Date, or any cause of action against the Company or its assets and property calculated either as at the Filing Date, or, in the case of claims under executory contracts arising subsequent to the Filing Date as a result of the termination of such contracts in accordance with an order of the Court made prior to the date of the Meeting, as at the date of such termination, either:

(a) as set forth in a Proof of Claim which has either:

(i) been admitted by the Company pursuant to the Plan for all purposes; or

(ii) been determined by a Court of competent jurisdiction to be a proper obligation of either or both of the Company; or

(b) for which a valid Proof of Claim could have been filed with the Company, but which Proof of Claim was not so filed prior to the Claims Bar Date;

provided that a Claim shall not include the amount due or accruing due to a Post Filing Creditor in respect of Post Filing Creditor Claims, nor shall the Claim include interest for the period subsequent to the Filing Date.

[Emphasis added]

The Reasons of the Chambers Judge

6 The chambers judge held that Mr. Esau's claim for damages for wrongful dismissal was a "contingent liability" at the Filing Date, and, as such, fell within the definition of "Claim" in the Plan. She relied on two superior court decisions, *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 21 B.C.L.R. (3d) 91 (B.C. S.C.), and *Rizzo & Rizzo Shoes Ltd., Re* (1991), 6 O.R. (3d) 441 (Ont. Gen. Div.), aff'd. (on other grounds), [1998] 1 S.C.R. 27 (S.C.C.), in concluding that the claim for damages for breach of Mr. Esau's employment contract accrued from the outset of his employment, and was therefore a liability of West Bay at the Filing Date.

7 The chambers judge ordered that Mr. Esau's claim was a "pre-filing claim" and was compromised by the Plan. She permanently stayed the action, and refused to grant Mr. Esau an extension of time to file a Proof of Claim.

8 Her reasons may be found at *West Bay SonShip Yachts Ltd., Re*, 2007 BCSC 1553, 37 C.B.R. (5th) 253 (B.C. S.C. [In Chambers]).

Issues on Appeal

9 On appeal, the parties joined issue on two alternative interpretations of the definition of "Claim" in the Plan, under which Mr. Esau's claim for damages for wrongful dismissal may be considered to be a "pre-filing claim": if it was a contingent liability at the Filing Date, or it was a claim under an executory contract.

10 Thus, there are two issues in this appeal:

1. Is a wrongful dismissal claim a contingent liability prior to the termination of employment?

2. Is an employment contract an executory contract?

Analysis

Contingent Liability

11 Mr. Esau takes the position that his claim for damages for breach of his employment contract did not ac-

crue throughout his employment, but only arose when he was terminated. Thus, he argues, West Bay had no liability, contingent or otherwise, until the termination of his employment, which occurred after West Bay filed for protection under the *CCAA*. Thus, he says, his claim for damages is not compromised by the Plan.

12 West Bay argues that while Mr. Esau's right to bring an action for damages for wrongful dismissal may not have crystallized until notice of termination was given, West Bay's obligation to pay severance was in existence "in whole or in part" as of the filing date. Thus, Mr. Esau's claim for damages for wrongful dismissal is a pre-filing claim and is compromised by the Plan.

13 Both *Eland Distributors* and *Rizzo & Rizzo Shoes Ltd., Re*, relied on by the chambers judge and West Bay, dealt with severance under employment standards legislation. The present case, however, involves a common law claim for damages for wrongful dismissal. As explored in three recent decisions of the British Columbia Employment Standards Tribunal, citing the decision of the Supreme Court of Canada in *Crabtree (Succession de) c. Barrette*, [1993] 1 S.C.R. 1027 (S.C.C.), this distinction is significant.

14 In *Sitter, Re*, [2000] B.C.E.S.T.D. No. 515 (B.C. Empl. Stnds. Trib.) at paras. 11 and 14, the adjudicator drew the following distinction between statutory and common law claims:

> Compensation for length of service payable under section 63 of the [*Employment Standards*] *Act* is a form of deferred contingent compensation that is intended "to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment ends" (see *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27). Consistent with it being a service-based benefit, the amount of compensation for length of service payable by an employer increases in lock-step with an employee's tenure. However, "an amount payable in lieu of [contractual] notice does not flow from services performed for the corporation, but rather from the damage arising from non-performance of a contractual obligation to give sufficient notice" (see *Barrette v. Crabtree Estate*, [1993] 1 S.C.R. 1027).
>
> . . . . .
>
> "Wages", as defined in section 1 of the Act, includes monies payable as compensation for length of service. Since compensation for length of service represents compensation for "years of service" (see *Rizzo*, supra.) it is, in fact, deferred compensation that is paid for "work" (see definition, section 1). On the other hand, damages for breach of a contractual notice provision are not paid for "work" but, rather, are paid (subject to mitigation) for "non-performance of a contractual obligation to give sufficient notice" (*Barrette*, supra.). An employee's right to sue for damages for breach of contract, even though the proper amount of compensation for length of service has been paid to the employee, is preserved by section 118 of the Act.
>
> [Emphasis added]

15 This view was affirmed in *Rupert Title Search Ltd., Re*, [2003] B.C.E.S.T.D. No. 70 (B.C. Empl. Stnds. Trib.) at paras. 25 and 32, and in *Taylor, Re*, [2003] B.C.E.S.T.D. No. 82 (B.C. Empl. Stnds. Trib.) at para. 11. In *Rupert Title Search*, the Tribunal described the statutory liability of an employer as "an 'earned' benefit to the employee that accumulates as the length of service of the employee increases", and distinguished this "length of service compensation" from common law damages for wrongful dismissal.

16 *Sitter*, *Rupert Title Search Ltd.*, and *Taylor* were recently approved by this Court in *Colak v. UV Systems Technology Inc.*, 2007 BCCA 220, 66 B.C.L.R. (4th) 373 (B.C. C.A.), at paras. 5-7. Madam Justice Huddart, for

the Court, held that the Tribunal's understanding of the *Employment Standards Act*, R.S.B.C. 1996, c. 113, and the distinction between statutory compensation payments and reasonable notice under an employment contract "merits respect". Common law claims for damages for wrongful dismissal are distinguishable from statutory claims for severance under employment standards legislation in terms of how they arise and are calculated.

17 It is not necessary for the purpose of this appeal to determine whether a statutory claim for severance is properly characterized as a contingent liability prior to termination of employment. For present purposes, it is sufficient to conclude that *Eland Distributors* and *Rizzo & Rizzo Shoes Ltd., Re* do not assist in the analysis of Mr. Esau's claim.

18 The first step in determining whether Mr. Esau's claim for damages for breach of his employment contract represents a contingent liability is to consider the meaning of that term. This was recently discussed by the Supreme Court of Canada in *McLarty v. R.*, 2008 SCC 26, [2008] 2 S.C.R. 79 (S.C.C.) at paras. 17-18, where Rothstein J. for the majority referred to the "well-accepted test for a contingent liability" as that described by Lord Guest in *Winter v. Inland Revenue Commissioners*, [1963] A.C. 235 (U.K. H.L.) at 262:

> I should define a contingency as an event which may or may not occur and a contingent liability as a liability which depends for its existence upon an event which may or may not happen.

19 Similarly, *Black's Law Dictionary*, 8th ed. 2004, defines contingent liability as a "liability that will occur only if a specific event happens; a liability that depends on the occurrence of a future and uncertain event."

20 For financial reporting purposes, threatened and pending litigation are considered to be contingent liabilities of a company: *Institute of Chartered Accountants Handbook*, looseleaf (Toronto: Canadian Institute of Chartered Accountants, 1981) at s. 3290; Errol C. Soriano, *Understanding Financial Analysis in Litigation* (Scarborough: Carswell, 2004) at 64-65; *Levy-Russell Ltd. v. Shieldings Inc.* (2004), 48 B.L.R. (3d) 28 (Ont. S.C.J. [Commercial List]) at para. 126. That is, threatened or pending litigation is characterized as a contingent liability. Actual liability will arise only when there is a judgment against the company.

21 The question that arises in this case is whether the existence of a contractual obligation, and the corresponding potential for a claim for damages for its breach, is a contingent liability of the party who may commit the breach. I conclude that, although there is the potential of a claim for damages, there can be no liability, contingent or otherwise, where there is no present cause of action. That is, until there is a breach of contract, there is no legal basis for any claim or any corresponding liability.

22 This conclusion finds support in the following definition of "liability" from *Royal Trust Co. v. H.A. Roberts Group Ltd.*, [1995] 4 W.W.R. 305 (Sask. Q.B.) at para. 119:

> These statutory provisions [s. 125(1) and (3) of *The Land Titles Act*] envisage three kinds of obligations that can be secured by a registrable mortgage: a debt, a loan, or a liability that is future or contingent. No case was cited to me that clarifies what is meant by these terms used in s. 125. The term "liability" is a broad term and is most often used to describe an unliquidated or unspecified legal obligation which arises due to negligence, breach of contract, etc. The term "debt" is a narrower term and means a specific kind of obligation for a liquidated or certain sum incurred pursuant to an agreement. The term "loan" is even narrower and means a specific type of debt. [emphasis added]

23 Further support can be found in the American case of *Grant-Howard Associates v. General Housewares*

Corp., 472 N.E.2d 1 (U.S. N.Y. Ct. App. 1984) at 3-4, approved in *Climatrol Industries, Inc. v. Fedders Corp.*, 501 N.E.2d 292 (U.S. Ill. Ct. App. 1 Dist. 1986), at 294-295, in the context of a product liability claim:

> An uninjured party simply is not a "contingent liability" in the usual sense of that term (see, e.g., Black's Law Dictionary [5th ed.], p. 291 ["A potential liability; e.g. pending lawsuit"]). There is no liability or claim before injury occurs. Granted that "contingency" invokes uncertain events, the uncertainty should be restricted to the success of asserting an existing claim, rather than expanding it to include the altogether unpredictable event that an injury will occur. [emphasis added]

24 I conclude that the liability to pay damages if an employment contract is breached for failing to give reasonable notice of termination is not a contingent liability within the ordinary meaning of that term. Until the termination of employment without adequate notice, there is no injury. The possibility of a breach of contract is not sufficient to give rise to a contingent liability.

25 Therefore, Mr. Esau's wrongful dismissal claim did not accrue from the outset of his employment and it did not represent a contingent liability of West Bay at the Filing Date. Consequently, Mr. Esau's claim is not a pre-filing claim on this basis.

Executory Contract

26 West Bay argues in the alternative that Mr. Esau's contract of employment was an executory contract. As a result, it maintains that his claim for damages for its termination after the Filing Date and before the date of the meeting of General Creditors to approve the Plan on June 12, 2006 (the "Meeting"), was a "Claim" within the meaning of, and compromised by, the Plan. It says that the characterization of an employment contract as an executory contract is consistent with the legal definition of executory contracts and the purpose of the *CCAA*.

27 Mr. Esau submits that when his employment contract was terminated it was not an executory contract because the only remaining performance to be tendered was the payment of money. He cites in support of his argument *U.S. Metalsource Corp., Re*, 163 B.R. 260 at 269, in which it was held that where the only obligation of the debtor was the obligation to pay severance pay to terminated employees, "[t]his type of contractual duty to pay a debt is insufficient to create an executory contract."

28 If the contract was an executory contract at the Filing Date, however, a claim arising subsequent to that date as a result of termination of the contract is a "Claim" as of the date of termination. That is, if Mr. Esau's contract of employment was an executory contract at the Filing Date, his claim for damages for wrongful dismissal, arising as a result of his termination subsequent to that date and before the Meeting, became a "Claim" as of the date of termination.

29 Thus, the question is whether a contract of employment such as Mr. Esau's, under which he promised to render services in return for West Bay's promise to pay him, was an executory contract at the Filing Date.

30 The Alberta Court of Appeal recently considered the meaning of "executory contract" in *Kary Investment Corp. v. Tremblay*, 2005 ABCA 273 at para. 19, 371 A.R. 339 (Alta. C.A.):

> A contract is said to be executory if anything remains to be done under it by any party, and executed when it has been wholly performed by all parties: *Halsbury's Laws of England*, 4th ed. reissue, vol. 9(1) (London: Butterworths, 1998) at 341, para. 606; *S. W. Mackay & Associates Ltd. v. Park Lane Ventures Ltd.* (1997),

32 B.C.L.R. (3d) 338 at para. 8 (S.C.).

[Emphasis added]

31 In "*A Joint Report of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals — Joint Task Force on Business Insolvency Law Reform — March 15, 2002*", the authors cited the following meanings for "executory contract":

> What is an executory contract? Neither the CCAA nor the BIA use the expression, but the United States Bankruptcy Code does in s. 365 ("Code, s. 365"). In general contract law, "executory contract" means a contract under which one or both parties still have obligations to perform. However, in U.S. bankruptcy law the expression is normally given a narrower meaning. According to the most widely accepted definition in the United States, an executory contract for the purposes of Code s. 365 is:
>
> > a contract under which both the obligations of the bankrupt ["A"] under the contract and the other party to the contract ["B"] are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.
>
> (Countryman, "Executory Contracts in Bankruptcy" (1974) 57 *Minnesota Law Review* 439 (Part 1), at 460).

32 The authors included an employment contract as an executory contract in this sense. See also: *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*, a Report of the Standing Senate Committee on Banking, Trade and Commerce, November 2003, at 131, and Janis Sarra, *Rescue!: The Companies' Creditors Arrangement Act* (Toronto: Carswell, 2007) at 177-178, where employment contracts were characterized as executory contracts in the context of the discussion of insolvency laws. Professor Sarra noted (at 178-179) that damage claims resulting from termination or repudiation of executory contracts after the initial order are unsecured claims for damages.

33 None of these sources discussed the application of the U.S. definition of executory contract for bankruptcy purposes to an employment contract. It is not clear to me, because of the nature of the employment relationship, that that definition will generally apply. As a matter of contract law, if the employee fails to provide the promised services, or the employer fails to pay for services rendered, subject to any other terms of the contract, that would ordinarily be a material breach excusing the performance of the other party. Whether that conclusion would ordinarily apply to an employment contract is, however, a question I do not need to decide for the purposes of this case. The ordinary legal definition of executory contract covers these circumstances.

34 An ongoing employment contract, under which an employee has promised to render services in return for the employer's promise to pay for those services, is an executory contract as there are obligations on both parties that are yet to be completed. Thus, Mr. Esau's employment contract was, at the Filing Date, an executory contract.

35 Accordingly, Mr. Esau's claim against West Bay for damages for wrongful dismissal fell within the definition of "Claim" in the Plan.

36 That Mr. Esau's rights arising on termination of his employment contract were compromised under the Plan is consistent with the purpose of the *CCAA*, as recently considered by this Court in *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at para. 34:

...[C]ourts appear to have given full effect to the "broad public policy objectives" of the [CCAA], which in the phrase of a venerable article on the topic (Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", (1947) 25 *Can. Bar Rev.* 587) are to "keep the company going despite insolvency" for the benefit of creditors, shareholders and others who depend on the debtor's continued viability for their economic success. As the author commented:

> Hon. C.H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation through reorganization to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often the sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders. Reorganization may give to those who have a financial stake in the company an opportunity to salvage its intangible assets. To accomplish this they must ordinarily give up some of their nominal rights, in order to keep the enterprise going until business is better or defects in the management can be remedied. This object may be furthered by providing in the reorganization plan for such matters as a shift in control of the company or reduction of the fixed charges to such a degree as to make it possible to raise new money through new issues of bonds or shares. It may therefore be in the interest of all parties concerned to give up their claims against an insolvent company in exchange for new securities of lower nominal amount and later maturity date.
>
> [Emphasis added]

37 The Plan permitted West Bay to rationalize its business affairs with a view to a reorganization that would make it viable in the future. The stated purpose of the Plan was to allow West Bay to "settle payment of its liabilities arising both before and after the Filing Date and to compromise the indebtedness owed to Creditors of the Company on a fair and equitable basis" (Plan, s. 2.1). It needed to retain its employees in order to complete existing orders for the construction of yachts, and to use the sale proceeds from the yachts to fund payments to its creditors on a compromised basis, on the basis that all of its creditors would "derive a greater benefit from the Plan than would result from the bankruptcy of the Company and so as to allow the Company to continue in business in the future". West Bay's tangible assets were sold to a related company to provide cash to further fund payments to creditors. It was intended that the company would remain in business using a revised production financing model, using private capital raised after the effective date of the Plan.

38 In *Skeena*, the issue addressed by the Court was whether the termination of replaceable forest contracts, which could have "disastrous consequences for many individuals, local governments and communities", supplanted the intent and purpose of the *CCAA* to stave off a bankruptcy. The Court upheld the trial judge's decision [2002 CarswellBC 2032 (B.C. S.C.)] that terminated employees were not to be placed in a better position than other creditors (at para. 22), and noted that "[i]n the exercise of their 'broad discretion' under the CCAA, it has now become common for courts to sanction the indefinite, or even permanent, affecting of contractual rights" (at para. 37). In considering whether the arrangement under the *CCAA*, as a whole, was "fair, reasonable and equitable", the Court noted that "equity" is not necessarily "equality" and that the courts looks to all of the creditors to see if rights are compromised in an attempt to balance interests (at para. 59). The Court concluded (at para. 60):

> As the Chief Justice noted, many individuals and corporations, as well as the Province, incurred major losses under the Plan. Each of them might also ask "Why me?" However, as he also noted, that is a frequent and unfortunate fact of life in CCAA cases, where the only "upside" is the possibility that bankruptcy and even greater losses will be averted.

Mr. Esau's Claim

39 Mr. Esau's claim was thus subject to the terms of the Plan, which required creditors to file a "Proof of Claim" in accordance with the procedure and before the times set out in the relevant court orders. Mr. Esau did not file a Proof of Claim at any time. He did not receive a "Proof of Claim Package", as did other creditors, providing notice to file a Proof of Claim. However, West Bay published the notice to creditors, as ordered by the court, in the Vancouver Sun, and on its website. Mr. Esau was advised, through his counsel, that he was not entitled to bring an action against the company because of the stay of proceedings, that his claim as a creditor was compromised in the Plan, and that he could apply for an extension of time to file a Proof of Claim.

40 In West Bay's application that is the subject of this appeal, it sought an order extending the time for Mr. Esau to file a Proof of Claim. It was only during the hearing of West Bay's application that Mr. Esau took the position that the time should be extended.

41 The chambers judge denied the application for the extension of time, after considering the factors enumerated in *Blue Range Resource Corp., Re*, **2000 ABCA 285, 271 A.R. 138** (Alta. C.A.) at para. 26:

> 1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
>
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
>
> 3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
>
> 4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

42 She concluded that the delay was significant, and was not caused by inadvertence. She further concluded that permitting the claim would result in prejudice that could not reasonably be alleviated (at paras. 32-36).

43 The chambers judge's decision to deny an extension of time to file a Proof of Claim was discretionary, reviewable by this Court only if it was clearly wrong or has worked a substantial injustice: see *Mueller v. Coronation Insurance Co.* (1995), 12 B.C.L.R. (3d) 90 (B.C. C.A.).

44 Mr. Esau has not shown that the chambers judge's decision was clearly wrong, and she was in the best position, as the judge supervising the *CCAA* proceedings, to weigh the relative prejudice to all parties if his claim was allowed to be litigated while all other matters involving West Bay's creditors had been finalized.

45 I see no basis to interfere with the chambers judge's decision not to extend the time to file the Proof of Claim.

2009 CarswellBC 139, 2009 BCCA 31, [2009] B.C.W.L.D. 1229, [2009] B.C.W.L.D. 1230, 71 C.C.E.L. (3d) 45, 49 C.B.R. (5th) 159, [2009] 4 W.W.R. 415, 89 B.C.L.R. (4th) 82, 265 B.C.A.C. 203, 446 W.A.C. 203, 306 D.L.R. (4th) 294

Conclusion

46 Mr. Esau's claim for damages for wrongful dismissal was a claim under an executory contract, and as such was stayed and compromised by the *CCAA* proceedings. There is no basis to interfere with the chambers judge's decision not to extend the time to file a Proof of Claim, nor to consider Mr. Esau's claim for misrepresentation.

47 It follows that I would dismiss the appeal.

***Rowles J.A.*:**

I agree.

***Groberman J.A.*:**

I agree.

Appeal dismissed.

END OF DOCUMENT

TAB L

1932 CarswellOnt 28, 13 C.B.R. 518, [1932] O.R. 245, [1932] 2 D.L.R. 688

1932 CarswellOnt 28, 13 C.B.R. 518, [1932] O.R. 245, [1932] 2 D.L.R. 688

Trusts & Guarantee Co. v. Brenner

Trusts and Guarantee Company Limited v. Brenner et al.

Ontario Court of Appeal

Magee, Hodgins and Riddell, JJ.A.

Judgment: March 11, 1932

Counsel: *I. F. Hellmuth, K.C.*, and *L. Kert*, for the defendant Brenner.

R. S. Robertson, K.C., for the defendant Stobie, Forlong & Company.

D. L. McCarthy, K.C., and *I. Levinter*, for the plaintiff.

Subject: Corporate and Commercial; Insolvency; Property; Contracts; Civil Practice and Procedure; Torts; Securities

Bailment and Warehousing --- Bailee's liability for conversion.

Bankruptcy --- Proving claim — Provable debts — Conversion.

Bankruptcy --- Effect of bankruptcy on other proceedings — Proceedings against bankrupt — Before discharge of trustee — Effect of failure to obtain bankrupt — Leave nunc pro tunc.

Securities and Commodities --- Broker and customer — Duties of broker — Accounting — General.

Torts --- Conversion — Waiver of tort.

Stockbrokers — Bankruptcy of — Action Against for Damages for Wrongful Conversion — For Breach of Trust — For Proceeds of Sales of Stocks — Action Without Leave — Judgment for Plaintiff — Appeal — Debt Provable in Bankruptcy — Leave to Bring Action Nunc Pro Tunc — Terms — Settlement Suggested by Court — The Bankruptcy Act, Secs. 2(p), 24, 104(2), 147, 9 C.B.R. 20, 78, 213, 298.

Certain stock had been purchased on margin by one Miller through a firm of brokers but some time prior to his death owing to ill health it was deemed advisable to transfer this stock and accordingly a document was signed by Miller directing the brokers to transfer all the stock held to one Brenner or his agents. Brenner arranged a transfer of this stock in May 1928 from this firm of brokers to Stobie Forlong & Company, the latter firm paying the amount necessary to obtain the transfer and taking over the stock to hold for Miller. Early in June 1928 owing apparently to margin calls, on the direction of Brenner and Miller's son the stock was sold and realized $41,822 over the amount owing on the stock. Instead of accounting to the owner for the surplus, on instructions from Brenner and Miller's son the brokerage firm

bought and sold stock with it, the surplus being frittered away. Miller died in 1929 and in May, 1930, the plaintiff, as executor and trustee of Miller's estate, brought action against the brokerage firm and Brenner claiming (a) an accounting in respect of all dealings between Miller and the defendants, (b) damages for wrongful conversion, breach of contract, fraud and fraudulent breach of trust, or, in the alternative, (c) judgment for the amount found due to Miller at the time of the transfer of the account to the defendants, or, in the alternative, (d) judgment requiring the defendants to account for the proceeds of the sales of the stock and judgment for such amount plus the value of shares of a certain stock.

The judgment of Logie, J., at the trial was in favour of the plaintiff and an appeal was taken by all defendants.

In the statement of defence of the brokerage firm it was set up that it had made an assignment in bankruptcy and that therefore the plaintiff could not proceed. On the appeal the plaintiff asked for leave *nunc pro tunc* for the institution of the action.

Held, that there can be no doubt as to the right of the plaintiff to claim against the bankrupt estate the sum mentioned in the judgment and it would be a waste of money to require it to establish its claim in bankruptcy but if the amount of the judgment is to stand it must be on the following terms:

(1) it must be considered only as a claim in bankruptcy against the estate and have no further or other effect;

(2) the other defendant, Brenner, must be considered in the same position as if the action had been only against him;

(3) the plaintiff should pay the costs, including the costs of this appeal so far as the brokers are concerned (the objection as to jurisdiction was raised by the defence of the brokers; and the plaintiff proceeded in the face of that objection).

The plaintiff declining these terms, the appeal of the brokers should be allowed with costs and the action dismissed with costs, without prejudice to proceedings being taken in bankruptcy.

Per Riddell, J.A. — "It is, of course, elementary that when a bailee, agent or otherwise, sells property without authority, the owner has one of two courses to take, but not both; he may claim in tort for conversion; or he may waive the tort, and claim the proceeds as money had and received to his use; if he takes the latter course, he cannot then resort to the former (*Smith v. Baker* (1873), L.R. 8 C.P. 350, especially pp. 355, 356, 357, 42 L.J.C.P. 155, where it is held that where 'the plaintiff claimed the proceeds of the sale in a judicial proceeding' he could not 'treat the sale as a tortious act, and *** demand *** the value of the goods and any damages resulting *** from such tortious act').

As will be seen, an express claim is made in the present case that the surplus from the sale, a credit of Miller's, was wrongfully converted by the defendants, i.e. that this money having belonged to Miller was improperly used by them, agents of Miller, and misapplied to their own use. It is plain, I think, that there is here a waiver of the tort and a claim for the proceeds, less, of course, the amount which the brokers were entitled to deduct from the proceeds, as being the amount unpaid by Miller; and that is the amount given them by the judgment appealed from; and, apparently, on that basis. That the brokers are liable to the plaintiff for the amount of this surplus is quite clear, and, indeed, is not now disputed; consequently, if the action is maintainable in this Court, the appeal of the brokers cannot succeed.

But even if the claim against the brokers be considered, notwithstanding the assertion of claim to the proceeds of the sale of the stock, an action in tort, the foundation of the claim is a 'liability *** to which the debtor — sec. 2(p) — is subject at the date of the receiving order', and arising by reason of a contract (of agency or bailment) or breach of trust; such a liability comes within the express words of sec 104(2) as a 'debt provable in bankruptcy'.

Held, that, as to the defendant Brenner, the plaintiff suffered some damage and the true amount should be determined

upon a reference, the costs of the appeal to be allowed to him, the costs of the action and previous trial to be allowed to the plaintiff.

It was suggested by the Court that if all parties agreed, a proper disposition of the whole case would be that the plaintiff be declared entitled to rank upon the bankrupt estate for $41,822 and interest from the day of the sale of the stock; and against Brenner for the difference between this amount and the amount to be received in the bankruptcy proceedings. The costs of action and appeal to be to the brokers; costs of action and trial to the plaintiff against Brenner, but costs of this appeal to Brenner against the plaintiff.

Riddell, J.A. **(delivering the judgment of the Court):**

1 The late Harry Miller was for some time before his death incapable of transacting business; he had bought through a firm of brokers in Toronto, certain stock, which had not been paid in full, and was being held by the brokers, Messrs. A. E. Pierce & Co., "on margin" for him. It was deemed advisable to transfer this stock; and a document was signed by Miller directing the brokers "to transfer all the stock which you now hold for me to Meyer Brenner or his agents," with a following direction of no significance in the present case, — Meyer Brenner was a "customers' man" with the Stobie, Forlong firm of brokers in Toronto receiving half the commission on the orders he secured for stock for this firm; and had rooms adjoining theirs. He was a relative of Miller's and had been looking after his business as a trader in stock; and he in May, 1928, arranged a transfer of the stock in question from the Pierce firm to the Stobie, Forlong firm — this firm paid the amount necessary to obtain this transfer, and took over the stock to hold for Miller. We may omit certain technical difficulties in this transfer as it is not complained of on any hand; all parties are content with the situation that the new firm came properly into possession of the stock, and properly held it for Miller.

2 Early in June, 1928, apparently, a call was made for further margin, as the stock was going down; and Brenner in agreement with Ben Miller, the son of the Harry Miller whose stock was in question, directed the Stobie firm to sell the stock. This they did, and realized $41,822 over and above the amount owing on the stock by the elder Miller. It is not disputed by any party that the brokers should have accounted to the owner of the stock for this surplus. Instead of so doing, they took instructions from Ben Miller and Brenner, acting in concert, and bought and sold stock with this surplus, with the result that it was frittered away.

3 Harry Miller died in 1929; and the present plaintiff was appointed executor and trustee of his estate.

4 May 27, 1930, this action was begun, the defendants being Brenner and the members of the Stobie, Forlong firm. The statement of claim after formal allegations, and saying that the stock in question was transferred to the Stobie, Forlong firm, Miller having at that time an "interest or equity in it *** in excess of $70,000," goes on to allege:

> 8. In or about the early part of June, 1928, without authority, instructions or consent from the said Harry Miller, in breach of faith, and duty, the said defendants, Meyer Brenner and Stobie, Forlong & Company wrongfully, fraudulently and illegally commenced to trade with the said stock above referred to with the exception of 100 shares of Muirhead Cafeteria Limited and to wrongfully, fraudulently and illegally deal with the same on their own initiative and without the consent or authority of the said Harry Miller, wrongfully, fraudulently and illegally sold and disposed of the said stocks and wrongfully, fraudulently and illegally misapplied the proceeds of the said stocks and converted them to their own use.
>
> 9. The plaintiffs allege and the fact is that after the wrongful and fraudulent disposition and conversion of the said stocks were made, there was a credit in favour of the said Harry Miller in a sum approximating $42,000 plus 100 shares of Muirhead Cafeteria Limited, after allowing for any moneys that may have been owing thereon, which said amount was wrongfully converted by the defendants.

10. The plaintiffs allege and the fact is that the defendants are responsible for the proceeds of the sale of the said stock in the said account, as having made profits or gain therefrom as agents of the said Harry Miller.

11. The plaintiffs allege and the fact is that the said cause of action arose by reason of the fraud and fraudulent breach of trust on the part of the said Malcolm Stobie and Charles J. Forlong and Meyer Brenner.

12. The plaintiffs therefore claim, —

(a) An accounting from the defendants in respect of all dealings between the said Harry Miller and defendants, Meyer Brenner and Stobie, Forlong & Company and for this purpose that all necessary references be had and accounts taken.

(b) Damages for wrongful conversion, breach of contract, fraud and fraudulent breach of trust, or in the alternative,

(c) Judgment for the amount found due to the said Harry Miller at the time of the transfer of the said account from E. A. Pierce & Company to the said defendants, or in the alternative,

(d) Judgment requiring the defendants to account for the proceeds of the sales of the said stock and judgment for such amount plus the value of 100 shares of Muirhead Cafeteria Limited or the recovery of the said 100 shares of Muirhead Cafeteria Limited.

(e) The costs of this action.

(f) Such further and other relief as the nature of the case may require.

5 It is obvious that the claim is that (a) the brokers were in possession of stocks belonging to Harry Miller, (b) that they and Brenner wrongfully sold it, (c) that there was a balance after paying the indebtedness of Miller, of the proceeds of the sale amounting to about $42,000, (d) that this sum "was a credit in favour of *** Miller," (e) the brokers were therefore in possession of some $42,000 "as agents of *** Miller," (f) that the brokers and Brenner "as agents of *** Miller," are responsible for the proceeds of the sale of the said stock. Having thus described the cause of action, the plaintiff adds (g) "that the said cause of action arose by reason of the fraud and fraudulent breach of trust on the part of" the defendants.

6 "The said cause of action," it seems to me, is plainly the improper use of the "credit" of Miller, by the defendant; and this impropriety is charged as being a "fraud and fraudulent breach of trust" by the agents of Miller. Then as to what is sought in the action, there is claimed (a) an accounting from the defendants, of course, as such agents, and judgment for the amount due to Miller or for the proceeds of the sale of stock, etc. — these are wholly proper claims to be made of agents into whose hands the money of Miller came. Then is superadded a claim for damages based upon the alleged torts. Apparently we are not to look upon the words "fraud," etc., as mere "vituperative epithets" like "gross" in "gross negligence": *Wilson v. Brett* (1843), 11 M. & W. 113, at pp. 115, 116, 12 L.J. Ex. 264; *Grill v. General Iron Screw Colliery Co.* (1866), L.R. 1 C.P. 600, 35 L.J.C.P. 321; but an aggravation of the improper conduct of the agents, which calls for the award of damages in addition to the amount for which they, as such agents must account to the representative of their principal.

7 The learned trial Judge finds Brenner guilty of fraud, but does not find this against the brokers; and I have no hesitation in saying that the evidence would not justify such a finding; consequently, if the judgment as against the brokers in appeal rests upon any such basis, it cannot stand, and should be set aside on the merits with costs.

8 But it is not necessary to appeal to any such alleged cause of action; it is evident that the brokers were in possession of certain property of Miller and that, without lawful authority, they sold it. However honestly this was done it was improper and illegal.

9 It is, of course, elementary that when a bailee, agent or otherwise, sells property without authority, the owner has one of two courses to take, but not both; he may claim in tort for conversion; or he may waive the tort, and claim the proceeds as money had and received to his use; if he takes the latter course, he cannot then resort to the former (*Smith v. Baker* (1873), L.R. 8 C.P. 350, especially pp. 355, 356, 357, 42 L.J.C.P. 155, where it is held that where "the plaintiff claimed the proceeds of the sale in a judicial proceeding" he could not "treat the sale as a tortious act, and *** demand *** the value of the goods and any damages resulting *** from such tortious act").

10 As will be seen, an express claim is made in the present case that the surplus from the sale, a credit of Miller's, was wrongfully converted by the defendants, i.e., that this money having belonged to Miller was improperly used by them, agents of Miller, and misapplied to their own use. It is plain, I think, that there is here a waiver of the tort and a claim for the proceeds, less, of course, the amount which the brokers were entitled to deduct from the proceeds, as being the amount unpaid by Miller; and that is the amount given them by the judgment appealed from; and, apparently, on that basis. That the brokers are liable to the plaintiff for the amount of this surplus is quite clear, and, indeed, is not now disputed; consequently, if the action is maintainable in this Court, the appeal of the brokers cannot succeed. But it was set up in the statement of defence of these defendants that they made an assignment in bankruptcy, and that, therefore, the plaintiff cannot proceed in this Court. This objection is based upon sec. 24 of *The Bankruptcy Act* [9 C.B.R. 78], which reads:

> On the making of a receiving order or authorized assignment, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor or shall commence or continue any action, execution or other proceedings for the recovery of a debt provable in bankruptcy unless with the leave of the court and on such terms as the court may impose.

11 The expression "debt provable in bankruptcy" is defined by sec. 104(2) [9 C.B.R. 213], thus:

> Save as aforesaid, all debts and liabilities, present or future, to which the debtor is subject at the date of the receiving order or the making of the authorized assignment or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order or of the making of the authorized assignment, shall be deemed to be debts provable in bankruptcy or in proceedings under an authorized assignment.

12 The exceptions referred to appear in sec. 104 [9 C.B.R. 213] expressed in this language:

> Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy or in proceedings under an authorized assignment.

13 If my interpretation above of the cause of action which alone can succeed here is correct, it is beyond controversy, a "debt provable in bankruptcy"; and consequently under sec. 24, should not have been begun (as the writ was tested after the assignment in bankruptcy) and should not have been proceeded with.

14 But even if the claim against the brokers be considered, notwithstanding the assertion of claim to the proceeds of the sale of the stock, an action in tort, the foundation of the claim is a "liability *** to which the debtor — sec. 2(*p*) [9 C.B.R. 20] — is subject at the date of the receiving order," and arising by reason of a contract (of agency or bailment) or breach of trust; such a liability comes within the express words of sec. 104(2) as a "debt provable in bankruptcy."

15 It is wholly unnecessary, therefore, to enter into a discussion, as to what would be the position were the Act less clear; for the cases, see 1 C.E.D. (Ont.), p. 499 and notes.

16 The case of *Parker v. Crole* (1828), 5 Bing. 63, 2 Moo. & P. 150, 6 L.J.C.P. 229, 130 E.R. 983, was strongly urged as authority that a fraudulent breach of trust was not a wrong to be entertained in bankruptcy. That case, however, while it might be conclusive were it not for the definition in our Act, is of no significance here, as it was an interpretation of an Act which dealt only with "debts arising out of a contract of the parties"; and, as was said by Best, C.J. (5 Bing. at p. 70), quoting from Grose, J., in *Parker v. Norton* (1796), 6 Term. Rep. 700: "This is not a debt arising out of any contract of the parties, but, if it be a debt at all, it arises out of the misconduct of the Defendant." Were the same words used in our Act as in the Act of 5 Geo. II, ch. 30 (Imp.), we should, no doubt, feel bound by this case; but as things are, it is *nihil ad rem.*

17 Nor does the language of sec. 147 (1*b*) [9 C.B.R. 298-9], providing that "An order of discharge shall not release the bankrupt *** from any debt or liability incurred by means of any fraud or fraudulent breach of trust ***" forbid the proof of such a claim in bankruptcy; rather, as pointed out by Cave, J. (afterwards L.C.), in *Jack v. Kipping* (1882), 9 Q.B.D. 113, at p. 117, 51 L.J.Q.B. 463, "the very expression 'liability incurred by means of fraud' implies that in some cases a liability arising out of a fraud which is not a debt may be proved in bankruptcy." This case was approved and followed in *Tilley v. Bowman Ltd.*, [1910] 1 K.B. 745, see especially p. 752, 79 L.J.K.B. 547.

18 I can find nothing in the facts or the law to exclude the real claim against the brokers from the bankruptcy proceedings. Consequently, in my opinion, the action, trial and judgment are wholly irregular and against the express prohibition of the statute. In strictness, the appeal should be allowed with costs and the action dismissed with costs.

19 But we are asked now to give leave, *nunc pro tunc*, to bring and proceed with the action against the brokers. Were the matter destitute of authority, I should have grave doubts as to our power to accede to this request, so as to validate a proceeding which is expressly forbidden. But the question has received the attention of the Alberta Supreme Court in *Blais v. Bankers' Trust Corpn. Ltd.* (1913), 6 Alta. L.R. 444, 5 W.W.R. 243, 14 D.L.R. 277; and it was held that the commencement of such an action was irregular only and not void; and it was indicated that leave might be given as asked here. It would be unfortunate if the practice in bankruptcy should be different in different provinces; and I would yield to this authority and hold that we have the power claimed for us.

20 There is and can be no doubt as to the right of the plaintiff to claim against the bankrupt estate the sum mentioned in the judgment; it would therefore be a waste of money to require it to establish its claim in bankruptcy by a repetition of the evidence, etc., but on granting leave, we are empowered to do so "on such terms as the Court may impose" (sec. 24 [9 C.B.R. 78]).

21 It would be, I think, wholly improper to allow the plaintiff to enjoy an advantage by taking the prohibited and illegal course, over that it would have had, had it proceeded in the proper forum; it would also be wholly improper to allow it to have an advantage over creditors who have proceeded legally, properly and regularly; also, I think, to allow it to interfere with the rights of others as it could not had it followed the proper course.

22 Consequently, if we allow the amount of the judgment to stand:

23 1. It must be considered only as a claim in bankruptcy against the estate and have no further or other effect;

24 2. The other defendant, Brenner, must be considered in the same position as if the action had been only against him;

25 3. The plaintiff should pay the costs, including the costs of this appeal so far as the brokers are concerned (the objection as to jurisdiction was raised by the defence of the brokers; and the plaintiff proceeded in the face of that

objection, which I think is fatal).

26 The plaintiff declining these terms, the appeal of the brokers should be allowed with costs and the action dismissed with costs, without prejudice to proceedings being taken in bankruptcy.

27 As to the appeal of the defendant Brenner, I think it is quite clear that very considerable evidence was taken and made use of against him which was evidence only against the brokers, and that the amount of damages awarded against him was determined on testimony which was not available as evidence to fix the amount of damages against him. But that there was some damage is clear; and the true amount can be determined upon a reference. He had to come to this Court to obtain his legal rights and he should have the costs of the appeal; the costs of the reference may well be left to the Master; the costs of the action and previous trial should be to the plaintiff as it must succeed in part. This is the result, I think, if the parties are to have their strict rights according to law; and may insist upon it, if so advised. But the parties desiring to save costs, and act reasonably, it seems to me that the situation can be satisfactorily and without unnecessary costs met by considering the facts.

28 I cannot think that a finding of actual fraud should be made against Brenner; it was his duty, when he had directed the brokers to sell the stock, to see to it that the net proceeds were given to the owner; his error, for which he should pay, was in not insisting on such payment over, but instead directing the purchase on Miller's account of other stock. Were that done at the present time, it might be thought to imply fraud; but these were the "flush times" of 1928, when, as is common, — too common — knowledge, every one on the stock market was optimistic, enthusiastically optimistic and it was thought practically impossible to lose. Whether the actions of Brenner come under the appellation of "Constructive Fraud" or not, there does not seem to me to be any ground for holding that he believed that he was not acting in the interests of Miller — it is difficult to see any motive for wilful wrongdoing.

29 However that may be, the real wrongdoing of Brenner was, as things have turned out, the omission to have the net proceeds of the sale turned over to the owner of the stock. The result has been that instead of the estate having the sum of $41,822 and interest, it has only the amount to be realized in the bankruptcy proceedings; and the difference should be paid by Brenner.

30 All parties agreeing, the proper disposition of the whole case would be that the plaintiff be declared entitled to rank upon the bankruptcy estate for $41,822 and interest from the day of the sale of the stock; and against Brenner for the difference between this amount and the amount to be received in the bankruptcy proceedings. The costs of action and appeal to be to the brokers; costs of action and trial to the plaintiff against Brenner, but costs of this appeal to Brenner against the plaintiff.

END OF DOCUMENT

1933 CarswellOnt 66, 15 C.B.R. 112, [1933] S.C.R. 656, [1933] 4 D.L.R. 273

1933 CarswellOnt 66, 15 C.B.R. 112, [1933] S.C.R. 656, [1933] 4 D.L.R. 273

Trusts & Guarantee Co. v. Brenner

Trusts and Guarantee Company Limited, and Dora Miller, as Executors of the last Will and Testament of Harry Miller, deceased (Plaintiffs), Appellants v. Meyer Brenner and Malcolm Stobie and Charles J. Forlong (formerly Stobie, Forlong & Company), (Defendants), Respondents

Supreme Court of Canada

Duff, C.J.C., Rinfret, Lamont, Cannon and Crocket, JJ.

Judgment: June 28, 1933

Counsel: *D. L. McCarthy, K.C.* , and *I. Levinter* , for the appellants.

R. S. Robertson, K.C. , for the respondents, Stobie and Forlong.

L. Kert , for the respondent, Brenner.

Subject: Corporate and Commercial; Insolvency; Property; Civil Practice and Procedure; Torts; Estates and Trusts; Securities

Bankruptcy --- Property of bankrupt — Property in hands of bankrupt agent or broker — Stockbrokers.

Bankruptcy --- Proving claim — Provable debts — Conversion.

Bankruptcy --- Effect of bankruptcy on other proceedings — Proceedings against bankrupt — Before discharge of trustee — Effect of failure to obtain bankrupt — Leave nunc pro tunc.

Securities and Commodities --- Margin transactions — Pledging of customer's securities — Conversion.

Torts --- Conversion — Waiver of tort.

Trusts and Trustees --- Breach of trust — Administration of trust assets — Unauthorized investments.

The Bankruptcy Act, Secs. 2(p), 24, 104(2), 147, 9 C.B.R. 20 , 78, 213, 298.

Appeal by the plaintiffs from the judgment of the Court of Appeal for Ontario, 13 C.B.R. 518 , where the facts are stated in the headnote, on an appeal by the defendants from the judgment of Logie, J., in favour of the plaintiffs at the trial.

On the appeal, the Court gave judgment in favour of the appellants against both parties for $41,822, but directed that

the appellants must undertake not to use the judgment against Stobie, Forlong & Company except as a judgment determining the amount for which they might rank upon the estate of the bankrupt, and then only as *prima facie* evidence of that amount, the appellants to pay the costs of Stobie, Forlong & Company throughout and the defendant Brenner to pay the costs of the appellants throughout.

As to the defendant Brenner, the Court was of opinion there were not sufficient reasons for reversing the finding of the trial Judge, that Brenner had acted fraudulently and stated Brenner was chargeable as having fraudulently brought about the breach of trust. As to the defendant Brenner's position, the Court quoted with approval 28 Hals. 407, where it is said a "person renders himself liable for the consequent loss to the trust estate where he knowingly becomes an active party to a fraudulent or improper disposition of the trust property in breach of the trust affecting it."

As to the defendant Stobie, Forlong & Company, per Duff, C.J.C., "There seems to me no ground for doubting the liability of Stobie, Forlong & Company to account for these moneys as trust moneys *** In my judgment the claim against Stobie, Forlong & Company is a claim arising out of breach of trust and, therefore, unenforceable against them except by leave under sec. 24. *** Stobie, Forlong & Company were plainly not guilty of fraud, and the only charge alleged and proved against them in respect of these moneys is breach of trust, which is clearly established. *** We think that there might have been formidable difficulties in the appellants' way if the action had not been directed against both parties, and that the appellants should have leave *nunc pro tunc* , subject to the conditions to be stated."

Duff, C.J.C. **(concurred in by *Rinfret, Lamont* and *Crocket, JJ.*):**

1 This case has been considered very fully by the Court of Appeal for Ontario, 13 C.B.R. 518, [1932] O.R. 245 . One naturally feels some diffidence in giving effect to views which are not entirely in agreement with that of Judges who are so adequately fitted to deal with such matters; but it is, of course, one's duty to act upon one's own conclusions.

2 There are some findings of fact by the learned trial Judge which are important. The initiation of the transactions out of which the dispute arises was a sale of certain shares held by Stobie, Forlong & Co. for Harry Miller. Harry Miller was at that time incapable of doing business. It is not disputed that Stobie, Forlong & Company were unaware of this, and Meyer Brenner who, as the learned trial Judge found, was acting in concert with one Ben Miller, the son of Harry Miller, was aware of it. Brenner's relation with Stobie, Forlong & Company was that described by the phrase "customer's man." He had an office of his own in the office of Stobie, Forlong & Company. He brought customers to them and received one-half of the commissions which Stobie, Forlong & Company earned on the business so brought them.

3 The initial date is May 9, 1928. On that date and succeeding dates, Stobie, Forlong & Company, acting on the instructions of Brenner, who professed to be proceeding upon the instructions of Harry Miller but had no authority from him, sold shares which had been transferred by Harry Miller from E. H. Pierce & Com pany, his brokers, to Stobie, Forlong & Company. The learned trial Judge has found that the amount realized from these sales, over and above broker's loans, was $41,822. There seems to me no ground for doubting the liability of Stobie, Forlong & Company to account for these moneys as trust moneys. They proceeded on the instructions of Brenner, who was acting without any authority whatever from Harry Miller, who was incapable of doing business during the period, to use these moneys in speculative trading and, admittedly, the result of these operations was that Miller's credit disappeared. A broker is not strictly an express trustee, but the manner in which equity has treated moneys received by a broker from the sales of his client's property may be stated in the words of Lord Parker in *Sinclair v. Brougham*, [1914] A.C. 398 , at pp. 441-2, 83 L.J. Ch. 465:

> Equity *** treated the matter from a different standpoint *** the money in their hands was (treated) for all practical purposes (as) trust money. Starting from a personal equity, based on the consideration that it would be unconscionable for any one who could not plead purchase for value without notice to retain an advantage derived

> from the misapplication of trust money, it ended, as was so often the case, in creating what were, in effect, rights of property, though not recognized as such by the common law.

In my judgment, the claim against Stobie, Forlong & Company is a claim arising out of breach of trust and, therefore, unenforceable against them except by leave under sec. 24 [9 C.B.R. 78].

4 It may well be open to question whether, on the facts, Stobie, Forlong & Company acted wrongfully in selling the shares originally placed in their hands by Harry Miller himself. The prices of these shares, which were held on margin, were falling, and a call had been made. There was, apparently, no further money available (Harry Miller was in such condition that he could not be approached), and Stobie, Forlong & Company, in ignorance of his condition, acted as already mentioned upon the directions of Brenner with the concurrence of Miller's son, Ben Miller. The shares having been sold, even though wrongfully, the proceeds, if traceable, which is not disputed, were in equity the property of Harry Miller, under the principle of Lord Parker's observations quoted above. At common law, Harry Miller could waive the tort and hold Stobie, Forlong & Company accountable *in assumpsit* for the amount of the proceeds as moneys received to his use.

5 In equity a trustee *de son tort* is accountable just as an express trustee would be in such circumstances.

6 The statement of claim, which has been carefully analyzed by Riddell, J.A., treats these moneys as moneys held by Stobie, Forlong & Company for the account of Harry Miller; and the cause of action asserted against all parties is fraud and fraudulent breach of trust in dealing with these moneys. Stobie, Forlong & Company were plainly not guilty of fraud, and the only charge alleged and proved against them in respect of these moneys is breach of trust, which is clearly established.

7 In point of law, Brenner's position is not precisely the same. He was not a trustee for Miller. It was not suggested that, even as regards the transactions in question, he was a partner of Stobie, Forlong & Company. The learned trial Judge, however, has found that he assumed the responsibility of putting himself forward as acting on Miller's behalf, which he knew he had no authority to do. He has also found that, during one or two brief, lucid intervals in the course of Miller's unfortunate malady, he deliberately concealed his operations from Miller. He was not a participant in the physical acts which constituted the wrongful conversion of Miller's money; or, as observed, a partner of those who were. The question is not merely whether in the circumstances Brenner is liable to Miller's estate for his wrongful acts, but whether the estate has a claim against him arising out of breach of trust.

8 It is a proper inference, if not indeed an inevitable one, that had it not been for Brenner's conduct in misleading Stobie, Forlong & Company, they would not have proceeded to deal as they did with Miller's money. In a business sense, Brenner's instructions, as coming from Miller, were an integral part of the transactions. In the treatise on trusts which is a part of Lord Halsbury's collection, it is said a

> person renders himself liable for the consequent loss to the trust estate where he knowingly becomes an active party to a fraudulent or improper disposition of the trust property in breach of the trust affecting it (28 Hals. 407).

I think this passage correctly states the law and applies to the circumstances here.

9 In *Gray v. Johnston* (1868), L.R. 3 H.L. at p. 11 , it was said by Lord Cairns that, in order to make bankers liable for breach of trust, there must be

> proof that the bankers are privy to the intent to make this misapplication of the trust funds. And to that I think I may safely add, that if it be shewn that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed.

10 In the present case, Brenner was not merely "an active party" or "in privity," his was the mind that conceived — he was the person who, acting on an unfounded assumption of authority, in effect directed — the breach of trust; Stobie, Forlong & Company being throughout the ignorant instrument in the "improper disposition" of the funds.

11 We do not think there are sufficient reasons for reversing the finding of the trial Judge that Brenner acted fraudulently. He industriously concealed the facts from Stobie, Forlong & Company and, during the lucid intervals of Harry Miller, from him also. He is chargeable as having fraudulently brought about the breach of trust. We have fully considered the evidence and are satisfied it is ample to support the judgment of the learned trial Judge in respect of the amount for which the parties are accountable.

12 As to Stobie, Forlong & Company, we think that there might have been formidable difficulties in the appellants' way if the action had not been directed against both parties and that the appellants should have leave *nunc pro tunc* , subject to the conditions to be stated. We think the judgment of Beck, J., in *Blais v. Bankers' Trust Corpn.* (1913), 5 W.W.R. 243, 6 Alta. L.R. 444, 14 D.L.R. 277 , pronounced twenty years ago, was well decided.

13 There will be judgment against both parties for $41,822, but the appellants must undertake not to use this judgment against Stobie, Forlong & Company except as a judgment determining the amount for which they may rank upon the estate of the bankrupt and then only as *prima facie* evidence of that amount. The appellants will pay the costs of Stobie, Forlong & Company throughout; Brenner will pay the costs of the appellants throughout.

Cannon, J. :

14 The statement of claim, issued on May 27, 1930, represents:

> 1. The Plaintiffs are the Executors and Trustees of the estate of Harry Miller, late of the City of Toronto, in the County of York, who died on or about the 22nd day of December, 1929.
>
> 2. The defendant, Meyer Brenner, is a stockbroker residing in the said City of Toronto, and formerly carried on business either alone or in association with Stobie, Forlong & Company. The defendants Malcolm Stobie and Charles J. Forlong also reside in the said City of Toronto and prior to their bankruptcy carried on business in partnership as stockbrokers under the name of Stobie, Forlong & Company. The said Malcolm Stobie and Charles J. Forlong made an authorized assignment under the Bankruptcy Act on the 30th day of January, 1930.
>
> 3. Prior to the 9th day of May, 1928, the late Harry Miller had a brokerage account with the firm of E. A. Pierce and Company and the following stocks were held in the said account:
>
> > 4,000 Continental Oil of Delaware; 3,000 Dome Mines Limited; 100 Lago Oil & Transport Corporation; 2,500 Marland Oil Company Limited; 200 National Radiator Limited; 13/49 North American Company; 200 Pure Oil Company; 1,000 Texas Pacific Coal & Oil; 100 Hudson Bay Mining & Smelting Company; 1,000 Mining Corporation of Canada Limited; 1,000 Teck Hughes Gold Mines Limited.
>
> 4. On or about the said 9th day of May, 1928, the said stocks were transferred to the defendants Meyer Brenner and to the said Stobie, Forlong & Company to hold the same for the said Harry Miller.
>
> 5. The said defendant, Meyer Brenner, and Stobie, Forlong & Company duly paid E. A. Pierce and Company the amount required to transfer the stock and the said stock when transferred was placed in the account of the said Harry Miller.

6. The plaintiffs allege and the fact is that at the time of the transfer to the said defendants, the said Harry Miller had an interest or equity in the stocks transferred to an amount in excess of $70,000.00.

7. At the time of the said transfer the said defendants, according to the record furnished by the defendants to the plaintiffs, also held the following stocks for the said Harry Miller:

> 1,000 Wright-Hargreaves Mines Limited; 1,000 Mining Corporation of Canada Limited; 3,000 Amulet Mines Limited; 100 Muirhead Cafeteria Limited; 100 Hudson Bay Mining & Smelting Company.

8. In or about the early part of June, 1928, without authority, instructions or consent from the said Harry Miller, in breach of faith and duty, the said defendants, Meyer Brenner and Stobie, Forlong & Company wrongfully, fraudulently and illegally commenced to trade with the said stocks above referred to with the exception of 100 shares of Muirhead Cafeteria Limited and to wrongfully, fraudulently and illegally deal with the same on their own initiative and without the consent or authority of the said Harry Miller, wrongfully, fraudulently and illegally sold and disposed of the said stocks and wrongfully, fraudulently and illegally misapplied the proceeds of the said stocks and converted them to their own use.

9. The plaintiffs allege and the fact is that after the wrongful and fraudulent disposition and conversion of the said stocks were made, there was a credit in favour of the said Harry Miller in a sum approximating $42,000.00 plus 100 shares of Muirhead Cafeteria Limited, after allowing for any moneys that may have been owing thereon, which said amount was wrongfully converted by the defendants.

10. The plaintiffs allege and the fact is that the defendants are responsible for the proceeds of the sale of the said stock in the said account, as having made profits or gain therefrom as agents of the said Harry Miller.

11. The plaintiffs allege and the fact is that the said cause of action arose by reason of the fraud and fraudulent breach of trust on the part of the said Malcolm Stobie and Charles J. Forlong and Meyer Brenner.

12. The plaintiffs therefore claim:

> (a) An accounting from the defendants in respect of all dealings between the said Harry Miller and defendants, Meyer Brenner Stobie, Forlong & Company and for this purpose that all necessary references be had and accounts taken.
>
> (b) Damages for wrongful conversion, breach of contract. fraud and fraudulent breach of trust or *in the alternative*
>
> (c) Judgment for the amount found due to the said Harry Miller at the time of the transfer of the said account from E. A. Pierce & Company to the said defendants, or *in the alternative*
>
> (d) Judgment requiring the defendants to account for the proceeds of the sales of the said stock and judgment for such amount plus the value of 100 shares of Muirhead Cafeteria Limited, or the recovery of the said 100 shares of Muirhead Cafeteria Limited.
>
> (e) The costs of this action.
>
> (f) Such further and other relief as the nature of the case may require.

15 The defendant Brenner, by a separate plea, denied that he carried on a brokerage business himself, and alleged

that he was, in effect, a salesman for the other defendants, admits the transfer of the stocks to the latter, denies all other allegations so far as they relate to him, and states that he did not at any time:

(a) Receive or hold any stocks or securities or the proceeds thereof for the late Harry Miller.

(b) Wrongfully, fraudulently or illegally sell or deal with any of the said stocks.

(c) Wrongfully, fraudulently or illegally mis-apply the proceeds of the said stocks.

(d) Convert any of the proceeds to his own use.

(e) Make any profits or gains from or through the said stocks.

(f) Commit any fraud or fraudulent breach of trust.

6. The said defendant, Meyer Brenner, further alleges that the said late Harry Miller duly authorized and instructed all transactions in relation to the shares and securities mentioned in the Statement of Claim of the said plaintiffs and was duly advised of what was done from time to time and further adopted and confirmed the same.

16 The defendants Stobie and Forlong denied the allegations in the statement of claim, and further said that any account of the late Harry Miller with the former partnership firm of Stobie, Forlong & Company was an ordinary trading account in which transactions were had from time to time by the said late Harry Miller, and the said account was closed in the lifetime of the said late Harry Miller.

17 In any event, these defendants said, on January 30, 1930, they made an assignment under the provisions of *The Bankruptcy Act*, and one Norman L. Martin was subsequently, under the provisions of the said Act, appointed trustee of their estate, and all the assets of these defendants thereupon became vested in the said trustee for the benefit of their creditors. These defendants say that by reason of the said proceedings in bankruptcy the plaintiffs, even if they were otherwise entitled, cannot proceed to recover any remedy against the property or person of the debtors, or commence or continue this action.

18 This last allegation was, with some hesitation, dismissed by the trial Judge, who condemned the brokers to pay the net proceeds of the sale of securities, viz., $41,822; but it was accepted by the Appellate Division, [13 C.B.R. 518, [1932] O.R. 245], and the action dismissed with costs as against the brokers, because it was illegally taken after bankruptcy, it being a claim provable in bankruptcy (secs. 24 and 104 of *The Bankruptcy Act* [9 C.B.R. 78 , 213]). The finding of fraud against Brenner and the condemnation against him was also set aside and a reference ordered to ascertain the exact damages, if any, that he should pay to the appellants after their claim in bankruptcy should have been disposed of, and any dividend received from the insolvent estate duly credited.

19 Both parties, on the evidence, are liable. The fraudulent and deceitful conduct of Brenner is clearly shown, as found by the trial Judge. The brokers should have kept for, or paid to, Harry Miller the net proceeds of his stock, after deduction of their claim, instead of lending themselves to an orgy of speculation with Miller's money, reaping for Brenner, their close associate, and themselves, commissions amounting to $9,485.50, plus interest on large amounts allegedly advanced. The plaintiffs come before the Court, expose how they have been defrauded by the joint wrongdoing of the defendants, and ask for remedy. Have they, by asking alternative conclusions, waived their right of proceeding in tort? I do not think so. They have made no election and left it to the Court to give the necessary order.

20 The trial Judge's findings are as follows:

> But, as I see the case, there was an unauthorized sale, on the instructions of both Ben Miller and Meyer Brenner, by Stobie Forlong of stocks which the late Henry Miller held with the latter company. That this sale was fraudulent, and was concealed from the late Harry Miller, I can have no doubt; Brenner said so to me. I think both Ben Miller and Meyer Brenner acted as the result of a conspiracy between them to deal with these stocks, in the way in which they were dealt with. It is true that Ben Miller put it on the ground of filial affection, and the danger of disclosure to his father's health, but I can come to no other conclusion than that both of them knew that Mr. Harry Miller could not transact business, and both of them took advantage of that condition in gambling with Harry Miller's money.
>
> Under those circumstances I have no hesitation in finding that there was fraud. Ben Miller had no authority of any kind to authorize, or give instructions for the sale of these stocks by Stobie Forlong Company, or by anyone. Therefore, Stobie Forlong having sold the stocks on the instructions of an unauthorized agent, ought to have held the proceeds for Harry Miller, instead of which they misapplied the money, the property of their principal, who was Harry Miller, by permitting it to be used in speculative transactions, and are unquestionably liable for the proceeds.
>
> The only question remaining is whether the claim against Stobie Forlong Company should be proved in bankruptcy or not. Leave was not obtained. I have very grave doubt if such a claim, being in reality for deceit, is provable in bankruptcy under section 104; but I think it is better for the Appellate Division to determine whether the class of action disclosed by the evidence is provable in bankruptcy. It is true that the sale of the stocks might be described as a breach of contract with Harry Miller by Stobie Forlong, but I do not think that the claim arising out of the misapplication of funds is such a demand in the nature of unliquidated damages arising out of a contract as is provable in bankruptcy. I will leave a higher Court to correct me if I am wrong in that.

21 The learned trial Judge, not the plaintiffs, directed that the proceeds of the unauthorized sales, of some of the tortious acts complained of in paras. 8 and 9 of the action, should be reimbursed to the victim of defendants' illegal and improper course. The fact that they deliberately took their action after Stobie, Forlong's bankruptcy, without claiming in bankruptcy, and persistently considered, despite the latter's pleading, throughout the trial, that their claim was not provable in bankruptcy, shows that they never elected to make the unauthorized sale their own; they still persist in calling it a fraudulent conversion and they ask that the measure of damages resulting from the fraud be the net value of the securities when they were sold without Miller's knowledge or consent. The learned trial Judge thought that they were entitled to what would have been saved from the wreck immediately after the unauthorized sale, if the defendants had not continued their tortious acts by gambling with the proceeds, the property of Harry Miller, when the latter was incapable of transacting any business. Those are the damages, unliquidated before the trial, but ascertained by the trial Judge, representing the loss or *damnum* suffered by Harry Miller when his money was frittered away by the defendants. The latter did not pretend to act by reason of a contract, promise, or even in breach of a trust, but had no possible shadow of an excuse to act as they did; they purely and simply took for their own purposes what did not belong to them.

22 Under such circumstances, the action against the joint tort feasors should not be defeated by technicalities.

23 *Smith v. Baker* (1873), L.R. 8 C.P. 350 , 42 L.J.C.P. 155 does not apply. In that case, the plaintiff did not commence any action in law for the tort, but resorted to the Court of Bankruptcy and made a successful application to have the bill of sale declared void. The plaintiffs here, as explained above, do not claim *exclusively* the proceeds of the sale, but mention them only as an alternative remedy against those who stole their money. They always treated both the sale and the subsequent transactions as tortious acts, and never acknowledged that Harry Miller had contracted with, or entrusted the defendants with his money. The plaintiffs explained how the transfer of shares had taken place and complained of the fraud through which subsequently a sick man had been victimized by people who knew that he was not capable of protecting his interest.

24 I, therefore, with due respect, beg to differ from the holding of the Court of Appeal that the demand in tort was

waived by the plaintiffs.

25 In *Smith v. Baker* (1873), L.R. 8 C.P. 350 , at p. 355, it is said:

> There may be other instances where an act may amount to a conclusive election *** to waive the tort. But there is another class of cases in which an act is of an ambiguous character, and may *** be done with the intention of adopting and affirming the wrongful act. In such cases the question whether the tort has been waived becomes rather a matter of fact than of law.

26 In *Rice v. Reed*, [1900] 1 Q.B. 54 , at p. 64, 69 L.J.Q.B. 33, Lord Russell of Killowen, C.J., says:

> *** an application for the proceeds of goods said to have been tortiously dealt with is not conclusive proof of election to affirm the transaction.

At p. 65, Smith, L.J., says:

> In the present case the plaintiff sued Soltau in trover, and in the alternative for money had and received. If nothing more had occurred, no Court could say that the plaintiff, by suing in the alternative for tort and for money had and received, had waived the tort and elected to affirm the transaction. It is clear that no authority goes so far as that.

At p. 66, Smith, L.J., agrees with the dictum in *Smith v. Baker* , that the question whether a tort has been waived is a matter of fact rather than law.

27 See also *Keating v. Marsh* (1834), 1 Mont. & Ayr. 582 affirmed at 592.

28 As pointed out by Brenner's counsel at p. 43, line 44, "they (the appellants) never elected to confirm sales made by us" (the respondents).

29 There is no evidence that appellants waived their cause of action in tort by proving in the bankruptcy proceedings. And I find, like the trial Judge, that, as a matter of fact, the appellants never waived their right of proceeding in tort for unliquidated damages, and they are, therefore, entitled to a remedy. The plaintiffs have proven their whole case; the defendant Brenner has failed to establish his plea and, in view of the record, para. 6 thereof is a clear sample of bad faith and may be considered as a deliberate attempt to mislead the Court. It was not disputed here, nor in the Court of Appeal, that the brokers are liable to the plaintiff for the amount of the surplus of the proceeds, after deducting their claim against Miller for moneys paid on his behalf to E. A. Pierce & Company.

30 But Brenner says: If we had not sold the stocks, if the account had remained dormant till Harry Miller's death, the plaintiffs would have lost all the equity and would have suffered the same loss on account of the continued decline of the market prices of their securities. Therefore they are not entitled to damages.

31 This is sophistry. The case is not to be determined on what might have happened if the defendants had not done what they did. They jointly, illegally and without even colour of right, gambled with Miller's money — the net proceeds of their first unauthorized sale of securities — over and above what was required by Stobie & Forlong for marginal or other purposes. The amount is clearly established, is not even disputed. I believe that the trial Judge took the right view of the whole case, refused to be stopped by ingenious but unfounded objections, and applied himself to carry out his duty under the following sec. 15, subsec. (h) of *The Judicature Act* , R.S.O., 1927, ch. 88:

> 15. In every civil cause or matter law and equity shall be administered according to the following rules: —

(h) The Court in the exercise of the Jurisdiction vested in it by this Act in every cause or matter pending before it, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as it shall deem just, all such remedies as any of the parties may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them in such cause or matter so that, as far as possible, all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

32 There is no need for a reference or for a retrial of this case before the Bankruptcy Court. The defendants should reimburse what they converted to their own purposes without even trying to consult with the owner thereof, or responsible members of his family; these funds so misappropriated amount to $41,822, as found by the trial Judge. His judgment should be restored and the appeal maintained with costs here and before the Appellate Division against the respondents.

END OF DOCUMENT

TAB M

2009 CarswellOnt 7882, 61 C.B.R. (5th) 200

2009 CarswellOnt 7882, 61 C.B.R. (5th) 200

Canwest Global Communications Corp., Re

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Heard: December 8, 2009
Judgment: December 15, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Alex Cobb, Shawn Irving for CMI Entities

Alan Mark, Alan Merskey for Special Committee of the Board of Directors of Canwest

David Byers, Maria Konyukhova for Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders

K. McElcheran, G. Gray for GS Parties

Hugh O'Reilly, Amanda Darrach for Canwest Retirees and the Canadian Media Guild

Hilary Clarke for Senior Secured Lenders to LP Entities

Steve Weisz for CIT Business Credit Canada Inc.

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

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Contractual rights

Business was acquired through acquisition company, C Co. — C Co. was jointly owned by moving parties and 441

Inc., wholly owned subsidiary of insolvent entities — Moving parties, 441 Inc., insolvent entities and C Co. entered into shareholders agreement providing that in event of insolvency of insolvent entities, moving parties could effect sale of their interest in C Co. and require sale of insolvent entities' interest — Shareholders agreement also provided that 441 Inc. could transfer its C Co. shares to insolvent entities at any time — 441 Inc. subsequently transferred shares of C Co. to insolvent entities and was dissolved — Insolvent entities obtained initial order under Companies' Creditors Arrangement Act including stay of proceedings — Moving parties brought motion seeking to set aside transfer of shares to insolvent entities or, in alternative, requiring insolvent entities to perform and not disclaim shareholders agreement as if shares had not been transferred — Insolvent entities brought motion for order that motion of moving parties was stayed — Moving parties brought cross-motion for leave to proceed with their motion — Motion of insolvent entities granted; motion and cross-motion of moving parties dismissed — Substance and subject matter of moving parties' motion were encompassed by stay — Substance of moving parties' motion was "proceeding" that was subject to stay under initial order which prohibited commencement of all proceedings against or in respect of insolvent entities or affecting business or property of insolvent entities — Relief sought would involve exercise of any right or remedy affecting business or property of insolvent entities which was stayed under initial order.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay

Business was acquired through acquisition company, C Co. — C Co. was jointly owned by moving parties and 441 Inc., wholly owned subsidiary of insolvent entities — Moving parties, 441 Inc., insolvent entities and C Co. entered into shareholders agreement providing that in event of insolvency of insolvent entities, moving parties could effect sale of their interest in C Co. and require sale of insolvent entities' interest — Shareholders agreement also provided that 441 Inc. could transfer its C Co. shares to insolvent entities at any time — 441 Inc. subsequently transferred shares of C Co. to insolvent entities and was dissolved — Insolvent entities obtained initial order under Companies' Creditors Arrangement Act including stay of proceedings — Moving parties brought motion seeking to set aside transfer of shares from 441 Inc. to insolvent entities or, in alternative, requiring insolvent entities to perform and not disclaim shareholders agreement as if shares had not been transferred — Insolvent entities brought motion for order that motion of moving parties was stayed — Moving parties brought cross-motion for leave to proceed with their motion — Motion of insolvent entities granted; motion and cross-motion of moving parties dismissed — Stay of proceedings not lifted — Balance of convenience, assessment of relative prejudice and relevant merits favoured position of insolvent entities — There was good arguable case that shareholders agreement, which would inform reasonable expectations of parties, permitted transfer and dissolution of 441 Inc. — Moving parties were in no worse position than any other stakeholder who was precluded from relying on rights that arose upon insolvency default — If stay were lifted, prejudice to insolvent entities would be great and proceedings contemplated by moving parties would be extraordinarily disruptive — Litigating subject matter of motion would undermine objective of protecting insolvent entities while they attempted to restructure — It was premature to address issue of whether insolvent entities could disclaim agreement — Issues surrounding any attempt at disclaimer should be canvassed on basis mandated in s. 32 of Act — Discretion to lift stay on basis of lack of good faith not exercised.

Cases considered by *Pepall J.*:

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — considered

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta. Q.B.) — considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — considered

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKCA 72, 2007

CarswellSask 324, [2007] 9 W.W.R. 79, (sub nom. *Bricore Land Group Ltd., Re)* 299 Sask. R. 194, (sub nom. *Bricore Land Group Ltd., Re)* 408 W.A.C. 194, 33 C.B.R. (5th) 50 (Sask. C.A.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 92 A.R. 81, 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 1988 CarswellAlta 318 (Alta. Q.B.) — considered

San Francisco Gifts Ltd., Re (2004), 5 C.B.R. (5th) 92, 42 Alta. L.R. (4th) 352, 2004 ABQB 705, 2004 CarswellAlta 1241, 359 A.R. 71 (Alta. Q.B.) — considered

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 8 — referred to

s. 11 — referred to

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 32 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 106 — referred to

Rules considered:

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

R. 25.11(b) — referred to

R. 25.11(c) — referred to

MOTION by moving party to set aside transfer of shares to insolvent entities or, in alternative, requiring insolvent entities to perform and not disclaim shareholders agreement; MOTION by insolvent entities for order that motion by moving party was stayed; CROSS-MOTION by moving party for leave to proceed with its motion.

***Pepall J.*:**

Relief Requested

1 The CCAA applicants and partnerships (the "CMI Entities") request an order declaring that the relief sought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.1 and GS VI AA One Parallel Holding S.ar.1 (the "GS Parties") is subject to the stay of proceedings granted in my Initial Order dated October 6, 2009. The GS Parties bring a cross-motion for an order that the stay be lifted so that they may pursue their motion which, among other things, challenges pre-filing conduct of the CMI Entities. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors support the position of the CMI Entities. All of these stakeholders are highly sophisticated. Put differently, no one is a commercial novice. Such is the context of this dispute.

Background Facts

2 Canwest's television broadcast business consists of the CTLP TV business which is comprised of 12 free-to-air television stations and a portfolio of subscription based specialty television channels on the one hand and the Specialty TV Business on the other. The latter consists of 13 specialty television channels that are operated by CMI for the account of CW Investments Co. and its subsidiaries and 4 other specialty television channels in which the CW Investments Co. ownership interest is less than 50%.

3 The Specialty TV Business was acquired jointly with Goldman Sachs from Alliance Atlantis in August, 2007. In January of that year, CMI and Goldman Sachs agreed to acquire the business of Alliance Atlantis through a jointly owned acquisition company which later became CW Investments Co. It is a Nova Scotia Unlimited Liability Corporation ("NSULC").

4 CMI held its shares in CW Investments Co. through its wholly owned subsidiary, 4414616 Canada Inc. ("441"). According to the CMI Entities, the sole purpose of 441 was to insulate CMI from any liabilities of CW Investments Co. As a NSULC, its shareholders may face exposure if the NSULC is liquidated or becomes bankrupt. As such, 441 served as a "blocker" to potential liability. The CMI Entities state that similarly the GS parties served as "blockers" for Goldman Sachs' part of the transaction.

5 According to the GS Parties, the essential elements of the deal were as follows:

(i) GS would acquire at its own expense and at its own risk, the slower growth businesses;

(ii) CW Investments Co. would acquire the Specialty TV Business and that company would be owned by 441 and the GS Parties under the terms of a Shareholders Agreement;

(iii) GS would assist CW Investments Co. in obtaining separate financing for the Specialty TV Business;

(iv) Eventually Canwest would contribute its conventional TV business on a debt free basis to CW Investments Co. in return for an increased ownership stake in CW Investments Co.

6 The GS Parties also state that but for this arrangement, Canwest had no chance of acquiring control of the Specialty TV Business. That business is subject to regulation by the CRTC. Consistent with policy objectives, the CRTC had to satisfy itself that CW Investments Co. was not controlled either at law or in fact by a non-Canadian.

7 A Shareholders Agreement was entered into by the GS parties, CMI, 441, and CW Investments Co. The GS Parties state that 441 was a critical party to this Agreement. The Agreement reflects the share ownership of each of the parties to it: 64.67% held by the GS Parties and 35.33% held by 441. It also provides for control of CW Investments

Co. by distribution of voting shares: 33.33% held by the GS Parties and 66.67% held by 441. The Agreement limits certain activities of CW Investments Co. without the affirmative vote of a director nominated to its Board by the GS Parties. The Agreement provides for call and put options that are designed to allow the GS parties to exit from the investment in CW Investments Co. in 2011, 2012, and 2013. Furthermore, in the event of an insolvency of CMI, the GS parties have the ability to effect a sale of their interest in CW Investments Co. and require as well a sale of CMI's interest. This is referred to as the drag-along provision. Specifically, Article 6.10(a) of the Shareholders Agreement states:

> Notwithstanding the other provisions of this Article 6, if an Insolvency Event occurs in respect of CanWest and is continuing, the GS Parties shall be entitled to sell all of their Shares to any *bona fide* Arm's Length third party or parties at a price and on other terms and conditions negotiated by GSCP in its discretion provided that such third party or parties acquires all of the Shares held by the CanWest Parties at the same price and on the same terms and conditions, and in such event, the CanWest Parties shall sell their Shares to such third party or parties at such price and on such terms and conditions. The Corporation and the CanWest Parties each agree to cooperate with and assist GSCP with the sale process (including by providing protected purchasers designated by GSCP with confidential information regarding the Corporation (subject to a customary confidentiality agreement) and with access to management).

8 The Agreement also provided that 441 as shareholder could transfer its CW Investments Co. shares to its parent, CMI, at any time, by gift, assignment or otherwise, whether or not for value. While another specified entity could not be dissolved, no prohibition was placed on the dissolution of 441. 441 had certain voting obligations that were to be carried out at the direction of CMI. Furthermore, CMI was responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

9 On October 5, 2009, pursuant to a Dissolution Agreement between 441 and CMI and as part of the winding-up and distribution of its property, 441 transferred all of its property, namely its 352,986 Class A shares and 666 Class B preferred shares of CW Investments Co., to CMI. CMI undertook to pay and discharge all of 441's liabilities and obligations. The material obligations were those contained in the Shareholders Agreement. At the time, 441 and CW Investments Co. were both solvent and CMI was insolvent. 441 was subsequently dissolved.

10 For the purposes of these two motions only, the parties have agreed that the court should assume that the transfer and dissolution of 441 was intended by CMI to provide it with the benefit of all the provisions of the CCAA proceedings in relation to contractual obligations pertaining to those shares. This would presumably include both the stay provisions found in section 11 of the CCAA and the disclaimer provisions in section 32 .

11 The CMI Entities state that CMI's interest in the Specialty TV Business is critical to the restructuring and recapitalization prospects of the CMI Entities and that if the GS parties were able to effect a sale of CW Investments Co. at this time, and on terms that suit them, it would be disastrous to the CMI Entities and their stakeholders. Even the overhanging threat of such a sale is adversely affecting the negotiation of a successful restructuring or recapitalization of the CMI Entities.

12 On October 6, 2009, I granted an Initial Order in these proceedings. CW Investments Co. was not an applicant. The CMI Entities requested a stay of proceedings to allow them to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of 8% Noteholders had agreed on terms of such a transaction that were reflected in a support agreement and term sheet. Those noteholders who support the term sheet have agreed to vote in favour of the plan subject to certain conditions one of which is a requirement that the Shareholders Agreement be amended.

13 The Initial Order included the typical stay of proceedings provisions that are found in the standard form order promulgated by the Commercial List Users Committee. Specifically, the order stated:

15. THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.

16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

14 The GS parties were not given notice of the CCAA application. On November 2, 2009, they brought a motion that, among other things, seeks to set aside the transfer of the shares from 441 to CMI or, in the alternative, require CMI to perform and not disclaim the Shareholders Agreement as if the shares had not been transferred. On November 10, 2009 the GS parties purported to revive 441 by filing Articles of Revival with the Director of the CBCA. The CMI Entities were not notified nor was any leave of the court sought in this regard. In an amended notice of motion dated November 19, 2009 (the "main motion"), the GS Parties request an order:

(a) Setting aside and declaring void the transfer of the shares from 441 to CMI;

(b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by these CCAA proceedings in any way whatsoever;

(c) in the alternative to (a) and (b), an order directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer;

(d) in the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer, may not be disclaimed by CMI pursuant to section 32 of the CCAA or otherwise; and

(e) if necessary, a trial of the issues arising from the foregoing.

15 They also requested an order amending paragraph 59 of the Initial Order but that issue has now been resolved and I am satisfied with the amendment proposed.

16 The CMI Entities then brought a motion on November 24, 2009 for an order that the GS motion is stayed. As in

a game of chess, on December 3, 2009, the GS Parties served a cross-motion in which, if required, they seek leave to proceed with their motion.

17 In furtherance of their main motion, the GS Parties have expressed a desire to examine 4 of the 5 members of the Special Committee of the Board of Directors of Canwest. That Committee was constituted, among other things, to oversee the restructuring. The GS Parties have also demanded an extensive list of documentary production. They also seek to impose significant discovery demands upon the senior management of CanWest.

Issues

18 The issues to be determined on these motions are whether the relief requested by the GS Parties in their main motion is stayed based on the Initial Order and if so, whether the stay should be lifted. In addition, should the relief sought in paragraph 1(e) of the main motion be struck.

Positions of Parties

19 In brief, the parties' positions are as follows. The CMI Entities submit that the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order. In addition, the relief sought by them involves "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order. The stay is consistent with the purpose of the CCAA. They submit that the subject matter of the motion should be caught so as to prevent the GS parties from gaining an unfair advantage over other stakeholders of the CMI Entities and to ensure that the resources of the CMI Entities are devoted to developing a viable restructuring plan for the benefit of all stakeholders. They also state that CMI's interest in CW Investments Co. is a significant portion of its enterprise value. They state further that their actions were not in breach of the Shareholders Agreement and in any event, debtor companies are able to organize their affairs in order to benefit from the CCAA stay. Furthermore, any loss suffered by the GS Parties can be quantified.

20 In paragraph 1(e) of the main motion, the GS parties seek to prevent CMI from disclaiming the obligations of 441 that existed immediately prior to the transfer of the shares to CMI. If this relief is not stayed, the CMI Entities submit that it should be struck out pursuant to Rule 25.11(b) and (c) as premature and improper. They also argue that section 32 of the CCAA provides a procedure for disclaimer of agreements which the GS Parties improperly seek to circumvent.

21 Lastly, the CMI Entities state that the bases on which a CCAA stay should be lifted are very limited. Most of the grounds set forth in *Canadian Airlines Corp., Re*[FN1] which support the lifting of a stay are manifestly inapplicable. As to prejudice, the GS parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise on an insolvency default. In contrast, the prejudice to the CMI Entities would be debilitating and their resources need to be devoted to their restructuring. The GS Parties' rights would not be lost by the passage of time. The GS Parties' motion is all about leverage and a desire to improve the GS Parties' negotiating position submits counsel for the CMI Entities.

22 The Ad Hoc Committee of Noteholders, as mentioned, supports the CMI Entities' position. In examining the context of the dispute, they submit that the Shareholders Agreement permitted and did not prohibit the transfer of 441's shares. Furthermore, the operative obligations in that agreement are obligations of CMI, not 441. It is the substance of the GS Parties' claims and not the form that should govern their ability to pursue them and it is clearly encompassed by the stay. The Committee relies on *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*[FN2] in support of their position on timing.

23 The Special Committee also supports the CMI Entities. It submits that the primary relief sought by the GS parties is a declaration that their contracts to and with CW Investments cannot or should not be disclaimed. The debate

as to whether 441 could properly be assimilated into CMI is no more than an alternate argument as to why such disclaimer can or cannot occur. They state that the subject matter of the GS Parties' motion is premature.

24 The GS Parties submit that the stay does not prevent parties affected by the CCAA proceedings from bringing motions within the CCAA proceedings themselves. The use of CCAA powers and the scope of the stay provided in the Initial Order and whether it applies to the GS Parties' motion are proper questions for the court charged with supervising the CCAA process. They also argue that the motion would facilitate negotiation between key parties, raises the important preliminary issue of the proper scope and application of section 32 of the CCAA, and avoids putting the Monitor in the impossible position of having to draw legal conclusions as to the scope of CMI's power to disclaim. The court should be concerned with pre-filing conduct including the reason for the share transfer, the timing, and CMI's intentions.

25 Even if the stay is applicable, the GS parties submit that it should be lifted. In this regard, the court should consider the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action. The court should also consider whether the debtor company has acted and is acting in good faith. The GS Parties were the medium by which the Specialty TV Business became part of Canwest. Here, all that is being sought is a reversal of the false and highly prejudicial start to these restructuring proceedings. It is necessary to take steps now to protect a right that could be lost by the passage of time. The transfer of the shares exhibited bad faith on the part of Canwest. 441 insulated CW Investments Co. and the Specialty TV Business from the insolvency of CMI and thereby protected the contractual rights of the GS Parties. The manifest harm to the GS Parties that invited the motion should be given weight in the court's balancing of prejudices. Concerns as to disruption of the restructuring process could be met by imposing conditions on the lifting of a stay as, for example, the establishment of a timetable.

Discussion

(a) Legal Principles

26 First I will address the legal principles applicable to the granting and lifting of a CCAA stay.

27 The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

> 11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying until otherwise ordered by the court, for any period that the court considers necessary, all

proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

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

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

28 The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of the CCAA: *Stelco Inc., Re* [FN3] and the key element of the CCAA process: *Canadian Airlines Corp., Re*[FN4] The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose. As noted in *Lehndorff General Partner Ltd., Re*[FN5] , the power to grant a stay extends to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company. As stated by Farley J. in that case,

> "It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed....The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors."[FN6] (Citations omitted)

29 The all encompassing scope of the CCAA is underscored by section 8 of the Act which precludes parties from contracting out of the statute. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* [FN7] in this regard.

30 Two cases dealing with stays merit specific attention. *Campeau v. Olympia & York Developments Ltd.* [FN8] was a decision granted in the early stages of the evolution of the CCAA. In that case, the plaintiffs brought an action for damages including the loss of share value and loss of opportunity both against a company under CCAA protection and a bank. The statement of claim had been served before the company's CCAA filing. The plaintiff sought to lift the stay to proceed with its action. The bank sought an order staying the action against it pending the disposition of the CCAA proceedings. Blair J. examined the stay power described in the CCAA, section 106 of the Courts of Justice Act[FN9] and the court's inherent jurisdiction. He refused to lift the stay and granted the stay in favour of the bank until the expiration of the CCAA stay period. Blair J. stated that the plaintiff's claims may be addressed more expeditiously in the CCAA proceeding itself.[FN10] Presumably this meant through a claims process and a compromise of claims. The CCAA stay precludes the litigating of claims comparable to the plaintiff's in *Campeau*. If it were otherwise, the stay would have no meaningful impact.

31 The decision of *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* is also germane to the case before me. There, the Bank demanded payment from the debtor company and thereafter the debtor company issued instant trust deeds to qualify for protection under the CCAA. The bank commenced proceedings on debenture security and the next day the company sought relief under the CCAA. The court stayed the bank's enforcement proceedings. The bank appealed the order and asked the appellate court to set aside the stay order insofar as it restrained the bank from exercising its rights under its security. The B.C. Court of Appeal refused to do so having regard to the broad public policy objectives of the CCAA.

32 As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines con-

tained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"[FN11], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*[FN12]. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.[FN13]

33 Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Canadian Airlines Corp., Re*[FN14]and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).

4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

7. There is a real risk that a creditor's loan will become unsecured during the stay period.

8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

9. It is in the interests of justice to do so.

(b) Application

34 Turning then to an application of all of these legal principles to the facts of the case before me, I will first consider whether the subject matter of the main motion of the GS Parties is captured by the stay and then will address whether the stay should be lifted.

35 In analyzing the applicability of the stay, I must examine the substance of the main motion of the GS Parties and the language of the stay found in paragraphs 15 and 16 of my Initial Order.

36 In essence, the GS Parties' motion seeks to:

(i) undo the transfer of the CW Investments Co. shares from 441 to CMI or

(ii) require CMI to perform and not disclaim the Shareholders Agreement as though the shares had not been transferred.

37 It seems to me that the first issue is caught by the stay of proceedings and the second issue is properly addressed if and when CMI seeks to disclaim the Shareholders Agreement.

38 The substance of the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order which prohibits the commencement of all proceedings against or in respect of the CMI Entities, or affecting the CMI Business or the CMI Property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order.

39 When one examines the relief requested in detail, the application of the stay is clear. The GS Parties ask first for an order setting aside and declaring void the transfer of the shares from 441. As the shares have been transferred to the CMI Entities presumably pursuant to section 6.5(a) of the Shareholders Agreement, this is relief "affecting the CMI Property". Secondly, the GS Parties ask for a declaration that the rights and remedies of the GS Parties in respect of the obligations of 441 are not affected by the CCAA proceedings. This relief would permit the GS Parties to require CMI to tender the shares for sale pursuant to section 6.10 of the Shareholders Agreement. This too is relief affecting the CMI Entities and the CMI Property. Thirdly, they ask for an order directing CMI to perform all of the obligations that bound 441 prior to the transfer. This represents the exercise of a right or remedy against CMI and would affect the CMI Business and CMI Property in violation of paragraph 16 of the Initial Order. This is also stayed by virtue of paragraph 15. Fourthly, the GS Parties seek an order declaring that the obligations that bound 441 prior to the transfer may not be disclaimed. This both violates paragraph 16 of the Initial Order and also seeks to avoid the express provisions contained in the recent amendments to the CCAA that address disclaimer.

40 Accordingly, the substance and subject matter of the GS Parties' motion are certainly encompassed by the stay. As Mr. Barnes for the CMI Entities submitted, had CMI taken the steps it did six months ago and the GS Parties commenced a lawsuit, the action would have been stayed. Certainly to the extent that the GS Parties are seeking the freedom to exercise their drag along rights, these rights should be captured by the stay.

41 The real question, it seems to me, is whether the stay should be lifted in this case. In considering the request to lift the stay, it is helpful to consider the context and the provisions of the Shareholders Agreement. In his affidavit sworn November 24, 2009, Mr. Strike, the President of Corporate Development & Strategy Implementation of Canwest Global and its Recapitalization Officer, states that the joint acquisition from Alliance Atlantis was intensely and very carefully negotiated by the parties and that the negotiation was extremely complex and difficult. "Every aspect of the deal was carefully scrutinized, including the form, substance and precise terms of the Initial Shareholders Agreement." The Shareholders Agreement was finalized following the CRTC approval hearing. Among other things:

- Article 2.2 (b) provides that CMI is responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

- Article 6.1 contains a restriction on the transfer of shares.

- Article 6.5 addresses permitted transfers. Subsection (a) expressly permits each shareholder to transfer shares to a parent of the shareholder. CMI was the parent of the shareholder, 441.

- Article 6.10 provides that notwithstanding the other provisions of Article 6, if an insolvency event occurs (which includes the commencement of a CCAA proceeding), the GS Parties may sell their shares and cause the Canwest parties to sell their shares on the same terms. This is the drag along provision.

• Article 6.13 prohibits the liquidation or dissolution of another company[FN15] without the prior written consent of one of the GS Parties[FN16].

42 The recital of these provisions and the absence of any prohibition against the dissolution of 441 indicate that there is a good arguable case that the Shareholders Agreement, which would inform the reasonable expectations of the parties, permitted the transfer and dissolution.

43 The GS Parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise upon an insolvency default. As stated in *San Francisco Gifts Ltd., Re*[FN17] :

> "The Initial Order enjoined all of San Francisco's landlords from enforcing contractual insolvency clauses. This is a common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to proceedings in the first place."[FN18]

44 Similarly, in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*[FN19] , one of the debtor's joint venture partners in certain petroleum operations was unable to rely on an insolvency clause in an agreement that provided for the immediate replacement of the operator if it became bankrupt or insolvent.

45 If the stay were lifted, the prejudice to CMI would be great and the proceedings contemplated by the GS Parties would be extraordinarily disruptive. The GS Parties have asked to examine 4 of the 5 members of the Special Committee. The Special Committee is a committee of the Board of Directors of Canwest. Its mandate includes, among other things, responsibility for overseeing the implementation of a restructuring with respect to all, or part of the business and/or capital structure of Canwest. The GS Parties have also requested an extensive list of documentary production including all documents considered by the Special Committee and any member of that Committee relating to the matters at issue; all documents considered by the Board of Directors and any member of the Board of Directors relating to the matters at issue; all documents evidencing the deliberations, discussions and decisions of the Special Committee and the Board of Directors relating to the matters at issue; all documents relating to the matters at issue sent to or received by Leonard Asper, Derek Burney, David Drybrough, David Kerr, Richard Leipsic, John Maguire, Margot Micillef, Thomas Strike, and Hap Stephen, the Chief Restructuring Advisor appointed by the court. As stated by Mr. Strike in his affidavit sworn November 24, 2009,

> The witnesses that the GS Parties propose to examine include the most senior executives of the CMI Entities; those who are most intensely involved in the enormously complex process of achieving a successful going concern restructuring or recapitalization of the CMI Entities. Myself, Mr. Stephen, Mr. Maguire and the others are all working flat out on trying to achieve a successful restructuring or recapitalization of the CMI Entities. Frankly, the last thing we should be doing at this point is preparing for a forensic examination, in minute detail, over events that have taken place over the past several months. At this point in the restructuring/recapitalization process, the proposed examination would be an enormous distraction and would significantly prejudice the CMI Entities' restructuring and recapitalization efforts.

46 While Mr. McElcheran for the GS Parties submits that the examinations and the scope of the examinations could be managed, in my view, the litigating of the subject matter of the motion would undermine the objective of protecting the CMI Entities while they attempt to restructure. The GS Parties continue to own their shares in CW Investments Co. as does CMI. CMI continues to operate the Specialty TV Business. Furthermore, CMI cannot sell the shares without the involvement of the Monitor and the court. None of these facts have changed. The drag along rights are stayed (although as Mr. McElcheran said, it is the cancellation of those rights that the GS Parties are concerned about.)

47 A key issue will be whether the CMI Parties can then disclaim that Agreement or whether they should be required to perform the obligations which previously bound 441. This issue will no doubt arise if and when the CMI

Entities seek to disclaim the Shareholders Agreement. It is premature to address that issue now. Furthermore, section 32 of the CCAA now provides a detailed process for disclaimer. It states:

> 32.(1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.
>
> (2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.
>
> (3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

48 Section 32, therefore, provides the scheme and machinery for the disclaimer of an agreement. If the monitor approves the disclaimer, another party may contest it. If the monitor does not approve the disclaimer, permission of the court must be obtained. It seems to me that the issues surrounding any attempt at disclaimer in this case should be canvassed on the basis mandated by Parliament in section 32 of the amended Act.

49 In my view, the balance of convenience, the assessment of relative prejudice and the relevant merits favour the position of the CMI Entities on this lift stay motion. As to the issue of good faith, the question is whether, absent more, one can infer a lack of good faith based on the facts outlined in the materials filed including the agreed upon admission by the CMI Entities. The onus to lift the stay is on the moving party. I decline to exercise my discretion to lift the stay on this basis.

50 Turning then to the factors listed by Professor McLaren, again I am not persuaded that based on the current state of affairs, any of the factors are such that the stay should be lifted. In light of this determination, there is no need to address the motion to strike paragraph 1(e) of the GS Parties' main motion.

51 The stay of proceedings in this case is performing the essential function of keeping stakeholders at bay in order to give the CMI Entities a reasonable opportunity to develop a restructuring plan. The motions of the GS Parties are dismissed (with the exception of that portion dealing with paragraph 59 of the Initial Order which is on consent) and the motion of the CMI Entities is granted with the exception of the strike portion which is moot.

52 The Monitor, reasonably in my view, did not take a position on these motions. Its counsel, Mr. Byers, advised the court that the Monitor was of the view that a commercial resolution was the best way to resolve the GS Parties' issues. It is difficult to disagree with that assessment.

Insolvent entities' motion granted; motion and cross-motion of moving party dismissed.

FN1 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.).

FN2 (B.C. C.A.) at p. 4.

FN3 (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 36.

FN4 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.).

FN5 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

FN6 Ibid, at p. 32.

FN7 Supra, note 2

FN8 (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.).

FN9 R.S.O. 1990, c.C.43.

FN10 Supra, note 6 at paras. 24 and 25.

FN11 (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

FN12 (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

FN13 Ibid, at para. 68.

FN14 Supra, note 3.

FN15 This was 4414641 Canada Inc. but not 4414616 Canada Inc., the company in issue before me.

FN16 Specifically, GS Capital Partners VI Fund, L.P.

FN17 (2004), 5 C.B.R. (5th) 92 (Alta. Q.B.) at para.37.

FN18 Ibid, at para. 37.

FN19 (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.).

END OF DOCUMENT

TAB N

1921 CarswellOnt 28, 2 C.B.R. 133, 51 O.L.R. 235, 67 D.L.R. 63

1921 CarswellOnt 28, 2 C.B.R. 133, 51 O.L.R. 235, 67 D.L.R. 63

Fairweathers Ltd., Re

In re Fairweathers, Limited

Ex parte City of Montreal

Ontario Supreme Court, In Bankruptcy

Orde, J.

Judgment: November 11, 1921

Counsel: *T. N. Phelan*, for City of Montreal.

R. S. Cassels, K.C., for the authorized trustee.

Subject: Corporate and Commercial; Insolvency

Bankruptcy --- Bankruptcy and insolvency jurisdiction — Jurisdiction of Courts — Jurisdiction of Bankruptcy Court — Territorial jurisdiction — General.

Bankruptcy --- Bankruptcy and insolvency jurisdiction — Jurisdiction of Courts — Auxiliary bankruptcy jurisdiction.

Assignment for Creditors — Preferred Claim — Contestation — Business of Insolvents Carried on in Two Provinces — Bankruptcy Proceedings in Province where Assignment Made — Claim of City in Another Province for Preference in Respect of Business Tax and Water Rates — Consideration of Laws of the Other Province — Reference of Contestation to Bankruptcy Court of that Province — Bankruptcy Act, Secs. 6(1), 51(6), 71(2).

Where a claim is made by a city municipality in a province other than that in which the bankruptcy proceedings are being carried on to rank as a preferred creditor for taxes and public utility supplies to a branch business there carried on by the insolvent company, the bankruptcy Court may properly refer the contestation of the preference involving a consideration of the laws of the other province to the Judge in bankruptcy for that province with the right of either party to appeal to the Appeal Court in bankruptcy of that province.

Motion by way of appeal from the decision of the authorized trustee heard before Orde, J. in Chambers at Toronto, November 5, 1921.

***Orde, J.*:**

1 The city of Montreal in the province of Quebec, through its treasurer, filed with the trustee proof of a claim

against the insolvents for $2,900 for water rates and business taxes for 1921 in respect of the business premises at 487 St. Catherine Street West, Montreal, which had been occupied by the Montreal branch of the insolvent company prior to its assignment under *The Bankruptcy Act.*

2 Of the $2,900, the sum of $1,200 is for water rates, and $1,700 for business tax. The city claims priority over ordinary claims under subsec. 6 of sec. 51 of the Act, and the trustee has disallowed the claim to priority, on the ground that the movable goods of the insolvent had come into the hands of the trustee before any seizure was made.

3 From this disallowance the city now appeals, and also asks for an order transferring the proceedings to the Bankruptcy Court in Montreal in order that the questions involved may be determined there. The trustee opposes the application to transfer the matter to the Bankruptcy Court in Montreal and urges that the issue can be determined more satisfactorily by the Bankruptcy Court in Ontario, which, by reason of the location of the head office of the company and the making of the assignment in this province, is the Court primarily charged with jurisdiction over the insolvent estate.

4 That once the Courts of one province are seized with the matter, no Court in any other province will be permitted to intervene in the proceedings or to interfere with the administration of the insolvent estate, except under the order of the Court so seized, is clearly established by the judgment of the Supreme Court of Canada in *Stewart v. LePage* (1916) 53 S.C.R. 337, a decision upon those provisions of the Dominion *Winding-up Act* (R.S.C., 1906, ch. 144, sec. 125) which correspond to subsec. 2 of sec. 71 of *The Bankruptcy Act.* See also *Brewster v. Canada Iron Corporation* (1914) 7 O.W.N. 128.

5 So that, except in the enforcement of a lien or charge upon property of the insolvent company still locally situate in the province of Quebec where the right to proceed independently of the administration in bankruptcy is preserved to the creditor by subsec. 1 of sec. 6, the Courts of the province of Quebec have no power to entertain or adjudicate upon the claim of the city of Montreal in this case without an order of this Court obtained under sec. 71(2).

6 It therefore becomes a question whether or not in the exercise of my judicial discretion it will be more reasonable in view of all the circumstances that I should attempt to try the question here or remit it to the Quebec Court for that purpose.

7 It was urged by Mr. Cassels that my judgment in *In re West & Co.* (not yet reported) (2 C.B.R. 3) in which, *inter alia*, I held that in the existing state of the legislation of this province, the city of Toronto was not entitled to any preference or priority under subsec. 6 of sec. 51 for business taxes, rendered it unnecessary to refer the matter to the Quebec Court, or to deal with the appeal otherwise than on the footing of that case. But this contention overlooks the fact that my judgment is based upon the omission, as I regarded it, from the legislation of this province of any provision which, by virtue of subsec. 6, [1 C.B.R. 56] gave to a municipality any preference for business taxes which could be enforced after the bankruptcy had intervened. But the expression "business tax" may mean entirely different things in different provinces, and my decision was not intended to hold, and cannot be interpreted as holding, that the mere appellation of "business tax" to some particular form of impost excludes it from the operation of subsec. 6 in every province and without regard to the local statutory provisions for its realization.

8 In the present case the goods of the insolvent upon the premises in question are admitted to have been sufficient to answer the liability for the taxes claimed had a seizure been made by the city before the insolvent company assigned to the trustee. And the city claims that under the law of the province of Quebec it was entitled nevertheless to collect the water rates and the business tax in question, either in spite of, or by virtue of, subsec. 6 of sec. 51. This necessarily involves a question of Quebec law, and if the circumstances were such that the duty of dealing with that question were cast upon me, I would be obliged to deal with it in the ordinary way, by hearing evidence as to the law of Quebec and dealing with such evidence as a matter of fact rather than of law. This procedure, at all times unsatisfactory, would be particularly so where the question is to some extent a technical one, involving the consideration possibly of the Civil

and Municipal Codes of the province of Quebec and the charter of the city of Montreal. In such a case it will clearly be much more satisfactory to have the application of the law of Quebec to the question in issue dealt with by the Courts of that province, rather than by the unsatisfactory method, which for lack of a better one, the Courts of one country are forced to adopt when dealing with the laws of another. In my judgment, subsec. 2 of sec. 71 is particularly adapted for just such cases as this, and it would be difficult to suggest a more appropriate occasion for resorting to the benefit of its provisions than the one now before me.

9 It was not made quite clear to me whether or not after the assignment the goods of the insolvent upon the premises in question had been removed by the trustee from the province of Quebec into the province of Ontario. If so, the trustee may desire to contend that, assuming that in spite of the assignment the city still had the right by law to seize goods found upon the premises in question, the removal from the premises or from the province before seizure has affected the city's preferential claim. While that question might, perhaps, be reserved for myself to deal with, yet inasmuch as the question, if raised, may invoke some consideration of Quebec law, I think it preferable that my order should not in any way hamper or interfere with the freedom of the Bankruptcy Judge in Montreal to deal with the whole matter involved in the appeal. It may not be amiss to say that it would seem to me to be highly improper that any act of an authorized trustee, such as the removal by him of goods from one province to another, should be allowed to prejudicially affect preferential rights in existence at the time of the assignment, even though such rights depended for their full enforcement upon the continuance upon the premises in question of the goods of the insolvent until actual seizure. But the question is not yet ripe for any considered judgment of mine upon that point.

10 There will be an order under the authority given to me by subsec. 2 of sec. 71 referring the appeal of the city of Montreal from the trustee's decision to the Judge in Bankruptcy for the province of Quebec exercising jurisdiction in the city of Montreal, including the right to either party to appeal from his decision to the Appeal side of the Court of King's Bench of that province.

11 The costs of this application will go to the party ultimately successful upon the issue involved. The trustee's costs will, of course, be payable out of the estate.

Reference to Bankruptcy Judge of Quebec.

END OF DOCUMENT

\\apps1\users\creerym\Postmedia send to Quebec\Fairweathers.doc

TAB O

Indexed as:

Knai v. Steen Contractors Ltd. (Trustee of)

Between
Steiner Knai and Kenneth Sinclair, applicants, and
In the Matter of the Bankruptcy of Steen Contractors Limited, respondent

[2001] O.J. No. 269

[2001] O.T.C. 38

22 C.B.R. (4th) 223

102 A.C.W.S. (3d) 859

Court File No. 31-351227

Ontario Superior Court of Justice
Commercial List

Jarvis J.

Heard: November 2, 2000.
Judgment: January 30, 2001.

(27 paras.)

Bankruptcy -- Conflict of laws -- Actions -- Forum conveniens -- Considerations.

Application by Sinclair and Knai to transfer bankruptcy proceedings to the Quebec Superior Court. Sinclair and Knai were employed by Steen Contractors, Dominion Bridge Inc. and Dominion Bridge Company in Montreal. Their contracts were signed in Montreal. Both individuals resided in Montreal. The latter two companies were Quebec companies while Steen was incorporated in Ontario. The three companies were related. Sinclair and Knai commenced litigation in Quebec against the three companies. The companies filed assignments in bankruptcy in their respective domiciles. Sinclair and Knai filed proofs of claim in the three bankruptcies. The trustee of Steen applied to the Ontario court for directions. The court did not make a ruling as it awaited the outcome of concurrent Quebec proceedings. Steen's trustee submitted that the proper location for its bankruptcy was in Ontario since its head office and business were located in Ontario.

HELD: Application allowed. The proceedings were transferred to Quebec. Quebec was the appropriate forum to deal with the bankruptcies of the three companies. This was based on the residence of Sinclair and Knai, the location of their services and the court where they commenced their litigation.

Counsel:

L. Joseph Latham, for Steiner Knai.
D.V. MacDonald, for Kenneth Sinclair.
Monica Creery, for Richter & Partners Inc., Trustee of Steen Contractors Limited.

1 **JARVIS J.**:-- These applications involve the bankruptcy of three related companies. One of these companies, Steen Contractors Limited ("Steen"), is an Ontario company. Both Dominion Bridge Inc. ("DBI") and Dominion Bridge Company ("DBC"), the parent of Steen and DBI, are Quebec companies.

2 The background of these matters is important and is best set out separately.

SINCLAIR CLAIM

3 Kenneth Sinclair ("Sinclair") was President and CEO of DBI and Steen from December 1, 1997 to June 10, 1998. Sinclair served in this position pursuant to a Services Agreement dated December 1, 1997. The agreement provided that Sinclair could terminate his employment for "good cause", which was defined to include a change in the persons instructing him. Sinclair alleges that such a change occurred and gave rise to his termination of the agreement. Sinclair resigned and brought action against the related companies in Quebec claiming compensation pursuant to the Services Agreement. DBC, DBI and Steen retained counsel and filed a defence to the Sinclair action in August 1998.

4 On August 11, 1998, the related companies filed notice of intention to file proposals under the Bankruptcy and Insolvency Act ("BIA"), effective August 11, 1998. The filings of DBC and DBI were in Quebec, while that of Steen was in Ontario.

5 In August 1998, Sinclair moved in Quebec for an order lifting the stay of proceedings against the related companies. The motion was dismissed. Steen appeared and participated through counsel in this proceeding.

6 Sinclair filed proofs in all 3 bankruptcies.

7 Sinclair again moved in Quebec to lift the stays and the motion was dismissed by the Registrar in Bankruptcy on April 18, 2000. Again the Steen trustee participated through counsel.

8 On April 27, 2000, Sinclair moved to the Quebec Court to appeal the decision of the Registrar of April 18, 2000 and to vary the original order of the court refusing to lift the stays. These motions proceeded on June 16, 2000 before Guthrie J. of the Quebec Superior Court. Again, Steen participated through counsel.

9 On June 16, 2000, Guthrie J. ordered that the evaluation process proceed forthwith and that the process be carried out by the three trustees and ruled that the valuation of the Sinclair claims

was properly before the Quebec Court. Guthrie J. adjourned the motion to July 13, 2000 to allow the valuations to proceed.

10 On July 5, 2000, the Steen trustee moved before the Ontario Superior Court of Justice Commercial List seeking directions regarding the Sinclair Proof of Claim and a date for a hearing of a motion to determine whether a proper interpretation of the Services Agreement is that Steen is not liable to Sinclair pursuant to the terms of the Agreement.

11 On July 5, 2000, Cameron J. heard that motion and adjourned it to August 9, 2000 pending the decision of Guthrie J. in Quebec.

12 On July 11, 2000 the DBI trustee disallowed Sinclair's claim, as did the DBC trustee with identical notice on July 12, 2000. No such notice or valuation of Sinclair's proof in the Steen bankruptcy has occurred.

13 On July 13, 2000, the hearing of the Quebec motions continued. Guthrie J. adjourned the matters sine die, pending a decision by this Court on the jurisdictional issue relating to the Steen bankruptcy. In doing so, Guthrie J. said:

> The undersigned, who has been involved in these three bankruptcy matters for almost 2 years is of the opinion that the interests of justice would be better served if the proceedings in these three bankruptcies were continued in the Bankruptcy and Insolvency Division of the Supreme Court of Montreal, in the Province of Quebec.

KNAI CLAIM

14 This claim is procedurally similar to the Sinclair claim in that the Steen trustee is seeking to proceed in Ontario for relief similar to that sought against Sinclair. In other words, they seek an order in Ontario that Steen is not contractually bound by the provisions that otherwise apply to termination of the contract. Knai has also filed proofs in all three bankruptcy proceedings and this involved litigation in Quebec relating to his employment. The significant difference is that Knai was terminated by the related companies on January 30, 1997. Knai is a defendant in an action brought against him and his wife by DBC in the Quebec Superior Court and has cross-claimed against DBC in that action seeking $3,087,240.

15 On December 30, 1997, Knai sued DBC for damages and salary for wrongful termination. As I understand it, there have been no motions to date in Quebec regarding the Knai actions and or the bankruptcies of the related companies in which Knai has participated.

16 Knai was involved in the Steen bankruptcy by virtue of the proof of claim filed in Ontario. Knai supports Sinclair's position. Both Sinclair and Knai say that all matters regarding their claims ought to be determined in Quebec.

CURRENT SITUATION

17 Since the Steen trustee's motion for directions was adjourned, Sinclair and Knai have applied for orders that all proceedings relating to their claims, including the Trustee's motion for Directions and any appeal from any motions of disallowance or valuation of their claims, be heard and determined by the Superior Court of Quebec. On August 9, 2000, a scheduling hearing was conducted by Blair J. at which he directed that the Sinclair and Knai motions should be argued before

the substantive motion brought by the trustee and scheduled the current jurisdictional motion which I have heard.

DISCUSSION

18 Steen's trustee argues that at the date of Steen's assignment in bankruptcy its head office and undertakings were located in Ontario and that therefore the proper location for Steen's bankruptcy proceedings is this Court in Toronto. While the Ontario Court has the power to request the aid of the Quebec Court, it must take into consideration the interests of justice and the interests of the general body of creditors that the trustee's costs be minimized. It is argued that these interests are best protected by having the contractual issue determined in Ontario. It is also argued that this is a threshold issue which does not overlap with the issues raised in the Quebec bankruptcy proceedings. It is also argued that there was no attornment to Quebec's jurisdiction by Steen, rather counsel appeared there to argue that the Quebec Court had no jurisdiction to deal with Steen and that there was therefore no jurisdiction for the Quebec Court to ask the Ontario Court to refer the matter to Quebec and the statement of Guthrie J. to this effect must be considered obiter.

19 Both Sinclair and Knai are residents of Quebec and worked in that province for the related companies. The respective circumstances of their employment will be relevant to the threshold argument. It is difficult to predict the course of the "threshold proceeding", but it is more than possible that there will be factual issues similar to those in determining the issues before the Quebec Court. It is therefore at least arguable at this point that to proceed in both provinces would give rise to at least the possibility of inconsistent findings, which, if it were to occur, would tend to bring the administration of justice into disrepute.

20 It was virtually conceded on behalf of the Steen trustee that were the threshold argument to fail, the Sinclair and Knai issues would otherwise be best dealt with in Quebec.

21 There is little in the way of reported decisions to provide guidance. Ironically, Guthrie J. dealt with a similar issue in Castor Holdings Ltd. (1995), 36 C.B.R. (3d) 199. He reviewed the background of these types of proceedings at page 204:

> In 1923, the Supreme Court of Ontario, in the case of Re Bryant Isard & Co., was called upon to apply s. 71(2) of the Bankruptcy Act, which section has survived almost intact as s. 188(2) of the Act. This matter concerned the taxation of the fees of a Quebec attorney acting for the former trustee in the bankruptcy. The head office of the debtor company was in Toronto; the authorized assignment was made to a trustee in the province of Ontario and the administration of the estate was in the province of Ontario. Nevertheless, the Quebec attorney attempted to have his bill of costs taxed in the province of Quebec.
>
> Fisher J. of the Supreme Court of Ontario stated [emphasis added]:
>
> ... there are and can be no bankruptcy proceedings of this estate in the province of Quebec without the consent and concurrence of this Court. Consequently, there can be no possible doubt that the only Court having original jurisdiction in this matter is the Court in the Province of Ontario [...] If a creditor desires to proceed against the trustee in another province with any matter arising in the administration of an insolvent estate, he must apply to the Court having original ju-

> risdiction for an order under sec. 71(2) of the Bankruptcy Act [...] and the Judge presiding in that Court, possessing discretionary powers, would be entitled to consider on that application whether, in all the circumstances, it was advisable or not to ask the assistance of the Bankruptcy Court in another province for its determination of the question. As soon as the Courts of any one province are seised with the administration of an insolvent estate, they should not permit any other Court to interfere with the administration of the insolvent's estate, except with its leave or concurrence. If such interference were permitted, the Court rightly seised of jurisdiction, would be abnegating its duty, and permitting an undue interference with the due administration of the trustee. While sec. 71(2) [...] shows that one Court may seek the assistance of another Court, there is nothing in that section, nor in any other section which enables a suitor to invoke that assistance.

Justice Guthrie was considering an appeal of the Registrar's order "seeking the aid of the Alberta Court in the taxation of the respondent's cost." Guthrie J. recited the relevant factors and placed great stress on the "interests of the general body of creditors that the costs to the trustee of the taxation procedure be minimized." He ordered that the costs be taxed in Quebec.

22 This procedure was also considered in re Fairweathers Ltd. (1921), 2 C.B.R. 133. Orde J. of the Supreme Court of Ontario referred the contestation of the preference involving consideration of the law of Quebec to the Superior Court of the province. In doing so he said at p. 134:

> That once the Courts of one province are seized with the matter, no Court in any other province will be permitted to intervene in the proceedings or to interfere with the administration of the insolvent estate, except under the order of the Court so seized, is clearly established by the judgment of the Supreme Court of Canada in Stewart v. LePage (1916) 53 S.C.R. 337, a decision upon those provisions of the Dominion Winding Up Act R.S.C. 1906, ch. 144, sec. 125) which correspond to subsec. 2 of sec. 71 of The Bankruptcy Act. See also Brewster v. Canada Iron Corporation (1914) 7 O.W.N. 128.

23 Orde J. stated at page 135:

> It therefore becomes a question whether or not in the exercise of my judicial discretion it will be more reasonable in view of all the circumstances that I should attempt to try the question here or remit it to the Quebec Court for that purpose.

CONCLUSION

24 I consider the factors which overwhelmingly favour the referral of these claims to the Quebec Court to include the following:

1. Both creditors were employed in the City of Montreal, in the Province of Quebec throughout their time with the related companies.
2. Kenneth Sinclair's claims in all three bankruptcies arise from a single Services Agreement between Sinclair and the bankrupt companies.
3. Prior to the bankruptcies, Sinclair's claims were being advanced in the Quebec action and DBC, DBI and Steen filed a common defense to that action.

4. Knai's claims arise out of his employment in the Province of Ontario and from a single Services Agreement entered into by him and the three bankrupt companies.
5. The present proceedings in Ontario and Quebec have involved factual and legal issues which to some extent will predictably overlap. This leads to the probability of duplication of time, expense and the possibility of inconsistent findings and conclusions which might lead the administration of justice into disrepute.

25 In addition, in my view, Quebec is the appropriate forum to have all of these matters determined. Among the factors leading me to this conclusion are the following:

1. The bankruptcies of DBI and DBC are being dealt with by the Quebec Court.
2. The trustees in bankruptcy of DBI and DBC are located in Montreal and one of them, Richter and Associates, Inc., is associated with the trustee in bankruptcy of Steen, Richter and Partners, Inc.
3. DBC, DBI and Steen all had offices in Montreal and Sinclair and Knai provided services for those companies in Montreal.
4. The Services Agreement was signed by all the parties in Montreal.
5. Sinclair and Knai are domiciled and reside in the City of Montreal.
6. Both Sinclair and Knai commenced actions in the Quebec Court. While the Sinclair action has been stayed, if it should be lifted it would continue in a Quebec Court.
7. It is likely that the preponderance of witnesses necessary to determine these various matters are residents of Montreal.

26 The conveniences of modern travel and communication make it less likely than it has been in the past that serious hardship will accrue to any of the parties by choosing either province. As I have said, however, the arguments before me have convinced me that it is more likely that these matters can proceed at the least expense to the creditors if they proceed in the province of Quebec and for that reason I request that all proceedings relating to the Sinclair and Knai proofs of claim, including the trustee's motion for directions returnable July 2000 as it relates to the Sinclair and Knai proofs of claim and any appeals from any notice of disallowance or valuation of the Sinclair or Knai proofs of claim be heard in the Quebec Court.

27 If counsel cannot agree, I may be spoken to regarding the form of the Order and costs.

JARVIS J.

cp/s/qlsar

\\apps1\users\creerym\Enforce foreign judgment\Knai_v._Steen_Contractors_Ltd._(Trustee_of),.DOC

TAB P

1969 CarswellMan 18, 67 W.W.R. 355, (sub nom. Bank of Western Canada, Re) 4 D.L.R. (3d) 58

1969 CarswellMan 18, 67 W.W.R. 355, (sub nom. Bank of Western Canada, Re) 4 D.L.R. (3d) 58

Genovese v. York Lambton Corp.

Re Winding-up Act

Genovese (Plaintiff) Respondent v. York Lambton Corporation Limited (Defendant) Appellant and Canada Trust Company et al (Defendants)

Manitoba Court of Appeal

Smith, C.J.M., Freedman, Guy, Monnin and Dickson, JJ.A.

Judgment: January 28, 1969

Counsel: *A. W. Scarth, Q.C.*, for liquidator.

H. B. Monk, Q.C., and *C. Phelan*, for Canada Trust Co.

J. T. Weir, Q.C. (of the Ontario Bar) and *F. D. Allen*, for York Lambton Corpn. Ltd.

A. Sweatman, Q.C., and *K. Turner, Q.C.*, for holders of trustees' subscription certificates and others.

G. Kroft, for remaining shareholders of York Lambton Corpn. Ltd.

Subject: Corporate and Commercial

Corporations --- Winding-up — Under Dominion Act — Appeals — Jurisdiction of Courts.

Courts — Proceedings under Winding-up Act — Transfer of Proceeding from One Province to Another — Appeal — Proper Forum — Jurisdiction — Winding-up Act, SS. 103, 104, 127.

Appeal from a judgment of Wilson, J., of the supreme court of Ontario pursuant to secs. 103 and 104 of the *Winding-up Act*, RSC, 1952, ch. 296; sec. 103 gives the right of appeal from "an order or decision of the court or a single judge in any proceeding under this Act ... by leave ...." Sec. 104 reads: "Such appeal lies to the highest court of final resort in or for the province or territory in which the proceeding originated." Leave to appeal having been granted, the question arose, to which court of appeal, Manitoba or Ontario, should the appeal go? The winding-up was taking place in Manitoba and the question dealt with by Wilson, J., in Ontario, was earlier brought before Matas, J. in Manitoba who ordered that, pursuant to sec. 127 of the *Winding-up Act* it be transferred to Ontario to be there determined by the supreme court of Ontario in its auxiliary capacity under the Act. The question of jurisdiction was argued as a preliminary issue.

It was *held*, per Freedman, J.A. and Smith, C.J.M., Guy, J.A. concurring, Dickson and Monnin, JJ.A. dissenting, that the court was without jurisdiction to entertain the appeal; the word "proceeding" in secs. 103 and 104 used, as it was, in the singular, clearly referred, not to the winding-up as a whole, but to the one question which was before Wilson, J. in Ontario; and the word "originated" in sec. 104 must be taken to mean no more than "took place." The clear intention of sec. 104 was that the appeal would go to the court of appeal of the province where the proceeding, the decision in which was the subject of the appeal took place.

Smith, C.J.M.:

1 I concur in the judgment which has been read by my brother Freedman and wish only to add a comment on one of the points made therein. This is the point that Matas, J. did not transfer a proceeding to the Ontario court, that what he transferred was an issue, matter or question. In my view, the distinction between an issue and the proceeding by which it is determined is very clear and in the context of this appeal must always be kept in mind.

2 A proceeding may be a prosecution, an action or a motion. In all types of situations it is the process by which the issue or issues to be determined are brought to and dealt with by the court. A prosecution is begun by the laying of an information, an action by the issue of a writ, or statement of claim or the presentation of a petition, and a motion commonly by filing a notice of motion. The issue or issues may originate long before the proceeding. A prosecution proceeding does not originate with or at the time of the commission of the alleged offence or the arrest of the accused, but with the laying of the information. Similarly a civil action proceeding originates with the issue of the writ, or statement of claim or presentation of the petition, and not before. Similarly also, the proceeding to resolve either a civil matter that does not require an action or an interlocutory issue in an action originates with the filing of the notice of motion.

3 In the present case, by an order dated March 1, 1968, Matas, J., of the Manitoba Court of Queen's Bench, ordered that:

> ... the matter of the payment of the fund of $3,679,000 and interest held in the name of the liquidator, The Clarkson Company Limited, be transferred from this Court to the Supreme Court of Ontario, with the concurrence of the Supreme Court of Ontario, so that the Supreme Court of Ontario in its auxiliary capacity under the aforesaid section 127, [*i.e.*, of the *Winding-up Act*] may direct the manner in which the fund shall be paid after hearing such evidence and making such determinations as it shall deem necessary, ...

4 The matter thus ordered to be transferred to Ontario had arisen in the winding-up proceedings by claims made during the preceding several months that there was a trust which affected the bank shares in respect of which the fund of $3,679,000 was to be distributed. However, with great respect for those who hold the opposite view, in my opinion the proceeding to determine the matter so transferred originated with and at the time when, pursuant to the order of Matas, J., notice was given, dated April 23, 1968, that on May 1, 1968, a motion would be made in the supreme court of Ontario for an order that the transferred matter be determined by the supreme court of Ontario, or for such other order as in the circumstances might seem just. It was in the proceeding thus originated that the order of Wilson, J. [1968] 2 O.R. 569, which is the subject of this appeal, was made.

Freedman, J.A.:

5 This is a preliminary issue to determine whether this court has jurisdiction to hear an appeal from a decision of Wilson, J. of the supreme court of Ontario [1968] 2 O.R. 569, under the circumstances hereinafter set forth, or whether jurisdiction over that appeal lies instead in the court of appeal for Ontario.

6 The matter arises under the *Winding-up Act*, RSC, 1952, ch. 296, and relates to the winding-up of Bank of Western Canada. The provisions of sec. 127 of that Act must first be noted. It reads as follows:

> 127. The courts of the various provinces, and the judges of the said courts respectively, are auxiliary to one another for the purposes of this Act; and the winding up of the business of the company or any matter or proceeding relating thereto may be transferred from one court to another with the concurrence, or by the order or orders of the two courts, or by an order of the Supreme Court of Canada.

7 The winding-up is taking place in the province of Manitoba. On February 23, 1968, a class action was commenced in the supreme court of Ontario by Grace Genovese on her own behalf as a holder of trustee's subscription certificates evidencing subscription for common shares in the capital stock of the Wellington Financial Corporation, Limited (now York Lambton Corporation Limited) and on behalf of the other holders of such certificates or of shares or warrants converted therefrom. The defendants in the action are York Lambton Corporation Limited, British International Finance (Canada) Limited, Canada Trust Company, and Marc Masson Bienvenu. The nub of the plaintiff's claim is that the moneys subscribed for the trustee's subscription certificates were to be used solely for the purpose of purchasing shares in the capital stock of Bank of Western Canada and holding those shares as an investment. But it is alleged, that purpose became impossible of performance by reason of the winding-up. (It is common ground that the bank never opened its doors for business, that its shareholders by resolution resolved that it be wound up, and that Matas, J., on a petition to the Court of Queen's Bench pursuant to that resolution, made an order on October 30, 1967, that it be wound up and that the Clarkson Company Limited be appointed liquidator.) The plaintiff pleads the *Frustrated Contracts Act*, RSO, 1960, ch. 157, and asks for recovery of the amounts subscribed for the said trustee's subscription certificates, and for other relief.

8 Although the liquidator is not a party defendant to the Genovese action it is clear that the matters raised therein plainly relate to Bank of Western Canada and its winding-up. Accordingly on February 27, 1968, the plaintiff made an application before Matas, J. in the Court of Queen's Bench of Manitoba:

> for an order or concurrence under section 127 of 'Dominion Winding-Up Act' to enable suit No. 1346/68 now pending in the Supreme Court of Ontario to be transferred to this Honourable Court, or for such other order as may be right and just under the circumstances.

9 That application was adjudicated upon by Matas, J. on March 1, 1968. To appreciate the determination he made of the matter it is pertinent to note that, even before the Genovese action had been instituted, claims had been made before Matas, J. by other parties that a trust interest in the shares of Bank of Western Canada owned by York Lambton Corporation Limited existed in favour of minority shareholders of York Lambton. On January 26, 1968, Matas, J. had ordered that any dividends or other distributions in respect of those shares be held pending further order of the Court of Queen's Bench, the matter of a trust interest as claimed on behalf of minority shareholders of York Lambton being meanwhile adjourned. Now the Genovese action was before the court, it too raising, in effect if not in specific terms, the existence of such a trust interest.

10 In these circumstances Matas, J. made the following order:

> It is ordered that pursuant to Section 127 of 'The Winding Up Act' the matter of the payment of the fund of $3,679,000 and interest held in the name of the liquidator, The Clarkson Company Limited, be transferred from this Court to the Supreme Court of Ontario, with the concur rence of the Supreme Court of Ontario, so that the Supreme Court of Ontario in its auxiliary capacity under the aforesaid section 127, may direct the manner in which the fund shall be paid after hearing such evidence and making such determinations as it shall deem necessary ....

11 In short, instead of transferring the Ontario action to Manitoba for adjudication here, the learned judge, granting the alternative relief "for such other order as may be right and just under the circumstances," transferred to the supreme court of Ontario the matter of how the fund of $3,679,000 should be paid after hearing such evidence and making such

determinations as that court should deem necessary. The main determination required of the court was, of course, whether a trust interest did exist, as claimed, in favour of minority shareholders of York Lambton Corporation Limited. In my view, Matas, J. did not transfer a proceeding, he transferred an issue, matter or question to Ontario for determination by the supreme court of that province, the determination to be made by means of an appropriate proceeding to be started and carried through in accordance with Ontario law and procedure.

12 An appeal against the order of Matas, J. was taken to the court of appeal for Manitoba. That appeal was dismissed. My brother Dickson, delivering the judgment of this court, said in part as follows:

> The Ontario Supreme Court is the proper forum in which to try the issues .... Ontario law will govern .... In transferring the dispute to Ontario the Manitoba Court is not abdicating its responsibility in favour of a foreign court. It is simply giving recognition to the probability that the issues will be more conveniently, expeditiously, and economically determined by the High Court of Ontario, a court auxiliary to the Court of Queen's Bench of Manitoba for the purposes of the *Winding-up Act, supra.*

13 The subject matter of the order of Matas, J. having been transferred to the supreme court of Ontario, certain preliminary steps were taken and orders made in that court. In due course the matter itself came on for hearing before Wilson, J. That learned judge found and declared that there was a trust in favour of the minority shareholders of York Lambton as claimed. Leave to appeal from his decision has been duly given. The neat question now is, to which court does the appeal go — to the court of appeal for Manitoba or to the court of appeal for Ontario?

14 That the question is reasonably debatable is indicated by the fact that notices of appeal have been filed in both courts. We have been told that the appeals in Ontario have been stayed pending our disposition of the matter here. Counsel contending that Manitoba is the proper place for the appeal say that the filing of notices of appeal in Ontario was done *ex abundanti cautela.* I do not for a moment question the sincerity of that submission. I say only that the filing of appeals in Ontario, even if dictated by considerations of utmost prudence, still points to the existence of some doubt concerning the proper forum of appeal.

15 Recognizing the desirability of first determining whether we have the right to deal with this appeal, we fixed a hearing at which we invited counsel to submit argument on the question of jurisdiction. Prior to that hearing we had ascertained from a meeting with counsel that, while argument would be submitted in favour of our jurisdiction, none would in all probability be offered against our jurisdiction. The court accordingly requested Mr. Alan Scarth, Q.C., who as counsel for the bank and the liquidator occupied a position of neutrality between the contending parties, to submit argument in support of the view that the Ontario court was the proper forum for the appeal. Mr. J. T. Weir, Q.C., of the Ontario bar, as counsel for York Lambton Corporation Limited, made the main submission for the contrary view that Manitoba was the proper place of appeal. To both these eminent counsel we are indebted for able and illuminating presentations of the two divergent positions.

16 Against this background I turn now to the determination of the jurisdictional issue before us. Two sections of the *Winding-up Act* are, in my view, decisive of the matter. They are secs. 103 and 104, and they are in the following terms:

> 103. Except in the Northwest Territories, any person dissatisfied with an order or decision of the court or a single judge in any proceeding under this Act may,
>
> (*a*) if the question to be raised on the appeal involves future rights,
>
> (*b*) if the order or decision is likely to affect other cases of a similar nature in the winding-up proceedings, or
>
> (*c*) if the amount involved in the appeal exceeds five hundred dollars, by leave of a judge of the court, or by leave

> of the court or a judge of the court to which the appeal lies, appeal therefrom.
>
> 104. Such appeal lies to the highest court of final resort in or for the province or territory in which the proceeding originated.

17 It will be observed that sec. 103 speaks of a "proceeding." Then sec. 104 makes reference to "the proceeding." I have no doubt whatever that the proceeding mentioned in sec. 104 is precisely the same proceeding as is referred to in sec. 103. What was that proceeding in the present case? In my view, it is immediately and incontrovertibly identifiable by its linkage in sec. 103 with the words "an order or decision of the court or a single judge in ...." The proceeding we are concerned with is that in which Wilson, J. made the order or decision which is the subject of the present appeal. The appeal is from that decision and from nothing else.

18 But Mr. Weir urges a somewhat different approach to the matter. I quote from his factum, thus:

> If Section 104 refers to the whole of the proceedings, then of course they originated with the Winding-up Order in Manitoba. If, on the other hand, it refers to a part of the proceedings, then it originated with either the Liquidator's application to settle the contributories (since both the appellants and the respondents here seek to be treated as contributories) or when Matas, J. on March 1st, determined that a separate lis should be carved out of the whole of the proceedings to deal with the issue in this appeal.

19 Three possibilities are here suggested. The first is that "the proceeding" as used in sec. 104 refers to the winding-up proceedings in their entirety. To that I say simply that it is the singular of the word and not the plural that is used. Had sec. 104 spoken of "the proceedings" there would have been more force to the submission. Standing as it does, however, the proceeding mentioned in sec. 104 can only be the proceeding giving rise to the order or decision with which certain of the parties are "dissatisfied" and which is the subject of the present appeal. We are concerned only with where *that* proceeding originated, and not with where the winding-up proceedings as a whole arose.

20 The second and third possibilities, as I read the argument, have reference not so much to the meaning of the words "the proceeding" as to the meaning, in a local sense, of the word "originated." Indeed neither the liquidator's application to settle the contributories nor "the separate lis" which Matas, J. carved out could in any way be "the proceeding" referred to in sec. 104. For neither of them gave rise to the order or decision now under appeal. The order of Matas, J. was in fact itself appealed and dealt with on appeal — by this court as above indicated — but that is another matter entirely.

21 So I am left with the conviction that there is only one possible proceeding which can fall within the meaning of that term as it is used in secs. 103 and 104 — namely, the proceeding before Wilson, J. resulting in his order or decision against which the present appeal has been taken. But that does not yet dispose of the matter. For we must now decide where that proceeding "originated." What does that word mean, in the present context?

22 In my view — as reference below to the history of the legislation will, I hope, make demonstrably clear — the word is intended to convey nothing more than "took place." Let me first indicate why I believe the word *should* mean that.

23 Under sec. 127 a matter or proceeding relating to a winding-up may be transferred to a court of another province as an auxiliary court. Such a transfer was made in the present case. One reason for the transfer was that Ontario law, including the *Frustrated Contracts Act* of that province, would govern the matter. If it governed the trial it will no less govern the appeal. The transfer here went from Manitoba to Ontario. Suppose, as Mr. Scarth asked us to imagine, it had gone instead to Quebec, as in an appropriate case it might well have. In that case Quebec law — *le Code Civil* — would govern, and the proceedings at the trial might even be conducted in French. Can it reasonably be thought that sec. 104 intended an appeal in such a case to go to the court of appeal for Manitoba? In my view, it is manifest that sec.

104 contemplated that the appeal would go to the court of appeal of the province where the proceeding, the decision in which is the subject of the appeal, took place. If it took place in Ontario, the appeal would be to the highest court of Ontario; if in Quebec, the appeal would be to the highest court of Quebec, and so on. It is in that sense that the word "originated" is, in my view, equivalent to "took place."

24 Nor, with respect, am I detached from that view by the very attractive argument which Mr. Weir has expressed in his factum thus:

> Section 127 specifically provides that either the whole winding-up or any matter or any proceeding relating thereto may be transferred, etc. It is apparent therefrom that prior to any transfer being made, a proceeding must have originated, and pursuant to Section 104, the only Court of Appeal with jurisdiction is the court in the Province where the proceeding originated prior to its transfer.

25 I quite agree that prior to any transfer being made by Matas, J., a proceeding must have originated; in fact several did. But I do not agree that that settles the problem posed by the language of sec. 104. The argument suggests that "the only Court of Appeal with jurisdiction is the court in the Province where the proceeding originated *prior to its transfer*." I have italicized the last four words because, as is apparent, they do not appear in the statute. Had those words been included in sec. 104, and had what Matas, J. transferred been a "proceeding," then there would have been a clear warrant for looking back beyond the proceedings before Wilson, J. to those before Matas, J. But in the absence of those words there is no justification for doing that unless compelled to do so upon an interpretation of the word "originated." For myself I see no such compulsion arising from such interpretation.

26 Assuming that the word "originated" requires us to go back to some point anterior to the actual hearing before Wilson, J., in my view that point would be the notice of motion dated April 23, 1968, which launched the proceeding in Ontario. That notice of motion asked for an order:

> ... directing that the manner in which a certain fund of $3,679,000 and interest, held in the name of the liquidator, shall be paid, shall be determined by the Supreme Court of Ontario, or for such other Order as in the circumstances may seem just.

27 If we treat what took place in Ontario in its totality as "the proceeding," then it had its commencement with the notice of motion above quoted, and its termination (subject to appeal) with the decision of Wilson, J. In that sense the matter may be said to be analogous to a proceeding in the Court of Queen's Bench (to take an example with which we are familiar) which commences with a statement of claim and ends (again subject to appeal) with the judgment or decision of the trial judge.

28 I have already indicated why the word "originated" *should* mean "took place." The history of the legislation convinces me that it *does* mean that. I am grateful to Mr. Scarth for the very helpful memorandum he furnished to the court on this point.

29 In RSC, 1906, ch. 144, the predecessors of secs. 103 and 104 appeared as secs. 101 and 102, as follows:

> 101. Except in the Northwest Territories, any person dissatisfied with an order or decision of the court or a single judge in any proceeding under this Act may, —
>
> (*a*) if the question to be raised on the appeal involves future rights; or,
>
> (*b*) if the order or decision is likely to affect other cases of a similar nature in the winding-up proceedings; or

(*c*) if the amount involved in the appeal exceeds five hundred dollars; by leave of a judge of the court, appeal therefrom.

102. Such appeal shall lie, —

(*a*) in Ontario, to the Court of Appeal for Ontario;

(*b*) in Quebec, to the Court of King's Bench; and,

(*c*) in any of the other provinces, and the Yukon Territory, to a superior court in banc.

30 I pause here only to point out that it was crystal clear, from the language of sec. 102 (now 104), that in Ontario the appeal lay to the court of appeal for Ontario, in Quebec to the Court of King's Bench, and in the other provinces and the Yukon Territory (none of which at that time had a court of appeal) to a superior court *in banc.*

31 Sec. 102 was amended twice in 1908 to take care of the situation arising from the establishment of certain provincial courts of appeal, thus:

Chap 74. An Act to amend the Winding-up Act.

His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: —

1. Paragraph (*c*) of section 102 of *The Winding-up Act*, chapter 144 of the Revised Statutes, 1906, is repealed and the following paragraphs are substituted therefor: —

'(*c*) in Manitoba, to the Court of Appeal for Manitoba;

'(*d*) in any of the other provinces, or the Yukon Territory, to a superior court *in banc.*'

32 And then in July of the same year:

Chap. 10 An Act respecting the Court of Appeal of British Columbia

His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: —

. . . . .

Winding-Up Act.

2. Section 102 of *The Winding-up Act*, chapter 144 of the Revised Statutes, 1906, as the said section is amended by chapter 74 of the statutes of 1908, is repealed and the following is substituted therefor: —

'102. Such appeal shall lie, —

'(*a*) in Ontario, to the Court of Appeal;

'(*b*) in Quebec, to the Court of King's Bench;

'(*c*) in Manitoba, to the Court of Appeal;

'(*d*) in British Columbia, to the Court of Appeal; and,

'(*e*) in any of the other provinces or the Yukon Territory, to a Superior Court in banc.'

33 Then in RSC, 1927, ch. 213, the draftsman consolidated the section as it now appears, sec. 103 remaining unchanged and sec. 104 reading thus:

104. Such appeal shall lie to the highest court of final resort in or for the province or territory in which the proceeding originated.

34 Did the consolidation bring about a change in the law, or did the revised sec. 104 merely represent the draftsman's desire to express the former idea or scheme in more compendious language? I find it hard to believe that the consolidation in the manner aforesaid changed the law so as to require litigants to go out of the jurisdiction seeking an "origin" behind the court appealed from. I am persuaded rather that the law remained unchanged by the consolidation. I am strengthened in that view by the very language of sec. 104. The words "the highest court of final resort in or for the province" on the one hand, and "or territory" on the other, together embrace the totality of all the appellate courts which under the former section had been enumerated in detail. Now in the consolidation the same idea is compressed into briefer phraseology.

35 In that connection it is relevant to note that the 1927 consolidation was authorized by 1924, ch. 65, sec. 8 which provides as follows:

8. The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted.

36 Some assistance in interpretation is furnished by reference to some recognized authorities in the field. *Craies on Statute Law*, 6th ed., reads as follows, at p. 135:

Consolidating Acts. In construing a consolidation Act prior statutes repealed but reproduced in substance are regarded as *in pari materia*, and judicial decisions on a repealed statute are treated as applicable to substantially identical provisions in the repealing Act.

Decisions on the older enactments are usually accepted as conclusive in the construction of the substituted section in the later Act, even, it would seem, although the words would, if used for the first time in the substituted section of the later Act, presumably bear another sense.

37 To the same effect is *Beal's Cardinal Rules of Legal Interpretation*, 3rd ed., at p. 404:

It is legitimate in the interpretation of a consolidating statute to refer to the previous state of the law for the purpose of ascertaining the intention of the legislature.

The same effect ought to be given to the provisions of a consolidating statute that does not profess to amend or alter the provisions of the statutes consolidated as was given to those of the statutes for which it was substituted.

Where there are ambiguous expressions in a consolidating statute regard may be had to the previous statutes in pari materia *for the purpose of interpreting those ambiguous expressions.*

38 If it is not perfectly plain that the term "originated" refers to the proceeding resulting in the appeal, at the very least it must be said that the term is ambiguous. Accordingly, the principle of interpretation applies under which regard should be had to the form of the law prior to consolidation, no presumption being made that change was intended. In the light of that earlier law, and in the absence of any persuasive reason to suggest that the consolidation was designed to bring about a radical change in its substance, I am satisfied that the former scheme, under which an appeal from a decision in an Ontario proceeding went to the court of appeal for Ontario, still applies today.

39 I am accordingly of the view that we are without jurisdiction to hear this appeal and that the proper forum is the court of appeal for Ontario.

40 Certain counsel had been appointed by order of the supreme court of Ontario to represent certain classes of persons for the purpose of the appeal, with liberty to appoint agents in this province. It was suggested to us that if our decision should be that we were without jurisdiction to hear the appeal, and if any of the parties should then contemplate an appeal to the Supreme Court of Canada, it would be desirable that counsel be appointed or re-appointed, lest any question arise that their status or authority to act was spent. Perhaps we are not the proper court to make such appointments in view of my conclusion as to lack of jurisdiction. For whatever it is worth, however, I would direct that the appointments of counsel already made be continued.

41 The matter of costs may be spoken to on application.

***Guy, J.A.* concurs with Freedman, J.A.:**

***Monnin, J.A.* concurs with Dickson, J.A.:**

***Dickson, J.A.* (dissenting):**

42 On June 6, 1968, Wilson, J. of the supreme court of Ontario, delivered a judgment relating to the winding up of the Bank of Western Canada [1968] 2 O.R. 569. From that judgment an appeal has been taken to this court. The preliminary question to be decided is whether we have jurisdiction to hear the appeal.

43 The sections of the *Winding-up Act*, RSC, 1952, ch. 296, which are of principal concern are secs. 103 and 104, reading: (See, *ante*, p. 361).

44 Sec. 127 of the Act also bears upon the question. This section reads: (See, *ante*, p. 357).

45 There can be no doubt that the appeal from the judgment of Wilson, J. is an appeal from an order or decision of a judge in a proceeding under the *Winding-up Act* within sec. 103 of the Act. According to sec. 104, the appeal lies to the highest court of final resort in the province in which the proceeding originated. Our task is to identify the proceeding and, having done so, determine where such proceeding originated.

46 It is necessary to review events giving rise to the situation under which Wilson, J., a judge in Ontario, came to be dealing with a matter or proceeding relating to the winding-up of a bank in Manitoba. Those events are set forth in detail in the judgment of Matas, J., dated March 8, 1968, and in the judgment of this court dated March 28, 1968. For present purposes the following outline will suffice. Bank of Western Canada was incorporated on July 15, 1966, 1966-67, ch. 99, with head office at the city of Winnipeg. The bank never opened its doors for business and on September 14, 1961, the shareholders resolved that the bank would be wound up. Matas, J. made an order accordingly and

appointed the Clarkson Company Limited as liquidator. Matas, J. has since supervised the winding-up on behalf of the court. Then, in chronological order, the following transpired:

47 *December 1, 1967*: Mr. Kerr Twaddle, acting for Messrs. J. P. Charlebois, P. A. Charlebois, and W. J. Mollard, wrote to the liquidator stating it to be his clients' position that certain moneys raised by York Lambton Corporation, Limited, from the public offering of trustee's subscription certificates of York Lambton had been raised subject to a trust condition that they be used for investment in shares of the bank, and not for the general purposes of York Lambton and, in consequence, moneys payable to York Lambton on liquidation of the bank were subject to a trust in favour of the subscribers for the trustee's subscription certificates and should not be paid to York Lambton but to trustees for the subscribers.

48 *December 20, 1967*: Upon the application of the liquidator, Matas, J. ordered the liquidator to make up a list of contributories of the bank and thereafter to proceed to settle the list of contributories in accordance with the *Winding-up Act* and the Rules in that behalf.

49 *January 5, 1968, and January 8, 1968*: The Canada Trust Company made application to the bank to transfer into the name of The Canada Trust Company, as trustee under a deed of trust and mortgage dated March 16, 1967, made by York Lambton, 283,000 shares in the capital stock of the bank registered as to 250,000 shares in the name of York Lambton and as to 33,000 shares in the name of York Trust & Savings Com pany Limited. It was apparent that if all or part of the shares in the capital stock of the bank subscribed for by York Lambton were held to be subject to a trust of the nature described by Mr. Twaddle in his letter of December 1, the right of York Lambton to mortgage those shares in favour of The Canada Trust Company, as trustee, would be called into question.

50 *January 17, 1968*: Upon the application of the liquidator for directions, Matas, J. ordered that the liquidator not sanction the transfer of any of the shares of the bank registered in the names of York Lambton and York Trust until further order of the court, following the appointment fixed for settling the list of contributories on January 26, 1968.

51 *January 26, 1968*: Matas, J. settled the list of contributories and at the same time ordered that any dividends or other distribution in respect of the 283,000 shares of the bank, to which I have referred, be held by the liquidator in a separate account in a Canadian chartered bank in the name of the liquidator, until further order of the court. The preliminary distribution in the course of liquidation was $13 per share; the amount distributable in respect of the 283,000 shares and held in the name of the liquidator was $3,679,000.

52 *February 23, 1968*: Mrs. Grace Genovese, on her own behalf, as a holder of trustee's subscription certificates of York Lambton, and on behalf of the other holders and on behalf of those who had converted their certificates into shares of York Lambton, issued a writ of summons in the supreme court of Ontario against York Lambton, Canada Trust Company, British International Finance (Canada) Limited and Marc Masson Bienvenu, claiming recovery from York Lambton of the amounts subscribed for the said trustee's subscription certificates, pursuant to the *Frustrated Contracts Act*, RSO, 1960, ch. 157, by reason of the impossibility of performance and frustration of the contract of purchase of the certificates. It was alleged by Mrs. Genovese that the proceeds of the offer of the trustee's subscription certificates were to be used solely for the purpose of purchasing shares in the capital stock of the bank and holding the same as an investment. Neither the Bank of Western Canada nor the liquidator of the bank was named as a party in the writ of summons.

53 *February 27, 1968*: Mrs. Genovese filed an orginating notice of motion in the Court of Queen's Bench of Manitoba, "for an order or concurrence under section 127 of 'Dominion Winding-Up Act' to enable suit No. 1346/68 now pending in The Supreme Court of Ontario to be transferred to this Honourable Court, *or for such other order as may be right and just under the circumstances.*" (Italicizing added.)

54 *March 1, 1968*: Matas, J. made an order which recited: (i) That a claim of a trust interest in the shares of the bank

owned by York Lambton had been made on December 20, 1967; (ii) That Canada Trust Company had made a claim in respect of the shares; (iii) That Mrs. Genovese had caused to be issued in the supreme court of Ontario a writ of summons; (iv) That Mrs. Genovese had made an application to the Court of Queen's Bench of Manitoba to transfer her action to Manitoba or for such other relief as to the Court of Queen's Bench might seem meet. The order then said:

> 1. It is ordered that pursuant to Section 127 of 'The Winding Up Act' the matter of the payment of the fund of $3,679,000 and interest held in the name of the liquidator, The Clarkson Company Limited, be transferred from this Court to the Supreme Court of Ontario, with the concurrence of the Supreme Court of Ontario, so that the Supreme Court of Ontario in its auxiliary capacity under the aforesaid section 127, may direct the manner in which the fund shall be paid after hearing such evidence and making such determinations as it shall deem necessary, provided that the sum of $55,000 shall not be paid out of the fund pending determination by this Court of the right of the liquidator to set-off a receivable in this amount against the fund.

55 *March 28, 1968*: An appeal to this court from the order of Matas, J. dated March 1, was dismissed. Two extracts from the judgment of this court might be repeated here:

> This is a 'matter or proceeding relating' to the winding up of the business of the Bank and therefore Section 127 of the *Winding-up Act* applies.
>
> . . . . .
>
> In transferring the dispute to Ontario the Manitoba Court is not abdicating its responsibility in favour of a foreign court. It is simply giving recognition to the probability that the issues will be more conveniently, expeditiously, and economically determined by the High Court of Ontario, a court auxiliary to the Court of Queen's Bench of Manitoba for the purposes of the *Winding-up Act, supra*. It is analogous to transferring an action or a fund held in court in one judicial district to another.

56 *April 3, 1968*: The liquidator moved in the supreme court of Ontario:

> ... for an Order pursuant to the Order of The Honourable Mr. Justice Matas of the Court of Queen's Bench, Manitoba, dated Friday the 1st day of March, 1968, affirmed by the Court of Appeal for Manitoba on the 28th day of March, 1968, directing that the manner in which a certain fund of $3,679,000 and interest, held in the name of the liquidator, shall be paid, shall be determined by the Supreme Court of Ontario, or for such other Order as in the circumstances may seem just.

57 *May 1, 1968*: By order made by Lieff, J., the supreme court of Ontario accepted the "transfer of the matter" and fixed the issue now in appeal. The issue is recited at the commencement of the judgment of Wilson, J.:

> This is an issue directed to be tried by an order of this Court pronounced by Lieff, J., on May 1, 1968, the issue being:
>
> 'to determine and direct the manner in which the fund of $3,679,000 and interest, respecting 283,000 shares of Bank of Western Canada, which fund is held in the name of the Liquidator, the Clarkson Company Limited, shall be paid.' all as directed in the order of Matas, J. of the Court of Queen's Bench in Manitoba, which order is dated Friday, March 1, 1968.

58 *May 27, 28, 29, 30, 31, and June 3, 1968*: Trial of the issue before Wilson, J.

59 *June 6, 1968*: Wilson, J. delivered judgment. The learned judge held that there was a resulting trust and that

Canada Trust Company did not hold a charge upon the $3,679,000 in priority to the holders of the trustee's subscription certificates.

60 *November 8, 1968*: Morand, J. of the supreme court of Ontario ordered that leave to appeal pursuant to sec. 103 of the *Winding-up Act* from the judgment of Wilson, J. be granted.

61 I return to secs. 103 and 104 of the *Winding-up Act*. In order to be appealable the order or decision of Wilson, J. had to be in a "proceeding." In order for this court to have jurisdiction such proceedings must have originated in Manitoba.

62 As Martin, J.A. said in *Eddy v. Stewart*, [1932] 3 W.W.R. 71, at 74, reversing [1932] 2 W.W.R. 699 (Sask.), the word "proceeding" may be differently construed in different Acts: "it is sometimes used as equivalent to and interchangeable with the word 'action' and it is also applied to any step in an action." It is necessary to determine the sense in which it is used in sec. 104 of the *Winding-up Act*, which is the same sense as the word is used in sec. 103.

63 "Proceeding" or "proceedings" are used in a number of sections of the Act. The singular use of the word appears, for example, in sec. 17 giving the court the right to restrain further proceedings in "any action, suit or proceeding against the company;" in sec. 21 which provides that "After the winding-up order is made, no suit, action or other proceeding shall be proceeded with;" in sec. 35 (1) (*a*), which permits the liquidator to "bring or defend any action, suit or prosecution or other legal proceeding, civil or criminal." It would appear that the word "proceeding" in these sections is being used in the broad sense rather than the narrow sense, that is to say, as being akin to and in the nature of an action or suit rather than a step in an action or suit.

64 Sec. 127 of the Act must be considered. Matas, J. acted under that section when he made the order of March 1, 1968. The section permits the transfer from one court to another of "the winding up of the business of the company or any matter or proceeding relating thereto." Did the learned judge transfer a "matter" or did he transfer a "proceeding?" If he transferred a proceeding, was there another subsequent separate and distinct proceeding in Ontario? Is the present appeal from a proceeding which originated in Manitoba or is it from a proceeding which originated in Ontario?

65 I am of the view that the proceeding under appeal is a proceeding which originated in Manitoba. The proceeding was commenced by Mrs. Genovese' notice of motion asking for the transfer of her Ontario action to Manitoba "or for such other order as may be right and just under the circumstances." Matas, J. refused to transfer the action. Instead, in compliance with Mrs. Genovese' notice of motion he made the order which he considered to be "right and just," in the light of the claim advanced by Mrs. Genovese and in the light of events which preceded the entry of Mrs. Genovese upon the stage. Matas, J. carved out of the general body of winding-up proceedings a separate proceeding, a *lis*, which he transferred to Ontario. It seems to me to be the better view that Matas, J. transferred not just a "matter" but a "proceeding," a proceeding at the heart of which was the determination of the proper disposition of the fund of $3,679,000 which Matas, J. had segregated. Mrs. Genovese' notice of motion initiated the proceeding and was a step in the proceeding but it was not a proceeding in itself. The order made by the learned judge on March 1, 1968, was a step in that same proceeding but not a proceeding in itself.

66 If one accepts that view of the matter the next question must be whether that which took place in Ontario, or any part of it, was a proceeding. Was the liquidator's notice of motion in Ontario a proceeding? Was the order of Lieff, J. directing the trial of the issue a proceeding? Was the hearing before and determination by Wilson, J. a proceeding? I am of the opinion that each of these questions must be answered in the negative. Each may well be considered to be a step in a proceeding but the proceeding in which they were steps was the proceeding commenced in Manitoba and transferred from Manitoba to Ontario. This is made abundantly clear in the order of Lieff, J. and in the judgment of Wilson, J. under appeal, both of which read in part: "all as directed in the order of Matas, J.." With all deference to contrary opinion, I cannot accept the contention that there was a separate proceeding in Ontario and it is from that separate proceeding that appeal is taken. What took place in Ontario was all part of, and pursuant to, the proceeding

initiated in Manitoba. It is in respect of that proceeding the present appeal lies.

67 Mr. Scarth's able argument to the contrary was advanced on two main fronts. His first line of argument was that it is offensive to the scheme of the *Winding-up Act* and to good sense that an issue which is sent to a particular provincial jurisdiction under sec. 127 of the Act because the interested parties are there, and the law of that jurisdiction governs, should be moved back to another jurisdiction for the purpose of an appeal. This argument, which might possibly be termed the "practical" argument, would only have relevance if the legislation is so obscure as to make it necessary to try and divine, from the practicalities of the situation, what must have been in the mind of parliament in enacting the particular section. What we are here concerned with is not what the legislation should provide but what in fact it does provide. As Mr. Scarth suggested, a problem might arise if, for example, a court of this province referred to a court of the province of Quebec, as an auxiliary court, some matter or proceeding in the course of a winding-up and the determination of the matter or proceeding was then appealed to the court of appeal of Manitoba. Undoubtedly problems may arise from implementing sec. 127 of the *Winding-up Act* but clearly secs. 103 and 104 of the Act do not contemplate that appeals will in all cases be taken to the appellate court of the province in which the matter is heard. If that had been the intention the legislation would have so provided. It is clear from sec. 104 that an order or decision of a court of one province may come before the appellate court of another province. Mr. Weir, counsel for the appellant, York Lambton Corporation Limited, in the course of a persuasive argument, made the point that there is much to be said for the appellate court of the province in which the winding-up is being conducted having jurisdiction to hear appeals in respect of proceedings transferred to other provinces for hearing pursuant to sec. 127 of the Act. Also, the transfer from one province to another in order to meet the convenience of litigants may have much merit in trial matters which necessitate the attendance of witnesses but does not have the same force when the matter is under appeal.

68 The second line of argument advanced by Mr. Scarth might be termed the "historical" argument and rested upon review of the legislation which preceded the 1927 consolidation of the Canadian statutes. Assistance in ascertaining the meaning of the appeal provisions of the Act may be obtained by comparing its language with that used in earlier statutes relating to the same subject. From these earlier statutes it seems reasonably clear that an appeal from an order or decision of a judge in Ontario would lie to the court of appeal for Ontario. The earlier statutes specified in respect of each named province the court in that province to which an appeal would lie. On the consolidation the reference to each of the separate provinces was eliminated and replaced by sec. 104. Mr. Scarth contends that the history of the legislation demonstrates clearly that "originated" is intended to mean "took place." With respect, this gives the word "originated" a distorted meaning which the word does not readily or normally bear. The *Shorter Oxford English Dictionary* contains the following definition of "originate:" 1. *trans.* To give origin to, cause to arise or begin, initiate. 2. *intra.* To take its origin or rise, have its beginning; to spring, be derived."

69 If the plain meaning of the words contained in the present *Winding-up Act* differ in effect from those which were in the Act prior to 1927, I can only conclude that parliament, in its wisdom, made a change.

70 In short compass the conclusions which I have reached are:

71 (i) The appeal which it is sought to bring in this court concerns the proper disposition of a fund of $3,679,000, and interest, distributable in respect of 283,000 shares of Bank of Western Canada.

72 (ii) That question was first propounded in an order of Matas, J., dated March 1, 1968.

73 (iii) The order of Matas, J. was part of a proceeding.

74 (iv) Such proceeding commenced with Mrs. Genovese' notice of motion, or, it could be argued, with the liquidator's application to settle the contributories (since both the appellants and the respondents here seek to be treated as contributories).

75 (v) In either event "the proceeding" originated in Manitoba.

76 (vi) In present context the word "proceeding" in secs. 103 and 104 of the *Winding-up Act* is to be used synonymously with "action" or "suit" to describe the entire course from the notice of motion filed in Manitoba until the entry of judgment in Ontario.

77 (vii) The liquidator's motion in Ontario, the order of Lieff, J. and the hearing before, and determination by, Wilson, J. was not each a separate proceeding but rather a step in a continuing proceeding which had birth in Manitoba.

78 I would hold, therefore, that this court has jurisdiction to hear the appeal.

79 The question of costs may be spoken to on application.

END OF DOCUMENT

\\apps1\users\creerym\Postmedia\Genovese.doc

POSTMEDIA NETWORK INC.

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

Court File No: CV-10-8533-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE-
COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF POSTMEDIA NETWORK INC.

(returnable May 16, 2011)

GOODMANS LLP
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Fred Myers LSUC#: 26301A
Caroline Descours LSUC#: 58251A
Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for Postmedia Network Inc.

\5967288