Court of Appeal File No. M38600

**COURT OF APPEAL FOR ONTARIO**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP., AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Applicants

# BOOK OF AUTHORITIES OF THE APPLICANTS/MOVING PARTIES
## (Motion to Expedite a Motion for Leave to Appeal and the Proposed Appeal)

March 19, 2010

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TO: **THE SERVICE LIST**

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# BOOK OF AUTHORITIES OF THE APPLICANTS/MOVING PARTIES (Motion to Expedite a Motion for Leave to Appeal and the Proposed Appeal)

## INDEX

# Tab 1

*Case Name:*

# Canada (Canadian Wheat Board) v. Canada (Attorney General)

**Between**
**The Canadian Wheat Board, Applicant, and**
**The Attorney General of Canada, Respondent**

[2007] F.C.J. No. 92

[2007] A.C.F. no 92

2007 FC 39

2007 CF 39

155 A.C.W.S. (3d) 82

68 Admin. L.R. (4th) 22

2007 CarswellNat 160

Docket T-2138-06

Federal Court
Winnipeg, Manitoba

**de Montigny J.**

Heard: January 15, 2007.
Judgment: January 16, 2007.

(22 paras.)

*Administrative law -- The hearing -- Procedure -- Conduct of -- Application by the Canadian Wheat Board for an order to set an expedited hearing date and a timetable for its judicial review application dismissed -- There was no substantial reason to depart from the timelines contained in the Federal Courts Rules because the Board failed to show urgency.*

*Civil procedure -- Applications and motions -- Conduct of hearing -- Time requirements -- Application by the Canadian Wheat Board for an order to set an expedited hearing date and a timetable for its judicial review application dismissed -- There was no substantial reason to depart from the timelines contained in the Federal Courts Rules because the Board failed to show urgency.*

Application by the Canadian Wheat Board for an order setting an expedited hearing date and a timetable in order to bring its application for judicial review to a hearing in an expeditious manner -- Board applied for judicial review of a direction issued by the Governor in Council to it -- Direction prohibited it from expending funds on advocating the retention of its monopoly powers -- This was in line with the government's intention to give producers who were regulated by the Board the freedom to make their own marketing and transportation decisions -- Issue was whether the court could depart from the timelines contained in Part 5 of the Federal Courts Rules -- HELD: Application dismissed -- There was no substantial reason to depart from the timelines because the Board failed to show urgency -- It did not file its application within 30 days as required by the Federal Courts Act but waited 60 days after the direction was communicated to it -- Board created a false sense of urgency through its own delay -- Furthermore, for the hearing to be expedited and for it to occur within one month as the Board desired, the time frame for various proceedings would have to be seriously curtailed -- Considering the complexity of this application and the fact that it raised a constitutional issue the respondent would be seriously prejudiced if it had to file its affidavits and complete its cross-examinations within a week and if it had to prepare its record and submission within the following two weeks -- This would not only impede the respondent's capacity to answer the Board's arguments but would have an impact on the court's ability to adjudicate this important and complex matter with the benefit of fulsome representations from both sides.

**Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, s. 2(b)

Canadian Wheat Board Act, R.S.C. 1985, c. C-24, s. 5, s. 18(1)

Federal Courts Act, s. 18.1(2)

Federal Courts Rules, 1998, Rule 8(1), Rule 307, Rule 308, Rule 309, Rule 310, Rule 314, Part 5

Order in Council P.C. 2006-1092,

**Counsel:**

J.L. McDougall, Q.C. and Matthew Fleming, for the Applicant.

D.N. Abra, Q.C. and Steve Vincent, for the Respondent.

---

## REASONS FOR ORDER AND ORDER

**1** de **MONTIGNY J.**:-- This motion arises in the context of an application for judicial review of a direction (the "Direction") issued by the Governor in Council (the "GIC") to the Canadian

Wheat Board (the "CWB") pursuant to subsection 18(1) of the *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24, as amended (the "Act"). The Direction prohibits the CWB from expending funds "directly or indirectly, on advocating the retention of its monopoly powers, including the expenditure of funds for advertising, publishing or market research" and providing funds "to nay other person or entity to enable them to advocate the retention of [such] monopoly powers."

**2** The CWB seeks an order setting an expedited hearing date and a timetable for the remaining steps necessary to bring this matter to hearing in an expeditious matter, and appointing a case management judge to oversee the conduct of this application.

**3** The issue on this motion is therefore whether this Court ought to depart from the timelines prescribed in Part 5 of the *Federal Courts Rules, 1998* (the "Rules"), and more particularly, Rules 307, 308, 309, 310 and 314.

**THE FACTS**

**4** The CWB is a marketing agency created by the Act. Under that legislation, the CWB has, except as permitted under the regulations, control over the interprovincial and export trade of all wheat and barley in Canada, as well as control over the interprovincial and export marketing of wheat and barley produced in the designated area.

**5** The CWB's statutory purpose is to market grain in an orderly manner. To carry out that purpose, the CWB is given extraordinary regulatory powers over grain producers and other business enterprises in the grain handling, transport, processing and marketing system (section 5 of the Act).

**6** Following amendments to the Act in 1998, the CWB's board of directors assumed overall responsibility for directing and managing the CWB's business and affairs. Prior to that time, the CWB was directed by three to five federally appointed commissioners. The Board is now comprised of 10 directors elected directly by producers, four directors appointed by the Governor in Council, and one director who is also the president and chief executive officer of the CWB and is appointed by the GIC following consultation with the Board.

**7** Following the federal election in early 2006, the government indicated its intention to implement what has variously been termed a "dual market", "marketing choice" and a "voluntary" CWB. The objective is to give western grain farmers the freedom to make their own marketing and transportation decisions, including the ability to participate voluntarily in the CWB.

**8** On October 5, 2006, the government issued Order in Council P.C. 2006-1092, which purports to prohibit the CWB from expending funds "directly or indirectly, on advocating the retention of its monopoly powers, including the expenditure of funds for advertising, publishing or marketing research" and providing funds "to any other person or entity to enable them to advocate the retention of the monopoly powers" of the CWB.

**9** In the Regulatory Impact Analysis Statement accompanying the Direction, as published in the *Canada Gazette* Part II, Vol. 140, No. 21, it is stated:

> It is important that the CWB, as a shared-governance entity, not undermine government policy objectives. This Governor in Council order directing the CWB not to spend money on advocacy activity will ensure that the CWB carries out its operations and duties in a manner which is not inconsistent with the federal government's policy objectives.

**10** That Direction Order was issued pursuant to subsection 18(1) of the Act which provides that the GIC may, by order, direct the CWB with respect to the manner in which any of its operations, powers and duties under the Act shall be conducted, exercised or performed.

**11** On December 4, 2006, the CWB filed a Notice of Application in this Court for judicial review of the Direction. It is argued, *inter alia*, that the Direction is *ultra vires* the authority granted to the Governor in Council pursuant to subsection 18(1) of the Act, and that it contravenes subsection 2(b) of the *Canadian Charter of Rights and Freedoms*.

**12** On January 4, 2007, the CWB brought a motion to expedite the hearing of its application for judicial review. As stated in the CWB's factum, the issue to be decided is whether urgent circumstances or other valid reasons exist justifying an order for an expedited hearing and setting a timetable for the remaining steps in the application. As for the need for this proceeding to be specially managed, it is contingent on the resolution of the first question.

**ANALYSIS**

**13** Rule 8(1) of the *Federal Courts Rules* provides that a Court may extend or abridge a period provided by these Rules. It does not stipulate the factors upon which the discretion to extend or abridge time is to be exercised. However, the parties agree on the factors to be taken into consideration in exercising that discretion. They have been aptly summarized by the respondent in the following four questions:

- Is the proceeding really urgent or does the moving party simply prefer that the matter be expedited?
- Will the respondent be prejudiced if the proceeding is expedited?
- Will the proceeding be rendered moot if not decided prior to a particular event?
- Would expediting the proceeding result in the cancellation of other hearings?

*Pearson v. Canada*, [2000] F.C.J. No. 246 (F.C.)(QL); *Apotex Inc. v. Wellcome Foundation Ltd.* (1998), 228 N.R. 355, F.C.J. No. 859 (F.C.A.)(QL); *Esquega v. Canada (Attorney General)*, [2006] F.C.J. No. 429, 2006 FC 297 (F.C.); *Del Zotto v. Canada (Minister of National Revenue)* (2000), 257 N.R. 56, (F.C.A.).

**14** Before applying these factors to the facts of this case, I hasten to say that the burden is on the party seeking to vary the time frame provided by the Rules. While an application for judicial review must be dealt with more quickly than an action, the rule of law nevertheless requires that the parties be given enough time to prepare their records and submissions. The compromise reflected in Part 5 of the Rules should not be altered without giving the matter proper consideration. As Prothonotary Roger Lafrenière wrote in *Gordon v. Canada (Minister of National Defence)*, [2004] F.C.J. No. 2000, 2004 FC 1642, at paragraph. 17:

> Section 18.1 of the *Federal Courts Act* establishes a scheme for judicial review of federal administrative tribunals. In furtherance of that scheme, section 18.4 provides that judicial review applications "shall be heard and determined without delay and in a summary way." The timeframes provided by the Rules are designed to give the parties adequate time to prepare the case so that the Court can

> properly decide the matter before it, thereby rendering justice to the parties, while also respecting the objective of deciding the matter without delay. Any departure from these rules -- and especially an abridgement -- is exceptional.

**15** The CWB has argued that the matter is urgent, as the Direction is impeding its ability to carry out its mandate and fulfil its obligations. It is contended that CWB staff are having difficulty applying the Direction and must frequently seek legal advice before issuing external communications or publishing reports. Moreover, employees are apparently fearful of communicating in an open manner with producers and with the public, and do not know what they can and cannot say.

**16** The CWB also alleges that if the plebiscite on the marketing of barley is conducted before the Court determines the Direction's validity, the CWB's application will in part be rendered moot. In this respect, it must be noted that the Minister announced last Friday, January 12, 2007, that the voting period will commence with the mailing of ballots on January 31 and that the last day for return ballots to be postmarked will be March 6, 2007. Accordingly, the applicant is of the view that producers are entitled to have all relevant information available to them in making such a decision, which will not be the case if the application for judicial review is heard after the ballots have to be cast.

**17** There are at least three problems with this submission. First of all, there is no evidence before this Court that the producers will be prevented from making an informed decision if the CWB is not allowed to take a stand and campaign, or even to communicate with the producers and explain the advantages of the current system. This is a debate that has been going on for a long time, and there are other sources of information (including the media) ensuring that an open and transparent clash of opinions will take place.

**18** Even if I were prepared to accept that the CWB has a unique expertise and is the repository of studies and data that will not likely be disseminated by other participants in the upcoming plebiscite, I do not think it would be enough to make the CWB's application for judicial review urgent. Without going into the merits of each side's arguments about the effect of the Direction, it is fair to say that the applicant has not conducted itself as if the application is urgent. First of all, it did not file its application for judicial review within the 30 days required by subsection 18.1(2) of the *Federal Courts Act*, but waited instead approximately 60 days after the Direction was communicated to it.

**19** The CWB has known that there would be a barley plebiscite early in 2007, since the Minister first announced it on October 31, 2006. Despite this knowledge, the CWB did not file its application for judicial review until some 34 days after that announcement. Even if I were to accept that this delay can be explained by the fact that the CWB initially believed it could continue to fulfil its statutory obligations while complying with the Direction, and also by the concern about commencing legal proceedings with the government during the election period of some of its board members, the fact remains that the CWB waited another month after filing its application for judicial review before bringing this motion for an expedited hearing. To that extent, it is fair to say that the applicant has itself created a false sense of urgency through its own delay.

**20** But there is more. The applicant argues that its application will be rendered moot in part if it is not heard before the barley plebiscite. As a result, the applicant proposes, by way of the proposed schedule attached to its notice of motion, to have its application heard on an expedited basis on February 15-16, 2007, or as soon as thereafter as possible. Any hearing that takes place on February

15-16, 2007, will take place half-way through the voting period on the barley plebiscite. If the judge who ultimately hears this complex application on February 15 or 16, decides to reserve his or her decision, any such decision will likely be delivered towards the end of the voting period, if not after.

**21** Finally, there is another reason why I am not inclined to grant the applicant's motion. For the hearing to take place on February 15 or 16, the time frame for the various proceedings would have to be seriously curtailed. Considering the complexity of this application, and the fact that it raises a constitutional issue, I am of the view that the respondent would be seriously prejudiced if he was required to file his affidavits and complete his cross-examinations within a week, and to prepare his record and his submission within the two following weeks. This would not only impede the respondent's capacity to answer the applicant's arguments, but it would also have an impact on this Court's ability to adjudicate this important and complex matter with the benefit of fulsome representations from both sides.

**22** For all of these reasons, I find that there is no substantial reason to depart from the timelines prescribed in Part 5 of the Rules. The applicant's motion for an order setting an expedited hearing date and a timetable for the remaining steps is therefore dismissed. There is no need, in light of that decision, to appoint a case management judge to oversee the conduct of this application.

## ORDER

**THIS COURT ORDERS that** the motion for an Order setting an expedited hearing date and for an Order appointing a case management judge is dismissed, with costs.

de MONTIGNY J.

cp/e/qlecl/qlcem/qltxp/qlbrl

# Tab 2

see no error in that award.

[3] The appeal is, therefore, dismissed.

[4] Costs to the respondent are fixed on a partial indemnity basis in the amount of $15,000, inclusive of disbursements and GST.

Appeal dismissed.

Editor: Jana A. Andersen/gs

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

And In The Matter Of Section 191 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended

And In The Matter Of a Plan of Compromise or Arrangement of Air Canada and Those Subsidiaries Listed on Schedule "A"

Application Under The Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as amended
(M29922; M29923)

**Indexed As: Air Canada, Re**

Ontario Court of Appeal
Laskin, J.A.
June 4, 2003.

**Summary:**

Air Canada sought protection under the Companies' Creditors Arrangement Act. Global Payments Direct Inc. and Global Payments Canada Inc. (Global) sought an order under s. 11.3 of the Act to give it security for continuing to provide services to Air Canada. The Ontario Superior Court dismissed the motion. Global sought to expedite and consolidate the hearing of their motion for leave to appeal and appeal (if leave was granted) from Farley, J.'s order.

The Ontario Court of Appeal, per Laskin, J.A., expedited both the leave motion and, if leave is granted, the appeal. The two proceedings were to be heard separately.

**Practice - Topic 8872.1**

Appeals - Leave to appeal - Expediting - Creditors sought leave to appeal a decision of a motions judge made under the Companies' Creditors Arrangement Act (CCAA) - The creditors moved to expedite and consolidate the hearing of their motion for leave to appeal and appeal (if leave was granted) and have the two matters heard orally and as a single proceeding before the same panel - Normally, leave motions were dealt with in writing (Civil Procedure Rule 61.03.1) - The panel either decided the motion or ordered an oral hearing - The Ontario Court of Appeal, per Laskin, J.A., held that it had jurisdiction to make the order sought - Given the need for certainty and stability in the CCAA proceedings, the court abridged the 36 day period for hearing the leave motion and ordered that the hearing be expedited - The court ordered that the hearing of the appeal be expedited, if leave was granted - As the creditors would not be unfairly prejudiced, the court ordered that the leave motion and the appeal be heard separately - See paragraphs 10 to 17.

**Practice - Topic 9134**

Appeals - Hearing of appeal - Expediting - [See **Practice - Topic 8872.1**].

**Cases Noticed:**

Dragan v. Canada (Minister of Citizenship and Immigration) (2003), 303 N.R. 112 (F.C.A.), refd to. [para. 15].

**Counsel:**

Frank J.C. Newbould, Michael J. MacNaughton and Tanya Kozak, for the moving parties, Global Payments Direct Inc. and Global Payments Canada Inc.;

Peter Howard, for the responding party, Air Canada;

Peter Osborne, for the responding party, Ernest and Young (Monitor);

Jeremy Dacks, for the responding party, GE Capital.

This motion was heard in Chambers on June 3, 2003, before Laskin, J.A., of the Ontario Court of Appeal, who released the following decision on June 4, 2003.

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## A. INTRODUCTION

**[1] Laskin, J.A.:** The moving parties, Global Payments Direct Inc. and Global Payments Canada Inc. ("Global") seek to expedite and consolidate the hearing of their motion for leave to appeal and appeal (if leave is granted) from the order of Farley, J., dated May 7, 2003 in the **Companies' Creditors Arrangement Act** ("**CCAA**"), proceedings for Air Canada.

**[2]** Global acts as an intermediary. For a fee, it pays Air Canada for future flights purchased by customers on Visa and MasterCard. At the beginning of April 2003, based on its admitted insolvency, Air Canada obtained relief from the Superior Court by an initial order under the **CCAA**. Paragraph 11 of the initial order required Global to continue to make payments to Air Canada as it had in the past.

**[3]** Global moved for an order under s. 11.3 of the **CCAA**, which, if granted, would have given it security for continuing to provide services to Air Canada. Farley, J., dismissed the motion. [see footnote 1]

**[4]** Under s. 13 of the **CCAA**, Global can appeal a dismissal to this court, but only with leave. Our rules require leave motions to be in writing. If leave is granted, the appeal is then heard orally. Global, however, asks that the leave motion and the appeal be heard orally and as a single proceeding before the same panel and that the hearing be expedited.

**[5]** Air Canada agrees that the leave motion be expedited but says that it should be dealt with separately from the appeal in accordance with this court's usual practice. The Monitor also urges the court to expedite Global's review of Farley, J.'s, order but takes no position on whether the leave motion and the appeal should be dealt with separately or at the same time. For the brief reasons that follow, I propose to expedite both the leave motion and, if leave is granted, the appeal. But the two proceedings shall be heard separately.

## B. BACKGROUND FACTS

**[6]** Global's risk of loss comes from exposure to what are called "chargebacks". Its arrangements with Visa, MasterCard and Air Canada work as follows: once a customer of Air Canada buys a ticket for future flight using a Visa or MasterCard, the customer's bank (or card issuer) debits the customer's account for the amount of the ticket. The bank then forwards the payment to Global and, in turn, Global forwards the payment

(less agreed charges, including a fee) to Air Canada.

**[7]** If Air Canada does not provide the purchased flight, the customer may request a refund or credit from its credit card issuer. If, as is likely, the credit card issuer agrees to the customer's request, it is entitled to chargeback the amount to Global. The amount of the chargeback is automatically debited to Global's account. Global is then entitled to recover that amount from Air Canada, which is obligated to pay it. If Air Canada were to fail, Global runs the risk of not recovering these chargebacks. In his affidavit sworn April 21, 2003, Mr. Kelly, the Chief Financial Officer of Global, estimated that the exposure for chargebacks was about $432,000,000. Global was an unsecured creditor for that amount at the date of the initial **CCAA** order.

**[8]** Because of its continuing exposure to chargebacks, Global brought a motion before Farley, J., seeking an order under s. 11.3 of the **CCAA**:

> "11.3 Effect of order - No order made under section 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
>
> (b) requiring the further advance of money or credit."

**[9]** It is not, of course, in Global's interest for Air Canada to stop flying. What Global wants is to continue to provide payment services to Air Canada but to do so with security for its chargeback exposures. That is evident from its alternative request for relief in its motion before Farley, J.:

> "(c) in the alternative to (b), an order directing Air Canada to provide reasonable protection to Global in respect of its post-filing financial exposure on terms to be agreed between Air Canada and Global, or failing such agreement, on terms established by the Court; and"

An order under s. 11.3 would have given it that security. On its motion for leave to appeal, Global contends that in dismissing its motion Farley, J., erred in his interpretation of s. 11.3. For the purpose of the motion before me I need not and do not express an opinion on the merits of Global's position.

## C. DISCUSSION

**[10]** Two issues arise on this motion. First, do I have jurisdiction to make the order sought by Global; and if so, second, should I make it?

### (a) Jurisdiction

**[11]** This court's practice in civil and criminal appeals differs. Where leave is a requirement in criminal appeals - for example sentence and summary conviction appeals - the request for leave is heard together with the appeal itself as a single oral hearing. In civil appeals, however, the historical practice of this court, except in rare cases, has separated the leave motion from the appeal itself. Under the court's current civil rules the leave motion "shall" be in writing (Rule 61.03.1(1)) and, will be heard by a panel 36 days after the motion is perfected (Rule 61.03.1(2)). The panel either decides the motion or orders an oral hearing (Rule 61.03.1(14)). In practice, virtually every

leave motion is dealt with in writing.

[12] These rules for leave motions were designed primarily for appeals from the Divisional Court. However, they also apply to appeals to this court from orders of the Superior Court where leave is required. Thus, they apply to appeals from orders made under the **CCAA**. That this is so is made clear by s. 14 of the **CCAA**, which states "All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to ...".

[13] What Global seeks is an exception not just to our usual practice in civil cases but to the requirements of the rules. Indeed the mandatory language of rule 61.03.1(1) might suggest that I have no jurisdiction to make the order Global seeks. I am satisfied, however, that I do have this jurisdiction. At a minimum I think that it can be found in rule 2.03 which states that "[t]he court may, only where and as necessary in the interests of justice, dispense with compliance with any rule at any time".

**(b) Should the order be made?**

[14] I begin here by saying that I think it appropriate to abridge the 36 day period for hearing the leave motion and to order that the hearing be expedited. I also think it appropriate to expedite the hearing of the appeal, if leave is granted. Apart from Global's concerns, I agree with the Monitor that certainty and stability in the **CCAA** proceedings warrant having both the leave motion and, if leave is granted, the appeal itself heard promptly.

[15] Thus, the only contentious issue is whether I should go further and order that the leave motion and the appeal itself be heard orally as a single proceeding before the same panel. An order of this kind - not given to other litigants - would be exceptional and should rarely be made. I think it would be in the interests of justice to make it only if Global can demonstrate that it will be substantially prejudiced if the order is not made and that Air Canada would not be unfairly prejudiced if it is made. See, for example, **Dragon v. Canada (Minister of Citizenship and Immigration)** (2003), 303 N.R. 112; 2003 FCA 139 (F.C.A.), per Rothstein, J.A.

[16] In my view the expediting orders I propose to make, which are not challenged by Air Canada, sufficiently protect Global's interests. For at least the following three reasons I am not satisfied that Global will be prejudiced if I do not consolidate the leave motion and the appeal itself:

(1) As a result of the labour negotiations this past weekend, Air Canada has reached agreement with the Unions for all of its employees. Although the agreement with the pilots' union has not been ratified by its members, the fact that it has been reached materially diminishes the risk of Air Canada failing, certainly in the short term. Labour peace will reduce Air Canada's current $5,000,000 daily loss. The Monitor's 6th report recognized the importance of labour peace to a successful restructuring of Air Canada. Paragraph 44 of the report states, "Labour cost reductions are critical to reducing the overall cost structure and to stabilize the situation and allow the Company to pursue the balance of its restructuring";

(2) Every time Air Canada flies a plane Global's chargeback exposure for tickets

purchased for that flight on Visa or MasterCard is eliminated. Therefore, because of the decreased volume of Air Canada's business, Global's exposure to chargebacks is decreasing, not increasing;

(3) Global itself has not said that Farley, J.'s, order has materially increased its risk. Global is a public company trading on the New York Stock Exchange. It has an obligation to make timely disclosure of material changes. It has made no disclosure. Since the order of Farley, J., it has not changed its reserves, issued a press release, or announced any material change to its risk of continuing to service Air Canada.

**[17]** I therefore intend to follow the court's usual practice of keeping separate the leave motion and the appeal, and of having the leave motion heard in writing. The expediting orders I propose to make are all that are needed.

## D. DISPOSITION

**[18]** I make the following orders:

1. Global's motion for leave to appeal shall be expedited and heard in writing by a panel of this court, unless the panel orders otherwise. Counsel may speak to me this afternoon to fix a date for the hearing of the motion and for the filing of material;

2. If leave is granted, the hearing of the appeal shall be expedited. If a panel is available, the appeal shall be heard before the end of June;

3. I will case manage the proceedings and arrange for the necessary hearing dates; and

4. As agreed by counsel, whichever party is successful on the appeal shall be entitled to the costs of this motion. Neither the Monitor nor GE Capital are asking for costs.

**[19]** I am grateful to counsel for their assistance on this motion.

Motion allowed in part.

Editor: Rodney A. Jordan/gs

### Footnote

1. Except that he ordered Air Canada to provide reasonable protection to Global for certain fees and discounts payable.

# Tab 3

[Indexed as: **Stelco Inc., Re [Leave to appeal motion — re removal of directors]**]

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

And In the Matter of a proposed plan of compromise or arrangement with respect to Stelco Inc. and the other applicants listed in schedule "A" Application under The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Ontario Court of Appeal [In Chambers]

Laskin J.A.

Heard: March 3, 2005

Judgment: March 4, 2005

Docket: CA M32266, M31848

Jeffrey S. Leon, Richard B. Swan for Moving Parties, Michael Woollcombe, Roland Keiper

John R. Varley for Stelco and Subsidiaries Salaried Employees Association

Alfred J. Esterbauer, Andrew J. Hatnay for retired salaried beneficiaries of Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd. and Welland Pipe Ltd.

Sharon L.C. White for United Steelworkers of America Local 1005

Kenneth T. Rosenberg for United Steelworkers of America

David P. Jacobs, Michael C.P. McCreary for United Steelworkers of America Local Union 8782 and Local Union 5328

Robert I. Thornton for Ernst & Young Inc., in its capacity as monitor of Applicants

Peter H. Griffin for Stelco Inc. Board of Directors

**Civil practice and procedure — Practice on appeal — Leave to appeal — Application — General principles** — Motion to expedite hearing — S Inc. was undergoing restructuring under Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA") — Court ordered removal of W and K from board of directors of S Inc. on ground that, because corporations W and K represented had accumulated significant number of S Inc. shares, their objective might be to maximize shareholder value and not to act in best long-term interests of S Inc. — W and K applied for leave to appeal order — W and K moved to expedite hearing — Motion granted — Expediting leave motion would engender stability and certainty in CCAA proceedings — S Inc. board was directly and aggressively pursuing its own financing options and wanted to know quickly if W and K were going to participate.

**Bankruptcy and insolvency — Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues** — S Inc. was undergoing restructuring under Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA") — Court ordered removal

of W and K from board of directors of S Inc. on ground that, because corporations W and K represented had accumulated significant number of S Inc. shares, their objective might be to maximize shareholder value and not to act in best long-term interests of S Inc. — W and K applied for leave to appeal order — W and K moved to expedite hearing — Motion granted — Expediting leave motion would engender stability and certainty in CCAA proceedings — S Inc. board was directly and aggressively pursuing its own financing options and wanted to know quickly if W and K were going to participate.

**Cases considered by *Laskin J.A.*:**

*Stelco Inc., Re* (2005), 2005 CarswellOnt 742 (Ont. S.C.J. [Commercial List]) — referred to

**Statutes considered:**

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

MOTION to expedite hearing of motion for leave to appeal order made pursuant to *Companies' Creditors Arrangement Act* in judgment reported at *Stelco Inc., Re*, 2005 CarswellOnt 742 (Ont. S.C.J. [Commercial List]).

***Laskin J.A.*:**

1 On February 25, 2005, Farley J. [*Stelco Inc., Re*, 2005 CarswellOnt 742 (Ont. S.C.J. [Commercial List])] made an order removing two directors — Michael Woollcombe and Roland Keiper — from the Board of Stelco. Woollcombe and Keiper have sought leave to appeal this order. They now seek an order expediting the hearing of their leave motion, directing that it be heard orally, and if leave is granted, directing that the appeal be heard at the same time.

2 In ordering Woollcombe's and Keiper's removal from the Board, Farley J. found no impropriety on their part. He was concerned, however, that because the corporations Woollcombe and Keiper represent had accumulated a significant number of Stelco shares, their objective might be to "maximize shareholder value", and not to act in the best long-term interests of the company. He ordered their removal under what he said was his "inherent jurisdiction and the discretion given to the court pursuant to the CCAA". I make no comment on the merits of the leave motion other than to say it is arguable, not frivolous. The sole issue before me is whether the motion and the appeal are sufficiently urgent that they should be expedited, instead of being heard in the ordinary course. Under the court's current timelines, the "ordinary course" would see the leave motion dealt with in early April and, if leave is granted, the appeal heard in the late summer or early fall.

3 None of the other stakeholders support the motion to expedite. The Stelco Board, however, stresses that the Board needs certainty to function effectively. The workers –represented by the salaried retirees (who brought the removal mo-

tion before Farley J.), the United Steelworkers of America, two United Steelworkers locals, and the salaried employees — oppose this motion to expedite. They contend that the leave motion is not urgent. They argue that because after Farley J.'s order the Board rejected the capital raising proposals put before it, the "critical phase" relied on by Woollcombe and Keiper has passed. They also argue that Woollcombe and Keiper are pursuing a personal grievance now not supported by Stelco itself, and that the restructuring process under the CCAA proceedings is unaffected because the Stelco Board continues to function.

4 Although these arguments have merit, I have decided to grant the order to expedite. I do so for these reasons:

- CCAA proceedings are invariably fast-moving, and often unpredictable. In this context, the court should strive where it can to achieve a measure of stability and certainty. To me, that means taking a generous view of "urgency". Indeed, if "real time" litigation — the speedy handling of restructurings — is to be meaningful, it must occur not just in the "commercial list", but also in this court when rulings affecting the restructuring are challenged. Otherwise, the corporate community, the commercial bar and the public will lose confidence in the ability of this court to deliver justice.
- Although one critical phase of the Stelco restructuring may have passed, the Board has already moved into yet another "critical phase". It is now directly and "aggressively" pursuing its own financing options. Inevitably, the Board will be making ongoing decisions affecting the restructuring process. The Stelco Board ought to know quickly whether Woollcombe and Keiper are going to play a role in that decision-making. I agree with the submission of Mr. Griffin, counsel for the Board, that the Board needs certainty. On the question of the Board's composition, that certainty can best be achieved by granting the order to expedite.
- A related point is that, although the Board can certainly function and make decisions without Woollcombe and Keiper, the Board itself had sought their contributions to the process and had unanimously approved their appointments. Whether they will continue to take part in decisions concerning Stelco's restructuring should be resolved sooner rather than later. Delay, in my view, may adversely affect the restructuring process.
- The dispute in issue here is not one that can be resolved down the line by the payment of money. This is a dispute over who is going to participate in important decisions affecting the restructuring of one of Canada's major steel producers. If Woollcombe and Keiper are entitled to a voice in these decisions, that should be resolved quickly. Otherwise, irreversible decisions may be made without their participation.

- The workers brought their motion to remove Woollcombe and Keiper on an urgent basis. That urgency does not disappear because the workers obtained the order that they wanted.

5 For these reasons, I grant the motion to expedite. The motion for leave to appeal, and if leave is granted, the appeal will be heard orally before Goudge, Feldman and Blair JJ.A. on Friday, March 18, 2005 from 9:00 a.m. to 12:30 p.m. Blair J.A. — or, in his absence, Goudge J.A. — has agreed to case manage any matters arising in the interval. Subject to his direction, the time for argument shall be divided equally between the moving party (and any supporters) and those parties opposing the motion. The moving party shall file all of its materials, including its factum, by Tuesday, March 8, 2005. The responding parties shall file their material by Friday, March 11, 2005. If the moving party wishes to file a reply factum on the leave motion, it shall do so by Monday, March 14, 2005. The costs of this motion are reserved to the panel on March 18, 2005.

6 Lastly, I repeat what I said in open court: for those counsel with young children, I regret that the March 18th date comes in the middle of Spring Break. That day, however, was the only realistic date the court had available for an urgent hearing of this duration. I thank all counsel for their submissions.

*Motion granted.*

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP., AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICANTS

Court File No: M38600

**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at Toronto

**BOOK OF AUTHORITIES**
**OF THE APPLICANTS/MOVING PARTIES**

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