Court File No. CV-12-9667-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

BRIEF OF AUTHORITIES OF SINO-FOREST CORPORATION
(Motions Returnable October 9-10, 2012)

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Case Name:

Canadian Airlines Corp. (Re)

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

[2000] A.J. No. 1692

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

Docket: 0001-05071, 0001-05044

Alberta Court of Queen's Bench
Judicial District of Calgary

Paperny J.

Oral Judgment: May 4, 2000.

(41 paras.)

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

Counsel:

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

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

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

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

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

P. McCarthy, for Monitor - Price Waterhouse Cooper.

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

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

G. Wells, for NavCanada.

D. Hardy, for Royal Bank of Canada.

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

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

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

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

4 Under the terms of the Indenture, CAC is required to make an offer to purchase the Senior Secured Notes where there is a "change of control" of CAC. It is submitted by the Senior Secured Noteholders that Air Canada indirectly acquired control of CAC on January 4, 2000 resulting in a change of control. Under the Indenture, CAC is then required to purchase the notes at 101 percent

of the outstanding principal, interest and costs. CAC did not do so. According to the Trustee, an Event of Default occurred, and on March 6, 2000 the Trustee delivered Notices of Intention to Enforce Security under the Bankruptcy and Insolvency Act.

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

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

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

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

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

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

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

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

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

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

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

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

11 The Senior Secured Noteholders suggest that the Plan will not be impacted if they are permitted to realize on their security now instead of after a formal rejection of the Plan at the court scheduled vote on May 26, 2000. The Senior Secured Noteholders argue that for all of the preceding reasons lifting the stay would be in accordance with the spirit and intent of the CCAA.

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

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

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

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

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

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

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

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

18 Further commentary on the status quo is contained in Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 80 C.B.R. (N.S.) 98 (B.C.S.C.). Thackray J. comments that the maintenance of the

status quo does not mean that every detail of the status quo must survive. Rather, it means that the debtor will be able to stay in business and will have breathing space to develop a proposal to remain viable.

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

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

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

> Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:
>
> 1. When the plan is likely to fail;
> 2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
> 3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);
> 4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
> 5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;
> 6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

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

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

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

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

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

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

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

> In my opinion, the continuation of the stay of proceedings to allow the restructuring process to continue will be of benefit to all stakeholders including the holders of the Senior Secured Notes. A termination of the stay proceedings as regards the security of the holders of the Senior Secured Notes would immediately deprive CAIL of assets which are critical to its operational integrity and would result in grave disruption of CAIL's operations and could lead to the cessation of operations. This would result in the destruction of value for all stake-

> holders, including the holders of the Senior Secured Notes. Furthermore, if CAIL ceased to operate, it is doubtful that Canadian Re-gional Airlines (1998) Ltd. ("CRAL98"), whose shares form a significant part of the security package of the holders of the Senior Secured Notes, would be in a position to continue operating and there would be a very real possibility that the equity of CAIL and CRAL, valued at approximately $115 million for the purposes of the issuance of the Senior Secured Notes in 1998, would be largely lost. Further, if such seizure caused CAIL to cease operations, the market for the assets and equipment which are subject to the security of the holders of the Senior Secured Notes could well be adversely affected, in that it could either lengthen the time necessary to realize on these assets or reduce realization values.

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

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

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

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

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

Senior Secured Noteholders have not established that they will suffer any material prejudice in the intervening period.

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

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

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

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

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

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

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

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

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

> In deciding whether to exercise its inherent jurisdiction, the court should weigh the interests of the insolvent company against the interests of parties who will be

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

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

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

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

PAPERNY J.

cp/s/qw/qlmmm

Case Name:

Stelco Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C., c. C-36, as amended
AND IN THE MATTER OF a proposed plan of compromise or arrangement with respect to Stelco Inc., and other Applicants listed in Schedule "A"*
[* Editor's note: Schedule "A" was not attached to the copy received from the Court and therefore is not included in the judgment.]
APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2005] O.J. No. 1171

75 O.R. (3d) 5

253 D.L.R. (4th) 109

196 O.A.C. 142

2 B.L.R. (4th) 238

9 C.B.R. (5th) 135

138 A.C.W.S. (3d) 222

2005 CarswellOnt 1188

2005 CanLII 8671

Docket: M32289

Ontario Court of Appeal
Toronto, Ontario

S.T. Goudge, K.N. Feldman and R.A. Blair JJ.A.

Heard: March 18, 2005.

Judgment: March 31, 2005.

(79 paras.)

Creditors & debtors law -- Legislation -- Debtors' relief -- Companies' Creditors Arrangement Act -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Civil procedure -- Courts -- Jurisdiction -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Civil procedure -- Courts -- Superior courts -- Inherent jurisdiction -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Corporations and associations law -- Corporations -- Directors -- Appointment or election -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Corporations and associations law -- Corporations -- Directors -- Duties -- Business judgment rule -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Corporations and associations law -- Corporations -- Directors -- Duties -- Fiduciary duties -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Insolvency law -- Proposals -- Court approval -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Administrative law -- Natural justice -- Reasonable apprehension of bias -- Appeal from endorsement reported at [2005] O.J. No. 729 and reasons for judgment reported at [2005] O.J. No. 730 allowed.

Application by two former directors of Stelco for leave to appeal and appeal from the order of their removal from the board of directors. Stelco was engaged in an extensive economic restructuring while under statutory insolvency protection that involved court-appointed capital raising via a competitive bid process. The appellants were involved with two companies that purchased approximately 20 per cent of Stelco's publicly traded shares during the protection period and were subsequently appointed to its board of directors to fill vacancies caused by resignations. As part of the appointment process, the appellants were informed of their fiduciary duties and agreed that their companies would have no further involvement in the competitive bid process. Stelco's employees sought the appellants' removal from the board on the basis that the participation of two major shareholder representatives would tilt the evaluation of the bids in favour of maximizing shareholder value at the expense of bids more favourable to the interests of the employees. The motions judge held that the involvement of the appellants on the board raised an unnecessary risk that their future conduct potentially jeopardized the integrity and neutrality of the capital raising process, and de-

clared the appointments to be of no force and effect. The judge cited the inherent jurisdiction of the court as the basis for the order. The appellants submitted that the judge had no jurisdiction to make a removal order, and in the alternative, he erred in applying a reasonable bias test to the removal of directors. The appellants further submitted that the judge erred by interfering with the board's exercise of business judgment, and that the facts did not justify the removal order.

HELD: Application for leave and appeal allowed. The judge misconstrued his authority, and made an order that he was not empowered to make. The court had no statutory or inherent authority to interfere with the composition of the board of directors. The judge erred in declining to give effect to the business judgment rule, and was not entitled to usurp the role of the directors and management in conducting the company's restructuring efforts. The record did not support a finding that there was sufficient risk of misconduct to warrant a conclusion of oppression, nor was the level of such risk assessed. There was no statutory principle that envisaged screening the neutrality of the appellants in advance of their appointment to the board of Stelco. Legal remedies were available to the employees of Stelco in the event that the appellants engaged in conduct that breached their legal obligations to the corporation. The applicability of such remedies was dependent on actual misconduct rather than mere speculation. Therefore, an apprehension of bias approach was not appropriate in the corporate law context.

Statutes, Regulations and Rules Cited:

Canada Business Corporations Act ss. 1, 102, 106(3), 109(1), 111, 122(1)(a), 122(1)(b), 145, 145(2)(b), 241, 241(3)(e)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 As Amended, ss. 11, 11(1), 11(3), 11(4), 11(6), 20

Appeal From:

Application for Leave to Appeal, and if leave be granted, an appeal from the order of Farley J. dated February 25, 2005 removing the applicants as directors of Stelco Inc., reported at: [2005] O.J. No. 729.

Counsel:

Jeffrey S. Leon and Richard B. Swan, for the appellants, Michael Woollcombe and Roland Keiper

Kenneth T. Rosenberg and Robert A. Centa, for the respondent United Steelworkers of America

Murray Gold and Andrew J. Hatnay, for the respondent Retired Salaried Beneficiaries of Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd. and Welland Pipe Ltd.

Michael C.P. McCreary and Carrie L. Clynick, for USWA Locals 5328 and 8782

John R. Varley, for the Active Salaried Employee Representative

Michael Barrack, for Stelco Inc.

Peter Griffin, for the Board of Directors of Stelco Inc.

K. Mahar, for the Monitor

David R. Byers, for CIT Business Credit, Agent for the DIP Lender

The judgment of the Court was delivered by

R.A. BLAIR J.A.:--

PART I - INTRODUCTION

1 Stelco Inc. and four of its wholly owned subsidiaries obtained protection from their creditors under the Companies' Creditors Arrangement Act[1] on January 29, 2004. Since that time, the Stelco Group has been engaged in a high profile, and sometimes controversial, process of economic restructuring. Since October 2004, the restructuring has revolved around a court-approved capital raising process which, by February 2005, had generated a number of competitive bids for the Stelco Group.

2 Farley J., an experienced judge of the Superior Court Commercial List in Toronto, has been supervising the CCAA process from the outset.

3 The appellants, Michael Woollcombe and Roland Keiper, are associated with two companies - Clearwater Capital Management Inc., and Equilibrium Capital Management Inc. - which, respectively, hold approximately 20% of the outstanding publicly traded common shares of Stelco. Most of these shares have been acquired while the CCAA process has been ongoing, and Messrs. Woollcombe and Keiper have made it clear publicly that they believe there is good shareholder value in Stelco in spite of the restructuring. The reason they are able to take this position is that there has been a solid turn around in worldwide steel markets, as a result of which Stelco, although remaining in insolvency protection, is earning annual operating profits.

4 The Stelco board of directors ("the Board") has been depleted as a result of resignations, and in January of this year Messrs. Woollcombe and Keiper expressed an interest in being appointed to the Board. They were supported in this request by other shareholders who, together with Clearwater and Equilibrium, represent about 40% of the Stelco common shareholders. On February 18, 2005, the Board appointed the appellants directors. In announcing the appointments publicly, Stelco said in a press release:

> After careful consideration, and given potential recoveries at the end of the company's restructuring process, the Board responded favourably to the requests by making the appointments announced today.
>
> Richard Drouin, Chairman of Stelco's Board of Directors, said: "I'm pleased to welcome Roland Keiper and Michael Woollcombe to the Board. Their experience and their perspective will assist the Board as it strives to serve the best interests of all our stakeholders. We look forward to their positive contribution."

5 On the same day, the Board began its consideration of the various competing bids that had been received through the capital raising process.

6 The appointments of the appellants to the Board incensed the employee stakeholders of Stelco ("the Employees"), represented by the respondent Retired Salaried Beneficiaries of Stelco

and the respondent United Steelworkers of America ("USWA"). Outstanding pension liabilities to current and retired employees are said to be Stelco's largest long-term liability - exceeding several billion dollars. The Employees perceive they do not have the same, or very much, economic leverage in what has sometimes been referred to as 'the bare knuckled arena' of the restructuring process. At the same time, they are amongst the most financially vulnerable stakeholders in the piece. They see the appointments of Messrs. Woollcombe and Keiper to the Board as a threat to their well being in the restructuring process, because the appointments provide the appellants, and the shareholders they represent, with direct access to sensitive information relating to the competing bids to which other stakeholders (including themselves) are not privy.

7 The Employees fear that the participation of the two major shareholder representatives will tilt the bid process in favour of maximizing shareholder value at the expense of bids that might be more favourable to the interests of the Employees. They sought and obtained an order from Farley J. removing Messrs. Woollcombe and Keiper from their short-lived position of directors, essentially on the basis of that apprehension.

8 The Employees argue that there is a reasonable apprehension the appellants would not be able to act in the best interests of the corporation - as opposed to their own best interests as shareholders - in considering the bids. They say this is so because of prior public statements by the appellants about enhancing shareholder value in Stelco, because of the appellants' linkage to such a large shareholder group, because of their earlier failed bid in the restructuring, and because of their opposition to a capital proposal made in the proceeding by Deutsche Bank (known as "the Stalking Horse Bid"). They submit further that the appointments have poisoned the atmosphere of the restructuring process, and that the Board made the appointments under threat of facing a potential shareholders' meeting where the members of the Board would be replaced en masse.

9 On the other hand, Messrs. Woollcombe and Keiper seek to set aside the order of Farley J. on the grounds that (a) he did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test applied by the motion judge has no application to the removal of directors, (c) the motion judge erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) the facts do not meet any test that would justify the removal of directors by a court in any event.

10 For the reasons that follow, I would grant leave to appeal, allow the appeal, and order the reinstatement of the applicants to the Board.

PART II - ADDITIONAL FACTS

11 Before the initial CCAA order on January 29, 2004, the shareholders of Stelco had last met at their annual general meeting on April 29, 2003. At that meeting they elected eleven directors to the Board. By the date of the initial order, three of those directors had resigned, and on November 30, 2004, a fourth did as well, leaving the company with only seven directors.

12 Stelco's articles provide for the Board to be made up of a minimum of ten and a maximum of twenty directors. Consequently, after the last resignation, the company's corporate governance committee began to take steps to search for new directors. They had not succeeded in finding any prior to the approach by the appellants in January 2005.

13 Messrs. Woollcombe and Keiper had been accumulating shares in Stelco and had been participating in the CCAA proceedings for some time before their request to be appointed to the Board,

through their companies, Clearwater and Equilibrium. Clearwater and Equilibrium are privately held, Ontario-based, investment management firms. Mr. Keiper is the president of Equilibrium and associated with Clearwater. Mr. Woollcombe is a consultant to Clearwater. The motion judge found that they "come as a package."

14 In October 2004, Stelco sought court approval of its proposed method of raising capital. On October 19, 2004, Farley J. issued what has been referred to as the Initial Capital Process Order. This order set out a process by which Stelco, under the direction of the Board, would solicit bids, discuss the bids with stakeholders, evaluate the bids, and report on the bids to the court.

15 On November 9, 2004, Clearwater and Equilibrium announced they had formed an investor group and had made a capital proposal to Stelco. The proposal involved the raising of $125 million through a rights offering. Mr. Keiper stated at the time that he believed "the value of Stelco's equity would have the opportunity to increase substantially if Stelco emerged from CCAA while minimizing dilution of its shareholders." The Clearwater proposal was not accepted.

16 A few days later, on November 14, 2004, Stelco approved the Stalking Horse Bid. Clearwater and Equilibrium opposed the Deutsche Bank proposal. Mr. Keiper criticized it for not providing sufficient value to existing shareholders. However, on November 29, 2004, Farley J. approved the Stalking Horse Bid and amended the Initial Capital Process Order accordingly. The order set out the various channels of communication between Stelco, the monitor, potential bidders and the stakeholders. It provided that members of the Board were to see the details of the different bids before the Board selected one or more of the offers.

17 Subsequently, over a period of two and a half months, the shareholding position of Clearwater and Equilibrium increased from approximately 5% as at November 19, to 14.9% as at January 25, 2005, and finally to approximately 20% on a fully diluted basis as at January 31, 2005. On January 25, Clearwater and Equilibrium announced that they had reached an understanding jointly to pursue efforts to maximize shareholder value at Stelco. A press release stated:

> Such efforts will include seeking to ensure that the interests of Stelco's equity holders are appropriately protected by its board of directors and, ultimately, that Stelco's equity holders have an appropriate say, by vote or otherwise, in determining the future course of Stelco.

18 On February 1, 2005, Messrs. Keiper and Woollcombe and others representatives of Clearwater and Equilibrium, met with Mr. Drouin and other Board members to discuss their views of Stelco and a fair outcome for all stakeholders in the proceedings. Mr. Keiper made a detailed presentation, as Mr. Drouin testified, "encouraging the Board to examine how Stelco might improve its value through enhanced disclosure and other steps." Mr. Keiper expressed confidence that "there was value to the equity of Stelco," and added that he had backed this view up by investing millions of dollars of his own money in Stelco shares. At that meeting, Clearwater and Equilibrium requested that Messrs. Woollcombe and Keiper be added to the Board and to Stelco's restructuring committee. In this respect, they were supported by other shareholders holding about another 20% of the company's common shares.

19 At paragraphs 17 and 18 of his affidavit, Mr. Drouin, summarized his appraisal of the situation:

17. It was my assessment that each of Mr. Keiper and Mr. Woollcombe had personal qualities which would allow them to make a significant contribution to the Board in terms of their backgrounds and their knowledge of the steel industry generally and Stelco in particular. In addition I was aware that their appointment to the Board was supported by approximately 40% of the shareholders. In the event that these shareholders successfully requisitioned a shareholders meeting they were in a position to determine the composition of the entire Board.
18. I considered it essential that there be continuity of the Board through the CCAA process. I formed the view that the combination of existing Board members and these additional members would provide Stelco with the most appropriate board composition in the circumstances. The other members of the Board also shared my views.

20 In order to ensure that the appellants understood their duties as potential Board members and, particularly that "they would no longer be able to consider only the interests of shareholders alone but would have fiduciary responsibilities as a Board member to the corporation as a whole," Mr. Drouin and others held several further meetings with Mr. Woollcombe and Mr. Keiper. These discussions "included areas of independence, standards, fiduciary duties, the role of the Board Restructuring Committee and confidentiality matters." Mr. Woollcombe and Mr. Keiper gave their assurances that they fully understood the nature and extent of their prospective duties, and would abide by them. In addition, they agreed and confirmed that:

a) Mr. Woollcombe would no longer be an advisor to Clearwater and Equilibrium with respect to Stelco;
b) Clearwater and Equilibrium would no longer be represented by counsel in the CCAA proceedings; and
c) Clearwater and Equilibrium then had no involvement in, and would have no future involvement, in any bid for Stelco.

21 On the basis of the foregoing - and satisfied "that Messrs. Keiper and Woollcombe would make a positive contribution to the various issues before the Board both in [the] restructuring and the ongoing operation of the business" - the Board made the appointments on February 18, 2005.

22 Seven days later, the motion judge found it "appropriate, just, necessary and reasonable to declare" those appointments "to be of no force and effect" and to remove Messrs. Woollcombe and Keiper from the Board. He did so not on the basis of any actual conduct on the part of the appellants as directors of Stelco but because there was some risk of anticipated conduct in the future. The gist of the motion judge's rationale is found in the following passage from his reasons (at para. 23):

> In these particular circumstances and aside from the Board feeling coerced into the appointments for the sake of continuing stability, I am not of the view that it would be appropriate to wait and see if there was any explicit action on behalf of K and W while conducting themselves as Board members which would demonstrate that they had not lived up to their obligations to be "neutral." They may well conduct themselves beyond reproach. But if they did not, the fallout would be very detrimental to Stelco and its ability to successfully emerge. What would happen to the bids in such a dogfight? I fear that it would be trying to put Humpty Dumpty back together again. The same situation would prevail even if K and

W conducted themselves beyond reproach but with the Board continuing to be concerned that they not do anything seemingly offensive to the bloc. The risk to the process and to Stelco in its emergence is simply too great to risk the wait and see approach.

PART III - LEAVE TO APPEAL

23 Because of the "real time" dynamic of this restructuring project, Laskin J.A. granted an order on March 4, 2005, expediting the appellants' motion for leave to appeal, directing that it be heard orally and, if leave be granted, directing that the appeal be heard at the same time. The leave motion and the appeal were argued together, by order of the panel, on March 18, 2005.

24 This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": Country Style Food Services Inc. (Re), (2002) 158 O.A.C. 30; [2002] O.J. No. 1377 (C.A.), at para. 15. This criterion is determined in accordance with a four-pronged test, namely,

a) whether the point on appeal is of significance to the practice;
b) whether the point is of significance to the action;
c) whether the appeal is prima facie meritorious or frivolous;
d) whether the appeal will unduly hinder the progress of the action.

25 Counsel agree that (d) above is not relevant to this proceeding, given the expedited nature of the hearing. In my view, the tests set out in (a) - (c) are met in the circumstances, and as such, leave should be granted. The issue of the court's jurisdiction to intervene in corporate governance issues during a CCAA restructuring, and the scope of its discretion in doing so, are questions of considerable importance to the practice and on which there is little appellate jurisprudence. While Messrs. Woollcombe and Keiper are pursuing their remedies in their own right, and the company and its directors did not take an active role in the proceedings in this court, the Board and the company did stand by their decision to appoint the new directors at the hearing before the motion judge and in this court, and the question of who is to be involved in the Board's decision making process continues to be of importance to the CCAA proceedings. From the reasons that follow it will be evident that in my view the appeal has merit.

26 Leave to appeal is therefore granted.

PART IV - THE APPEAL

The Positions of the Parties

27 The appellants submit that,

a) in exercising its discretion under the CCAA, the court is not exercising its "inherent jurisdiction" as a superior court;
b) there is no jurisdiction under the CCAA to remove duly elected or appointed directors, notwithstanding the broad discretion provided by s. 11 of that Act; and that,
c) even if there is jurisdiction, the motion judge erred:

(i) by relying upon the administrative law test for reasonable apprehension of bias in determining that the directors should be removed;
(ii) by rejecting the application of the "business judgment" rule to the unanimous decision of the Board to appoint two new directors; and,
(iii) by concluding that Clearwater and Equilibrium, the shareholders with whom the appellants are associated, were focussed solely on a short-term investment horizon, without any evidence to that effect, and therefore concluding that there was a tangible risk that the appellants would not be neutral and act in the best interests of Stelco and all stakeholders in carrying out their duties as directors.

28 The respondents' arguments are rooted in fairness and process. They say, first, that the appointment of the appellants as directors has poisoned the atmosphere of the CCAA proceedings and, secondly, that it threatens to undermine the even-handedness and integrity of the capital raising process, thus jeopardizing the ability of the court at the end of the day to approve any compromise or arrangement emerging from that process. The respondents contend that Farley J. had jurisdiction to ensure the integrity of the CCAA process, including the capital raising process Stelco had asked him to approve, and that this court should not interfere with his decision that it was necessary to remove Messrs. Woollcombe and Keiper from the Board in order to ensure the integrity of that process. A judge exercising a supervisory function during a CCAA proceeding is owed considerable deference: Algoma Steel Inc. (2001), 25 C.B.R. (4th) 194, at para. 8.

29 The crux of the respondents' concern is well-articulated in the following excerpt from paragraph 72 of the factum of the Retired Salaried Beneficiaries:

> The appointments of Keiper and Woollcombe violated every tenet of fairness in the restructuring process that is supposed to lead to a plan of arrangement. One stakeholder group - particular investment funds that have acquired Stelco shares during the CCAA itself - have been provided with privileged access to the capital raising process, and voting seats on the Corporation's Board of Directors and Restructuring Committee. No other stakeholder has been treated in remotely the same way. To the contrary, the salaried retirees have been completely excluded from the capital raising process and have no say whatsoever in the Corporation's decision-making process.

30 The respondents submit that fairness, and the perception of fairness, underpin the CCAA process, and depend upon effective judicial supervision: see Olympia & York Development Ltd. v. Royal Trust (1993), 12 O.R. (3d) 500 (Gen. Div.); Re Ivaco Inc., (2004), 3 C.B.R. (5th) 33, at para. 15-16. The motion judge reasonably decided to remove the appellants as directors in the circumstances, they say, and this court should not interfere.

Jurisdiction

31 The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA." He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

32 The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: Babcock & Wilcox Canada Ltd. (Re), [2000] O.J. No. 786 (Sup. Ct.) at para. 11. See also, Re Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at p. 320; Re Lehndorff General Partners Ltd. (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.). Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see Re Dylex Ltd. (1995), 31 C.B.R. (3d) 106 (Ont. Gen Div. [Commercial List]), Royal Oak Mines Inc. (Re) (1999), 7 C.B.R. (4th) 293 (Ont. Gen Div. [Commercial List]); and Westar Mining Ltd. (Re) (1992), 70 B.C.L.R. (2d) 6 (B.C.S.C.).

33 It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent Jurisdiction

34 Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law," permitting the court "to maintain its authority and to prevent its process being obstructed and abused." It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner." See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Problems 27-28. In Halsbury's Laws of England, 4th ed. (London: Lexis-Nexis UK, 1973 -) vol. 37, at para. 14, the concept is described as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

35 In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the Legislature has acted. As Farley J. noted in Royal Oak Mines, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play" (para. 4). See also, Baxter Student Housing Ltd. v. College Housing Cooperative Ltd., [1976] 2 S.C.R. 475 (S.C.C.) at 480; Richtree Inc. (Re), [2005] O.J. No. 251 (Sup. Ct.).

36 In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that

regard, I agree with the comment of Newbury J.A. in Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., [2003] B.C.J. No. 1335 (B.C.C.A.), (2003) 43 C.B.R. (4th) 187 at para. 46, that:

> ... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above,[2] rather than the integrity of their own process.

37 As Jacob observes, in his article "The Inherent Jurisdiction of the Court," supra, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

38 I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however - difficult as it may be to draw - between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose."[3] Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

The Section 11 Discretion

39 This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, the s. 11 discretion - in spite of its considerable breadth and flexibility - does not permit the exercise of such a power in and of itself. There may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the CBCA, and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA. However, this was not argued in the present case, and the facts before the court would not justify the removal of Messrs. Woollcombe and Keiper on oppression remedy grounds.

40 The pertinent portions of s. 11 of the CCAA provide as follows:

Powers of court	11(1) Notwithstanding anything in the Bankruptcy and

Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

Initial application court orders

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days.

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Other than initial application court orders

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

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Burden of proof on application

(6) The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
(b) in the case of an order under subsection (4), the applicant also satisfied the court that the applicant has acted, and is acting, in good faith and with due diligence.

41 The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as R. v. Sharpe, [2001] 1 S.C.R. 45, at para. 33, and Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 21 is articulated in E.A. Driedger, The Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) as follows:

> Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002) at page 262.

42 The interpretation of s. 11 advanced above is true to these principles. It is consistent with the purpose and scheme of the CCAA, as articulated in para. 38 above, and with the fact that corporate governance matters are dealt with in other statutes. In addition, it honours the historical reluctance of courts to intervene in such matters, or to second-guess the business decisions made by directors and officers in the course of managing the business and affairs of the corporation.

43 Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparagraphs 11(3)(a)-(c) and 11(4)(a)-(c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. I agree.

44 What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors." But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.

45 With these principles in mind, I turn to an analysis of the various factors underlying the interpretation of the s. 11 discretion.

46 I start with the proposition that at common law directors could not be removed from office during the term for which they were elected or appointed: London Finance Corporation Limited v. Banking Service Corporation Limited (1923), 23 O.W.N. 138 (Ont. H.C.); Stephenson v. Vokes (1896), 27 O.R. 691 (Ont. H.C.). The authority to remove must therefore be found in statute law.

47 In Canada, the CBCA and its provincial equivalents govern the election, appointment and removal of directors, as well as providing for their duties and responsibilities. Shareholders elect directors, but the directors may fill vacancies that occur on the board of directors pending a further shareholders meeting: CBCA, ss. 106(3) and 111.[4] The specific power to remove directors is vested in the shareholders by s. 109(1) of the CBCA. However, s. 241 empowers the court - where it finds that oppression as therein defined exists - to "make any interim or final order it thinks fit," including (s. 241(3)(e)) "an order appointing directors in place of or in addition to all or any of the directors then in office." This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of misconduct required to trigger oppression remedy relief: see, for example, Catalyst Fund General Partner I Inc. v. Hollinger Inc., [2004] O.J. No. 4722.

48 There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment, and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See Baxter Student Housing Ltd. v. College Housing Cooperative Ltd., supra, at p. 480; Royal Oak Mines Inc. (Re), supra; and Richtree Inc. (Re), supra.

49 At paragraph 7 of his reasons, the motion judge said:

> The board is charged with the standard duty of "manage[ing], [sic] or supervising the management, of the business and affairs of the corporation": s. 102(1) CBCA. *Ordinarily the Court will not interfere with the composition of the board of directors. However, if there is good and sufficient valid reason to do so, then the Court must not hesitate to do so to correct a problem.* The directors should not be required to constantly look over their shoulders for this would be the sure recipe for board paralysis which would be so detrimental to a restructuring process; thus interested parties should only initiate a motion where it is reasonably obvious that there is a problem, actual or poised to become actual. [emphasis added]

50 Respectfully, I see no authority in s. 11 of the CCAA for the court to interfere with the composition of a board of directors on such a basis.

51 Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power - which the courts are disinclined to exercise in any event - except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

The Oppression Remedy Gateway

52 The fact that s. 11 does not itself provide the authority for a CCAA judge to order the removal of directors does not mean that the supervising judge is powerless to make such an order, however. Section 20 of the CCAA offers a gateway to the oppression remedy and other provisions of the CBCA and similar provincial statutes. Section 20 states:

> The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

53 The CBCA is legislation that "makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them." Accordingly, the powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances.

54 I do not accept the respondents' argument that the motion judge had the authority to order the removal of the appellants by virtue of the power contained in s. 145(2)(b) of the CBCA to make an order "declaring the result of the disputed election or appointment" of directors. In my view, s. 145 relates to the procedures underlying disputed elections or appointments, and not to disputes over the composition of the board of directors itself. Here, it is conceded that the appointment of Messrs. Woollcombe and Keiper as directors complied with all relevant statutory requirements. Farley J. quite properly did not seek to base his jurisdiction on any such authority.

The Level of Conduct Required

55 Colin Campbell J. recently invoked the oppression remedy to remove directors, without appointing anyone in their place, in Catalyst Fund General Partner I Inc. v. Hollinger Inc., supra. The bar is high. In reviewing the applicable law, C. Campbell J. said (para. 68):

> Director removal is *an extraordinary remedy* and certainly should be *imposed most sparingly*. As a starting point, I accept the basic proposition set out in Peterson, "Shareholder Remedies in Canada"[5]:
>
> > SS. 18.172 *Removing and appointing directors to the board is an extreme form of judicial intervention.* The board of directors is elected by the shareholders, vested with the power to manage the corporation, and appoints the officers of the company who undertake to conduct the day-to-day affairs of the corporation. [Footnote omitted.] It is clear that the board of directors has control over policymaking and management of the corporation. *By tampering with a board, a court directly affects the management of the corporation.* If a reasonable balance between protection of corporate stakeholders and the freedom of management to conduct the affairs of the business in an efficient manner is desired, altering the board of

> directors should be *a measure of last resort.* The order could be suitable where the continuing presence of the incumbent directors is harmful to both the company and the interests of corporate stakeholders, and where the appointment of a new director or directors would remedy the oppressive conduct without a receiver or receiver-manager. [emphasis added]

56 C. Campbell J. found that the continued involvement of the Ravelston directors in the Hollinger situation would "significantly impede" the interests of the public shareholders and that those directors were "motivated by putting their interests first, not those of the company" (paras. 82-83). The evidence in this case is far from reaching any such benchmark, however, and the record would not support a finding of oppression, even if one had been sought.

57 Everyone accepts that there is no evidence the appellants have conducted themselves, as directors - in which capacity they participated over two days in the bid consideration exercise - in anything but a neutral fashion, having regard to the best interests of Stelco and all of the stakeholders. The motion judge acknowledged that the appellants "may well conduct themselves beyond reproach." However, he simply decided there was a risk - a reasonable apprehension - that Messrs. Woollcombe and Keiper would not live up to their obligations to be neutral in the future.

58 The risk or apprehension appears to have been founded essentially on three things: (1) the earlier public statements made by Mr. Keiper about "maximizing shareholder value"; (2) the conduct of Clearwater and Equilibrium in criticizing and opposing the Stalking Horse Bid; and (3) the motion judge's opinion that Clearwater and Equilibrium - the shareholders represented by the appellants on the Board - had a "vision" that "usually does not encompass any significant concern for the long-term competitiveness and viability of an emerging corporation," as a result of which the appellants would approach their directors' duties looking to liquidate their shares on the basis of a "short-term hold" rather than with the best interests of Stelco in mind. The motion judge transposed these concerns into anticipated predisposed conduct on the part of the appellants as directors, despite their apparent understanding of their duties as directors and their assurances that they would act in the best interests of Stelco. He therefore concluded that "the risk to the process and to Stelco in its emergence [was] simply too great to risk the wait and see approach."

59 Directors have obligations under s. 122(1) of the CBCA (a) to act honestly and in good faith with a view to the best interest of the corporation (the "statutory fiduciary duty" obligation), and (b) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the "duty of care" obligation). They are also subject to control under the oppression remedy provisions of s. 241. The general nature of these duties does not change when the company approaches, or finds itself in, insolvency: Peoples Department Stores Inc (Trustee of). v. Wise, [2004] S.C.J. No. 64 (S.C.C.) at paras. 42-49.

60 In Peoples the Supreme Court noted that "the interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders" (para. 43), but also accepted "as an accurate statement of the law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" (para. 42). Importantly as well - in the context of "the shifting interest and incentives of shareholders and creditors" - the court stated (para. 47):

> In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders.

61 In determining whether directors have fallen foul of those obligations, however, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. Although the motion judge concluded that there was a risk of harm to the Stelco process if Messrs Woollcombe and Keiper remained as directors, he did not assess the level of that risk. The record does not support a finding that there was a sufficient risk of sufficient misconduct to warrant a conclusion of oppression. The motion judge was not asked to make such a finding, and he did not do so.

62 The respondents argue that this court should not interfere with the decision of the motion judge on grounds of deference. They point out that the motion judge has been case-managing the restructuring of Stelco under the CCAA for over fourteen months and is intimately familiar with the circumstances of Stelco as it seeks to restructure itself and emerge from court protection.

63 There is no question that the decisions of judges acting in a supervisory role under the CCAA, and particularly those of experienced commercial list judges, are entitled to great deference: see Algoma Steel Inc. v. Union Gas Limited (2003), 63 O.R. (3d) 78 (C.A.), at para. 16. The discretion must be exercised judicially and in accordance with the principles governing its operation. Here, respectfully, the motion judge misconstrued his authority, and made an order that he was not empowered to make in the circumstances.

64 The appellants argued that the motion judge made a number of findings without any evidence to support them. Given my decision with respect to jurisdiction, it is not necessary for me to address that issue.

The Business Judgment Rule

65 The appellants argue as well that the motion judge erred in failing to defer to the unanimous decision of the Stelco directors in deciding to appoint them to the Stelco Board. It is well-established that judges supervising restructuring proceedings - and courts in general - will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in Peoples, supra, at para. 67:

> Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making ...

66 In Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289 (C.A.) at 320, this court adopted the following statement by the trial judge, Anderson J.:

> Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority.[6]

67 McKinlay J.A then went on to say:

> There can be no doubt that on an application under s. 234[7] the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not meant that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.

68 Although a judge supervising a CCAA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind. See also Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., supra, Sammi Atlas Inc. (Re) (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.); Olympia & York Developments Ltd. (Re), supra; Re Alberta Pacific Terminals Ltd. (1991), 8 C.B.R. (3d) 99 (B.C.S.C.). The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.

69 Here, the motion judge was alive to the "business judgment" dimension in the situation he faced. He distinguished the application of the rule from the circumstances, however, stating at para. 18 of his reasons:

> With respect I do not see the present situation as involving the "management of the business and affairs of the corporation," but rather as a quasi-constitutional aspect of the corporation entrusted albeit to the Board pursuant to s. 111(1) of the CBCA. I agree that where a board is actually engaged in the business of a judgment situation, the board should be given appropriate deference. However, to the contrary in this situation, I do not see it as a situation calling for (as asserted) more deference, but rather considerably less than that. With regard to this decision of the Board having impact upon the capital raising process, as I conclude it would, then similarly deference ought not to be given.

70 I do not see the distinction between the directors' role in "the management of the business and affairs of the corporation" (CBCA, s. 102) - which describes the directors' overall responsibilities - and their role with respect to a "quasi-constitutional aspect of the corporation" (i.e. in filling out the composition of the board of directors in the event of a vacancy). The "affairs" of the corporation are defined in s. 1 of the CBCA as meaning "the relationships among a corporation, it affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate." Corporate governance decisions relate directly to such relationships and are at the heart of the Board's business decision-making role regarding the corporation's business and affairs. The dynamics of such decisions, and the intricate balancing of competing interests and other corporate-related factors that goes into making them, are no more within the purview of the court's knowledge and expertise than other business decisions, and they

deserve the same deferential approach. Respectfully, the motion judge erred in declining to give effect to the business judgment rule in the circumstances of this case.

71 This is not to say that the conduct of the Board in appointing the appellants as directors may never come under review by the supervising judge. The court must ultimately approve and sanction the plan of compromise or arrangement as finally negotiated and accepted by the company and its creditors and stakeholders. The plan must be found to be fair and reasonable before it can be sanctioned. If the Board's decision to appoint the appellants has somehow so tainted the capital raising process that those criteria are not met, any eventual plan that is put forward will fail.

72 The respondents submit that it makes no sense for the court to have jurisdiction to declare the process flawed only after the process has run its course. Such an approach to the restructuring process would be inefficient and a waste of resources. While there is some merit in this argument, the court cannot grant itself jurisdiction where it does not exist. Moreover, there are a plethora of checks and balances in the negotiating process itself that moderate the risk of the process becoming irretrievably tainted in this fashion - not the least of which is the restraining effect of the prospect of such a consequence. I do not think that this argument can prevail. In addition, the court at all times retains its broad and flexible supervisory jurisdiction - a jurisdiction which feeds the creativity that makes the CCAA work so well - in order to address fairness and process concerns along the way. This case relates only to the court's exceptional power to order the removal of directors.

The Reasonable Apprehension of Bias Analogy

73 In exercising what he saw as his discretion to remove the appellants as directors, the motion judge thought it would be useful to "borrow the concept of reasonable apprehension of bias ... with suitable adjustments for the nature of the decision making involved" (para. 8). He stressed that "there was absolutely no allegation against [Mr. Woollcombe and Mr. Keiper] of any actual 'bias' or its equivalent" (para. 8). He acknowledged that neither was alleged to have done anything wrong since their appointments as directors, and that at the time of their appointments the appellants had confirmed to the Board that they understood and would abide by their duties and responsibilities as directors, including the responsibility to act in the best interests of the corporation and not in their own interests as shareholders. In the end, however, he concluded that because of their prior public statements that they intended to "pursue efforts to maximize shareholder value at Stelco," and because of the nature of their business and the way in which they had been accumulating their shareholding position during the restructuring, and because of their linkage to 40% of the common shareholders, there was a risk that the appellants would not conduct themselves in a neutral fashion in the best interests of the corporation as directors.

74 In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.

75 Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise

the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants - including the respondents in this case - but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.

76 If the respondents are correct, and reasonable apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in Blair v. Consolidated Enfield Corp., [1995] 4 S.C.R. 5 (S.C.C.) at para. 35, "persons are assumed to act in good faith unless proven otherwise." With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

PART V - DISPOSITION

77 For the foregoing reasons, then, I am satisfied that the motion judge erred in declaring the appointment of Messrs. Woollcombe and Keiper as directors of Stelco of no force and effect.

78 I would grant leave to appeal, allow the appeal and set aside the order of Farley J. dated February 25, 2005.

79 Counsel have agreed that there shall be no costs of the appeal.

R.A. BLAIR J.A.
S.T. GOUDGE J.A. - I agree.
K.N. FELDMAN J.A. - I agree.

cp/ln/e/qljxh/qlkjg/qlgxc/qlmlt

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

2 The reference is to the decisions in Dyle, Royal Oak Mines, and Westar, cited above.

3 See paragraph 43, infra, where I elaborate on this distinction.

4 It is the latter authority that the directors of Stelco exercised when appointing the appellants to the Stelco Board.

5 Dennis H. Peterson, Shareholder Remedies in Canada (Markham: LexisNexis ' Butterworths ' Looseleaf Service, 1989) at 18-47.

6 Or, I would add, unpopular with other stakeholders.

7 Now s. 241.

Indexed as:

Chef Ready Foods Ltd. v. Hongkong Bank of Canada

IN THE MATTER of The Company Act R.S.B.C. 1979, C. 59
AND IN THE MATTER of The Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36
AND IN THE MATTER of Chef Ready Foods Ltd. and Istonio Foods Ltd.
Between
Chef Ready Foods Ltd., Respondent, (Petitioner), and
Hongkong Bank of Canada, Appellant, (Respondent)

[1990] B.C.J. No. 2384

[1991] 2 W.W.R. 136

51 B.C.L.R. (2d) 84

4 C.B.R. (3d) 311

23 A.C.W.S. (3d) 976

1990 CanLII 529

Vancouver Registry: CA12944

British Columbia Court of Appeal

Carrothers, Cumming and Gibbs JJ.A.

Heard: October 12, 1990
Judgment: October 29, 1990

Debtor and creditor -- Arrangement under companies' creditors arrangement act -- Bank Act security -- Priority.

Appeal from a stay order issued under the Companies' Creditors Arrangement Act. Bank supplying credit and services to Chef Ready, and holding security under section 178 of the Bank Act. Bank commencing proceedings upon its security. Chef Ready petitioning for relief under the Companies'

Creditors Arrangement Act. Order issued staying realization on any security of Chef Ready. Issue whether Bank Act security should be exempt from the order.

HELD: Appeal dismissed. Nothing in the Companies' Creditors Arrangement Act exempted any creditors from the provisions of the Act, and nothing in the Bank Act excluded the impact of the Companies' Creditors Arrangement Act. Bank's interest not defeated, but its right to seize and sell postponed. Broad protection of creditors in the Companies' Creditors Arrangement Act to prevail over the Bank Act. Section 178 security included in the term "security" in the Companies' Creditors Relief Act.

STATUTES, REGULATIONS AND RULES CITED:

Bank Act, R.S.C. 1985, c. B-1, s. 178, 179.
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 8, 11.

Counsel for the Appellant: D.I. Knowles and H.M. Ferris.
Counsel for the Respondent: R.H. Sahrmann and L.D. Goldberg.

GIBBS J.A. (for the Court, dismissing the appeal):-- The sole issue on this appeal is whether a stay order made by a Chambers judge under s. 11 of the Companies' Creditors Arrangement Act, R.S.C. 1985, Chap. C-36 is a bar to realization by the Hongkong Bank of Canada (the "Bank") on security granted to it under s. 178 of the Bank Act, R.S.C. 1985, Chap. B-1.

The facts relevant to resolution of the issue are not in dispute. The respondent Chef Ready Foods Ltd. ("Chef Ready") is in the business of manufacturing and wholesaling fresh and frozen pizza products. The appellant Bank provided credit and other banking services to Chef Ready. As part of the security for its indebtedness Chef Ready executed the appropriate documentation and filed the appropriate notices under s. 178 of the Bank Act. Accordingly the Bank holds what is commonly referred to as "section 178 security".

Chef Ready encountered financial difficulties. On August 22, 1990, following upon some fruitless negotiations, the Bank, through its solicitors, demanded payment from Chef Ready. The debt then stood at $365,318.69 with interest accruing thereafter at $150.443 per day. Chef Ready did not pay.

On August 27, 1990 the Bank commenced proceedings upon debenture security which it held and upon guarantees by the principals of Chef Ready. Also on August 27, 1990, the Bank appointed an agent under a general assignment of book debts which it held, with instructions to the agent to realize upon the accounts. In the meantime, on August 23, 1990, so as to qualify under the Companies' Creditors Arrangement Act (the "C.C.A.A."), Chef Ready had granted a trust deed to a trustee and issued an unsecured $50 bond. On August 28, 1990, the day after the Bank commenced its debenture and guarantee proceedings, Chef Ready filed a petition seeking various forms of relief under

the C.C.A.A. On the same day Chef Ready filed an application, ex parte, as they were entitled to do under the C.C.A.A. for an order to be issued that day granting the relief claimed in the petition.

The application was heard in Chambers in the afternoon of August 28, 1990 and the following day. The Bank learned "on the grapevine" of the application and appeared on the hearing and was given standing to make submissions. It also filed affidavit evidence which appears to have been taken into account by the Chambers judge. The affidavit evidence had appended to it, inter alia, the s. 178 security documentation. On August 30, 1990 the Chambers judge granted the order and delivered oral reasons at the end of which he said:

> "I therefore conclude that the Companies' Creditors Arrangement Act is an overriding statute which gives the court power to stay all proceedings including the right of the bank to collect the accounts receivable."

The reasons refer specifically to the accounts receivable because the Bank was then poised ready to take possession of those accounts and collect the amounts owing. Its right to do so arose under the general assignment of book debts and under clause 4 of the s. 178 security instrument:

> " 4. If the Customer shall sell the property or any part thereof, the proceeds of any such sale, including cash, bills, notes, evidence of title, and securities, and the indebtedness of any purchaser in connection with such sales shall be the property of the Bank to be forthwith paid or transferred to the Bank, and until so paid or transferred to be held by the Customer on behalf of and in trust for the Bank. Execution by the Customer and acceptance by the Bank of an assignment of book debts shall be deemed to be in furtherance of this declaration and not an acknowledgement by the Bank of any right or title on the part of the Customer to such book debts."

The formal order made by the Chambers judge contains a paragraph which stays realization upon or otherwise dealing with any securing on "the undertaking, property and assets" of Chef Ready:

> " THIS COURT FURTHER ORDERS THAT all proceedings taken or that might be taken by any of the Petitioners' creditors or any other person, firm or corporation under the Bankruptcy Act (Canada) or the Winding-Up Act (Canada) shall be stayed until further Order of this Court upon 2 days notice to the Petitioners and that further proceedings in any action, suit or proceeding commenced by any person, firm or corporation against any of the Petitioners be stayed until the further Order of this Court upon 2 days notice to the Petitioners, that no action, suit or other proceeding may be proceeded with or commenced against any of the Petitioners by any person, firm or corporation except with leave of this Court upon 2 days notice to the Petitioners and subject to such terms as this Court may impose and that the right of any person, firm or corporation to realize upon or otherwise deal with any property right or security held by that person firm or corporation on the undertaking, property and assets of the Petitioners be and the same is postponed;"
>
> (Emphasis added.)

The jurisdiction in the court to make such a stay order is found in s. 11 of the C.C.A.A.:

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

The question of whether a step, not involving any court or litigation process, taken to realize upon the accounts receivable is a "suit, action or other proceeding ... against the company" is not before the court on this appeal. The Bank does not put its case forward on that footing. Its contention is more general in nature. It is that s. 178 security is beyond the reach of the C.C.A.A.; put another way, that whatever the scope of the C.C.A.A. it does not go so far as to impede or qualify, or give jurisdiction to make orders which will impede or qualify, the rights of realization of a holder of s. 178 security. Consistent with that position, by way of relief on the appeal the Bank asks only that the stay order be varied to free up the s. 178 security:

"NATURE OF ORDER SOUGHT

> An order that the appeal of the Appellant be allowed and an order be made the Order of the Judge in the Court below be set aside insofar as it restrains the Appellant from exercising its rights under its section 178 security..."

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

There is nothing in the C.C.A.A. which exempts any creditors of a debtor company from its provisions. The all encompassing scope of the Act qua creditors is even underscored by s. 8 which negates any contracting out provisions in a security instrument. And Chef Ready emphasizes the obvious, that if it had been intended that s. 178 security or the holders of s. 178 security be exempt from the C.C.A.A. it would have been a simple matter to say so. But that does not dispose of the issue. There is the Bank Act to consider.

There is nothing in the Loans and Security division of the Bank Act either, where s. 178 is found, which specifically excludes direct or indirect impact by the C.C.A.A. Nonetheless the Bank's position, in essence, is that there is a notional cordon sanitaire around s. 178 and other sections associated with it such that neither the C.C.A.A. or orders made under it can penetrate. In support of its position the Bank relies heavily upon the recent unanimous judgment of the Supreme Court of Canada in Bank of Montreal v. Hall, [1990 1 S.C.R. 121, and to a lesser degree upon an earlier unanimous Supreme Court of Canada judgment in Flintoft v. Royal Bank of Canada (1964), S.C.R. 631.

The principal issue in Hall was whether ss. 19 to 36 of the Saskatchewan Limitation of Civil Rights Act applied to a security taken under ss. 178 and 179 of the Bank Act. The court held that it was beyond the competence of the Saskatchewan Legislature "to superadd conditions governing realization over and above those found within the confines of the Bank Act" (p. 154). In the course of arriving at its decision the court considered the property interest acquired by a bank under s. 178 security, the legislative history leading up to the present ss. 178 and 179, the purposes intended to be achieved by the legislation, and the rights of a bank holding s. 178 security. All of those considerations have application to the issue here, and the judgment merits reading in full to appreciate the relevance of all of its parts. However a few extracts will serve to illustrate the Bank's reliance:

> "... a bank taking security under section 178 effectively acquires legal title to the borrower's interest in the present and after-acquired property assigned to it by the borrower" (p. 134)
>
> "... the Parliament of Canada has enacted these sections not so much for the benefit of banks as for the benefit of manufacturers" (p. 139)
>
> "... These sections of the Bank Act have become an integral part of bank lending activities and are a means of providing support in many fields of endeavour to an extent which otherwise would not be practical from the standpoint of prudent banking" (p. 139)
>
> "The bank obtains and may assert its right to the goods and their proceeds against the world, except as only Parliament itself may reduce or modify those rights" (p. 143)
>
> "... the rights, duties and obligations of creditor and debtor are to be determined solely by reference to the Bank Act ..." (p. 143)
>
> "The essence of that regime [ss. 178 and 179], it hardly needs repeating, is to assign to the bank, on the taking out of the security, right and title to the goods in question, and to confer, on default of the debtor, and immediate right to seize and sell those goods ..." (p. 152)
>
> "... it was Parliament's manifest legislative purpose that the sole realization scheme applicable to the s. 178 security interest be that contained in the Bank Act itself" (p. 154)

> "... Parliament, under its power to regulate banking, has enacted a complete code that at once defines and provides for the realization of a security interest" (p. 155).

It is the insular theme which runs through these propositions that the Bank seizes upon to support its claim for immunity. But, it must be asked, in what respect does the preservation of the status quo qua creditors under the C.C.A.A. for a temporary period infringe upon the rights of the Bank under ss. 178 and 179? It does not detract from the Bank's title; it does not distort the mechanics of realization of the security in the sense of the steps to be taken; it does not prevent immediate crystallization of the right to seize and sell; it does not breach the "complete code". All that it does is postpone the exercise of the right to seize and sell. And here the Bank had already allowed at least five days to expire between the accrual of the right and the taking of a step to exercise. It follows from this analysis that there is no apparent bar in the Bank Act to the application of the C.C.A.A. to s. 178 security and the Bank's rights in respect of it.

Having regard to the broad public policy objectives of the C.C.A.A. there is good reason why s. 178 security should not be excluded from its provisions. The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent liquidation followed because that was the consequence of the only insolvency legislation which then existed - the Bankruptcy Act and the Winding-Up Act. Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business. These excerpts from an article by Stanley E. Edwards at p. 587 of 1947 Vol. 25 of the Canadian Bar Review, entitled "Reorganizations Under The Companies' Creditors Arrangement Act", explain very well the historic and continuing purposes of the Act:

> " It is important in applying the C.C.A.A. to keep in mind its purpose and several fundamental principles which may serve to accomplish that purpose. Its object, as one Ontario judge has stated in a number of cases, is to keep a company going despite insolvency. 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 a sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders." (p. 592)
>
> " There are a number of conditions and tendencies in this country which underline the importance of this statute. There has been over the last few years a rapid

> and continuous growth of industry, primarily manufacturing. The tendency here, as in other expanding private enterprise countries, is for the average size of corporations to increase faster than the number of them, and for much of the new wealth to be concentrated in the hands of existing companies or their successors. The results of permitting dissolutions of companies without giving the parties an adequate opportunity to reorganize them would therefore likely be more serious in the future than they have been in the past.
>
> Because of the country's relatively small population, however, Canadian industry is and will probably continue to be very much dependent on world markets and consequently vulnerable to world depressions. If there should be such a depression it will become particularly important that an adequate reorganization procedure should be in existence, so that the Canadian economy will not be permanently injured by discontinuance of its industries, so that whatever going concern value the insolvent companies have will not be lost through dismemberment and sale of their assets, so that their employees will not be thrown out of work, and so that large numbers of investors will not be deprived of their claims and their opportunity to share in the fruits of the future activities of the corporations. While we hope that this dismal prospect will not materialize, it is nevertheless a possibility which must be recognized. But whether it does or not, the growing importance of large companies in Canada will make it important that adequate provision be made for reorganization of insolvent corporations." (p. 590)

It is apparent from these excerpts and from the wording of the statute that, in contrast with ss. 178 and 179 of the Bank Act which are preoccupied with the competing rights and duties of the borrower and the lender, the C.C.A.A. serves the interests of a broad constituency of investors, creditors and employees. If a bank's rights in respect of s. 178 security are accorded an unique status which renders those rights immune from the provisions of the C.C.A.A. the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory. It will be illusory because almost inevitably the realization by the bank on its security will destroy the company as a going concern. Here, for example, if the Bank signifies and collects the accounts receivable Chef Ready will be deprived of working capital. Collapse and liquidation must necessarily follow. The lesson will be that where s. 178 security is present a single creditor can frustrate the public policy objectives of the C.C.A.A. There will be two classes of debtor companies: those for whom there are prospects for recovery under the C.C.A.A.; and those for whom the C.C.A.A. may be irrelevant dependant upon the whim of the s. 178 security holder. Given the economic circumstances which prevailed when the C.C.A.A. was enacted it is difficult to imagine that the legislators of the day intended that result to follow.

In the exercise of their functions under the C.C.A.A. Canadian courts have shown themselves partial to a standard of liberal construction which will further the policy objectives. See such cases as Meridian Developments Inc. v. T.D. Bank (1984), 52 C.B.R. 109 (Alta. Q.B.); Northland Properties Limited v. Excelsior Life Insurance Company (1989), 34 B.C.L.R. (2d) 122 (B.C.C.A.); Re Feifer and Frame Manufacturing Corporation (1947), 28 C.B.R. 124 (Que. C.A.); Wynden Canada Inc. v. Gaz Metropolitaine (1982), 44 C.B.R. 285 (Que. S.C.); and Norcen Energy Resources v. Oakwood Petroleums (1988) 72 C.B.R. 2 (Alta. Q.B.). The trend demonstrated by these cases is entirely consistent with the object and purpose of the C.C.A.A.

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

For these reasons the disposition by the Chambers judge of the application made by Chef Ready will be upheld. it follows that the appeal is dismissed.

GIBBS J.A.
CARROTHERS J.A.:-- I agree.
CUMMING J.A.:-- I agree.

Case Name:

Stelco Inc. (Re)

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

[2005] O.J. No. 4733

Docket: M33099 (C44332)

Ontario Court of Appeal
Toronto, Ontario

J.I. Laskin, M. Rosenberg and H.S. LaForme JJ.A.

Heard: November 2, 2005.
Judgment: November 4, 2005.

(32 paras.)

Creditors & debtors law -- Legislation -- Debtors' relief -- Companies' Creditors Arrangement Act -- Appeal by debenture holders from orders, reported at [2005] O.J. No. 4309, approving agreements involving steel company in bankruptcy protection, necessary for success of company's plan of arrangement, dismissed -- Motions judge had jurisdiction to make orders where power of debenture holders to vote down proposal preserved and agreements had support of other stakeholders and Monitor -- Companies' Creditors Arrangement Act, s. 11.

Insolvency law -- Proposals -- Court approval -- Appeal by debenture holders from orders approving agreements involving steel company in bankruptcy protection, necessary for success of company's plan of arrangement, dismissed -- Motions judge had jurisdiction to make orders where orders did not amount to approval of plan of arrangement -- Debentures holders' power to vote down proposed plan not usurped -- Companies' Creditors Arrangement Act, s. 11.

Application by a committee of senior debenture holders for leave to appeal from orders authorizing Stelco to enter into agreements with two stakeholders and a finance provider. A group of equity

holders supported the application, while other stakeholders and the Monitor supported the orders. Stelco and its four subsidiaries obtained protection from their creditors in 1994 *ES*. Stelco's attempts over twenty months to restructure were unsuccessful, in part because certain stakeholders continually exercised veto powers. Stelco's board of directors negotiated agreements with the stakeholders, the Ontario government and the steelworkers union, and Tricap Management, necessary to the success of Stelco's proposed plan of arrangement. The debenture holders objected to terms of the agreements providing for fees payable to Tricap and providing Ontario with power to accept or reject members of Stelco's board of directors. The debenture holders did not propose an alternate plan of arrangement, but made it clear they would not support the one on the table. The motions judge stated in his reasons he was not approving Stelco's plan, but did not think the plan was doomed to fail. He scheduled a meeting of creditors to vote on the plan for November 2005.

HELD: Application allowed. Leave to appeal was granted and the appeal was dismissed. Leave to appeal was granted because the debenture holders raised a novel and important point that was significant to the action. The appeal was prima facie meritorious, and would not unduly interfere with Stelco's continuing negotiations. The appeal was dismissed because the judge had jurisdiction to make the orders approving the agreements, as the orders did not usurp the debenture holders' power to ultimately decide on whether or not to approve Stelco's plan. It was open to the motions judge to find the plan was not doomed to fail, despite the position of the debenture holders, because of the support the plan had from other stakeholders and the Monitor.

Statute, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 6, 11, 11(4), 13

Appeal From:

On appeal from the orders of Justice James M. Farley of the Superior Court of Justice made on October 4, 2005.

Counsel:

Robert W. Staley and Alan P. Gardner for the Informal Committee of Senior Debentureholders, Appellants

Michael E. Barrack and Geoff R. Hall for Stelco Inc., Respondent

Robert I. Thornton and Kyla E.M. Mahar for the Monitor, Respondent

John R. Varley for Salaried Active Employees, Respondents

Michael C.P. McCreary and David P. Jacobs for USW Locals 8782 and 5328, Respondents

George Karayannides for EDS Canada Inc., Respondent

Aubrey E. Kauffman for Tricap Management Ltd., Respondents

Ben Zarnett and Gale Rubenstein for the Province of Ontario, Respondents

Murray Gold for Salaried Retirees, Respondents

Kenneth T. Rosenberg for USW International, Respondents

Robert A. Centa for USWA, Respondents

George Glezos for AGF Management Ltd., Respondents

The judgment of the Court was delivered by

1 **M. ROSENBERG J.A.**:-- This appeal is another chapter in the continuing attempt by Stelco Inc. and four of its wholly-owned subsidiaries to emerge from protection from their creditors under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36. The appellant, an Informal Committee of Senior Debenture Holders who are Stelco's largest creditor, applies for leave to appeal under s. 13 of the CCAA and if leave be granted appeals three orders made by Farley J. on October 4, 2005 in the CCAA proceedings. These orders authorize Stelco to enter into agreements with two of its stakeholders and a finance provider. The appellant submits that the motions judge had no jurisdiction to make these orders and that the effect of these orders is to distort or skew the CCAA process. A group of Stelco's equity holders support the submissions of the appellant. The various other players with a stake in the restructuring and the court-appointed Monitor support the orders made by the motions judge.

2 Given the urgency of the matter it is only possible to give relatively brief reasons for my conclusion that while leave to appeal should be granted, the appeal should be dismissed.

THE FACTS

3 Stelco Inc. and the four wholly-owned subsidiaries obtained protection from their creditors under the CCAA on January 29, 1994. Thus, the CCAA process has been going on for over twenty months, longer than anyone expected. Farley J. has been managing the process throughout. The initial order made under s. 11 of the CCAA gives Stelco sole and exclusive authority to propose and file a plan of arrangement with its creditors. To date, attempts to restructure have been unsuccessful. In particular, a plan put forward by the Senior Debt Holders failed.

4 While there have no doubt been many obstacles to a successful restructuring, the paramount problem appears to be that stakeholders, the Ontario government and Stelco's unions, who do not have a formal veto (i.e. they do not have a right to vote to approve any plan of arrangement and reorganization) have what the parties have referred to as a functional veto. It is unnecessary to set out the reasons for these functional vetoes. Suffice it to say, as did the Monitor in its Thirty-Eighth Report, that each of these stakeholders is "capable of exercising sufficient leverage against Stelco and other stakeholders such that no restructuring could be completed without that stakeholder's support".

5 In an attempt to successfully emerge from CCAA protection with a plan of arrangement, the Stelco board of directors has negotiated with two of these stakeholders and with a finance provider and has reached three agreements: an agreement with the provincial government (the Ontario Agreement), an agreement with The United Steelworkers International and Local 8782 (the USW Agreement), and an agreement with Tricap Management Limited (the Tricap Agreement). Those agreements are intrinsic to the success of the Plan of Arrangement that Stelco proposes. However, the debt holders including this appellant have the ultimate veto. They alone will vote on whether to approve Stelco's Plan. The vote of the affected debt holders is scheduled for November 15, 2005.

6 The three agreements have terms to which the appellant objects. For example, the Tricap Agreement contemplates a break fee of up to $10.75 million depending on the circumstances. Tricap will be entitled to a break fee if the Plan fails to obtain the requisite approvals or if Tricap terminates its obligations to provide financing as a result of the Plan being amended without Tricap's approval. Half of the break fee becomes payable if the Plan is voted down by the creditors. Another example is found in the Ontario Agreement, which provides that the order sanctioning the Final Plan shall name the members of Stelco's board of directors and such members must be acceptable to the province. Consistent with the Order of March 30, 2005 and as required by the terms of the agreements themselves, Stelco sought court authorization to enter into the three agreements. We were told that, in any event, it is common practice to seek court approval of agreements of this importance. The appellant submits that the motions judge had no jurisdiction to make these orders.

7 There are a number of other facts that form part of the context for understanding the issues raised by this appeal. First, on July 18, 2005, the motions judge extended the stay of proceedings until September 9, 2005 and warned the stakeholders that this was a "real and functional deadline". While that date has been extended because Stelco was making progress in its talks with the stakeholders, the urgency of the situation cannot be underestimated. Something will have to happen to either break the impasse or terminate the CCAA process.

8 Second, on October 4, 2005, the motions judge made several orders, not just the orders to authorize Stelco to enter into the three agreements to which the appellant objects. In particular, the motions judge extended the stay to December and made an order convening the creditors meeting on November 15th to approve the Stelco Plan. The appellant does not object to the orders extending the stay or convening the meeting to vote on the Plan.

9 Third, the appellant has not sought permission to prepare and file its own plan of arrangement. At present, the Stelco Board's Plan is the only plan on the table and as the motions judge observed, "one must realistically appreciate that a rival financing arrangement at this stage, starting from essentially a standing start, would take considerable time for due diligence and there is no assurance that the conditions will be any less onerous than those extracted by Tricap".

10 Fourth, in his orders authorizing Stelco to enter into these agreements, the motions judge made it clear that these authorizations, "are not a sanction of the terms of the plan ... and do not prohibit Stelco from continuing discussions in respect of the Plan with the Affected Creditors".

11 Fifth, the independent Monitor has reviewed the Agreements and the Plan and supports Stelco's position.

12 Finally, and importantly, the Senior Debenture Holders that make up the appellant have said unequivocally that they will not approve the Plan. The motions judge recognized this in his reasons:

> The Bondholder group has indicated that it is firmly opposed to the plan as presently constituted. That group also notes that more than half of the creditors by $ value have advised the Monitor that they are opposed to the plan as presently constituted. ... The present plan may be adjusted (with the blessing of others concerned) to the extent that it, in a revised form, is palatable to the creditors (assuming that they do not have a massive change of heart as to the presently proposed plan).

LEAVE TO APPEAL

13 The parties agree on the test for granting leave to appeal under s. 13 of the CCAA. The moving party must show the following:

(a) the point on appeal is of significance to the practice;
(b) the point is of significance to the action;
(c) the appeal is prima facie meritorious; and
(d) the appeal will not unduly hinder the progress of the action.

14 In my view, the appellant has met this test. The point raised is a novel and important one. It concerns the jurisdiction of the supervising judge to make orders that do not merely preserve the status quo but authorize key elements of the proposed plan of arrangement. The point is of obvious significance in this action. If the motions judge's approvals were to be set aside, it is doubtful that the Plan could proceed. On the other hand, the appellant submits that the orders have created a coercive and unfair environment and that the Plan is doomed to fail. It was therefore wrong to authorize Stelco to enter into agreements, especially the Tricap Agreement, that could further deplete the estate. The appeal is prima facie meritorious. The matter appears to be one of first impression. It certainly cannot be said that the appeal is frivolous. Finally, the appeal will not unduly hinder the progress of the action. Because of the speed with which this court is able to deal with the case, the appeal will not unduly interfere with the continuing negotiations prior to the November 15th meeting.

15 For these reasons, I would grant leave to appeal.

ANALYSIS

Jurisdiction generally

16 The thrust of the appellant's submissions is that while the judge supervising a CCAA process has jurisdiction to make orders that preserve the status quo, the judge has no jurisdiction to make an order that, in effect, entrenches elements of the proposed Plan. Rather, the approval of the Plan is a matter solely for the business judgement of the creditors. The appellant submits that the orders made by the motions judge are not authorized by the statute or under the court's inherent jurisdiction and are in fact inconsistent with the scheme and objects of the CCAA. They submit that the orders made in this case have the effect of substituting the court's judgment for that of the debt holders who, under s. 6, have exclusive jurisdiction to approve the plan. Under s. 6, it is only after a majority in number representing two-thirds in value of the creditors vote to approve the plan that the court has a role in deciding whether to sanction the plan.

17 Underlying this argument is a concern on the part of the creditors that the orders are coercive, designed to force the creditors to approve a plan, a plan in which they have had no input and of which they disapprove.

18 In my view, the motions judge had jurisdiction to make the orders he did authorizing Stelco to enter into the agreements. Section 11 of the CCAA provides a broad jurisdiction to impose terms and conditions on the granting of the stay. In my view, s. 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the status quo. The point of the CCAA process is not simply to preserve the status quo but to facilitate restructuring so that the company can successfully emerge from

the process. This point was made by Gibbs J.A. in Hongkong Bank v. Chef Ready Foods (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at para. 10:

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

19 In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary jurisdiction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and do not unduly interfere with the business judgement of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

20 The argument that the orders are coercive and therefore unreasonably interfere with the rights of the creditors turns largely on the potential $10.75 million break fee that may become payable to Tricap. However, the motions judge has found as a fact that the break fee is reasonable. As counsel for Ontario points out, this necessarily entails a finding that the break fee is not coercive even if it could to some extent deplete Stelco's assets.

21 Further, the motions judge both in his reasons and in his orders made it clear that he was not purporting to sanction the Plan. As he said in his reasons, "I wish to be absolutely clear that I am not ruling on or considering in any way the fairness of the plan as presented". The creditors will have the ultimate say on November 15th whether this plan will be approved.

Doomed to fail

22 The appellant submits that the motions judge had no jurisdiction to approve orders that would facilitate a Plan that is doomed to fail. The authorities indicate that a court should not approve a process that will lead to a plan that is doomed to fail. The appellant says that it has made it as clear as possible that it does not accept the proposed Plan and will vote against it. In Re Inducon Development Corp. (1991), 8 C.B.R. (3d) 306 (Ont. Ct. (Gen. Div.)) at 310 Farley J. said that, "It is of course, ... fruitless to proceed with a plan that is doomed to failure at a further stage."

23 However, it is important to take into account the dynamics of the situation. In fact, it is the appellant's position that nothing will happen until a vote on a Plan is imminent or a proposal from Stelco is voted down; only then will Stelco enter into realistic negotiations with its creditors. It is apparent that the motions judge is of the view that the Plan is not doomed to fail; he would not have approved steps to continue the process if he thought it was. As Austin J. said in Bargain Harold's Discount Ltd. v. Paribas Bank of Canada (1992), 7 O.R. (3d) 362 (Div. Ct.) at 369:

> The jurisprudence is clear that if it is obvious that no plan will be found acceptable to the required percentages of creditors, then the application should be refused. The fact that Paribas, the Royal Bank and K Mart now say there is no plan that they would approve, does not put an end to the inquiry. All affected constituencies must be considered, including secured, preferred and unsecured creditors, employees, landlords, shareholders, and the public generally ... [Emphasis added.]

24 It must be a matter of judgment for the supervising judge to determine whether the Plan is doomed to fail. This Plan is supported by the other stakeholders and the independent Monitor. It is a product of the business judgment of the Stelco board as a way out of the CCAA process. It was open to the motions judge to conclude that the plan was not doomed to fail and that the process should continue. Despite its opposition to the Plan, the appellant's position inherently concedes the possibility of success, otherwise these creditors would have opposed the extension of the stay, opposed the order setting a date for approval of the plan and sought to terminate the CCAA proceedings.

25 The motions judge said this in his reasons:

> It seems to me that Stelco as an ongoing enterprise is getting a little shop worn/shopped worn. It would not be helpful to once again start a new general process to find the ideal situation [sic solution?]; rather the urgency of the situation requires that a reasonable solution be found.

He went on to state that in the month before the vote there "will be considerable discussion and negotiation as to the plan which will in fact be put to the vote" and that the present Plan may be adjusted. He urged the stakeholders and Stelco to "deal with this question in a positive way" and that "it is better to move forward than backwards, especially where progress is required". It is obvious that the motions judge has brought his judgment to bear and decided that the Plan or some version of it is not doomed to fail. I can see no basis for second-guessing the motions judge on that issue.

26 I should comment on a submission made by the appellant that no deference should be paid to the business judgment of the Stelco board. The appellant submits that the board is entitled to deference for most of the decisions made in the day-to-day operations during the CCAA process except whether a restructuring should proceed or a plan of arrangement should proceed. The appellant submits that those latter decisions are solely the prerogative of the creditors by reason of s. 6. While there is no question that the ultimate decision is for the creditors, the board of directors plays an important role in the restructuring process. Blair J.A. made this clear in an earlier appeal to this court concerning Stelco reported at (2005), 75 O.R. (3d) 5 at para. 44:

> What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, [1993] O.J. No. 14, supra, at para. 5, "to make order[s] so as to effec-

> tively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts. [Emphasis added.]

27 The approvals given by the motions judge in this case are consistent with these principles. Those orders allow the company's restructuring efforts to move forward.

28 The position of the appellant also fails to give any weight to the broad range of interests in play in a CCAA process. Again to quote Blair J.A. in the earlier Stelco case at para. 36:

> In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. [Emphasis added.]

29 For these reasons, I would not give effect to the submissions of the appellant.

Submissions of the equity holders

30 The equity holders support the position of the appellant. They point out that the Stelco CCAA situation is somewhat unique. While Stelco entered the process in dire straits, since then almost unprecedented worldwide prices for steel have boosted Stelco's fortunes. In an endorsement of February 28, 2005, the motions judge recognized this unusual state of affairs:

> In most restructurings, on emergence the original shareholder equity, if it has not been legally "evaporated" because the insolvent corporations was so for under water, is very substantially diminished. For example, the old shares may be converted into new emergent shares at a rate of 100 to 1; 1,000 to 1; or even 12,000 to 1. ... Stelco is one of those rare situations in which a change of external circumstances ... may result in the original equity having a more substantial "recovery" on emergence than outline above."

31 The equity holders point out that while an earlier plan would have allowed the shareholders to benefit from the continued and anticipated growth in the Stelco equity, the present plan does not include any provision for the existing shareholders. I agree with counsel for Stelco that these arguments are premature. They raise issues for the supervising judge if and when he is called upon to exercise his discretion under s. 6 to sanction the Plan of arrangement.

DISPOSITION

32 Accordingly, I would dismiss the appeal. On behalf of the court, I wish to thank all counsel for their very helpful written and oral submissions that made it possible to deal with this appeal expeditiously.

M. ROSENBERG J.A.
J.I. LASKIN J.A. -- I agree.
H.S. LaFORME J.A. -- I agree.

cp/e/qw/qlsxl/qlkjg

e/drs/qlbms/qlmll

Case Name:

Timminco Ltd. (Re)

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 Timminco Limited and Bécancour Silicon Inc., Applicants

[2012] O.J. No. 1949

2012 ONSC 2515

Court File Nos. CV-12-9539-00CL and CV-09-378701-00CP

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: March 26, 2012.
Judgment: April 27, 2012.

(25 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Motion by plaintiff in class proceeding/creditor of company under CCAA protection to lift stay of proceedings allowed in part -- Stay lifted only to permit plaintiff to seek leave to appeal to Supreme Court of Canada procedural judgment about running of limitations period for class proceeding -- TO lift stay entirely would take focus of company's few remaining executives away from restructuring to deal with class proceeding, potentially causing prejudice to other stakeholders.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Motion by plaintiff in class proceeding/ creditor of company under CCAA protection to lift stay of proceedings allowed in part -- Stay lifted only to permit plaintiff to seek leave to appeal to Supreme Court of Canada procedural judgment about running of limitations period for class proceeding -- TO lift stay entirely would take focus of company's few remaining executives away from restructuring to deal with class proceeding, potentially causing prejudice to other stakeholders.

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Procedure -- Motion by plaintiff in class proceeding/creditor of company under CCAA protection to lift stay of pro-

ceedings allowed in part -- Stay lifted only to permit plaintiff to seek leave to appeal to Supreme Court of Canada procedural judgment about running of limitations period for class proceeding -- TO lift stay entirely would take focus of company's few remaining executives away from restructuring to deal with class proceeding, potentially causing prejudice to other stakeholders.

Motion by Penneyfeather for an order lifting a January 2012 stay of proceedings to permit Penneyfeather to continue a class proceeding against Timminco and others. Timminco was pursuing a restructuring process intended to maximize recovery for stakeholders. It continued to operate as a going concern with a greatly-reduced staff of 10 employees including the president and three executive officers. The class proceeding was commenced in May 2009. Settlement discussions had been terminated and there was a pending motion to strike portions of the statement of claim. Penneyfeather planned to seek leave to appeal to the Supreme Court of Canada an order declaring that the three-year limitation period provided in the Securities Act was not suspended by the operation of the Class Proceedings Act. Timminco consented to lift the stay to permit Penneyfeather to pursue this leave application only. Timminco submitted that key members of its executive team would have to expend considerable time dealing with Penneyfeather's class proceeding if the stay was lifted completely, thereby taking their focus away from the restructuring process.

HELD: Motion allowed in part. If forced to spend significant amounts of time dealing with Penneyfeather's class action in the coming months, the Timminco executive team would be unable to focus on the sales and restructuring process to the potential detriment of Timminco's other stakeholders. A delay in the sales process could have a negative impact on Timminco. It was premature to lift the stay other than with respect to the leave application.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, S.O. 1992, c. 6, s. 12, s. 28

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

Securities Act, R.S.O. 1990, c. S.5, s. 138.14

Counsel:

James C. Orr and N. Mizobuchi, for St. Clair Penneyfeather, Plaintiff in Class Proceeding, *Penneyfeather v. Timminco Limited et al.*

P. O'Kelly and A. Taylor, for the Applicants.

P. LeVay, for the Photon Defendants.

A. Lockhart, for Wacker Chemie AG.

K.D. Kraft, for Chubb Insurance Company of Canada.

D.J. Bell, for John P. Walsh.

A. Hatnay and James Harnum for Mercer Canada, Administrator of the Timminco Haley Plan.

S. Weisz, for FTI Consulting Canada Inc., Monitor.

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- St. Clair Penneyfeather, the Plaintiff in the *Penneyfeather v. Timminco Limited, et al* action, Court File No. CV-09-378701-00CP (the "Class Action"), brought this motion for an order lifting the stay of proceedings, as provided by the Initial Order of January 3, 2012 and extended by court order dated January 27, 2012, and permitting Mr. Penneyfeather to continue the Class Action against Timminco Limited ("Timminco"), Dr. Heinz Schimmelbusch, Mr. Robert Dietrich, Mr. Rene Boisvert, Mr. Arthur R. Spector, Mr. Jack Messman, Mr. John C. Fox, Mr. Michael D. Winfield, Mr. Mickey M. Yaksich and Mr. John P. Walsh.

2 The Class Action was commenced on May 14, 2009 and has been case managed by Perell J. The following steps have taken place in the litigation:

(a) a carriage motion;
(b) a motion to substitute the Representative Plaintiff;
(c) a motion to force disclosure of insurance policies;
(d) a motion for leave to appeal the result of the insurance motion which was heard by the Divisional Court and dismissed;
(e) settlement discussions;
(f) when settlement discussions were terminated, Perell J. declined an expedited leave hearing and instead declared any limitation period to be stayed;
(g) a motion for particulars; and
(h) a motion served but not heard to strike portions of the Statement of Claim.

3 On February 16, 2012, the Court of Appeal for Ontario set aside the decision of Perell J. declaring that s. 28 of the *Class Proceedings Act* suspended the running of the three-year limitation period under s. 138.14 of the *Securities Act*.

4 The Plaintiffs' counsel received instructions to seek leave to appeal the decision of the Court of Appeal for Ontario to the Supreme Court of Canada. The leave materials were required to be served and filed by April 16, 2012.

5 On April 10, 2012, the following endorsement was released in respect of this motion:

> The portion of the motion dealing with lifting the stay for the Plaintiff to seek leave to appeal the recent decision of the Court of Appeal for Ontario to the Supreme Court of Canada on the limitation period issue was not opposed. This portion of the motion is granted and an order shall issue to give effect to the foregoing. The balance of the requested relief is under reserve.

6 Counsel to Mr. Penneyfeather submits that, apart from the leave to appeal issues, there are steps that may occur before Perell J. as a result of the Court of Appeal ruling. Counsel references that the Defendants may bring motions for partial judgment and the Plaintiff could seek to have the court proceed with leave and certification with any order to be granted *nunc pro tunc* pursuant to s. 12 of the *Class Proceedings Act*.

7 Counsel to Mr. Penneyfeather submits that the three principal objectives of the *Class Proceedings Act* are judicial economy, access to justice and behaviour modification. (See *Western Ca-*

nadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534 at paras. 27-29.), and under the *Securities Act*, the deterrent represented by private plaintiffs armed with a realistic remedy is important in ensuring compliance with continuous disclosure rules.

8 Counsel submits that, in this situation, there is only one result that will not do violence to a primary legislative purpose and that is to lift the stay to permit the Class Action to proceed on the condition that any potential execution excludes Timminco's assets. Counsel further submits that, as a practical result, this would limit recovery in the Class Action to the proceeds of the insurance policies, or in the event that the insurers decline coverage because of fraud, to the personal assets of those officers and directors found responsible for the fraud.

9 Counsel to Mr. Penneyfeather takes the position that the requested outcome is consistent with the judicial principal that the CCAA is not meant as a refuge insulating insurers from providing appropriate indemnification. (See *Algoma Steel Corp. v. Royal Bank of Canada*, [1992] O.J. No. 889 at paras. 13-15 (C.A.) and *Re Carey Canada Inc.* [2006] O.J. No. 4905 at paras. 7, 16-17.)

10 In this case, counsel contends that, when examining the relative prejudice to the parties, the examination strongly favours lifting the stay in the manner proposed since the insurance proceeds are not available to other creditors and there would be no financial unfairness caused by lifting the stay.

11 The position put forward by Mr. Penneyfeather must be considered in the context of the CCAA proceedings. As stated in the affidavit of Ms. Konyukhova, the stay of proceedings was put in place in order to allow Timminco and Bécancour Silicon Inc. ("BSI" and, together with Timminco, the "Timminco Entities") to pursue a restructuring and sales process that is intended to maximize recovery for the stakeholders. The Timminco Entities continue to operate as a going concern, but with a substantially reduced management team. The Timminco Entities currently have only ten active employees, including Mr. Kalins, President, General Counsel and Corporate Secretary and three executive officers (the "Executive Team").

12 Counsel to the Timminco Entities submits that, if Mr. Penneyfeather is permitted to pursue further steps in the Class Action, key members of the Executive Team will be required to spend significant amounts of their time dealing with the Class Action in the coming months, which they contend is a key time in the CCAA proceedings. Counsel contends that the executive team is currently focussing on the CCAA proceedings and the sales process.

13 Counsel to the Timminco Entities points out that the Executive Team has been required to direct most of their time to restructuring efforts and the sales process. Currently, the "stalking horse" sales process will continue into June 2012 and I am satisfied that it will require intensive time commitments from management of the Timminco Entities.

14 It is reasonable to assume that, by late June 2012, all parties will have a much better idea as to when the sales process will be complete.

15 The stay of proceedings is one of the main tools available to achieve the purpose of the CCAA. The stay provides the Timminco Entities with a degree of time in which to attempt to arrange an acceptable restructuring plan or sale of assets in order to maximize recovery for stakeholders. The court's jurisdiction in granting a stay extends to both preserving the *status quo* and facilitating a restructuring. See *Re Stelco Inc.*, [2005] O.J. No. 1171 (C.A.) at para. 36.

16 Further, the party seeking to lift a stay bears a heavy onus as the practical effect of lifting a stay is to create a scenario where one stakeholder is placed in a better position than other stakeholders, rather than treating stakeholders equally in accordance with their priorities. See *Canwest Global Communications Corp. (Re)*, [2011] O.J. No. 1590 (S.C.J.) at para. 27.

17 Courts will consider a number of factors in assessing whether it is appropriate to lift a stay, but those factors can generally be grouped under three headings: (a) the relative prejudice to parties; (b) the balance of convenience; and (c) where relevant, the merits (*i.e.* if the matter has little chance of success, there may not be sound reasons for lifting the stay). See *Canwest Global Communications (Re), supra*, at para. 27.

18 Counsel to the Timminco Entities submits that the relative prejudice to the parties and the balance of convenience clearly favours keeping the stay in place, rather than to allow the Plaintiff to proceed with the SCC leave application. As noted above, leave has been granted to allow the Plaintiff to proceed with the SCC leave application. Counsel to the Timminco Entities further submits that, while the merits are vigorously disputed by the Defendants in the context of a Class Action, the Timminco Entities will not ask this court to make any determinations based on the merits of the Plaintiff's claim.

19 I can well recognize why Mr. Penneyfeather wishes to proceed. The objective of the Plaintiff in the Class Action is to access insurance proceeds that are not available to other creditors. However, the reality of the situation is that the operating side of Timminco is but a shadow of its former self. I accept the argument put forth by counsel to the Applicant that, if the Executive Team is required to spend significant amounts of time dealing with the Class Action in the coming months, it will detract from the ability of the Executive Team to focus on the sales process in the CCAA proceeding to the potential detriment of the Timminco Entities' other stakeholders. These are two competing interests. It seems to me, however, that the primary focus has to be on the sales process at this time. It is important that the Executive Team devote its energy to ensuring that the sales process is conducted in accordance with the timeliness previously approved. A delay in the sales process may very well have a negative impact on the creditors of Timminco. Conversely, the time sensitivity of the Class Action has been, to a large extent, alleviated by the lifting of the stay so as to permit the leave application to the Supreme Court of Canada.

20 It is also significant to recognize the submission of counsel on behalf of Mr. Walsh. Counsel to Mr. Walsh takes the position that Mr. Penneyfeather has nothing more than an "equity claim" as defined in the CCAA and, as such, his claim (both against the company and its directors who, in turn, would have an equity claim based on indemnity rights) would be subordinated to any creditor claims. Counsel further submits that of all the potential claims to require adjudication, presumably, equity claims would be the least pressing to be adjudicated and do not become relevant until all secured and unsecured claims have been paid in full.

21 In my view, it is not necessary for me to comment on this submission, other than to observe that to the extent that the claim of Mr. Penneyfeather is intended to access certain insurance proceeds, it seems to me that the prosecution of such claim can be put on hold, for a period of time, so as to permit the Executive Team to concentrate on the sales process.

22 Having considered the relative prejudice to the parties and the balance of convenience, I have concluded that it is premature to lift the stay at this time, with respect to the Timminco Entities, other than with respect to the leave application to the Supreme Court of Canada. It also fol-

lows, in my view, that the stay should be left in place with respect to the claim as against the directors and officers. Certain members of this group are involved in the Executive Team and, for the reasons stated above, I am satisfied that it is not appropriate to lift the stay as against them.

23 With respect to the claim against Photon, as pointed out by their counsel, it makes no sense to lift the stay only as against Photon and leave it in place with respect to the Timminco Entities. As counsel submits, the Timminco Entities have an interest in both the legal issues and the factual issues that may be advanced if Mr. Penneyfeather proceeds as against Photon, as any such issues as are determined in Timminco's absence may cause unfairness to Timminco, particularly, if Mr. Penneyfeather later seeks to rely on those findings as against Timminco. I am in agreement with counsel's submission that to make such an order would be prejudicial to Timminco's business and property. In addition, I accept the submission that it would also be unfair to Photon to require it to answer Mr. Penneyfeather's allegations in the absence of Timminco as counsel has indicated that Photon will necessarily rely on documents and information produced by Timminco as part of its own defence.

24 I am also in agreement with the submission that it would be wasteful of judicial resources to permit the class proceedings to proceed as against Photon but not Timminco as, in addition to the duplicative use of court time, there would be the possibility of inconsistent findings on similar or identical factual issues and legal issues. For these reasons, I have concluded that it is not appropriate to lift the stay as against Photon.

25 In the result, the motion dealing with issues not covered by the April 10, 2012 endorsement is dismissed without prejudice to the rights of the Plaintiff to renew his request no sooner than 75 days after today's date.

G.B. MORAWETZ J.

cp/e/qljel/qlpmg/qlced

Indexed as:

Campeau v. Olympia & York Developments Ltd.

Between
Robert Campeau, Robert Campeau Inc., 75090 Ontario Inc., and Robert Campeau Investments Inc., Plaintiffs, and Olympia & York Developments Limited, 857408 Ontario Inc., and National Bank of Canada, Defendants

[1992] O.J. No. 1946

14 C.B.R. (3d) 303

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

1992 CarswellOnt 185

35 A.C.W.S. (3d) 679

Action Nos. 92-CQ-19675 and B-125/92

Ontario Court of Justice - General Division
Toronto, Ontario

Blair J.

September 21, 1992

(14 pp.)

*Practice -- Insolvency -- **Stay** of **proceedings** -- General principles -- Defendant protected by Companies' Creditors Arrangement Act.*

Application for lifting a **stay** imposed by an order granted under section 11 of the Companies' Creditors Arrangement. The second defendant also applied for an order staying the separate action against it. The plaintiffs' action against the defendants was for the sum of $1 billion for damages allegedly suffered following breaches of contract and fiduciary duties by the defendants. The plaintiffs' claim against the second defendant directly involved certain acts of the first defendant.

HELD: Application dismissed. The second defendants' application allowed. There might be great prejudice to the first defendant if its attention was diverted from the corporate restructuring process. There was no prejudice to the plaintiffs whose rights were not precluded but merely postponed. The courts' power under section 11 extended to restraining conduct which could impair the debtor's ability to focus on the business purpose of negotiating a compromise.

STATUTES, REGULATIONS AND RULES CITED:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.
Courts of Justice Act, R.S.O. 1990, c. C-43, s. 106.
Personal Property Security Act, R.S.O. 1990, c. P.10, s. 17(1).
Ontario Rules of Civil Procedure, Rule 6.01(1).

Stephen T. Goudge, Q.C. and Peter C. Wardle, for the Plaintiffs.
Peter F.C. Howard, for the Defendant, National Bank of Canada.
Yoine Goldstein, for the Defendants, Olympia & York Developments Limited and 857408 Ontario Inc.

BLAIR J.:-- These Motions raise questions regarding the Court's power to **stay proceedings.** Two competing interests are to be weighed in the balance, namely,

a) the interests of a debtor which has been granted the protection of the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, and the "breathing space" offered by a s. 11 **stay** in such **proceedings,** on the one hand, and,
b) the interests of a unliquidated contingent claimant to pursue an action against that debtor and an arms length third party, on the other hand.

At issue is whether the Court should resort to an interplay between its specific power to grant a **stay,** under s. 11 of the CCAA, and its general power to do so under the Courts of Justice Act, R.S.O. 1990, Chap C-43 in order to **stay** the action completely; or whether it should lift the s. 11 **stay** to allow the action to **proceed;** or whether it should exercise some combination of these powers.

Background and Overview

This action was commenced on April 28, 1992, and the Statement of Claim was served before May 14, 1992, the date on which an Order was made extending the protection of the CCAA to Olympia & York Developments Limited and a group of related companies ("Olympia & York", or "O & Y" or the "Olympia & York Group").

The plaintiffs are Robert **Campeau** and three **Campeau** family corporations which, together with Mr. **Campeau,** held the control block of shares of **Campeau** Corporation. Mr. **Campeau** is the former Chairman and CEO of **Campeau** Corporation, said to have been one of North America's

largest real estate development companies, until its recent rather high profile demise. It is the fall of that empire which forms the subject matter of the lawsuit.

The Claim against the Olympia & York Defendants

The story begins, according to the Statement of Claim, in 1987, after **Campeau** Corporation had completed a successful leveraged buy-out of Allied Stores Corporation, a very large retailer based in the United States. Olympia & York had aided in funding the Allied takeover by purchasing half of **Campeau** Corporation's interest in the Scotia Plaza in Toronto and subsequently also purchasing 10% of the shares of **Campeau** Corporation. By late 1987, it is alleged, the relationship between Mr. **Campeau** and Mr. Paul Reichman (one of the principals of Olympia & York) had become very close, and an agreement had been made whereby Olympia & York was to provide significant financial support, together with the considerable expertise and the experience of its personnel, in connection with **Campeau** Corporation's subsequent bid for control of Federated Stores Inc (a second major U.S. department store chain). The story ends, so it is said, in 1991 after Mr. **Campeau** had been removed as Chairman and CEO of **Campeau** Corporation and that Company, itself, had filed for protection under the CCAA (from which it has since emerged, bearing the new name of Camdev Corp.).

In the meantime, un September, 1989, the Olympia & York defendants, through Mr. Paul Reichman, had entered unto a shareholders' agreement with the plaintiffs in which, it us further alleged, Olympia & York obliged itself to develop and implement expeditiously a viable restructuring plan for **Campeau** Corporation. The allegation that Olympia & York breached this obligation by failing to develop and implement such a plan, together with the further assertion that the O & Y Defendants actually frustrated Mr. **Campeau's** efforts to restructure **Campeau** Corporation's Canadian real estate operation, lies at the heart of the **Campeau** action. The Plaintiffs plead that as a result they have suffered very substantial damages, including the loss of the value of their shares in **Campeau** Corporation, the loss of the opportunity of completing a refinancing deal with the Edward DeBartolo Corporation, and the loss of the opportunity on Mr. **Campeau's** part to settle his personal obligations on terms which would have preserved his position as Chairman and CEO and majority shareholder of **Campeau** Corporation.

Damages are claimed in the amount of $1 billion, for breach of contract or, alternatively, for breach of fiduciary duty. Punitive damages in the amount of $250 million ore also sought.

The Claim against National Bank of Canada

Similar damages, in the amount of $1 billion (but no punitive damages), are claimed against the Defendant National Bank of Canada, as well. The causes of action against the Bank are framed as breach of fiduciary duty, negligence, and breach of the provisions of S. 17(1) of the Personal Property Security Act. They arise out of certain alleged acts of misconduct on the part of the Bank's representatives on the Board of Directors of **Campeau** Corporation.

In 1988 the Plaintiffs had pledged some of their shares in **Campeau** Corporation to the Bank as security for a loan advanced in connection with the Federated Stores transaction. In early 1990, one of the Plaintiffs defaulted on its obligations under the loan and the Bank took control of the pledged shares. Thereafter, the Statement of Claim alleges, the Bank became more active in the management of **Campeau,** through its nominees on the Board.

The Bank had two such nominees. Olympia & York had three. There were twelve directors in total. What is asserted against the Bank is that its directors, in cooperation with the Olympia & York directors, acted in a way to frustrate **Campeau's** restructuring efforts and favoured the interests of the Bank as a secured lender rather than the interests of **Campeau** Corporation, of which they were directors. In particular, it is alleged that the Bank's representatives failed to ensure that the DeBartolo refinancing was implemented and, indeed, actively supported Olympia & York's efforts to frustrate it, and in addition, that they supported Olympia & York's efforts to refuse to approve or delay the sale of real estate assets.

THE MOTIONS

There are two motions before me.

The first motion is by the **Campeau** Plaintiffs to lift the stay imposed by the Order of May 14, 1992 under the CCAA and to allow them to pursue their action against the Olympia & York defendants. They argue that a plaintiff's right to proceed with an action ought not lightly to be precluded; that this action is uniquely complex and difficult; and that the claim is better and more easily dealt with in the context of the action rather than in the context of the present CCAA proceedings. Counsel acknowledge that the factual bases of the claims against Olympia & York and the Bank are closely intertwined and that the claim for damages is the same, but argue that the causes of action asserted against the two are different. Moreover, they submit, this is not the usual kind of situation where a **stay** is imposed to control the process and avoid inconsistent findings when the same parties are litigating the same issues in parallel **proceedings.**

The second motion is by National Bank, which of course opposes the first motion, and which seeks an order staying the **Campeau'** action as against it as well, pending the disposition of the CCAA proceedings. Counsel submits that the factual substratum of the claim against the Bank is dependent entirely on the success of the allegations against the Olympia & York defendants, and that the claim against those defendants is better addressed within the parameters of the CCAA proceedings. He points out also that if the action were to be taken against the Bank alone, his client would be obliged to bring Olympia & York back into the action as third parties in any event.

The Power to Stay

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

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

Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": Arab Monetary Fund v. Hashim (unreported), [1992] O.J. No. 1330.

Apart from this inherent and general jurisdiction to **stay proceedings,** there are many instances where the Court is specifically granted the power to **stay** in a particular context, by virtue of

statute or under the Rules of Civil Procedure. The authority to prevent multiplicity of proceedings in the same court, under Rule 6.01(1), is an example of the latter. The power to **stay** judicial and extra-judicial **proceedings** under s. 11 of the CCAA, is an example of the former. Section 11 of the CCAA provides as follows:

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

The Power to **Stay** in the Context of CCAA **Proceedings**

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

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

Gibbs J.A. continued with this comment:

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

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.

I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the Court's exercise of its power to **stay proceedings.** These principles were reviewed by Mr. Justice Montgomery in Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance, supra (a "Mississauga Derailment" case), at pp. 65-66. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The Court must be satisfied that a continuance of the **proceeding** would serve as an injustice to the party seeking the **stay,** in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff. On all of these issues the onus of satisfying the Court is on the party seeking the stay: see also, Weight Watchers International Inc. v. Weight Watchers of Ont. Ltd. (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122, appeal allowed by consent without costs (sub nom. Weight Watchers of Ont. Ltd. v. Weight Watchers Int. Inc.) 42 D.L.R. (3d) 320n., 10 C.P.R. (2d) 96n (Fed. C.A.), where Mr. Justice Heald recited the foregoing principles from Empire Universal Films Ltd. et. al. v. Rank et al., [1947] O.R. 775 at p. 779.

Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance, supra, is a particularly helpful authority, although the question in issue there was somewhat different than those in issue on these motions. The case was one of several hundred arising out of the Mississauga derailment in November 1979, all of which actions were being case managed by Montgomery J. These actions were all part of what Montgomery J. called "a controlled stream" of litigation involving a large number of claims and innumerable parties. Similarly, while the Olympia & York proceedings under the CCAA do not involve a large number of separate actions, they do involve numerous Applicants, an even larger number of very substantial claimants, and a diverse collection of intricate and broad sweeping issues. In that sense the CCAA proceedings are a controlled stream of litigation. Maintaining the integrity of the flow is an important consideration.

DISPOSITION

I have concluded that the proper way to approach this situation is to continue the stay imposed under the CCAA prohibiting the action against the Olympia & York defendants, and in addition, to impose a stay, utilizing the Court's general jurisdiction in that regard, preventing the continuation of the action against National Bank as well. The stays will remain in effect for as long as the s. 11 stay remains operative, unless otherwise provided by order of this Court.

In making these orders, I see no prejudice to the **Campeau** Plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with -- at least for the purposes of that proceeding in the CCAA proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very effectively unless and until Olympia & York -- whose alleged misdeeds are the real focal point of the attack on both sets of defendants -- is able to participate.

In addition to the foregoing, I have considered the following factors in the exercise of my discretion:

1. Counsel for the Plaintiffs argued that the **Campeau** claim must be dealt with, either in the action or in the CCAA proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the CCAA proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the **Campeau** claim in determining their approach to the acceptance or rejection of the Olympia & York Plan filed under the Act.
2. In this sense, the **Campeau** claim -- like other secured, undersecured, unsecured, and contingent claims -- must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings -- i.e. the action and the CCAA proceeding -- the scales tip in favour of dealing with the **Campeau** claim in the context of the latter: see HM Attorney General v. Arthur Andersen & Co. (United Kingdom) and other, [1989] E.C.C. 224 (Eng. C.A.), cited in Arab Monetary Fund v. Hashim, supra.

I am aware, when saying this that in the Initial Plan of Compromise and Arrangement filed by the Applicants with the Court on August 21, 1992, the Applicants have chosen to include the **Campeau** plaintiffs amongst those described as "Persons not Affected by the Plan". This treatment does not change the issues, in my view, as it is up to the Applicants to decide how they wish to deal with that group of "creditors" in presenting their Plan, and up to the other creditors to decide whether they will accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the CCAA proceedings.

3. Pre-judgment interest will compensate the Plaintiffs for any delay caused by the imposition of the **stays,** should the action subsequently **proceed** and the Plaintiffs ultimately be successful.
4. While there may not be great prejudice to National Bank if the action were to continue against it alone and the causes of action asserted against the two groups of defendants are different, the complex factual situation is common to both claims and the damages are the same. The potential of two different inquiries at two different times into those same facts and damages is not something that should be encouraged. Such multiplicity of inquiries should in fact be discouraged, particularly where -- as is the case here -- the delay occasioned by the stay is relatively short (at least in terms of the speed with which an action like this **Campeau** action is likely to progress.

CONCLUSION

Accordingly, an Order will go as indicated, dismissing the Notion of the **Campeau** Plaintiffs and allowing the Motion of National Bank. Each stay will remain in effect until the expiration of the stay period under the CCAA unless extended or otherwise dealt with by the court prior to that time.

Costs to the Defendants in any event of the cause in the **Campeau** action. I will fix the amounts if counsel wish me to do so.

BLAIR J.

---- End of Request ----
Email Request: Current Document: 2
Time Of Request: Wednesday, October 03, 2012 14:09:13

Case Name:

Timminco Ltd. (Re)

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 Timminco Limited and Bécancour Silicon Inc., Applicants

[2012] O.J. No. 266

2012 ONSC 106

Court File No. 12-CL-9539-00CL

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: January 3, 2012.
Judgment: January 4, 2012.

(43 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Debtor company -- Where total claim exceeds $5,000,000 -- Ex parte application by debtor for relief under the Companies' Creditors Arrangement Act ("CCAA") allowed -- Debtor faced severe liquidity issues, was unable to meet financial covenants and did not have liquidity to meet ongoing payment obligations -- Total claims against debtor entities exceeded $89 million -- Debtor was insolvent and constituted debtor companies to which CCAA applied -- Stay of proceedings extended to directors and officers sitting on boards of intertwined companies -- Stay extended to agreement with general partner of debtor entities -- Administration charge and directors and officers charge granted -- Amount of charges sought were appropriate.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.02(3), s. 11.03, s. 11.51, s. 11.52

Ontario Pension Benefits Act,

QuÚbec Supplemental Pension Plans Act,

Counsel:

A.J. Taylor, M. Konyukhova and K. Esaw, for the Applicants.

S. Weisz, for FTI Consulting Canada Inc.

A. Kauffman, for Investissement Quebec.

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- Timminco Limited ("Timminco") and Bécancour Silicon Inc. ("BSI") (collectively, the "Timminco Entities") apply for relief under the *Companies' Creditors Arrangement Act* (the "CCAA").

2 Timminco produces silicon metal through Québec Silicon Limited Partnership ("QSLP") its 51% owned production partnership with Dow Corning Corporation ("DCC") for resale to customers in the chemical (silicones), aluminum, and electronics/solar industries. Timminco also produces solar-grade silicon through Timminco Solar, an unincorporated division of Timminco's wholly-owned subsidiary BSI ("Timminco Solar"), for customers in the solar photovoltaic industry.

3 The Timminco Entities are facing severe liquidity issues as a result of, among other things, a low profit margin realized on their silicon metal sales due to a high volume long-term supply contract at below market prices, a decrease in the demand and market price for solar-grade silicon, failure to recoup their capital expenditures incurred in connection with development of their solar-grade operations, and inability to secure additional funding. The Timminco Entities are also facing significant pension and environmental remediation legacy costs and financial costs related to large outstanding debts. A significant portion of the legacy costs are as a result of discontinued operations relating to Timminco's former magnesium business.

4 Counsel to the Timminco Entities submits that, as a result, the Timminco Entities are unable to meet various financial covenants set out in their Senior Secured Credit Facility and do not have the liquidity needed to meet their ongoing payment obligations. Counsel submits that, without the protection of the CCAA, a shutdown of operations is inevitable, which would be extremely detrimental to the Timminco Entities' employees, pensioners, suppliers and customers. Counsel further submits that CCAA protection will allow the Timminco entities to maintain operations while giving them the necessary time to consult with their stakeholders regarding the future of their business operations and corporate structure.

5 The facts with respect to this application are set out in the affidavit of Mr. Peter A. M. Kalins, sworn January 2, 2012.

6 Timminco and BSI are corporations established under the laws of Canada and Quebec respectively and, in my view, are "companies" within the definition of the CCAA.

7 Timminco has its head office in the city of Toronto. The board of directors of Timminco authorized this application. Further, pursuant to a unanimous shareholder declaration which removed the directorial powers from the directors of BSI and consolidated the decision making with

Timminco through its board of directors, the board of directors of Timminco has also authorized this filing on behalf of BSI. I am satisfied that the Applicants are properly before this court.

8 The affidavit of Mr. Kalins establishes that the Timminco Entities do not have the liquidity necessary to meet their obligations to creditors as they become due and, further, they have failed to pay certain obligations including, among other things, the interest payment due under the secured term loan and the interest payment due under the AMG Note on December 31, 2011.

9 The affidavit also establishes that the Timminco Entities are affiliate debtor companies with total claims against them in excess of $89 million.

10 The required financial statements and cash flow information are contained in the record.

11 The CCAA applies to a "debtor company" or affiliated debtor companies where the total of claims against the debtor or its affiliates exceed $5 million. I am satisfied that the record establishes that the Timminco Entities are insolvent and are "debtor companies" to which the CCAA applies.

12 On an initial application in respect of a debtor company, s. 11.02(3) of the CCAA provides authority for the court to make an order on any terms that it may impose where the applicant satisfies the court that circumstances exist that make the order appropriate.

13 Counsel to the Applicants submits that the Timminco Entities require the protection of the CCAA to allow them to maintain operations while giving them the necessary time to consult with their stakeholders regarding the future of their business operations and corporate structure.

14 In this case, in addition to the usual stay provisions affecting creditors of the debtor, counsel submits that, to ensure the ongoing stability of the Timminco Entities' business during the CCAA period, the Timminco Entities require the continued participation of their directors, officers, managers and employees.

15 Under s. 11.03, the court has jurisdiction to grant an order staying any action against a director of the company on any claim against directors that arose before the commencement of CCAA proceedings and that relate to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or arrangement in respect of the company, if one is filed, is sanctioned by the court or refused by the creditors or the court.

16 Counsel submits that there are several directors of BSI that also serve on the board of directors of Quebec Silicon General Partner Inc. ("QSGP") and several common officers (collectively, the "QSGP/BSI Directors").

17 Due to the intertwined nature of the Timminco Entities and QSLP's businesses and in order to allow these directors and officers to focus on the restructuring of the Timminco Entities, the Timminco Entities also seek to extend the stay of proceedings in favour of those directors and officers in their capacity as directors or officers of QSGP.

18 Counsel to the Timminco Entities submits that circumstances exist that make it appropriate to grant a stay in favour of the QSGP/BSI directors. In support of its argument, counsel relies on *Luscar Limited v. Smokey River Coal Limited* (1999), 12 C.B.R. (4th) 94 where the court indicated that its jurisdiction includes the power to stay conduct which "could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement".

19 In these circumstances, I am prepared to accept this argument and grant a stay in favour of the QSGP/BSI directors.

20 The Applicants have also requested that the stay of proceedings be extended with respect to the QSLP Agreements. Mr. Kalins' affidavit establishes that BSI's viability is directly related to its relationship with QSLP and that the relationship is governed by the QSLP Agreements. The QSLP Agreements provide for certain events to be deemed to have taken place, for certain modification of rights, and to entitle DCC, QSLP, and/or QSGP to take certain steps for the termination of certain QSLP Agreements in the event BSI becomes insolvent or commences proceedings under the CCAA. Counsel submits that due to the highly intertwined nature of the businesses of BSI and QSLP and BSI's high dependence on QSLP, it is imperative for the Timminco Entities and for the benefit of their creditors that BSI's rights under the QSLP Agreements not be modified as a result of its seeking protection under the CCAA.

21 For the purposes of this initial hearing, I am prepared to accept this argument and extend the stay as requested.

22 The Applicants also request an Administration Charge and a D&O Charge.

23 The requested Administration Charge on the assets, property and undertaking of the Timminco Entities (the "Property") is in the maximum amount of $1 million to secure the fees and disbursements in connection with services rendered by counsel to the Timminco Entities, the Monitor and the Monitor's counsel (the "Administration Charge").

24 The Timminco Entities request that the Administration Charge rank ahead of the existing security interest of Investissement Quebec ("IQ") but behind all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including any deemed trust created under the *Ontario Pension Benefits Act* or the *Québec Supplemental Pension Plans Act* (collectively, the "Encumbrances") in favour of any persons that have not been served with notice of this application.

25 IQ has been served and does not object to the requested charge, other than to adjust priorities such that the first-ranking charge should be the Administration Charge to a maximum of $500,000 followed by the D&O Charge to a maximum of $400,000 followed by the Administration Charge to a maximum amount of $500,000. This suggested change is agreeable to the Timminco Entities and has been incorporated into the draft order.

26 Section 11.52 of the CCAA provides statutory jurisdiction to grant such a charge. Under s. 11.52, factors that the court will consider include: the size and complexity of the business being restructured; the proposed role of the beneficiaries of the charge; whether there is unwarranted duplication of roles; whether the quantum of the proposed charge appears to be fair and reasonable; the position of the secured creditors likely to be affected by the charge; and the views of the monitor. Re Canwest Publishing Inc. (2010), 63 C.B.R. (5th) 115.

27 In this case, counsel submits that the Administration Charge is appropriate considering the following factors:

(a) the Timminco Entities operate a business which includes numerous facilities in Ontario and Quebec, several ongoing environmental monitoring and

remediation obligations, three defined benefit plans and an intertwined relationship with QSLP;

(b) the beneficiaries of the Administration Charge will provide essential legal and financial advice throughout the Timminco Entities' CCAA proceedings;

(c) there is no anticipated unwarranted duplication of roles;

(d) IQ was advised of the return date of the application and does not object; and

(e) the Administration Charge does not purport to prime any secured party or potential beneficiary of a deemed trust who has not received notice of this application.

28 The proposed monitor has advised that it is supportive of the Administration Charge.

29 I accept these submissions and find that it is appropriate to approve the requested Administration Charge. In doing so, I note that the Timminco Entities have stated that they intend to return to court and seek an order granting super-priority ranking to the Administration Charge ahead of the Encumbrances including, *inter alia*, any deemed trust created under provincial pension legislation on the comeback motion.

30 With respect to the D&O Charge, the Timminco Entities seek a charge over the property in favour of the Timminco Entities' directors and officers in the amount of $400,000 (the "D&O Charge"). The directors of the Timminco Entities have stated that, due to the significant personal exposure associated with the Timminco Entities' aforementioned liabilities, they cannot continue their service with the Timminco Entities unless the Initial Order grants the D&O Charge.

31 The CCAA has codified the granting of directors' and officers' charges on a priority basis in s. 11.51.

32 In *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 at para. 48, Pepall J. applied s. 11.51 noting that the court must be satisfied that the amount of the charge is appropriate in light of obligations and liabilities that may be incurred after commencement of proceedings.

33 Counsel advises that the Timminco Entities maintain directors' and officers' liability insurance ("D&O Insurance") for its directors and officers and the current D&O Insurance provides a total of $15 million in coverage. Counsel advises that it is expected that the D&O Insurance will provide coverage sufficient to protect the directors and officers and the proposed order provides that the D&O Charge shall only apply to the extent that the D&O Insurance is not adequate.

34 The proposed monitor has advised that it is supportive of the D&O Charge.

35 The Timminco Entities have also indicated their intention to return to court and seek an order granting super priority ranking to the D&O Charge ahead of the Encumbrances.

36 In these circumstances, I accept the submission that the requested D&O Charge is reasonable given the complexity of the Timminco Entities business and the corresponding potential exposure of the directors and officers to personal liability. The D&O Charge will also provide assurances to the employees of the Timminco Entities that obligations for accrued wages and termination and severance pay will be satisfied. The D&O Charge is approved.

37 In the result, CCAA protection is granted to the Timminco Entities and the stay of proceedings is extended in favour of the QSGP/BSI directors and with respect to the QSLP Agreements.

38 Further, the Administration Charge and the D&O Charge are granted in the amounts requested.

39 FTI Consulting Canada Inc., having filed its consent to act, is appointed as Monitor.

40 It is specifically noted that the comeback motion has been scheduled for Thursday, January 12, 2012.

41 The Stay Period shall be until February 2, 2012.

42 The Applicants acknowledge that the only party that received notice of this application was IQ. Counsel to the Applicants advised that this step was necessary in order to preserve the operations of the Timminco Entities.

43 For the purposes of the initial application, this matter was treated as being an *ex parte* application. Accordingly, the comeback motion on January 12, 2012 will provide any interested party with the opportunity to make submissions on any aspect of the Initial Order. A total of three hours has been set aside for argument on that date.

G.B. MORAWETZ J.

cp/e/qlafr/qlvxw

Court File No. CV-12-9667-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	TUESDAY, THE 8th
	)	
JUSTICE MORAWETZ	)	DAY OF MAY, 2012

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 AND ARRANGEMENT OF SINO-FOREST CORPORATION

ORDER

(Third Party Stay)

THIS MOTION, made by Sino-Forest Corporation (the "Applicant") for an order addressing the scope of the stay of proceedings herein was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Applicant's Notice of Motion and the materials summarized in Schedule "A" to the factum dated May 7, 2012, filed on behalf of the Monitor, as amended, including the affidavit of W. Judson Martin sworn April 23, 2012 (the "**Judson Affidavit**"), and on hearing the submissions of counsel for FTI Consulting Canada Inc. in its capacity as monitor (the "**Monitor**"), in the presence of counsel for the Applicant, the Applicant's directors and officers named as defendants (the "**Directors**") in the Ontario Class Action (as defined in the Judson Affidavit), Ernst & Young LLP, the plaintiffs in the Ontario Class Action, the underwriters named as defendants in the Ontario Class Action (the "**Underwriters**") and BDO Limited and those other parties present, no one appearing for the other parties served with the Applicant's Motion Record, although duly served as appears from the affidavit of service, filed:

SERVICE AND INTERPRETATION

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated such that this Motion is properly returnable today and hereby dispenses with further service thereof.

THIRD PARTY STAY AND TOLLING AGREEMENT

2. **THIS COURT ORDERS** that no Proceeding (as defined in the initial order granted by this Court on March 30, 2012 (as the same may be amended from time to time, the "**Initial Order**")) against or in respect of the Applicant, the Business or the Property (each as defined in the Initial Order), including without limitation the Ontario Class Action and any litigation in which the Applicant and the Directors, or any of them, are defendants, shall be commenced or continued as against any other party to such Proceeding or between or amongst such other parties (cross-claims and third party claims if any), until and including the expiration of the Stay Period (as defined in the Initial Order and as the same may be extended from time to time), provided that, notwithstanding the foregoing and anything to the contrary in the Initial Order, there shall be no stay of any Proceeding against Pöyry (Beijing) Consulting Co. Limited and/or any affiliate, any other Pöyry entity, representative or agent.

3. **THIS COURT ORDERS** that the Applicant is authorized to enter into agreements among the plaintiffs and defendants in the Ontario Class Action and in the action styled as Guining Liu v. Sino-Forest Corporation et al., bearing (Quebec) Court File No. 200-06-000132-111 (the "**Quebec Class Action**"), providing for, among other things, the tolling of certain limitation periods, as it sees fit, subject to the Monitor's approval.

MISCELLANEOUS

4. **THIS COURT ORDERS** that this order is subject to any further order of the court on a motion of any party, and is without prejudice to the right of the parties in the Ontario Class Action to move or vary this order on or after September 1, 2012.

5. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, Barbados, the

British Virgin Islands, Cayman Islands, Hong Kong, the People's Republic of China or in any other foreign jurisdiction, to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of the Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

MAY 11 2012

Court File No.: CV-12-9667-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

(PROCEEDING COMMENCED AT TORONTO)

ORDER

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Lawyers for the Applicant

Court File No. CV-12-9667-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND
IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

194

Counsel: See attached sheet. May 14, 2012

Contrarian seeks disclosure of forensic work
respect to the financial position of
the Pandora Entities and to explain
why the Plan does not contemplate
the holders of the Convertible Notes
receiving value for the guarantees
given to them by the Pandora
Entities. Contrarian takes the
position that it is unfair to
require Contrarian to elect
whether to vote in the Support Agreement in the Plan's
absence

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

MOTION RECORD

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Lawyers for Contrarian Capital Management, LLC

Court File Number: _____

Superior Court of Justice
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Judges Endorsment Continued

of such disclosure.

Contrarian argues that it requires the information by 5 p.m. today in order for Contrarian to make a decision as to whether it should execute the Support Agreement in time to receive the Early Consent Consideration.

The motion was opposed by the Applicant, the Board, the Noteholders and the Debtor.

For the following reasons I decline to grant the requested relief.

① The Applicant has determined that certain information is confidential. It appears that the Applicant and its decision making personnel have made this proper decision. There is nothing on the record to suggest the decision was made in bad faith. It seems

Judges Initials MKJ

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Judges Endorsment Continued

to me that the Applicant's decision makers have exercised their business judgment in determining not to provide the information in the absence of an executed confidentiality agreement.

I am reluctant, on the basis of the record before me, to interfere with this decision

(2) Contrarian does have an alternative. The Applicant is offered to disclose the information if Contrarian executes the ~~confidentiality~~ confidentiality agreement. It is up to Contrarian to determine whether it wishes to pursue this option.

(3) As pointed out by counsel to the Monitor, to no steps have been taken to deprive Contrarian of

Judges Initials CR

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Judges Endorsment Continued

its claim or its legal rights. Contrarian does have a certain degree of information on which to make its determination and Contrarian can obtain additional information, if it chooses to do so. I fail to see the prejudice.

For the foregoing reasons, the motion of Contrarian is dismissed.

14 MAY 2012
4:20 pm.

Judges Initials _____

Case Name:

Abitibibowater inc. (Re)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF: ABITIBIBOWATER INC., ABITIBI-CONSOLIDATED INC., BOWATER CANADIEN HOLDINGS INC. and THE OTHER PETITIONERS LISTED ON SCHEDULE "A", "B" and "C", Debtors
and
ERNST & YOUNG INC., Monitor
and
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEWFOUNDLAND AND LABRADOR, Petitioner

[2009] Q.J. No. 16916

2009 QCCS 5482

2010EXP-20

J.E. 2010-10

[2010] R.J.Q. 167

64 C.B.R. (5th) 189

2009 CarswellQue 11821

EYB 2009-166332

No.: 500-11-036133-094

Quebec Superior Court
District of Montreal

The Honourable Clément Gascon, J.S.C.

Heard: November 2, 2009.
Judgment: November 9, 2009.

(104 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of act -- Abitibibowater could, for legitimate business reasons and through the exercise of reasonable business judgment, restrict access to its electronic data rooms when its use by mere stakeholders would not further nor enhance its restructuring process -- Motion dismissed.

Her Majesty the Queen in Right of Newfoundland and Labrador (the Province) sought a declaratory order from the Court to access the electronic data rooms set up by the debtor, Abitibi -- Abitibi was under the protection of the Companies' Creditors Arrangement Act (CCAA) -- In the context of the restructuring process undertaken following the initial Order, it created electronic data rooms containing non-public financial and corporate information -- This was done in order to allow its stakeholders and their financial and legal advisors to better assess the ongoing condition of its business as the restructuring evolved -- To have access to the electronic data rooms, permission had first to be obtained from Abitibi -- The Province requested such an access to the electronic data rooms, but Abitibi denied its request -- The Province contended that Abitibi's refusal was contrary to the principles underlying the CCAA -- It argued that the denial was unfair, discriminatory and unjustifiable and insisted upon being treated in the same manner as other Abitibi's stakeholders -- Abitibi considered that the Province was neither a creditor of Abitibi, nor a genuine stakeholder in its restructuring -- It added that the Province did not come to Court with clean hands, but rather brought a Motion for collateral purposes, unrelated to the restructuring process -- In that regard, Abitibi insisted upon the fact the Province owed it in excess of $300 million for the recent wrongful appropriation of its assets -- HELD: Motion dismissed -- The status of the Province as creditor was not established, while its alleged status as potential creditor stood on rather weak grounds -- Access had been limited to some key undisputed creditors and their financial and legal advisors -- The alleged discrimination claimed by the Province was simply not established -- Abitibi could, for legitimate business reasons and through the exercise of reasonable business judgment, restrict access to its electronic data rooms when its use by mere stakeholders would not further nor enhance its restructuring process -- The Court considered it reasonable for Abitibi to deny access to its electronic data rooms to a potential creditor or mere stakeholder with whom it had a legitimate debate and reasonable expectations of upcoming litigation.

Statutes, Regulations and Rules Cited:

Abitibi-Consolidated Rights and Assets Act, S.N.L. 2008, c. A-1.01

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

Counsel:

Me Sean Dunphy, Me Guy P. Martel, Me Joseph Reynaud, STIKEMAN, ELLIOTT, Attorneys for the Debtors.

Me Catherine Powell and Me David R. Wingfield, WEIRFOULDS LLP, Attorneys for the Petitioner.

Me Jason Dolman, FLANZ FISHMAN MELAND PAQUIN, Attorneys for the Monitor.

Me Rachelle F. Moncur, THORNTON GROUT FINNIGAN, Attorneys for the Monitor.

JUDGMENT ON MOTION TO ACCESS
THE ELECTRONIC DATA ROOMS CREATED BY THE DEBTORS (#275)

1 Her Majesty the Queen in Right of Newfoundland and Labrador (the "Province") seeks a declaratory order from this Court to access the electronic data rooms set up by the Debtors ("Abitibi").

2 Abitibi is under the protection of the Companies' Creditors Arrangement Act[1] ("CCAA") since April 17, 2009. In the context of the restructuring process undertaken following the Initial Order, it created electronic data rooms containing non-public financial and corporate information.

3 This was done in order to allow its stakeholders and their financial and legal advisors to better assess the ongoing condition of its business as the restructuring evolved. To have access to the electronic data rooms, permission has first to be obtained from Abitibi. Signature of confidentiahty agreements is required as well.

4 The Province requested such an access to the electronic data rooms. Abitibi denied its request.

5 In its Motion[2], the Province contends that Abitibi's refusal is contrary to the principles underlying the CCAA. It argues that the denial is unfair, discriminatory and unjustifiable. It insists upon being treated in the same manner as other Abitibi's stakeholders.

6 Abitibi strongly opposes the Motion[3].

7 It considers that the Province is neither a creditor of Abitibi, nor a genuine stakeholder in its restructuring. It adds that the Province does not come to Court with clean hands, but rather brings the Motion for collateral purposes, unrelated to the restructuring process. In that regard, Abitibi insists upon the fact the Province owes it in excess of $300 million for the recent wrongful appropriation of its assets.

THE ELECTRONIC DATA ROOMS

8 Based on the representations made to the Court, the electronic data rooms, subject of the debate, were created voluntarily at the initiative of Abitibi. There are no statutory requirements in the CCAA imposing upon a debtor company to do so.

9 Abitibi has elected to do it in order to assist, facWitate and advance its restructuring process and to help transmitting its non-public financial and corporate information to those who required it in that context.

10 Creating such data rooms for the benefit of stakeholders in a CCAA restructuring process is not unheard of. In large restructurings such as this one, puffing in place similar data rooms is acceptable, if not common, practice. It normally enhances the chances of success of the process. Seldom does one see litigation arising from the creation of these data rooms. No precedents have indeed been found on the issue that the Court is asked to decide.

11 Here, access to Abitibis electronic data rooms has, apparently, not been given to every stakeholder. In fact, according to Abitibi, no individual creditor has been granted such access so far.

12 To this day, the data rooms have rather been accessed solely by the financial and legal advisors of precise creditor groups like the Ad Hoc Committee of the Unsecured Noteholders, the Term Lenders, the Ad Hoc Committee of the Senior Secured Noteholders, and the Unsecured Creditors Committee put in place pursuant to the Chapter 11 proceedings pending in the State of Delaware.

13 These electronic data rooms provide information that goes beyond the quite extensive financial information already circulated by the Monitor on a regular basis. To that end, no less than 20 reports are currently available on the Monitors public website.

14 They include, amongst others, regular four-week reporting on Abitibis cash-flow results, receipts and disbursements with variances analysis, current liquidity and revised cash-flow forecasts, and key performance indicators review. They cover as well a timely overview of current market conditions in the forest products industry.

THE POSITIONS OF THE PARTIES

a) The Province

15 The Province pleads that it needs to have access to the electronic data rooms to properly assess Abitibis financial status and to make informed decisions in the restructuring. It maintains that it has a duty to inform itself of the present and future potential ability of Abitibi to cover the Provinces claims against it.

16 To that end, it states that after Abitibi was granted CCAA protection in April 2009, the Province made a commitment to the tatters former employees whose entitlement to severance and termination pay was stayed by the Initial Order.

17 Thus, in June 2009, it allegedly began to implement a plan whereby Abitibi's former employees in the Province received their entitlement to severance and termination pay. In exchange, these former employees assigned their rights to make a claim in the restructuring process to an organisation created by the various unions involved and funded by the Province.

18 Apparently, the Province has expended in excess of $24 million from the public purse to fulfil these obligations. It contends that it will be repaid for these severance and termination expenses from the claims that will be made at some point during the restructuring process.

19 The Province also argues that Abitibi is responsible towards it for alleged environmental contamination from a former mine located in the town of Buchans. Relying on numerous media reports that it filed in the record[4], the Province claims that because of Abitibis economic activities, the latter has exposed itself to numerous environmental obligations, the precise extent of which remains to be determined.

20 The Province alleges that it has incurred significant costs in that regard. It adds, furthermore, that agreements have been entered into for the Provinces environmental consultants to have access to the sites for the purpose of determining the full nature and extent of Abitibi's residual and environmental obligations.

21 In addition, during oral argument, the Provinces Counsel claimed that his client would also have alleged tax claims to raise against Abitibi. However, no allegation in the Motion refers to such assertion.

22 Because of the above, the Province submits that it should be treated similarly to other Abitibi's stakeholders with respect to the electronic data rooms. The Courts discretion under the CCAA should, in its view, be exercised in favour of the Province so that the right of access sought may be granted without delay.

b) Abitibi

23 Abitibi replies that the Province is simply unable to justify any status as actual or even potential creditor in this restructuring process.

24 According to Abitibi, with regard to the funding process of Abitibis former employees, the allegations of the Motion indicate that the Province is simply not the assignee of the claims.

25 Abitibi states further that no evidence supports either the Provinces Counsels contentions that alleged tax claims would be owed to his client.

26 As for the environmental obligations that Abitibi would have, it considers that the Province is the owner of the lands and mining rights on which the mining site was situated. It adds that any residual interest was surrendered to the Province as far back as in 1994, such that the Province has owned and managed the lands in question for over 15 years.

27 Abitibi also notes that it never itself operated the mine in question, while the reports that have been received so far by the Province indicate a number of other possible causes of contamination.

28 Simply put, Abitibi is of the view that this contingent claim is, at best, highly speculative.

29 That said, Abitibi refers to the following background elements to justify its position that the Province does not come to Court with clean hands. In fact, it submits that ulterior motives warrant the filing ofthe Motion.

30 From Abitibis standpoint, the conflict with the Province on the access to the electronic data rooms has its roots in events going back to December 2008, some four months prior to the Initial Order issued in this case.

31 On December 4, 2008, after unsuccessful negotiations with the unions representing its workers, Abitibi announced the closure of the Grand Falls mill located in the Province. The closure was to take place in the first quarter of 2009.

32 In the days following the announcement, Abitibi attempted in vain to negotiate with the Province an orderly winding-down of the operations.

33 On December 16, 2008, without notice and within a single day, the Province introduced and passed into law the Abitibi-Consolidated Rights and Assets Act[5] (the "Abitibi Act").

34 Pursuant to the Abitibi Act, the Province purported

a) to seize with immediate effect substantially ail of the assets, property and undertakings ofAbitibi in the Province
b) to cancel substantially ail outstanding water and hydroelectric contracts and agreements between Abitibi and the Province

c) to cancel pending legal proceedings of Abitibi against the Province seeking the return of several hundreds of thousands of dollars in unlawfully assessed payments in respect of water rights;
d) to deny Abitibi any compensation for the seized assets ; and
e) to deny Abitibi access to the Provinces Courts to seek redress.

35 Abitibi voiced strong opposition to this enactment and denounced it as unconstitutional, contrary to basic principles of Canadian law and adopted in bad faith. In April 2009, one of Abitibis U.S. subsidiaries indeed filed a Notice of Intentto Submit a Claim to Arbitration in that regard under Chapter 11 of NAFTA[6].

36 According to Abitibi, the seized property and rights had a value in excess of $300 million. As well, the expropriated assets were generating revenues for Abitibi ; some of the fixed assets could have even been sold for profit during the restructuring process[7].

37 Because of this, Abitibi concludes that the filing of the Motion is nothing more than a reaction to the expected daims ofAbitibi against the Province. Therefore, as part of its own Motion to Contest the Provinces Motion, Abitibi itself seeks declaratory conclusions to the effect that the Province cannot daim any relief until it has recognized the property rights it has unlawfully seized.

38 Abitibi even wants this Court to immediately designate a Claims Officer to hear and determine the respective claims, counter-claims, cross-claims and set-off daims of the parties against each other.

ANALYSIS AND DISCUSSION

39 With all due respect to the position advanced by the Province, the Court considers that its Motion should be dismissed.

40 None of the arguments it submitted are persuasive under the circumstances. In contrast, Abitibis objections to the access sought are real ; they are serious and they are many.

a) The principles underlying the CCAA

41 To justify its request, the Province puts much emphasis on the principles underlying the CCAA. It is appropriate to briefly review them.

42 It has often been said. No one seriously disputes it anymore. The CCAA is a remedial statute. Its purpose is to facilitate compromises or arrangements between an insolvent debtor company and its creditors[8].

43 Admittedly, the restructuring process conducted under the CCAA is, first and foremost, that of the debtor company and its creditors who, ultimately, have the final say on the process.

44 Still, it is now accepted that the CCAA is designed as well to serve a broad constituency of stakeholders, be they investors, creditors, employees or even, sometimes, local communities. It has thus been stated that Courts must have regard not only to the interests of those that are directly affected by the restructuring process, but also to a wider public interest[9].

45 However, if this broader public dimension goes beyond the simple direct relations between the debtor company and its creditors, it does not stand alone by itself. This wider public interest or broader public dimension must always be put in the balance together with the interest ofthose most directly affected by the restructuring process.

46 Accordingly, in any application brought under the CCAA such as this one, it is fair to say that in giving weight to broader socio-economic or public interest considerations, the Court must keep in mmd the key objectives of the Act. That is, to facilitate a restructuring so as to reach a compromise between the debtor company and its creditors and allow the business to continue as a going concern[10].

47 As well, in exercising its jurisdiction in a broad and flexible manner to insure the CCAA's effectiveness, the Court must remember that its role is one of judicial oversight. It is there to supervise the process and keep it moving towards its ultimate goal, that of an acceptable arrangement.

48 In Re Stelco[11], the Ontario Court of Appeal stated that in carrying this supervisory function under the legislation, the judge in a CCAA restructuring process is exercising the statutory discretion provided by Section 11.

49 That said, in a CCAA restructuring process, the radically different economic stakes of the various creditors in the debtor company entail that it is not realistic to constantly expect or have a level playing field[12]. There will sometimes be asymmetries, variances and distinctions. Because of the flexibility ofthe CCAA, one is not to apply its regime rigidly, in the same manner in every situation.

50 Bearing these considerations in mmd, the Court considers that this is not a case where its judicial discretion should be exercised in the manner sought by the Province. There are no reasonable or reasoned justifications that would support it.

51 To begin with, the status ofthe Province as creditor is not established, while its alleged status as potential creditor stands on rather weak grounds.

52 Apart from that, relying on a mere and general quality of stakeholder remains quite insufficient to justify the relief sought. In this regard, the reasons for Abitibis denial appear legitimate and reasonable considering the objectives of the CCAA and the interests ofthose involved.

b) The creditor or potential creditor status of the Province

53 In this case, the Province has simply failed to adduce any reliable or admissible evidence to establish that it is, actually, a creditor of Abitibi.

54 On one hand, the Province alleges, without supporting-evidence, that it has made payments to certain former employees of the Abitibis Grand Falls mill. Yet, no evidence to establish the nature of the payments made or any lawful assignment of the related claims has been put forward.

55 Indeed, when one reads paragraphs 7, 8 and 9 of the Motion, it appears obvious that if Abitibis former employees in the Province claims have been assigned to anyone, it is to an organisation created by the various unions involved, not to the Province. Its role is simply to fund this organisation.

56 In that regard, the Motion itself refers to claims that will ultimately be made in the restructuring by an "Assignee". According to the Motion, this "Assignee" is certainly not the Province.

57 On the other hand, the Province has not provided the Court with any reasonable and convincing evidence in support of its other alleged status of potential creditor for environmental problems resulting from Abitibis economic activities.

58 The Motion has merely referred to several press articles in support of an alleged daim against Abitibi for the contamination arising from a closed mine in the town of Buchans.

59 These vague and unsubstantiated allegations are, at this point in time, barely supported. This is hardly sufficient to give to the Province an alleged standing as creditor or even potential creditor of Abitibi.

60 To conclude on this basis that the Province is a creditor of Abitibi would, in essence, substitute speculation for reason and guesswork for proof.

61 In a CCAA context, a potential creditor with a contingent claim bears the onus of showing, at the very least, that its claim is neither speculative nor remote[13]. Some credibie and reliabie evidence must be offered in support. None exists here.

62 Finally, even though the Provinces Counsel raised, during oral argument, that the Province would have a status as creditor of Abitibi by reason of some outstanding tax claims, no allegation in the Motion, nor any evidence adduced in support thereof, substantiate that contention.

c) The "stakeholder" argument

63 The Provinces other argument to the effect that it is, in any event, a "stakeholder" in Abitibis restructuring process is no more convincing than the first one. Nor is the submission that, as alleged stakeholder in the process, the Province should be entitied to an unfettered access to the electronic data rooms.

64 These data rooms have been set up to assist and enhance the Abitibi's restructuring process. However, there has not been an open access to the data rooms for every creditor, and certainly not for every potential stakeholder.

65 In fact, based on the Courts understanding, access has been limited to some key undisputed creditors and their financial and legal advisors.

66 More precisely, 50 far, access to the electronic data rooms has only been given to secured creditors of Abitibi whose assets are being used in the restructuring process, and to committees of unsecured creditors whose status is officially recognized in the US. proceedings or whose support is essential to the outcome of the restructuring because of the huge extent of the debt owed to them.

67 No evidence suggests that mere potential or contingent creditors such as the Province have been given the kind of access the Province is seeking. To the contrary, it appears that it has not been the case. From that standpoint, the alleged discrimination claimed by the Province is simply not established.

68 Likewise, the evidence offered does not support either the Provinces claim that it is entitled to the same rights as those of other stakeholders. Again, no stakeholder with a status similar to that of the Province has been given the access sought here.

69 Few would dispute that there are huge differences between the alleged status of the Province and that of key creditors whose claims are undisputed and whose invoivement remains pivotal to the final outcome of the restructuring.

70 In that regard, the Provinces reference to the testimony of Mr. Robertson at another hearing ignores the particular context in which it was given. It hardly justifies opening the doors of the electronic data rooms to all stakeholders without distinction. True, by definition[14], stakeholders are peo-

ple who have an interest in a companys or organizations affairs. However, while creditors are inevitably stakeholders, not all stakeholders are necessarliy creditors.

71 In its Memorandum of Argument, the Province goes as far as pleading that the fact that it may not be a creditor of Abitibi is not a valid reason to deny the access sought. The Court does not share that view. With respect, this is certainly a very important consideration to keep in mind on an issue like this one.

72 In fact, in the Courts opinion, seldom would a judge allow, in a CCAA restructuring process, mere stakeholders who are not creditors to have access to the non-public financial and corporate information ofthe debtor company.

73 In a similar fashion, access to the electronic data rooms to some creditors does not mean that similar access must necessarily be given to everyone who requests it. The fact that Abitibi should ensure transparency and openness in its restructuring proceedings and process does not entail that everyone shouid be treated similarly. Fair and equitable treatment does not correspond to equai and identical treatment at all costs.

74 For instance, Abitibi could well, in some cases, deny access to its electronic data rooms to some categories of creditors for legitimate commercial reasons. The example of a creditor who is a competitor of Abitibi comes to mind. There are no doubt others.

75 Arguably, practical reasons could also justify Abitibi limiting access to its electronic data rooms to prevent its use becoming impractical or the signing of confidentially agreements meaningless by reason of the fact that too many persons have access to the information.

76 This notwithstanding, the Province seems to suggest that because some creditors have had access to the electronic data rooms, all stakeholders, no matter what is their status, should be given the same opportunity. The Court disagrees.

77 Contrary to what the Province pleads, it is not a fundamental tenet of insolvency law that similarly situated "stakeholders" be treated in the same manner. The case law does not support this premise. It rather states that in insolvency law, unsecured creditors are normally treated in the same manner in similar situation[15]. To apply the statement to "stakeholders" as well, with no consideration to their precise status, goes way beyond what the case law indicates.

78 In a restructuring process under the CCAA, voting on the plan of arrangement remains, at all times, in the hands of the creditors. If the interest of stakeholders other than creditors should, sometimes, be taken into consideration in the exercise of the Courts judicial discretion or inherent jurisdiction, it does not elevate nor equate the status of stakeholders to that of creditors.

79 In the conduct of the restructuring process, mere "stakeholders" cannot realistically pretend to a status equal to that of the creditors. The latter have a say in the ultimate plan. The former do not unless they do qualify as creditors.

80 This being so, the Court is of the view that Abitibi can, for legitimate business reasons and through the exercise of reasonable business judgment, restrict access to its electronic data rooms when its use by mere stakeholders (or, sometimes, even creditors) would not further nor enhance its restructuring process.

81 In this regard, lacking evidence of bad faith, the Court should be reluctant to intervene in the reasonable exercise of a debtor companys business judgment. Such exercise should not be second-guessed lightly.

82 Here, the Province wants access to the electronic data rooms not to enhance the restructuring process, but to assess the extent of Abitibi's present and future ability to cover the Provinces undetermined and potential environmental claims.

83 The Court considers it reasonable for Abitibi to deny access to its electronic data rooms to a potential creditor or mere stakeholder with whom it has a legitimate debate and reasonable expectations of upcoming litigation. In particular where, like here, the electronic data rooms apparently contain information concerning the economic claims of Abitibi against the Province.

84 In such a situation, the CCAA process should not be used to further a collateral objective that, in the end, is not in connection with the ultimate goal of the Act.

85 The broader public dimension of the CCAA does not entail an unlimited and unfettered access to the non-public books, records and financial data of a debtor company for all potential or contingent claimants, be they a public or governmental body.

86 Similarly, considerations for the wider public interest and broad public dimension do not confer to a mere stakeholder the same status as a creditor in all aspects of the restructuring process.

87 To that end, the judgments rendered in the cases of Fracmaster[16] and Calpine[17] hardly support the Provinces argument. Transparency and openness in an asset sale process for an optimal recovery to the benefit of the debtor company is hardly comparable to the kind of openness and transparency that the Province is advocating here.

88 Lastly, the alleged legitimate public interest relied upon by the Province is not in furtherance of the purposes of the CCAA. It is, to the contrary, in furtherance of the Provinces own interest of determining the real value of its potential claims that are yet to be established.

89 Put otherwise, the Province wants to have access to the electronic data rooms to better evaluate whether Abitibis pockets will, one day, be deep enough.

90 This does not constitute a legitimate legal interest in the restructuring process, nor a legitimate commercial interest in its success. From the allegations of its Motion, it is rather fair to say that the Province does not appear to have any genuine interest in the restructuring of Abitibi. At the present time, nothing suggests that the Province will either shape the plan of arrangement or have a say in its approval.

91 The fact that the Province is a governmental body does not change anything. It does not have more investigative entitlement in the non-public financial or business information of a potential debtor than does any other person.

92 One could easily add that if the Provinces true goal is merely to assess Abitibi's on going financial condition, what the Monitor puts regularly on its website definitely provides the reader with what it needs in this respect.

93 In sum, the Court accepts Abitibis assertion that the Provinces purpose here is a collateral one. It has nothing to do with the key objectives of the CCAA, namely to facilitate a restructuring and insure that Abitibi continues as a going concern.

94 Abitibis denial ofthe Provinces request is legitimate and reasonable. It is based on proper considerations. This is not a situation where the Court should second-guess or review the exercise of Abitibis business judgment.

95 To paraphrase what Farley J. once wrote, justice does not dictate to grant the access sought. Nor does practicality demand that it be done here.

d) Closing remarks

96 In closing, the Court notes that both sides have said a lot on the Abitibi Act.

97 For its part, the Province considers that the Abitibi Act is constitutional, even though it is retrospective, targeted and confiscatory in nature[18].

98 In contrast, Abitibi contends that the enactment is contrary to fundamental constitutional principles of the Canadian Charter of Rights and Freedoms and Canadian Bill of Rights, as well as being unconstitutional. It considers the Act to be punitive, conflscatory in nature and repugnant to public policy[19].

99 While the Province argues thatthe potential claims of Abitibi against it as a result of the Abitibi Act are without merit, the latter maintains that if any claim is ever filed by the Province in the restructuring process, the Court will have to assess the constitutional validity of the Abitibi Act and the value of its cross-claims or set-off claims against the Province for the wrongful expropriation it has been subjected to.

100 Be that as it may, the Court views as premature the requests contained in the conclusions of Abitibi's own Motion to Contest. It is necessary to immediately designate a former judge as Claims Officer to hear and determine all alleged claims filed by the Province as well as any counter-claims or set-off claims to be raised by Abitibi.

101 For the time being, the Province has filed no claim in the Claims Process established in Abitibi's CCAA restructuring. Consequently, it is too early to implement any kind of special process in that regard.

FOR THESE REASONS, THE COURT:

102 DISMISSES the "Motion for a Declaration that the Petitioner is Entitled to Access to the Electronic Data Rooms Created by the Debtors"

103 DISMISSES as well conclusions [25] and [26] of the "Motion to Contest the Motion for Access to the Electronic Data Rooms Created by the Petitioners";

104 WITH COSTS against Her Majesty the Queen in Right of Newfoundland and Labrador.

CLÉMENT GASCON, J.S.C.

* * * * *

SCHEDULE "A"

ABITIBI PETITIONERS

1. ABITIBI-CONSOLIDATED INC.
2. ABITIBI-CONSOLIDATED COMPANY OF CANADA

3. 3224112 NOVA SCOTIA LIMITED
4. MARKETING DONOHUE INC.
5. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
6. 3834328 CANADA INC.
7. 6169678 CANADA INC.
8. 4042140 CANADA INC.
9. DONOHUE RECYCLING INC.
10. 1508756 ONTARIO INC.
11. 3217925 NOVA SCOTIA COMPANY
12. LA TUQUE FOREST PRODUCTS INC.
13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
14. SAGUENAY FOREST PRODUCTS INC.
15. TERRA NOVA EXPLORATIONS LTD.
16. THE JONQUIERE PULP COMPANY
17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY
18. SCRAMBLE MINING LTD.
19. 9150-3383 QUÉBEC INC.

* * * * *

SCHEDULE "B

BOWATER PETITIONERS

1. BOWATERCANADIAN HOLDINGS INC.
2. BOWATER CANADA FINANCE CORPORATION
3. BOWATER CANADIAN LIMITED
4. 3231378 NOVA SCOTIA COMPANY
5. ABITIBIBOWATER CANADA INC.
6. BOWATER CANADA TREASURY CORPORATION
7. BOWATER CANADIAN FOREST PRODUCTS INC.
8. BOWATER SHELBURNE CORPORATION
9. BOWATER LAHAVE CORPORATION
10. ST-MAURICE RIVER DRIVE COMPANY LIMITED
11. BOWATERTREATEDWOOD INC.
12. CANEXEL HARDBOARD INC.
13. 9068-9050 QUÉBEC INC.
14. ALLIANCE FOREST PRODUCTS (2001) INC.
15. BOWATER BELLEDUNE SAWMILL INC.
16. BOWATER MARITIMES INC.
17. BOWATER MITIS INC.
18. BOWATER GUÉRETTE INC.
19. BOWATER COUTURIER INC.

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SCHEDULE "C"

18.6 CCAA PETITIONERS

1. ABITIBIBOWATER INC.
2. ABITIBIBOWATER US HOLDING 1 CORP.
3. BOWATERVENTURES INC.
4. BOWATER INCORPORATED
5. BOWATER NUWAY INC.
6. BOWATER NUWAY MID-STATES INC.
7. CATAWBA PROPERTY HOLDINGS LLC
8. BOWATER FINANCE COMPANY INC.
9. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED
10. BOWATERAMERICA INC.
11. LAKE SUPERIOR FOREST PRODUCTS INC.
12. BOWATER NEWSPRINT SOUTH LLC
13. BOWATER NEWSPRINT SOUTH OPERATIONS LLC
14. BOWATER FINANCE II, LLC
15. BOWATERALABAMA LLC
16. COOSA PINES GOLF CLUB HOLDINGS LLC

cp/s/qlcys/qlmlt/qlcla/qlcal/qlana

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

2 "Motion for a Declaration that the Petitioner is Entitled to Access the Electronic Data Rooms Created by the Debtors" dated October 16, 2009.

3 "Motion to Contest the Motion for Access to the Electronic Data Rooms Created by the Petitioners" dated October 26, 2009.

4 Exhibit NL-1.

5 S.N.L. 2008, c. A-1.01., filed as Exhibit R-2.

6 Exhibit R-3.

7 Testimony of Alice Minville at the hearing.

8 Stelco Inc. (Bankruptcy), (Re), (2005), 9 C.B.R. (5th) 135, 2005 CanLII 8671 (CanLII), at paras 32 ff.; Metcalfe & Mansfield Alternative Investments II Corp., (Re), 2008 ONCA 587 (CanLII), at paras 44-61.

9 Metcalfe & Mansfield Alternative Investments II Corp., (re), 2008 ONCA 587 (CanLII), at paras 50-52; Syndicat national de l'amiante d'Asbestos v. Mine Jeffrey inc., [2003] R.J.Q. 420 (C.A.), at paras 27-30.

10 Metcalfe & Mansfield Alternative Investments II Corp., (Re), 2008 ONCA 587 (CanLII), at paras 50-52; Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp., 2008 BCCA 327 (CanLII), at paras 27-29.

11 (2005), 75 O.R. (3d) 5 (Ont. C.A.), at paras 32-34.

12 Janis P. SARRA, Rescue! : The Companies' Creditors Arrangement Act, (Toronto : Thomson Carswell, 2007), at page 11.

13 Re Air Canada, (2004) 2 C.B.R. (5th) 23 (Ont. S.C.J.).

14 Collins COBUILD Advanced Learner's English Dictionary on CD-ROM, Lexicon, 2003, HarperCollins Publishers, "stakeholders".

15 See, in this respect, Indalex Ltd. (Re), (2009), 55 C.B.R. (5th) 64 (Ont. S.C.) : Woodward's Ltd. (Re), (1993), 17 C.B.R. (3rd) 236 (B.C.S.C.); Pacific National Lease Holding Corp. (Re), (1992) 15 C.B.R. (3rd) 265 (B.C.C.A.).

16 Fracmaster (Re), (1999), 11 C.B.R. (4th) 204 (Alta Q.B.).

17 Calpine (Re), (2007), 28 C.B.R. (5th) 185 (Alta Q.B.).

18 To that end, it refers notably to British Columbia v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473, at pp. 503-504.

19 Amongst others, it invokes Reference re Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297 and Laane & Baltser v. Estonian S.S. Line, [1949] S.C.R. 530.

Ainslie et al. v. CV Technologies Inc. et al.*
[Indexed as: Ainslie v. CV Technologies Inc.]

93 O.R. (3d) 200

Ontario Superior Court of Justice,

Lax J.

December 3, 2008
* A corrigendum to these reasons for decision was released on December 4, 2008. See p. 210 for text of the corrigendum.

Securities regulation -- Misrepresentation -- Statutory cause of action -- Leave of court -- Section 138.8(2) of Securities Act not requiring every proposed defendant to file affidavit on application for leave to commence action -- Proposed defendant only required to file affidavit where it intends to lead evidence of material facts in response to motion for leave -- Plaintiffs not entitled to resort to rule 39.03 of Rules of Civil Procedure to examine proposed defendant for purposes of motion for leave under s. 138.8 of Securities Act -- Securities Act, R.S.O. 1990, c. S.5, s. 138.8 -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 39.03.

The plaintiffs brought a motion under s. 138.8(2) of the Securities Act for leave to bring an action for misrepresentation under Part XXIII.1 of the Act. Section 138.8(2) of the Act provides that upon an application under s. 138.8, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely. It was the plaintiffs' position that a proper interpretation of s. 138.8(2) required each of the proposed defendants to file an affidavit upon which they could be cross-examined. They brought a motion to compel each defendant to file and serve an affidavit setting forth the material facts upon which each intended to rely in response to the motion for leave. Alternatively, they sought an order requiring each defendant to be examined under rule 39.03 of the Rules of Civil Procedure.

Held, the motion should be dismissed.

Section 138.8 was not enacted to benefit plaintiffs. Rather, it was enacted to protect defendants from coercive litigation and to reduce their exposure to costly proceedings. Proposed defendants are not required to assist plaintiffs in securing evidence upon which to base an action under Part XXIII.1. The ordinary meaning of s. 138.8(2) is that a proposed defendant must file an affidavit only where it intends to lead evidence of material facts in response to the motion for leave. The plaintiffs were not entitled to resort to rule 39.03 of the Rules to examine the proposed defendants. Subsection 138.8(3) of the Act specifically provides that "the maker of such affidavit may be examined". That provision would be redundant and unnecessary if the Rules applied to permit the plain-

tiffs to examine any witnesses they chose. The plaintiffs had yet to meet their onus under s. 138.8(1). Their proposed reliance on rule 39.03 was not contemplated by the Act or by the principles governing examinations under that rule. To permit the plaintiffs to accomplish indirectly what they were prevented from doing directly would amount to an abuse of process.

Cases referred to

Silver v. IMAX Corp., [2008] O.J. No. 1844, 167 A.C.W.S. (3d) 881 (S.C.J.) [Leave to appeal refused [2008] O.J. No. 2751, 169 A.C.W.S. (3d) 64 (Div. Ct.)], consd [page201]

Other cases referred to

Beck v. Bradstock (1976), 14 O.R. (2d) 333, [1976] O.J. No. 2320, 2 C.P.C. 90 (H.C.J.); Canada Post Corp. v. Key Mail Canada Inc. (2005), 77 O.R. (3d) 294, [2005] O.J. No. 3653, 259 D.L.R. (4th) 309, 202 O.A.C. 158, 142 A.C.W.S. (3d) 70 (C.A.); CanWest MediaWorks Inc. v. Canada (Attorney General), [2007] O.J. No. 3119, 2007 ONCA 567, 227 O.A.C. 116, 48 C.P.C. (6th) 281, 159 A.C.W.S. (3d) 778; Epstein v. First Marathon Inc., [2000] O.J. No. 452, [2000] O.T.C. 109, 2 B.L.R. (3d) 30, 41 C.P.C. (4th) 159, 94 A.C.W.S. (3d) 1062 (S.C.J.); Fehringer v. Sun Media Corp. (2001), 54 O.R. (3d) 31, [2001] O.J. No. 5783 (S.C.J.); Kaighin Capital Inc. v. Canadian National Sportsmen's Shows (1987), 58 O.R. (2d) 790, [1987] O.J. No. 2172, 17 C.P.C. (2d) 59, 4 A.C.W.S. (3d) 5 (H.C.J.); Lang v. Kligerman, [1998] O.J. No. 3708, 82 A.C.W.S. (3d) 811 (C.A.); Meditrust Healthcare Inc. v. Shoppers Drug Mart, a Division of Imasco Retail Inc., [2000] O.J. No. 3762, 100 A.C.W.S. (3d) 226 (S.C.J.); Royal Bank v. Société Générale (Canada), [2006] O.J. No. 5081, 219 O.A.C. 83, 31 B.L.R. (4th) 63, 154 A.C.W.S. (3d) 72 (C.A.); Schreiber v. Mulroney (2007), 87 O.R. (3d) 643, [2007] O.J. No. 3901, 160 A.C.W.S. (3d) 1010 (S.C.J.); Sun-Times Media Group Inc. v. Black, 2007 CarswellOnt 1186 (S.C.J., Comm. List); Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1995), 27 O.R. (3d) 291, [1995] O.J. No. 3886, 46 C.P.C. (3d) 110, 59 A.C.W.S. (3d) 864 (Gen. Div.)

Statutes referred to

Securities Act, R.S.O. 1990, c. S.5, Part XXIII.1, s. 138.3 [as am.], 138.8 [as am.]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 20, 20.04 [as am.], 39.03

Authorities referred to

Driedger, E., and Ruth Sullivan, Driedger on the Construction of Statutes, 3d ed. (Toronto: Butterworths, 1994)

Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of "Material Fact" and "Material Change", Canadian Securities Administrators, CSA Notice 53-302, 2000 O.S.C.B. 7383

Toronto Stock Exchange, Interim Report of the Committee on Corporate Disclosure, Toward Improved Disclosure -- A Search for Balance in Corporate Disclosure (Allen Committee Interim Report) (Toronto Stock Exchange, December 1995)

Toronto Stock Exchange, Final Report of the Committee on Corporate Disclosure, Toward Improved Disclosure -- A Search for Balance in Corporate Disclosure (Allen Committee Final Report) (Toronto Stock Exchange, March 1997)

MOTION for an order compelling the defendants to file and serve an affidavit under s. 138.8(2) of Securities Act or, alternatively, for an order for examination of the defendants under rule 39.03 of Rules of Civil Procedure.

W.V. Sasso, J. Strosberg and M.G. Robb, for plaintiffs.

A.L.W. D'Silva and P. O'Kelly, for defendants CV Technologies Inc., Harry Buddle, Gordon Tallman and Jacqueline J. Shan.

R. Heintzman and M. Fleming, for defendant Grant Thornton LLP. [page202]

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[1] **LAX J.**: -- This is one of the first actions to be brought under Part XXIII.1 of the Ontario Securities Act, R.S.O. 1990, c. S.5 as amended ("OSA"). The amendments (familiarly known as Bill 198) permit a statutory cause of action for misrepresentation in the secondary market if the plaintiffs obtain leave from the court pursuant to s. 138.8 of the Act. At issue on this motion is the interpretation of s. 138.8(2), which has not previously been interpreted.

[2] Section 138.8 provides:

> 138.8(1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,
>
> (a) the action is being brought in good faith; and
>
> (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.
>
> (2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.
>
> (3) The maker of such an affidavit may be examined on it in accordance with the rules of court.
>
> (4) A copy of the application for leave to proceed and any affidavits filed with the court shall be sent to the Commission when filed.

(Emphasis added)

[3] The plaintiffs' action is against CV Technologies Inc. and three of its former or present officers and directors ("CV") and against CV's former auditors, Grant Thornton LLP ("GT"). The Statement of Claim alleges that CV in its 2006 fiscal year and in the first quarter of its 2007 fiscal year falsely represented that CV's financial statements were prepared and reported in accordance with GAAP. The plaintiffs allege that the statements improperly recognized sales of its Cold-FX products to customers in the United States as revenue earned in those periods and that this did not fairly present CV's financial results. The plaintiffs therefore assert that CV's public filings contained misrepresentations and that CV and certain of its officers and directors are liable to the plaintiffs for damages. The plaintiffs also allege that GT is liable to the plaintiffs based on claims of negligence and negligent misrepresentation in connection with the audit performed by GT of CV's financial statements for its 2006 fiscal year.

[4] The leave motion and the certification motion are scheduled to be heard together in June 2009. The plaintiffs have delivered affidavits in support of both motions and have confirmed that [page203] they have put before the court all material facts and the evidentiary basis necessary for the court to decide the leave motion. The CV defendants have filed the affidavits of two expert witnesses on which they intend to rely in opposing the leave and certification motions. GT has filed no affidavit material in response to the plaintiffs' leave motion and intends to rely on the facts disclosed in the plaintiffs' motion materials upon which they propose to cross-examine.

[5] It is the plaintiffs' position that a proper interpretation of s. 138.8(2) requires each of the proposed defendants to file an affidavit sworn in their name upon which they can be cross-examined. They bring this motion to compel each defendant to forthwith file and serve an affidavit setting forth the material facts upon which each intends to rely in response to the plaintiffs' motion for leave to plead the causes of action in s. 138.3 of the Act and to attend to be cross-examined on their affidavits. Alternatively, the plaintiffs seek an order requiring each defendant to be examined under rule 39.03 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

[6] The defendants submit that the plaintiffs' position is an improper attempt to dictate the evidence on which the defendants can rely in opposition to the leave motion and that it affords the plaintiffs greater rights than in an action where it is unnecessary to obtain leave. They argue that this is inconsistent with the plain meaning of the section and improperly shifts the onus from the plaintiffs to the defendants contrary to its legislative intent.

Legislative Background to Bill 198

[7] The genesis of the secondary market liability provisions including s. 138.8 can be found in the 1997 interim and final reports of the Toronto Stock Exchange Committee on Corporate Disclosure (more commonly referred to as the "Allen Committee").[1] The mandate of the Allen Committee was to examine the adequacy of continuous disclosure by public companies in Canada and to consider whether additional remedies should be made available to investors or regulators for breaches by companies of their continuous disclosure obligations. [page204]

[8] The Allen Committee recommended the adoption of a statutory civil liability regime for the secondary securities market as a means of deterring misleading continuous disclosure by issuers. In doing so, it emphasized that deterrence, rather than investor compensation, was the focus of its recommendations.[2]

[9] In response to the Allen Committee's recommendations, the Canadian Securities Administrators (the "CSA") proposed draft legislation to amend the Act and implement a secondary market

liability regime. It recognized and endorsed the Allen Committee's objective which was to create a system of statutory liability that would contain enough checks and balances through, for example, the availability of due diligence defences and limitations on liability by means of damage caps so that issuers and their directors would be deterred from inadequate or untimely disclosure without, at the same time, creating a regime that would favour short-term over long-term investors. The focus on deterrence was in part a recognition that while compensation of a prospectus investor would generally involve the culpable issuer returning subscription money it received from aggrieved investors, by contrast, compensation of aggrieved secondary market investors would come at the expense of other innocent investors, particularly the issuer's continuing shareholders.[3]

[10] Initially, neither the Allen Committee, nor the CSA, proposed a gatekeeper mechanism such as that now found in s. 138.8(1) of the Act. However, in response to comments received by the CSA during the public consultation process, the CSA recommended this as a means to dissuade plaintiffs from bringing "strike suits" -- that is, coercive and unmeritorious claims which are aimed at pressuring a defendant into a settlement in order to avoid costly litigation.[4] These had become increasingly frequent in securities class action litigation in the United States and ultimately led to legislative reforms there.

[11] The Allen Committee had concluded that the litigation environment in Canada was sufficiently different to the United States to make it unlikely that meritless class actions would be brought, but after the release in 1997 of the Allen Committee Final Report, a "strike suit" showed up in an Ontario courtroom.[5] The issuer [page205] community, which had opposed the introduction of secondary market liability provisions, was successful in persuading the CSA of the need to introduce measures to deter the potential for them.

[12] In recommending that the Act include a screening mechanism, the CSA concluded that, irrespective of whether it was believed that the proposed legislation would result in strike suits, a screening mechanism was necessary in order to prevent corporate defendants from being exposed to proceedings "that cause real harm to long-term shareholders and resulting damage to our capital markets".[6] The 2000 Draft Legislation proposed by the CSA retained the "loser pay" costs, proportionate liability and damage cap provisions recommended by the Allen Committee, but added the screening mechanism now found in s. 138.8(1). The CSA described its purpose as follows:

> This screening mechanism is designed not only to minimize the prospects of an adverse court award in the absence of a meritorious claim but, more importantly, to try to ensure that unmeritorious litigation and the time and expense it imposes on defendants, is avoided or brought to an end early in the litigation process.[7]

(Emphasis added)

[13] In the result, the CSA revised its proposed legislation to incorporate a provision requiring plaintiffs to obtain leave from the court in order to bring an action for secondary market liability. The CSA's proposed legislation for secondary market liability was ultimately adopted, with some modifications in Bill 198 which was introduced for first reading in the legislature on October 30, 2002 and was given royal assent on December 9, 2002. Following technical amendments to certain sections of the secondary market liability provisions, Part XXIII.1 of the Act was proclaimed into force on December 31, 2005.

The Interpretation of Section 138.8(2)

[14] Section 138.8(1) sets out a two-part test for obtaining leave to bring an action under Part XXIII.1 of the OSA and places the onus on the plaintiffs to demonstrate that (1) their proposed action is brought in good faith and (2) has a reasonable prospect for success at trial. As s. 138.8(1) requires an examination of the merits, the plaintiffs submit that the section is supplemented with s. 138.8(2) and (3). They rely on the mandatory language in s. 138.8(2) ("and each defendant shall" [emphasis added]) and [page206] submit that without the benefit of this requirement and the ability to cross-examine, a plaintiff would be deprived of the tools necessary to meet the standard the legislature created in s. 138.8(1).

[15] This submission ignores the legislative purpose of s. 138.8. The section was not enacted to benefit plaintiffs or to level the playing field for them in prosecuting an action under Part XXIII.1 of the Act. Rather, it was enacted to protect defendants from coercive litigation and to reduce their exposure to costly proceedings. No onus is placed upon proposed defendants by s. 138.8. Nor are they required to assist plaintiffs in securing evidence upon which to base an action under Part XXIII.1. The essence of the leave motion is that putative plaintiffs are required to demonstrate the propriety of their proposed secondary market liability claim before a defendant is required to respond. Section 138.8(2) must be interpreted to reflect this underlying policy rationale and the legislature's intention in imposing a "gatekeeper mechanism".

[16] The plaintiffs appear to be interpreting s. 138.8(2) as if it read: "Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits." But, the subsection continues: "setting forth the material facts upon which each intends to rely". If there are no material facts upon which a defendant intends to rely in responding to a leave motion, how can it be that a defendant is required to file an affidavit? Similarly, if a defendant files one or more affidavits, how can a plaintiff require that defendant to file other affidavits? By discounting this language, the plaintiffs are proposing an interpretation which relieves them of their obligation to demonstrate that their proposed action meets the pre-conditions for granting leave under the Act.

[17] The plaintiffs' interpretation also fails to address the language used in subsections (3) and (4). Section 138.8(3) reads: "The maker of such an affidavit may be examined on it in accordance with the rules of court." Section 138.8(4) reads: "A copy of the application for leave to proceed and any affidavits filed with the court shall be sent to the Commission when filed" (emphasis added). Had it been the intention of the legislature to require the parties to file affidavits, irrespective of the onus placed upon the moving party, the legislature would have substituted the word "the" for "any" in s. 138.8(4) and the words "the plaintiff and each defendant" for "maker" in s. 138.8(3). I also note that the legislature attached no consequences to the failure of "each defendant" to file an affidavit.

[18] In terms of onus, a useful analogy can be found in the summary judgment rule, Rule 20, of the Rules of Civil Procedure. Rule 20.04 provides: [page207]

> 20.04(1) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

(Emphasis added)

[19] Similar to s. 138.8(2), rule 20.04 utilizes language suggesting that a responding party "must" or "shall" file affidavit material. Notwithstanding the use of such language, under Rule 20, a re-

sponding party retains the option to counter the motion by simply cross-examining the moving party, rather than by leading any direct evidence on the motion. In this regard, rule 20.04 has been interpreted as requiring the respondent to a summary judgment motion to "lead trump or risk losing". Notably, however, the onus to establish that there is no genuine issue for trial remains with the moving party. The onus does not shift to the respondent to show that a genuine issue for trial does in fact exist.[8]

[20] Similarly, in a motion under s. 138.8 of the Act, the onus to demonstrate that the proposed claim meets the required threshold remains with the plaintiffs. The onus does not shift to the defendants. A defendant that does not "lead trump" by filing affidavit evidence in response to a motion under s. 138.8 may well take the risk that leave will be granted to the plaintiffs. It does not follow, however, that a defendant is obligated to file evidence or produce an affidavit from each named defendant. It is a well-established principle that, as a general proposition, it is counsel who decides on the witnesses whose evidence will be put forward.[9]

[21] The plaintiffs submit that their interpretation of s. 138.8(2) and (3) is consistent with the only judicial interpretation of Part XXIII.1 of the OSA, referring to the decision in Silver v. IMAX Corp.[10] In that case, the proposed defendants (the corporation and certain directors) chose to file affidavits setting out the statutory defences upon which they intended to rely in response to a [page208] motion for leave pursuant to s. 138.8(1). The issue in IMAX was the permissible scope of the examination on those affidavits authorized by s. 138.8(3).

[22] In concluding that the defendants were required to answer questions that met the "semblance of relevance" test, van Rensburg J. appears to have been influenced by the unfairness that would result if the defendants were able to file evidence asserting statutory defences but were immune to having that evidence fully tested by cross-examination. Her comments must be considered in this context: As she stated [at paras. 17, 19]:

> The Securities Act provides its own procedure in respect of the statutory remedy, that specifically requires proposed defendants to put forward information (presumably otherwise confidential and non-compellable information to the extent it may be relevant to their defence) . . .
>
> . . . . .
>
> There is no indication in the statute that evidence put forward or examined upon must be restricted to what is in the public record. Indeed the facts to support a due diligence defence are generally in the possession and control of the party asserting such a defence.

(Emphasis added)

[23] In IMAX, van Rensburg J. considered [at para. 19] s. 138.8(2) to prescribe a "mandatory requirement for each plaintiff and each proposed defendant to set out the facts by affidavit, with the right to cross-examine". I respectfully suggest that these comments should be confined to the facts and circumstances at issue in IMAX. These comments were made in obiter in resolving a refusals motion in circumstances where the defendants had filed affidavit material. It is important to recognize that in IMAX, the court was not addressing the interpretation of s. 138.8(2). The reasons make no reference to the Allen Committee Reports or CSA Notice 53-302, which are admissible as evi-

dence of the purpose of legislation and the intention of the legislature. I regard these documents as essential interpretive tools, but it would appear that they were not provided to the court in IMAX.

[24] In my view, the "gatekeeper provision" was intended to set a bar. That bar would be considerably lowered if the plaintiffs' view is correct. As I have already indicated, a defendant who does not file affidavit material accepts the risk that it may be impairing its ability to successfully defeat the motion for leave and is probably foregoing the right to assert the statutory defences under Part XXIII.1 of the Act. However, parties are entitled to present their case as they see fit and this includes the right to oppose the leave motion on the basis of the record put forward by the plaintiffs as GT intends, or on the basis of the affidavits of experts as CV intends. [page209]

[25] To accept the plaintiffs' submissions would require each defendant to produce evidence that may not be necessary for the leave motion and would serve no purpose other than to expose those defendants to a time-consuming and costly discovery process. It would sanction "fishing expeditions" prior to the plaintiffs obtaining leave to proceed with their proposed action. This is an unreasonable interpretation of s. 138.8(2). It is inconsistent with the scheme and object of the Act. Properly interpreted, the ordinary meaning of s. 138.8(2) is that a proposed defendant must file an affidavit only where it intends to lead evidence of material facts in response to the motion for leave.

Rule 39.03

[26] It is well-established that a proposed examination under rule 39.03 will not be permitted if it is being used for an ulterior or improper purpose or is nothing more than a "fishing expedition".[11] In Beck v. Bradstock, for example, the court refused to permit an examination under rule 39.03 -- notwithstanding that the information from the proposed examination would be relevant to the motion at issue -- because the plaintiff intended to use the proposed examination for the improper purpose of obtaining information to commence an action against the witness. The court held that such an examination would constitute an abuse of process.[12]

[27] In addition, an examination under rule 39.03 is improper if the purpose of the examination is to prematurely inquire into a party's defences or otherwise commence the discovery process before the close of pleadings.[13] For instance, in Fehringer v. Sun Media Corp., the plaintiff sought to examine the defendants under rule 39.03 in relation to a motion for certification. The court held that the proposed examinations under rule 39.03 constitute an abuse of process insofar as those examinations would (i) allow the plaintiffs to conduct a general examination of the defendants before the close of pleadings and (ii) impose a significant cost [page210] burden on those defendants before it was [known] if the action was certifiable.[14]

[28] The Securities Act provides its own procedure in respect of the statutory remedy and it should not be presumed that all of the rights and procedures under the Rules apply.[15] Section 138.8(3) of the OSA specifically provides that "the maker of such affidavit may be examined". This provision would be redundant and unnecessary if the Rules applied to permit the plaintiffs to examine any witnesses they chose.

[29] The plaintiffs have yet to meet their onus under s. 138.8(1). Their proposed reliance on rule 39.03 is neither contemplated by the statute nor by the principles governing examinations under this rule. To permit the plaintiffs to accomplish indirectly what they are prevented from doing directly would amount to an abuse of process.

[30] For these reasons, the plaintiffs' motion is dismissed.

[31] If the parties are unable to agree on costs, they may submit costs outlines and brief submissions within 30 days.

Motion dismissed.

CORRIGENDUM

December 4, 2008

[1] LAX J.: -- In Reasons for Decision in an interlocutory motion in this proposed class proceeding, released December 3, 2008, I said, at para. 23, that it appeared that the court in Silver v. IMAX, [2008] O.J. No. 1844 (S.C.J.) had not been provided with the Allen Committee Reports and CSA Notice 53-302 on the hearing of a motion in that case. It has since been brought to my attention that these references were provided to the court.

[2] I was also in error in stating that the court in IMAX had made no reference to these documents. I regret that I overlooked a reference to CSA 53-302 in para. 14 of the IMAX reasons.

[3] This information does not change my conclusion or my analysis.

Notes

1 Interim Report of the Committee on Corporate Disclosure, Toward Improved Disclosure - A Search for Balance in Corporate Disclosure (Allen Committee Interim Report), Toronto Stock Exchange (December 1995) at p. iii; Final Report of the Committee on Corporate Disclosure, Toward Improved Disclosure - A Search for Balance in Corporate Disclosure (Allen Committee Final Report), Toronto Stock Exchange (March 1997); Canadian Securities Administrators Notice 53-302 ("CSA Notice 53-302"), 2000 O.S.C.B. 7383, at 7385.

2 Allen Committee Interim Report, at p. 58; Allen Committee Final Report, at pp. 41-42; CSA Notice 53-302, at p. 7386.

3 CSA Notice 53-302, at p. 7387.

4 Ibid., at pp. 7389-90.

5 Epstein v. First Marathon Inc., [2000] O.J. No. 452, 2 B.L.R. (3d) 30 (S.C.J.).

6 CSA Notice 53-302, at p. 7389.

7 Ibid., at p. 7390.

8 Royal Bank v. Société Générale (Canada), [2006] O.J. No. 5081, 31 B.L.R. (4th) 63 (C.A.), at paras. 35-37; Lang v. Kligerman, [1998] O.J. No. 3708, 82 A.C.W.S. (3d) 811 (C.A.), at

para. 9; Meditrust Healthcare Inc. v. Shoppers Drug Mart, a Division of Imasco Retail Inc., [2000] O.J. No. 3762, 100 A.C.W.S. (3d) 226 (S.C.J.), at para. 11; Kaighin Capital Inc. v. Canadian National Sportsmen's Shows (1987), 58 O.R. (2d) 790, [1987] O.J. No. 2172 (H.C.J.), at p. 792.

9 CanWest MediaWorks Inc. v. Canada (Attorney General), [2007] O.J. No. 3119, 48 C.P.C. (6th) 281 (C.A.), at p. 285 C.P.C.

10 [2008] O.J. No. 1844, 167 A.C.W.S. (3d) 881 (S.C.J.), leave to appeal refused [2008] O.J. No. 2751, 169 A.C.W.S. (3d) 64 (Div. Ct.).

11 Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1995), 27 O.R. (3d) 291, [1995] O.J. No. 3886 (Gen. Div.), at p. 299 O.R.; Schreiber v. Mulroney (2007), 87 O.R. (3d) 643, [2007] O.J. No. 3901 (S.C.J.), at p. 648 O.R.

12 (1976), 14 O.R. (2d) 333, [1976] O.J. No. 2320 (H.C.J.), at p. 337 O.R., per Cory J.

13 Fehringer v. Sun Media Corp. (2001), 54 O.R. (3d) 31, [2001] O.J. No. 5783 (S.C.J.), at p. 35 O.R.; See also, Sun-Times Media Group Inc. v. Black, 2007 CarswellOnt 1186 (S.C.J., Comm. List), at paras. 46-47.

14 Fehringer v. Sun Media Corp., supra, at p. 35 O.R.

15 Elmer Driedger and Ruth Sullivan, Driedger on the Construction of Statutes, 3d ed. (Toronto: Butterworths, 1994) at p. 168; Canada Post Corp. v. Key Mail Canada Inc. (2005), 77 O.R. (3d) 294, [2005] O.J. No. 3653 (C.A.).

Case Name:

Ainslie v. CV Technologies Inc.

RE: David Ainslie and Muriel Marentette, and CV Technologies Inc., Grant Thornton LLP, Jacqueline J. Shan, Gordon G. Tallman, and Harry Buddle

[2009] O.J. No. 730

Toronto Court File No. 26/09

Ontario Superior Court of Justice

D.E. Bellamy J.

Heard: February 3, 2009.
udgment: February 11, 2009.

(16 paras.)

Statutory interpretation -- Statutes -- Role of court -- Application for leave to appeal an interlocutory order in which the judge dismissed a secondary market leave motion allowed in part -- Applicants argued case was one of first impression and was of general importance to the conduct of securities litigation -- They also submitted that the motions judge's approach ignored the plain, mandatory language of the statute and conflicted with another decision of this court -- Leave to appeal granted on the issue of whether the motions judge erred in concluding that the Ontario Securities Act did not require each defendant to file an affidavit -- The issue was a novel one that was of general public importance -- Leave to appeal the order regarding the availability of Rule 39.03 was denied as there was no good reason to doubt the correctness of the order.

Application for leave to appeal an interlocutory order in which the judge dismissed a secondary market leave motion. The judge ruled that the Ontario Securities Act did not require each defendant to file an affidavit in response to the plaintiff's motion for leave to bring an action. She also concluded that it would be an abuse of process to permit the appellants to rely on Rule 39.03, as such reliance was not contemplated either by the OSA or by the principles governing examinations under Rule 39.03. The applicants argued that the case was one of first impression and was of general importance to the conduct of securities litigation in Ontario. They also submitted that the motions judge's approach ignored the plain, mandatory language of the statute and conflicted with another decision of this court.

HELD: Application allowed in part. Leave to appeal granted on the issue of whether the motions judge erred in concluding that s. 138.8(2) of the Ontario Securities Act did not require each defendant to file an affidavit in response to the plaintiff's motion for leave to bring an action. The issue was a novel one that was of general public importance. The motions judge's decision was not specific to the facts of this case, but consisted of the first interpretation of a new section of the OSA. Leave to appeal the order regarding the availability of Rule 39.03 was denied as there was no good reason to doubt the correctness of the order.

Statutes, Regulations and Rules Cited:

Ontario Securities Act, R.S.O. 1990, c. S.5, s. 138.8

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 39, Rule 62.02(4)

Counsel:

William Sasso, Jay Strosberg & Michael Robb, for the plaintiffs/moving parties.

Alan L.W. D'Silva, for CV Technologies Inc., Shan, Tallman & Buddle, defendants/responding parties.

Robb C. Heintzman & Matthew Fleming, for Grant Thornton, defendant/responding party.

ENDORSEMENT

1 **D.E. BELLAMY J.**:-- The appellants seek leave to appeal an interlocutory order of Justice J. Lax, released on December 3, 2008, in which she dismissed a secondary market leave motion pursuant to s. 138.8 of Part XXIII.1 of the *Ontario Securities Act,* R.S.O. 1990, c. S.5 as amended (OSA). At issue is the motions judge's interpretation of subsection s. 138.8(2), which had not previously been interpreted, and the interplay between Rule 39 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194 and Part XXIII.1 of the OSA.

2 Lax J. ruled that s. 138.8(2) of the OSA does not require each defendant to file an affidavit in response to the plaintiff's motion for leave to bring an action under Part XXIII.1 of the Act, which provides for secondary market liability. She also concluded that it would be an abuse of process to permit the appellants to rely on Rule 39.03, as such reliance was not contemplated either by the OSA or by the principles governing examinations under Rule 39.03.

3 For the reasons that follow, the motion for leave to appeal with respect to s. 138.8(2) of the OSA is allowed. However, the application for leave to appeal with respect to the order regarding Rule 39.03(1) is denied, as there is no good reason to doubt the correctness of the order, given the specific facts of this case.

4 The moving parties seek leave to appeal under both branches of Rule 62.02(4). They submit that this case of first impression is of undoubted general importance to the conduct of securities litigation in Ontario as well as in other provinces with similar legislation. They also submit that the motions judge's approach ignores the apparently plain, mandatory language of the statute and conflicts with another decision of this court: *Silver v. Imax Corp.,* [2008] O.J. No. 1844 (leave to appeal

denied, [2008] O.J. No. 2751 (Sup.Ct.Jus.)). If left unchallenged, they argue, the decision may render Part XXIII.1 of the OSA ineffective, may discourage access to justice, and may leave the court in the unenviable position of having to decide a leave motion with insufficient information.

5 The responding parties argue that great deference is owed to decisions of a class action judge and, in any event, the motions judge's decision is correct. *Imax,* they submit, is not a conflicting decision. Finally, they argue that the position advocated by the moving parties is unreasonable and untenable, and that Lax, J. recognized this in her well-reasoned decision.

6 While I do not believe the moving parties meet the test under Rule 62.02(4)(a), they do meet the test under Rule 62.02(4)(b).

7 As Lax, J. correctly noted, van Rensburg, J. in *Imax* made *obiter* remarks while resolving a refusals motion in circumstances where the defendants had chosen to file affidavit material. She was interpreting subsection s. 138.8(3) and not subsection 138.8(2) as Lax, J. was. To that extent, *Imax* is not a conflicting decision within the meaning of Rule 62.02(4)(a).

8 Having said that, however, it is important to note that there are two judges of the same level of court as the motions judge who have drawn the opposite conclusion from hers on this very subsection: van Rensburg, J., who ruled on the refusals motion and who is the case management judge dealing with all issues arising in the Imax matter, and Langdon, J. who disposed of the application for leave to appeal on the same matter. Justice van Rensburg had this to say about s. 138.8:

> 17. ... The fact that proposed defendants are not required generally under the Rules to make documentary production and are not subject to discovery is irrelevant, as is the observation that shareholders do not generally have access to confidential records of issuers. The *Securities Act* provides its own procedure in respect of the statutory remedy, that specifically requires proposed defendants to put forward information (presumably otherwise confidential and non-compellable information to the extent it may be relevant to their defence) and that specifically authorizes examination on such information. A shareholder who seeks leave to commence a claim under s. 138.8 has special powers that are available in the context of such a claim and not generally.
>
> 18. ... In this motion, much more is required of both the plaintiffs and the respondents. The plaintiffs cannot rely on their allegations, but must put forward evidence, which in turn can be tested in cross-examination. Likewise, in opposing leave, each prospective defendant must come forward with its defences, with evidence in support. The merits of the claim are clearly relevant, and based on the evidence adduced and tested, the plaintiffs must establish their good faith and that the action has a reasonable possibility of success at trial.
>
> 19. The challenge is that these are the first proceedings under Part XXIII.1 of the Act. The Act provides no guidance as to the interpretation of the threshold test and what type, quality and quantity of evidence a court is to consider in making a determination of the plaintiffs' good faith and the reasonable possibility of the plaintiffs' success at trial. We are left with what the statute prescribes - a mandatory requirement for each plaintiff and

> each proposed defendant to set out facts by affidavit, with the right to cross-examine the deponents of such affidavits. There is no indication in the statute that evidence put forward or examined upon must be restricted to what is in the public record. Indeed, the facts to support a due diligence defence are generally in the possession and control of the party asserting such a defence. There is no requirement in the statutory procedure for an affiant to attach documentary exhibits, but it is not unusual for exhibits to be attached to affidavits, and the parties in this case have attached extensive exhibits to their affidavits. (emphasis added throughout)

9 In the application for leave to appeal, Langdon, J. commented on s. 138.8 at paragraph 4:

> 4. S. 138.8, the "gate-keeping" section, provides that a plaintiff must obtain leave from the court before commencing such an action, and that, on an application for leave, the plaintiff *and each defendant* must serve and file affidavits setting forth the material facts on which each intends to rely. (italicized emphasis in the original)

10 I infer from the italicized emphasis on the words "and each defendant," that Langdon, J. was concluding, as van Rensburg, J. had done earlier, that the OSA required each defendant to serve and file affidavits.

11 Therefore, even though these two other decisions are not conflicting decisions in the sense that they are not interpreting the same subsection of the OSA, both decisions contain decidedly strong conclusory remarks regarding the subsection that Justice Lax was interpreting. These observations regarding the apparently mandatory language of the subsection contradict the interpretation ascribed to it by the motions judge.

Conclusion

12 On a motion for leave to appeal under Rule 62.02(4)(b), I do not need to conclude that the decision was wrong or even probably wrong or that, if I had been hearing the original motion, I would have decided it differently. It is sufficient if I am satisfied that the correctness of the order is open to very serious debate: *Ash v. Lloyd's Corp.* (1992), 8 O.R. (3d) 282 (Gen.Div.).

13 In my view, this novel issue is one that is open to very serious debate and is of general public importance requiring the attention of an appellate court. The motions judge's decision was not specific to the facts of this case, but consisted of the first interpretation of a new section of the OSA. The result of her decision is that it will potentially affect the conduct of all or many future leave motions brought under Part XXIII.1 of the OSA, together with the conduct of proceedings of any other provincial legislation that follows secondary market disclosure provisions of Part XXIII.1.

Disposition

14 For the reasons outlined above, leave to appeal the order dismissing the appellant's motion is granted on the following issue:

> Did the motions judge err in concluding that s. 138.8(2) of the *Ontario Securities Act* does not require each defendant to file an affidavit in response to the plaintiff's motion for leave to bring an action under Part XXIII.1 of the Act.

15 Leave to appeal the order regarding the availability of Rule 39.03 is denied.

Costs

16 The costs of this motion is reserved to the panel disposing of the appeal.

D.E. BELLAMY J.

cp/e/qllqs/qlcnt/qlaxw

Case Name:

Bartram (Litigation guardian of) v. Glaxosmithkline Inc.

Brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50
Between
Meah Bartram an Infant, by her Mother and Litigation Guardian, Faith Gibson, and the said Faith Gibson, Plaintiffs, and Glaxosmithkline Inc. and Glaxosmithkline UK Limited, Defendants

[2011] B.C.J. No. 1647

2011 BCSC 1174

340 D.L.R. (4th) 568

205 A.C.W.S. (3d) 905

Docket: S081441

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

N. Smith J.

Heard: July 27, 2011.
Judgment: August 30, 2011.

(22 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Procedure -- Discovery -- Production and inspection of documents -- Objections and compelling production -- Privileged documents -- Medical records -- Application by the defendants in a proposed class action for access to the plaintiffs' medical records prior to responding to the certification application dismissed -- Proposed class action related to plaintiff's use of anti-depressant drug during pregnancy and complications suffered by her infant daughter -- Defendants sought production of all medical and pharmaceutical records for plaintiff and infant from two years before plaintiff started taking drug to present -- Defendants did not establish that specific condition and medical history of only

one infant and one adult member of proposed class would either advance defendants' position or assist court.

Statutes, Regulations and Rules Cited:

Business Practices and Consumer Protection Act, SBC 2004, CHAPTER 2,

Class Proceedings Act, RSBC 1996, CHAPTER 50, s. 4, s. 4(2)(a), s. 4(2)(b)

Counsel:

Counsel for Plaintiffs: D.M. Rosenberg, Q.C. and G.T. Kosakoski.

Counsel for Defendants: R.C. Sutton and M. Shirreff.

Reasons for Judgment

1 **N. SMITH J.**:-- The plaintiffs allege that a child suffered birth defects as a result of her mother's use of the antidepressant Paxil during her pregnancy. They have applied to certify this action as a class proceeding. The present issue is whether the defendants, who manufactured and marketed the drug, should have access to the plaintiffs' medical records before they respond to the certification application.

2 According to the statement of claim, the infant plaintiff Meah Bartram was born on September 14, 2005. It is alleged that:

> The Plaintiff, Meah Bartram, suffered serious complications during her birth. In particular, Meah Bartram suffered cardiovascular defects, and was born with a moderate sized perimembranous Ventricular Septal Defect.

3 That condition is alleged to have been caused by her mother, the adult plaintiff Faith Gibson, using Paxil before and during her pregnancy. The statement of claim alleges:

> The Defendants knew or ought to have known at least as early as June, 2003, that there was a significant risk of serious adverse cardiovascular complication for newborns from pregnant mothers ingesting Paxil. The Defendants failed to apprise the Plaintiff, Faith Gibson or her physicians of that risk.

4 The certification application, which has not yet been heard, seeks the appointment of Faith Gibson as representative plaintiff in a class proceeding and seeks to define the class as "any person in Canada, born with cardiovascular defects, to women who ingested Paxil while pregnant, and the mothers of those persons".

5 The application also seeks to certify nine issues as issues common to all members of the class. For present purposes, the most significant of those proposed common issues are:

(a) did Paxil cause or increase the likelihood of birth defects?
(b) is Paxil unfit for its intended purpose?

(c) did the Defendant Glaxosmithkline Inc. fail to warn class members and/or Health Canada of the true risk of birth defects caused by using Paxil?
(d) did the Defendant Glaxosmithkline Inc. breach a duty of care to class members and if so, when and how?

The balance of the proposed common issues deal with questions of punitive damages and the possible application of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2.

6 On this application, the defendants seek production of all medical and pharmaceutical records for both the adult and infant plaintiffs for a period beginning two years before Ms. Gibson first took Paxil and continuing to the present. They say that they and their experts require these records in order to fully respond to the issues on the certification application.

7 The plaintiffs concede that, if the action is certified, some or all of these records may become producible at some point, but say they are not relevant on the certification application. The plaintiffs also point out that the defendants have not filed a statement of defence under the former rules of court or a response to civil claim under the current rules. They say there can be no obligation to provide discovery of documents because, until pleadings are closed, it is not possible to say what documents are relevant to issues in the litigation.

8 The requirements for certification and the matters that must be considered on a certification application are set out in s. 4 of the *Class Proceedings Act*, which reads:

> 4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
> (b) there is an identifiable class of 2 or more persons;
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

(b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
(d) whether other means of resolving the claims are less practical or less efficient;
(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

9 The act defines "common issues" as: "(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts".

10 In *Jones v. Zimmer GMBH*, 2010 BCSC 1504, at paras. 10-11, Loo J. described a class action as a multistage process that begins with the certification hearing, proceeds through the determination of issues common to the class and concludes with the determination of issues specific to individual class members:

> ... The common issues at the initial certification stage must not be confused with the individual issues at the last stage: s. 4 of the *Class Proceedings Act*, [...]; *Harrington v. Dow Corning*, 2000 BCCA 605 at paras. 42-46; *T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)*, 2010 ABQB 203 at para. 16.
>
> The certification stage is procedural. It focuses on the form of the action and whether the action is properly a class action. The issue on the certification stage is not whether the plaintiffs' claim is likely to succeed: *Hollick v. Toronto City*, [2001] 3 S.C.R. 158, 2001 SCC 68 at para. 16.

11 There is no automatic right to document discovery at the certification stage and a party seeking such discovery must demonstrate the need for it. In *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2007 BCSC 1663, at paras. 23-25, Myers J. stated:

> In *Mathews v. Servier Canada Inc.* (1999), 65 B.C.L.R. (3d) 348, [1999] B.C.J. No. 435 (S.C.) [Matthews cited to B.C.L.R.], Edwards J. stated at pp. 349-350:
>
> > The question of whether document discovery should be permitted before certification was addressed earlier in this case and in *Endean v. Canadian Red Cross Society*, [1997] B.C.J. No. 295 (February 6, 1997) Doc. Vancouver C965349 (B.C.S.C.). Document discovery, if ordered before certification in a case such as this where it will be an enormous task for the defendants to produce all potentially relevant documents will not be ordered automatically. The plaintiff will be required to show discovery of documents is necessary in order to inform the certification process.
> >
> > This could lead to a "chicken and egg" debate over which comes first, but unless a plausible basis for requiring extensive pre-certification document

> discovery is demonstrated, there is a risk that a requirement to make full disclosure before certification will be so onerous it will amount to an unfair imposition on defendants and potential settlement tool in the hands of a plaintiff who may not have a certifiable class action.

That analysis was adopted by Bauman J. in *Samos Investments Inc. v. Pattison*, 2001 BCSC 440, [2001] B.C.J. No. 578. It is also consistent with the approach taken in other jurisdictions. See *Murray v. Alberta (Minister of Health)*, 2007 ABQB 231, 76 Alta. L.R. (4th) 118 and *Pardy v. Bayer Inc.*, 2003 NLSCTD 130, 230 Nfld. and P.E.I.R. 325.

I, too, would adopt that approach. It appears to me that at the certification stage of a class proceeding, a party must justify the need for document disclosure. It must show that the sought-after documents would inform the certification process. I do not say the onus is a high one: that is not an issue I need address because I do not think the plaintiffs have even met a low threshold here.

12 Two recent decisions of this Court have considered applications for pre-certification production of the proposed representative plaintiffs' medical records. Both thoroughly reviewed the applicable case law from across Canada, but came to opposite conclusions on the facts of each case. The governing principles were summarized by Gropper J. in *Stanway v. Wyeth Canada*, 2010 BCSC 1497, at para. 21:

> The principles thus derived are:
>
> 1. Precertification disclosure is ordered in the exceptional case where the defendant demonstrates that the record before the court for the certification hearing will be inadequate for consideration of the issues at that stage of the proceedings.
> 2. In considering whether an order for disclosure ought to be made the court must address the goals of judicial economy, access to justice, and behaviour modification.
> 3. It can be assumed that each individual's medical record will be unique. However, the medical evidence suggesting the significance of the individual factors of those who may have been prescribed and ingested the prescription drug may be necessary to furnish the evidentiary record;
>
> and specifically in British Columbia,
>
> 5. There is no right to examine the representative plaintiff or other affiants in British Columbia; an order of the court is required.
> 6. In British Columbia, in accordance with the Act, the court must consider whether the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members, and whether questions of fact or law

> common to the members of the class predominate over any questions affecting only individual members.

13 The proposed common issues in *Stanway* dealt with an alleged causal link between certain medications and breast cancer. The medical evidence identified a wide range of individual risk factors for breast cancer and suggested that treatment decisions may be highly individualized in each case. Gropper J. held that it was "the exceptional case" where pre-certification disclosure of medical records was required in order to determine the predominance of common issues.

14 The proposed common issues and proposed class here appear to be more narrowly defined than in *Stanway*. This action focuses on the use of the drug during a defined, relatively brief period of time (pregnancy) and alleges a close temporal connection between that use and the time the alleged injury occurred or became manifest (at or near the time of birth.)

15 I also note that, subsequent to this application being argued, Gropper J. has given reasons for judgment on certification in *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057. Although production of medical records had been ordered, evidence from those records does not appear to have played a significant role in the certification hearing. Only one of 82 paragraphs in the judgment refers to a submission based on the records and Gropper J. did not accept that submission.

16 In Jones, which was decided the day before *Stanway* was argued, Loo J. denied the defendant's application for production of medical records prior to certification. Jones concerned an allegedly defective hip implant. Loo J. referred (as did Gropper J. in *Stanway*) to *Pardy v. Bayer Inc.*, 2003 NLSCTD 130. In that case, which dealt with the alleged adverse effects of a drug, the court said at paras. 47 and 48:

> The Defendant contended that the medical records are relevant to whether the Plaintiffs are in the classes proposed, whether the Plaintiffs are representative and whether certification is warranted. The Defendant challenged the class definition proposed by the Plaintiffs and argued that factors such as the timing of prescriptions, the amount of prescribed dosages, co-prescription of other drugs and the advice of the Plaintiffs' physicians may indicate that the only classes worthy of consideration would be too narrow to warrant certification. The Defendant submitted that the Plaintiffs' medical records may provide information on these factors.
>
> The medical records of the Plaintiffs are clearly relevant to the merits of their individual claims but, as noted above, the certification stage is not meant to determine the merits of the action. Indeed the Court must be vigilant to ensure that the certification application does not become mired down in the merits of an individual claim. [Emphasis added]

17 The defendants rely on an affidavit from Dr. Edward Lammer, a paediatrician and medical geneticist, who says there are a large number of cardiovascular malformations and abnormalities with a variety of causes:

> Ms. Gibson's daughter, [Meah], is stated to have been both with a ventricular septal defect ("VSD"), a structural cardiovascular condition that characterized by a hole in the wall that divides the lower pumping chambers of the heart into right

> and left ventricles. There are different types of VSDs characterized both by anatomic location of the defect and its pathogenesis - *i.e.*, its developmental origin. [Emphasis in original.]
>
> In addition to VSDs, there are numerous other types of structural cardiovascular malformations as well as functional cardiovascular abnormalities. While most structural malformations have their genesis during the first trimester of pregnancy, functional abnormalities may occur at any time during gestation, and even postnatally. In addition, within the first trimester, there are different windows of vulnerability during which the heart is susceptible to different types of structural malformations.

18 Dr. Lammer's affidavit exhibits a copy of an opinion he provided for use in a proposed Paxil class action in Saskatchewan, which did not proceed. In that opinion, he states:

> A causation determination is not a "one size fits all" proposition. Rather, it is a determination that must be made with defect and pathogenetic specificity. Consequently, before undertaking an appropriate causation inquiry, it is imperative to have a precise clinical diagnosis and phonotypic description for each child included in the purported class. Without such phonotypic specificity, a valid causation hypothesis cannot be formulated and a meaningful causation determination cannot be undertaken.

19 Dr. Lammer reviewed records in the Saskatchewan case and says:

> ... Based on my review, I was able to comment more specifically on: (i) the nature of each child's birth defect; (ii) individual genetic and other factors involved in their etiology; and (iii) how, ultimately, these particular birth defects related to and differed from the broad range of alleged conditions encompassed by the class definition. The medical records also provided an effective context for explaining the necessary scientific inquiries that would need to be undertaken in assessing any possible connection between Paxil (R) use and the alleged conditions.

20 In my view, Dr. Lammer's evidence serves to negate, rather than support, the relevance of individual medical records at this stage of this proceeding. I have no doubt that there are many different cardiovascular defects, each of which may have a number of possible causes. The number and nature of those variables and how they may affect the causation analysis in an individual case may be an important factor to consider on the certification application and the defendants may wish to present evidence, from Dr. Lammer or other experts, on those matters. Such evidence would likely be based largely on general medical principles, medical literature and perhaps the experts' own experience and research. In that context, I fail to see how the specific condition and medical history of only one infant and one adult member of the proposed class will either advance the defendants' position or assist the court.

21 In conclusion, I am not persuaded that this is one of the exceptional cases where pre-certification disclosure of medical records is necessary. Indeed, the introduction of individual medical records at this stage would be more likely to improperly confuse the issues on the certification action with a premature consideration of the merits of an individual claim.

22 The defendants' application is dismissed.

N. SMITH J.

cp/e/qlrds/qlvxw/qlhcs

Case Name:

Bartram (Litigation guardian of) v. Glaxosmithkline Inc.

Between
Meah Bartram, an Infant by her Mother and Litigation Guardian, Faith Gibson and the said Faith Gibson, Respondents (Plaintiffs), and
Glaxosmithkline Inc. and Glaxosmithkline UK Limited, Appellants (Defendants)

[2011] B.C.J. No. 2516

2011 BCCA 539

315 B.C.A.C. 79

346 D.L.R. (4th) 361

211 A.C.W.S. (3d) 816

Docket: CA039373

British Columbia Court of Appeal
Vancouver, British Columbia

J.E. Prowse J.A.
(In Chambers)

Heard: December 21, 2011.
Judgment: December 30, 2011.

(26 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Certification -- Procedure -- Discovery -- Production and inspection of documents -- Privileged documents -- Medical records -- Appeals -- Quashing or dismissal of -- No reasonable chance of success -- Appeal by drug manufacturer from dismissal of production application prior to responding to certification application dismissed -- Manufacturer sought production of medical records of mother of proposed representative plaintiff, allegedly injured in utero through mother's use of anti-depressant which manufacturer knew could have negative effects on fetuses -- Judge gave due consideration to record

in refusing to order production as unnecessary and having potential to confuse issues -- Matter not of importance to profession or action itself -- Delay appeal could cause was another reason to dismiss appeal -- Class Proceedings Act, s. 4.

Appeal by Glaxosmithkline from the dismissal of its application for production of the medical and pharmaceutical records of Bartram, the proposed representative plaintiff in a class proceeding, prior to responding to the application for certification. Bartram was a child born in 2005 to a mother who took Paxil, an anti-depressant manufactured and marketed in Canada by Glaxosmithkline, during her pregnancy. Bartram allegedly sustained a cardiovascular defect as a result of her mother's use of Paxil. It was alleged that Glaxosmithkline knew, at least by June 2003, that there was a significant risk of such problems in babies born to mothers taking Paxil, but failed to advise Bartram's mother or her physicians of that risk. The documents supporting the certification application included a December 2005 warning issued by Glaxosmithkline to health practitioners, indicating that Paxil might cause a higher incidence of birth defects in children born to mothers taking Paxil in the first trimester of pregnancy. Glaxosmithkline took the position that it needed to review medical and pharmaceutical records for Bartram's mother for a period of two years before she started taking Paxil until the present, in order to properly respond to the certification application. The judge noted that Glaxosmithkline lacked a right to discovery during the certification process, and found that it failed to prove production in this case was necessary. He stated that the information sought was more likely to confuse the issues on the certification application with a premature consideration of an individual claim.

HELD: Appeal dismissed. Glaxosmithkline failed to disclose arguable grounds for appeal. There was no basis to conclude that the judge failed to fully consider the adequacy of the record before him in dismissing Glaxosmithkline's production request. The proposed appeal was not of general importance, because the decision under appeal was an exercise of an individual judge's discretion, not a statement on the law regarding production in class proceedings. The appeal was not of importance to the action, as Glaxosmithkline could seek production of the records at a later stage in the proceedings if necessary. The potential the appeal had to delay the certification application was another reason to dismiss it.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, RSBC 1996, CHAPTER 50, s. 4, s. 4(1), s. 4(1)(c), s. 4(1)(d), s. 4(1)(e)

Appeal From:

On appeal from: Supreme Court of British Columbia, August 30, 2011 (*Bartram v. Glaxosmithkline Inc.*, 2011 BCSC 1174, Vancouver Registry S081441)

Counsel:

Counsel for the Appellants: W. McNamara, R. Sutton.

Counsel for the Respondents: G. Kosakoski, D.M. Rosenberg, Q.C.

Reasons for Judgment

1 **J.E. PROWSE J.A.**:-- Glaxosmithkline Inc. (the "defendant") is applying for leave to appeal the decision of a chambers judge, made August 30, 2011, dismissing its application for production of the medical and pharmaceutical records of the intended representative plaintiffs in a proposed class action proceeding, prior to responding to the application for certification. It also seeks a stay of proceedings in the Supreme Court pending the disposition of the appeal.

2 By way of brief background, the plaintiffs have applied to certify a class action on behalf of children born in Canada to mothers who took the antidepressant prescription drug Paxil during their pregnancies, and on behalf of mothers who took the drug. The certification application (set to be heard in October 2012) seeks to have Faith Gibson appointed as representative plaintiff in the class proceeding. She claims that she took Paxil during her pregnancy, as a result of which her daughter, born in September 2005, suffers from cardiovascular defects, and, in particular, a ventricular septal defect ("VSD"). The defendant manufactures, markets and sells Paxil in Canada.

3 The plaintiffs allege, amongst other things, that the defendant knew or ought to have known, at least as of June 2003, that there was a significant risk of adverse cardiovascular complication for babies born to mothers who ingested Paxil during pregnancy, and that the defendant failed to apprise the plaintiff or her physicians of that risk. Included in the materials before the chambers judge was a document dated December 2005 authored by the defendant (or related company) informing health practitioners that Paxil may cause a higher incidence of birth defects, particularly atrial septal defects ("ASDs") and VSDs, in children born to mothers who took Paxil during the first trimester of pregnancy.

4 The common issues sought to be certified by the plaintiffs include: (a) whether Paxil caused or increased the likelihood of birth defects; (b) whether Paxil is unfit for its intended purpose; (c) whether the defendants failed to warn class members and/or Health Canada of the true risk of birth defects caused by using Paxil; and (d) whether the defendants breached a duty of care to class members, and if so, when, and how. Counsel for the plaintiffs advised in oral argument that "failure to warn" is the predominant issue.

5 The defendant's application was for the production of all medical and pharmaceutical records for the plaintiffs for a period beginning two years before Ms. Gibson first took Paxil and continuing to the present. It alleges that it requires those records in order to properly and fully respond to the certification application.

6 The plaintiffs took the position before the chambers judge that the requested documents may be relevant and admissible at some later time in the proceedings, but that they were not relevant on the certification application, particularly in circumstances where the defendants had not yet filed materials responsive to the certification application (or, for that matter, a statement of defence or a response to civil claim).

7 After referring to relevant provisions of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "*Act*"), authorities in British Columbia and other Canadian jurisdictions, and the record before him, the chambers judge, who is also the case management judge, dismissed the defendant's application. He observed that there was no automatic right to discovery of documents at the certification stage and that the applicant must demonstrate a need for such discovery. He dealt at some length with the evidence of Dr. Lammer, upon which the defendant placed particular reliance in asserting the need for production of the requested documents and gave reasons. He then set forth his conclusion with

respect to the request for production of the requested documents at para. 21 of his reasons, as follows:

> In conclusion, I am not persuaded that this is one of the exceptional cases where pre-certification disclosure of medical records is necessary. Indeed, the introduction of individual medical records at this stage would be more likely to improperly confuse the issues on the certification action with a premature consideration of the merits of an individual claim.

8 In determining whether this is an appropriate case in which to grant to leave to appeal, the Court must consider the following factors:

1) whether the appeal is *prima facie* meritorious;
2) whether the point on appeal is of significance to the practice;
3) whether the point raised is of significance to the action itself; and
4) whether the appeal will unduly hinder the progress of the action.

9 With respect to the merits of the proposed appeal, counsel for the defendant acknowledges that the order under appeal is essentially discretionary in nature. He submits, however, that the chambers judge erred in the exercise of his discretion by failing to properly consider all of the requirements for certification under s. 4(1) of the *Act* in determining whether the requested records were necessary to make a fair and informed decision on the pending application for certification. In particular, he submits that the chambers judge erred by focusing "solely" on s. 4(1)(c) of the *Act*, which deals with the question of common issues, and in failing to consider whether the records were necessary to determine whether a class proceeding was the preferable procedure (s. 4(1)(d)) and whether the proposed representative plaintiffs would fairly and adequately represent the proposed class (s. 4(1)(e)). The defendant also submits that the chambers judge erred in his analysis of the common issues factor by misinterpreting and misapplying the expert evidence of Dr. Lammer, an expert relied upon by the defendant in asserting that the documents were necessary to properly respond to the application for certification.

10 In its written argument, the defendant also suggests that, if the records are produced, "it may be clear that Ms. Gibson did not ingest Paxil during pregnancy, or that Ms. Bartram does not have the [medical] conditions alleged." The defendant did not pursue this submission in oral argument, and it appears to me to be sufficiently lacking in any discernible foundation, except, perhaps, as an invitation to a fishing expedition, that I do not propose to address it.

11 The defendant also submits that the chambers judge failed to consider that its request for production of records in this case would constitute a minimal inconvenience and expense to the plaintiffs on the basis that the records requested are limited in scope and the defendant is prepared to pay for their production. Counsel for the defendant also adversely commented on the nature of the medical evidence proffered by the plaintiffs on the basis that it suggested a lawyer-driven approach to this litigation. This suggestion does not appear to have been made to the chambers judge, and I do not find it helpful to my determination on this leave application.

12 Counsel for the plaintiffs submits that there is no merit to the proposed appeal and that the application for the production of the requested documents is, at best, premature. Counsel emphasizes that the decision not to order production was a discretionary decision, which attracts a highly

deferential standard of review. That standard of review has been found by this Court to be even higher where the decision is made by a case management judge who is familiar with the case and has ongoing responsibility for it. Counsel observes that a case management judge on procedural applications such as this is in the best position to determine what evidence is required in order to properly determine a certification application. He submits that there is no basis for interfering with the decision that no persuasive basis had been established for the production of the requested documents at this early stage of the proceeding. Counsel submits that the chambers judge was clearly aware of, and referred to, the requirements of s. 4 of the *Act* and that it was not necessary for him to give detailed reasons for rejecting the defendant's submissions with respect to each of the subsections.

13 Counsel for the plaintiffs also submits that the evidence of Dr. Lammer, upon which the defendant placed considerable reliance, was focused largely on causation issues, and that the chambers judge was justified in finding that the production of the requested documents at this stage of the proceeding would be more likely to confuse, than to elucidate, the issues on certification.

14 The plaintiffs submit that the fact that the defendant is prepared to pay for production of the documents is of little moment in determining whether the chambers judge erred in finding that they were not necessary at this stage of the proceedings. They also submit that the exceptionally private nature of the documents requested, which relate to Ms. Gibson's physical and mental health before, during and following the birth of her child, are factors which militate against requiring production earlier than necessary to do justice between the parties.

15 In summary, the plaintiffs submit that the defendant is simply seeking to have this Court substitute its discretion for that exercised by the chambers judge, which is not a permissible basis for granting leave to appeal.

16 Generally speaking, the merits threshold in determining whether to grant leave to appeal is relatively low. In *A.L.J. v. S.J.M.* (1994), 46 B.C.A.C. 158 (in Chambers), the test was expressed as "[w]hether the applicant has identified a good arguable case of sufficient merit to warrant scrutiny by a division of this Court." Where the order under consideration is discretionary, leave to appeal will generally only be granted where the order is clearly wrong, where a serious injustice would occur if leave were refused, or where discretion was exercised on a wrong principle. (See, for example, *Strata Plan LMS 2019 v. Green*, 2001 BCCA 286 (in Chambers).) The standard of review of discretionary orders is very stringent, and it is even more so where the appeal is from the discretionary order of a judge who has case management of the proceedings. The reason for the deferential approach to such orders is referred to by Mr. Justice Donald in *Robak Industries Ltd. v. Gardner*, 2006 BCCA 395 (in Chambers), at para. 13:

> This Court's policy of non-intervention derives from the obvious reason that the orderly pre-trial processes in complex cases should be interrupted by this Court as seldom as possible given the power of the case management judge to adjust to evolving circumstances and even to re-visit directions when necessary.

17 After reviewing the materials and authorities, I am not persuaded that there is any merit in the proposed grounds of appeal. In coming to that conclusion, I am in essential agreement with the substance of the submissions made by counsel for the plaintiffs in opposition to this application. For example, I am unable to ascertain a reasoned basis for finding that the chambers judge failed to ful-

ly consider the adequacy of the record before him in relation to the factors set out in s. 4 of the *Act*. He specifically referred to the s. 4 criteria for certification and he was not required to do a subsection by subsection analysis of why he found the evidence sufficient to enable him to proceed without requiring production of the requested medical records. In coming to that conclusion, he clearly considered the evidence of Dr. Lammer, who opined that further evidence was necessary. Ultimately, that is a legal decision, albeit informed by the medical and other evidence. The chambers judge was of the view that production of the requested evidence had the potential to confuse, rather than clarify, the relevant issues at the certification stage. After reviewing Dr. Lammer's affidavit, I see no likelihood of this Court finding that the chambers judge erred in any significant way in his interpretation of this evidence, or in failing to appreciate its significance.

18 Based on the authorities to which he was referred, the chambers judge accepted that production of the requested documents at this early stage of the proceedings should not be ordered as a matter of course, but only in exceptional circumstances where, for example, they were necessary to supplement the record before the court at the certification hearing. As case management judge, and the judge who will ultimately hear the certification application, he was in a privileged position in making the determination as to whether the record was sufficient in that regard. I can see no prospect of a division of this Court interfering with his judgment call in that regard.

19 In my view, the tenor of the defendant's submission, based largely on Dr. Lammer's affidavit, is that medical records of this kind, or the equivalent information in affidavit form, is essential as a matter of course to enable a defendant in an action involving personal injury in the product liability context to properly plead or respond to an application for certification. The effect of that position would be to transform what is a recognized exception to the practice into the norm. In that regard, it is noteworthy that the counsel for the defendant did not challenge the law upon which the chambers judge relied, and, in particular, the principle that orders of this nature were not to be granted as a matter of course. Rather, the defendant reiterated the submissions it made to the chambers judge to the effect that it was not possible to determine the issues on certification without the requested documents, given what it described as a "paper thin" evidentiary record. As earlier stated, it is not for this Court to substitute its exercise of discretion for that of the chambers judge, in the absence of clear error of the nature I have earlier described.

20 It may be that at some point after the defendant files its responsive materials on the certification application (and/or files a statement of defence in the action), a more substantial basis for production of documents will arise. That remains to be seen. At this stage, however, I repeat that I see little likelihood that a division of this Court, applying the relevant standard of review, would interfere with the impugned order.

21 In addition to finding that the proposed appeal does not pass the merits threshold, I am also of the view that the issues raised are not of general significance to the practice. In that respect, there is no challenge to the general principles applicable to production of documents at the pre-certification stage of proposed class action proceedings, at least in British Columbia. (There may be variations from province to province depending on the wording of the legislation.) As earlier stated, the challenge here is to the exercise of discretion by the chambers judge, a matter which will vary from case to case.

22 Counsel for the defendant indicated that it would be helpful if this Court were to provide greater direction as to the nature and extent of the evidentiary foundation required for a certification application, but I do not see this case, based on its facts, as the vehicle for such a discussion. Nor do

I find the simple fact that class action proceedings are frequently national in scope calls for appellate intervention for the purpose of stating general principles in the absence of a significant conflict in the authorities in this province. On the contrary, the fact that procedural requirements differ to some extent from province to province suggests that principles enunciated in this Court may not prove to be of general utility.

23 Nor am I persuaded that this appeal is of particular interest to the action itself since, as noted by Mr. Justice Donald, there is a considerable degree of flexibility in the case management process which may result in the issue of production of these records being revisited at a later stage. Further, if certification is ultimately granted and the defendant pursues an appeal of that decision, my decision on this leave application should not be taken to preclude this issue being raised as an issue on that appeal.

24 Finally, with respect to the timing of this application and whether an appeal would unduly interfere with the progress of the action, I note that this Court has very early dates for the hearing of an appeal; the parties agreed that they could be prepared to proceed with an appeal in mid-March 2012; and the certification hearing is not set to be heard until October 2012. If the other factors favoured granting leave to appeal, the factor of potential delay would not have militated against doing so.

25 In the result, having considered all of the relevant factors, I would dismiss the application for leave to appeal.

26 Since I have dismissed the application for leave to appeal, I would dismiss the application for a stay as moot.

J.E. PROWSE J.A.

cp/e/qlrds/qljxr/qlgpr/qlhcs

Case Name:

Pro-Sys Consultants Ltd. v. Microsoft Corp.

Between
Pro-Sys Consultants Ltd. and Neil Godfrey,
Plaintiffs, and
Microsoft Corporation and Microsoft Canada Co./Microsoft Canada CIE, Defendants

[2007] B.C.J. No. 2443

2007 BCSC 1663

162 A.C.W.S. (3d) 372

49 C.P.C. (6th) 383

[2008] 3 W.W.R. 761

76 B.C.L.R. (4th) 171

2007 CarswellBC 2717

Docket: L043175

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

E.M. Myers J.
(In Chambers)

Heard: November 9, 2007.
Oral judgment: November 9, 2007.

(33 paras.)

Civil procedure -- Parties -- Class or representative actions -- Certification -- Motion by the plaintiffs dismissed -- The plaintiffs proposed a class action hearing for damages flowing from the an-

ti-competitive practices of the defendants -- The plaintiffs sought production from the defendants of documents relevant to certification -- Such documents included materials related to similar hearings in the United States and the calculation of damages -- The court found that the plaintiffs' broad request did not demonstrate that the documents would inform the certification process, or were necessary for certification.

Civil procedure -- Discovery -- Production and inspection of documents -- Motion by the plaintiffs dismissed -- The plaintiffs proposed a class action hearing for damages flowing from the anti-competitive practices of the defendants -- The plaintiffs sought production from the defendants of documents relevant to certification -- Such documents included materials related to similar hearings in the United States and the calculation of damages -- The court found that the plaintiffs' broad request did not demonstrate that the documents would inform the certification process, or were necessary for certification.

Counsel:

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Counsel for the Defendants: N. Finkelstein, J. Sullivan and S. Knowles.

[Editor's note: A corrigendum was released by the Court November 28, 2007. The corrections have been made to the text and the corrigendum is appended to this document.]

Reasons for Judgment

1 E.M. MYERS J. (orally):-- This motion, brought by the plaintiffs, concerns the issue of document production for the purposes of a class action certification hearing. The plaintiffs say they are entitled to the production of "all documents that are relevant to the certification issues". However, their main focus is on documents exchanged in a certification application in similar litigation in the United States and documents relating to proof of damages.

2 All of the causes of action flow from alleged anti-competitive practices of Microsoft which resulted in class members paying more (indirectly) for Microsoft software than they otherwise would have paid.

3 If certified as sought, the class would be comprised of persons in British Columbia who indirectly acquired a license for Microsoft's operating systems or certain Microsoft application software after January 1, 1994.

4 Indirect acquisition refers to purchasers who bought computers with the software pre-installed, as opposed to buying the software directly from a retail outlet.

5 The certification hearing is scheduled for February 4, 2008.

6 The plaintiffs filed their certification materials in June 2007, and Microsoft has recently filed its reply materials.

7 A backdrop to this motion - and the litigation as a whole - is similar litigation in the United States. I am told that there were 23 actions brought in various United States state courts on behalf of indirect purchasers. Two actions were not certified, 20 were settled, and one remains outstanding.

8 The most recent class action in the United States to be settled was in Iowa, which settled part way through trial. Before the trial, Microsoft brought an unsuccessful decertification motion.

9 Not surprisingly, numerous documents were filed or exchanged in that action, both in relation to the certification process and the action in principle.

10 The filing and exchange of documents was done pursuant to a confidentiality order of the Iowa court.

11 One of the main thrusts of the plaintiffs' application is the request for an order that Microsoft produce documents from the Iowa litigation. The plaintiffs do not ask me to make an order which would violate or conflict with the Iowa confidentiality order. Rather, they submit that I should make the order for production of the requested documents on the basis that the production would be subject to that order. The plaintiffs would then apply to have the Iowa order varied.

12 The plaintiffs have also filed a motion in the Iowa court to be added as an intervenor to that litigation so that they can obtain access to the documents. The motion is scheduled to be heard at the end of this month.

13 As I stated, the plaintiff's motion requested the production of all documents that are relevant to the certification issues. At the hearing of the motion, the plaintiffs "narrowed" this to four categories:

(a) documents that were referred to in - but not exhibited to - affidavits filed by Microsoft in opposition to the certification of this action. Microsoft rightly conceded that those documents are relevant to the certification proceeding and are producible;
(b) relevant documents that are in the possession and control of Microsoft but are not covered by any protective orders;
(c) Microsoft documents that have been produced for the Iowa certification proceedings or decertification proceedings which are subject to the confidentiality order; and
(d) documents of others who were not parties to the U.S.A. litigation, but which Microsoft has in its possession and control as a result of the Iowa proceedings. These would also be subject to the confidentiality order.

14 The plaintiff's request encompasses, at minimum, all documents used in the Iowa certification and de-certification applications.

15 A major issue in the certification motion will be whether there are class-wide methods of measuring the size of the alleged illegal overcharge that was charged to the direct purchasers of the Microsoft software, and how much of that overcharge was passed on by the direct purchasers to the ultimate consumers.

16 The parties have exchanged expert reports that address that issue. The plaintiffs' experts have set out several methods by which the passed-on overcharge can be calculated. (One of those experts was also used by plaintiffs in various U.S.A. actions, including the Iowa action.)

17 Microsoft has filed reply affidavits from experts attempting to demonstrate that the passed-on overcharges cannot be calculated.

18 A central point of the plaintiffs' submissions is that they are entitled to the further document disclosure in order to have their experts reply to the reports prepared for Microsoft on that issue. However, the plaintiffs' experts have not deposed that they need further documents in order to reply.

19 The plaintiffs submit that there is a general obligation in British Columbia for parties to produce all documents which are relevant to certification issues. Hence, the wide scope of their notice of motion.

20 Microsoft argues that it is for the plaintiffs to prove that document production is necessary for the determination of the certification motion. It argues that no general request for production was made by the plaintiffs prior to them filing their materials and that the plaintiffs' experts have not said that they require further documents in order to rebut the expert reports prepared for Microsoft.

21 The plaintiffs rely on the following statement of Macaulay J. in ***Kimpton v Canada (Attorney General)***, 2002 BCSC 67, 97 B.C.L.R. (3d) 119, at para. 16:

> I conclude that the objectives of the Act as well as the Rules can be best be achieved by ordering document production limited to those relevant to the issues at the certification hearing.

22 However, that statement, and the decision itself, need to be put in the context of the other authorities referred to by Macaulay J.

23 In ***Mathews v. Servier Canada Inc.*** (1999), 65 B.C.L.R. (3d) 348, [1999] B.C.J. No. 435 (QL) (S.C.) [***Matthews*** cited to B.C.L.R.], Edwards J. stated at pp. 349-350:

> The question of whether document discovery should be permitted before certification was addressed earlier in this case and in *Endean v. Canadian Red Cross Society*, [1997] B.C.J. No. 295 (February 6, 1997) Doc. Vancouver C965349 (B.C.S.C.). Document discovery, if ordered before certification in a case such as this where it will be an enormous task for the defendants to produce all potentially relevant documents will not be ordered automatically. The plaintiff will be required to show discovery of documents is necessary in order to inform the certification process.
>
> This could lead to a "chicken and egg" debate over which comes first, but unless a plausible basis for requiring extensive pre-certification document discovery is demonstrated, there is a risk that a requirement to make full disclosure before certification will be so onerous it will amount to an unfair imposition on defendants and potential settlement tool in the hands of a plaintiff who may not have a certifiable class action.

24 That analysis was adopted by Bauman J. in ***Samos Investments Inc. v. Pattison***, 2001 BCSC 440, [2001] B.C.J. No. 578 (QL). It is also consistent with the approach taken in other jurisdictions. See ***Murray v. Alberta (Minister of Health)***, 2007 ABQB 231, 76 Alta. L.R. (4th) 118 and ***Pardy v. Bayer Inc.***, 2003 NLSCTD 130, 230 Nfld. and P.E.I.R. 325.

25 I, too, would adopt that approach. It appears to me that at the certification stage of a class proceeding, a party must justify the need for document disclosure. It must show that the sought-after documents would inform the certification process. I do not say the onus is a high one: that is not an issue I need address because I do not think the plaintiffs have even met a low threshold here.

26 A request for all documents relevant to the certification issue does not advance the matter - it merely begs the question as to what is relevant. It does not address the requirement of a party to demonstrate what documents are actually required for the certification process.

27 The broad request also blurs the dividing line between documents that are required for certification and those which are to be produced as part of the action in principle if it is certified. As I have stated above, the main substantive issue underlying this document motion is whether the plaintiffs will have the ability - if the action is certified - to show class-wide damages. At one level, every document that would go to proving damages would be producible as being relevant to that issue. I do not see the utility or the necessity to make such a broad order. Without the demonstration that such documents are, in fact, necessary to certification, it would cast too wide a net.

28 I also do think that Microsoft should be ordered to produce all the U.S.A. certification documents in its power or control. While that request is somewhat narrower than a request for all documents relevant to the certification issues, it still involves millions of pages and, again, the plaintiffs have not shown that those documents are necessary to decide the certification issues in this Court.

29 The one limited class of documents that has been requested by the plaintiffs is a series of expert reports filed in the U.S.A. cases by plaintiffs. The reports were prepared by the same expert being used by the plaintiffs in the case at bar, or his firm.

30 Once again, no need has been demonstrated for these documents. That is enough to dispose of the issue.

31 Further, these documents are only in the hands of Microsoft because they received them in the course of the Iowa action and other litigation in the United States. They are not Microsoft's documents. Apart from the confidentiality order in Iowa, plaintiffs' counsel here would have access to them because in the case at bar they are acting with some of the class counsel from the United States litigation. Therefore the real issue engaged in this request is not the necessity to obtain those documents from Microsoft. Rather it is the Iowa confidentiality order.

32 I do not say there is anything wrong from this Court's perspective in the plaintiffs seeking documents from the U.S.A. proceedings along with appropriate amendments to the confidentiality orders there. However, that issue should be dealt with head-on and not under the guise of this document production motion.

33 Accordingly, except to the extent of the documents which have been referred to by Microsoft in its reply materials, the plaintiffs' motion is denied.

E.M. MYERS J.

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Corrigendum
Released: November 28, 2007

Corrigendum to the Oral Reasons for Judgment issued advising that the first line of paragraph 28 should be changed from:

I also do think that Microsoft should be ordered to produce all the ...

To read:

I also do **not** think that Microsoft should be ordered to produce all the ...

cp/e/qlaxs/qlmxt/qlbrl/qljxh/qlcas/qltxp/qlrxg