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2009 CarswellAlta 1269, 2009 ABQB 490, [2009] A.W.L.D. 3785, 57 C.B.R. (5th) 205, 479 A.R. 318

SemCanada Crude Co., 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 SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 319278 Nova Scotia Company and 1380331 Alberta ULC

Alberta Court of Queen's Bench

B.E. Romaine J.

Heard: August 5, 2009 Judgment: August 24, 2009 Docket: Calgary 0801-08510

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Counsel: A. Robert Anderson, Q.C., Rupert Chartrand, Michael De Lellis, Cynthia L. Spry, Douglas Schweitzer for Applicants

David R. Byers, for Bank of America

Patrick T. McCarthy, Josef A. Krüger for Monitor

Douglas S. Nishimura for ARC Resources Ltd., City of Medicine Hat, Black Rider Resources Inc. Wolf Coulee Resources Inc., Orleans Energy Ltd., Crew Energy Inc., Trilogy Energy LP

Brendan O'Neill, Jason Wadden for Fortis Capital Corp.

Sean Fitzgerald for Tri-Ocean Engineering Ltd.

Dean Hutchison for Crescent Point Energy Trust, Enbridge Pipelines Inc.

Caireen Hanert for Bellamount Exploration Ltd., Enersul Limited Partnership

Bryce McLean for DPH Focus Corporation

Aubrey Kauffman for BNP Paribas

Subject: Insolvency

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

S brought application for various relief related to holding of meetings of creditors to consider three plans to restructure and distribute assets of Companies' Creditors Arrangement Act ("CCAA") applicants, including applications for orders authorizing establishment of single class of creditors for each plan for purpose of considering and voting on plan — Applications granted — There was no good reason to exclude secured lenders and noteholders from single classification of voters in proposed plans, nor to create separate class for their votes — There were no material distinctions between claims of these two creditors and claims of remaining unsecured creditors that were not more properly subject of sanction hearing, apart from deferred issue of whether secured lenders were entitled to vote their entire guarantee claim — No rights of remaining unsecured creditors were being confiscated by proposed classification, and no injustice arose, particularly given separate tabulation of votes which enabled voice of remaining unsecured creditors to be heard and measured at sanction hearing — There were no conflicts of interest so over-riding as to make consultation impossible — While there were differences of interest and treatment among affected creditors in class, these were issues that would be addressed at sanction hearing — Approval of proposed classification in context of integrated plans was in accordance with spirit and purpose of CCAA.

Cases considered by B.E. Romaine J.:

Campeau Corp., Re (1991), 10 C.B.R. (3d) 100, 86 D.L.R. (4th) 570, 1991 CarswellOnt 155 (Ont. Gen. Div.) — considered

Canadian Airlines Corp., Re (2000), 80 Alta. L.R. (3d) 213, 2000 ABCA 149, 2000 CarswellAlta 503, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — considered

Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 2000 ABCA 238, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — followed

Canadian Airlines Corp., Re (2000), 88 Alta. L.R. (3d) 8, 2001 ABCA 9, 2000 CarswellAlta 1556, [2001] 4 W.W.R. 1, 277 A.R. 179, 242 W.A.C. 179 (Alta. C.A.) — referred to

Canadian Airlines Corp., Re (2001), 2001 CarswellAlta 888, 2001 CarswellAlta 889, 275 N.R. 386 (note), 293 A.R. 351 (note), 257 W.A.C. 351 (note) (S.C.C.) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 64 Alta. L.R. (2d) 139, 1988 CarswellAlta 319 (Alta. Q.B.) — considered

San Francisco Gifts Ltd., Re (2004), 5 C.B.R. (5th) 92, 42 Alta. L.R. (4th) 352, 2004 ABQB 705, 2004 CarswellAlta 1241, 359 A.R. 71 (Alta. Q.B.) — referred to

San Francisco Gifts Ltd., Re (2004), 2004 ABCA 386, 2004 CarswellAlta 1607, 5 C.B.R. (5th) 300, 42 Alta. L.R. (4th) 371, 361 A.R. 220, 339 W.A.C. 220 (Alta. C.A.) — considered

SemCanada Crude Co., Re (2009), 2009 CarswellAlta 167, 2009 ABQB 90, 52 C.B.R. (5th) 131 (Alta. Q.B.) — referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 1991 CarswellOnt 220, 8 C.B.R. (3d) 312, 86

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D.L.R. (4th) 621 (Ont. Gen. Div.) — considered
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Stelco Inc., Re (2005), 2005 CarswellOnt 6818, 204 O.A.C. 205, 78 O.R. (3d) 241, 261 D.L.R. (4th) 368, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307 (Ont. C.A.) — considered

Woodward's Ltd., Re (1993), 20 C.B.R. (3d) 74, 84 B.C.L.R. (2d) 206, 1993 CarswellBC 555 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C.

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s. 503(b)(9) — referred to
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Chapter 7 — referred to

Chapter 11 — referred to

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

Generally - referred to

s. 6 — referred to

s. 11(1) — referred to

s. 22(2) [rep. & sub. 2007, c. 36, s. 71] — referred to

APPLICATION for orders authorizing establishment of single class of creditors for three plans to restructure and distribute assets for purpose of considering and voting on plans.

B.E. Romaine J.:

Introduction

The SemCanada Group applied for various relief related to the holding of meetings of creditors to consider three plans to restructure and distribute assets of the CCAA applicants, including applications for orders authorizing the establishment of a single class of creditors for each plan for the purpose of considering and voting on the plans. I granted the applications, and these are my reasons.

Relevant Facts

- On July 22, 2008, SemCanada Crude Company ("SemCanada Crude") and SemCAMS ULC ("SemCAMS") were granted initial Orders pursuant to s. 11(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended (the "CCAA").
- On July 30, 2008, the CCAA proceedings of SemCAMS and SemCanada Crude and the bankruptcy proceedings of SemCanada Energy Company ("SemCanada Energy") A.E. Sharp Ltd. ("AES") and CEG Energy Options, Inc. ("CEG") which had been commenced on July 24, 2008 were procedurally consolidated for the purpose of administrative convenience.

- In addition, CCAA protection was granted to two affiliated companies, 3191278 Nova Scotia Company (A319") and 1380331 Alberta ULC ("138"). SemCanada Energy, AES, CEG, 319 and 138 are collectively referred to as the "SemCanada Energy Companies". The CCAA applicants are collectively referred to as the "SemCanada Group".
- On July 22, 2008, SemGroup L.P. and its direct and indirect subsidiaries in the United States (the "U.S. Debtors") filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.
- According to the second report of the Monitor, the financial problems of the SemGroup arose from a failed trading strategy and the volatility of petroleum products prices, leading to material margin calls related to large futures and options positions on the NYMEX and OTC markets, resulting in a severe liquidity crisis. Sem-Group's credit facilities were insufficient to accommodate its capital needs, and the corporate group sought protection under Chapter 11 and the CCAA.
- 7 The SemCanada Group are indirect, wholly-owned subsidiaries of SemGroup LP. The SemCanada Group is comprised of three separate businesses:
 - (a) SemCanada Crude, a crude oil marketing and blending operation;
 - (b) the SemCanada Energy Companies, whose business was gas marketing, including the purchase and sale of gas to certain of its four subsidiaries as well as to SemCAMS; and
 - (c) SemCAMS, whose business consists of ownership interests in large gas processing facilities located in Alberta, as well as agreements to operate these facilities.
- SemCrude, L.P. as U.S. borrower and a predecessor company of SemCAMS as Canadian borrower, certain U.S. SemGroup corporations and Bank of America as administrative agent for a syndicate of lenders (the "Secured Lenders") entered into a credit agreement in 2005 (the "Credit Agreement"). The Credit Agreement provides four different credit facilities. There are no advances outstanding with respect to the Canadian term loan facility, but in excess of U.S. \$2.9 billion is owing under the U.S. term loan facility, the working capital loan facility and the revolver loan.
- Five of the SemCanada Group, including SemCanada Crude, SemCanada Energy and SemCAMS, have provided a guarantee of all obligations under the Credit Agreement to the Secured Lenders, who rank as senior secured lenders, and under a US \$600 million bond indenture issued by SemGroup. The guarantee is secured by a security and pledge agreement (the "Security Agreement") signed by the five members of the SemCanada Group.
- The SemCanada Energy Companies were liquidated or have ceased operations and no longer have significant ongoing operations. As a result of liquidation proceedings and the collection of outstanding accounts receivable, the SemCanada Energy Companies hold approximately \$113 million in cash. An application to distribute that cash to the Secured Lenders was adjourned *sine die* on January 19, 2009: *SemCanada Crude Co., Re*, 2009 ABQB 90 (Alta. Q.B.).
- Originally, SemCAMS and SemCanada Crude proposed to restructure their businesses as stand-alone operations without further affiliation with the U.S. Debtors and accordingly sought bids in a solicitation process

undertaken in early 2009. Unfortunately, no acceptable bids were received. It also became apparent that, as Sem-Canada Crude's business was closely integrated with certain North Dakota transportation rights and assets owned by the U.S. Debtors, restructuring SemCanada Crude's operations on a stand alone basis would be problematic. The SemCanada Group turned to the alternative of joining in the restructuring of the entire SemGroup through concurrent and integrated plans of arrangement in both Canada and the United States.

Summary of the U.S. and Canadian Plans

- The U.S. and Canadian plans are complex and need not be described in their entirety in these reasons. For the purpose of these reasons, the relevant aspects of the plans are as follows:
 - 1. The disclosure statement relating to a joint plan of affiliated U.S. Debtors was approved for distribution to creditors by the U.S. Bankruptcy Court on July 21, 2009. Under the Chapter 11 process, meetings of creditors are not necessary. Voting takes place through a notice and balloting mechanism that has been approved by the U.S. Court and September 3, 2009 has been set as the voting deadline for acceptance or rejection of the U.S. plan.
 - 2. The total distributable value of the SemGroup for the purpose of the plans is expected to be US \$2.3 billion, consisting of US \$965 million in cash, US \$300 million in second lien term loan interests and US \$1.035 billion in new common stock and warrants of the U.S. Debtors.
 - 3. The SemCanada Group will contribute approximately US \$161 million in available cash to the U.S. plan and US \$54 million is expected to be received from SemCanada Crude relating to crude oil settlements that will occur after the effective date of the plans, being cash received from prepayments that are outstanding on the implementation date which will be replaced with letters of credit or other postplan financing.
 - 4. Approximately US \$50 million will be retained by the corporate group for working capital and general corporate purposes, including for the post plan cash needs of SemCAMS and SemCanada Crude.
 - 5. Certain U.S. causes of action will be contributed to a "litigation trust" and will be distributed through the U.S. Plan, including to the Secured Lenders on their deficiency claims. No value has been placed on the litigation trust by the U.S. Debtors. The Monitor reports that it is unable to make an informed assessment of the value of the litigation trust assets as the trust is a complicated legal mechanism that will likely require the expenditure of significant time and professional fees before there will be any recovery.
 - 6. The U.S. plan contains a condition precedent that, on the effective date of the plan, the restructured corporate group will enter into a US \$500 million exit financing facility, which will apply to all post-restructuring affiliates, including SemCAMS and SemCanada Crude, and which will allow the corporate group to re-enter the crude marketing business in the United States and to continue operations in Canada.
 - 7. It is expected that the Secured Lenders will receive cash, second lien term loan interests and equity in priority to unsecured creditors on their secured guarantee claims of US \$2.9 billion, which will leave them with a deficiency of approximately US \$1.07 billion on the secured loans. The Secured Lenders are entitled under the U.S. Plan to a share in the litigation trust on their deficiency claim. If certain oth-

er classes of creditors do not vote to approve the U.S. plan, the Secured Lenders may also receive equity of a value up to 4.53% of their deficiency, subject to other contingencies. The Monitor reports that the Secured Lenders are thus estimated to recover approximately 57.1% of their estimated claims of US \$2.1 billion on secured working capital claims and 73.3% of their estimated claims of US \$811 million on secured revolver/term claims. The Monitor estimates that the Secured Lenders will recover no value on their deficiency claims, assuming no reallocation of equity from other categories of debtors and no value for the litigation trust.

- 8. The holders of the US \$600 million bonds (the "Noteholders") are entitled to receive common shares and warrants in the restructured corporate group, plus an interest in the litigation trust and certain trust-ee fees, for an estimated recovery of 8.34% on their claims of US \$610 million under the U.S. plan, assuming all classes of Noteholders approve the plan and no value is given to the litigation trust. Depending on certain contingencies, the range of recovery is 0.44\$ to 11.02% of their claim. Noteholders are treated more advantageously under the plans than general unsecured creditors in recognition that the Senior Notes are jointly and severally guaranteed by 23 U.S. debtors and the Canadian debtors, while in most instances only one SemGroup debtor is liable with respect to each ordinary unsecured creditor. In addition, the Noteholders have waived their right to receive distributions under the Canadian plans.
- 9. Under the U.S. Plan, general unsecured creditors will receive common shares, warrants and an interest in the litigation trust. Depending on the level of approval, recovery levels will range from 0.08% to 8.03% on claims of US \$811 million. The Monitor reports that it expects recovery to general unsecured creditors under the U.S. Plan to be 2.09% of their claim.
- 10. Pursuant to section 503(b)(9) of the U.S. Bankruptcy Code, entities that provided goods to the U.S. Debtors in the ordinary course of business that were received within 20 days of the filing of Chapter 11 proceedings are entitled to a priority claim that ranks above the claims of the Secured Lenders.
- 11. There are 3 Canadian plans. As the Secured Lenders will be entitled to some recovery in respect of their deficiency claim and the Noteholders will be entitled to some recovery on their unsecured claim under the U.S. Plan, the Secured Lenders and the Noteholders are deemed to have waived their rights to any additional recovery under the Canadian plans for the most part. However, the votes of the Secured Lenders and the Noteholders entitled to vote on the U.S. Plan are deemed to be votes for the purpose of the Canadian plans, both with respect to numbers of parties and value of claims, and are to be included in the single class of "Affected Creditors" entitled to vote on the Canadian plans. Originally, the Canadian plans provided that the value attributable to the Secured Lenders' votes would be based on the full amount of their guarantee claim, approximately US \$2.9 billion, and not only on their deficiency claim of approximately US \$1.07 billion. Thus, the aggregate value of the Secured Lenders' voting claims would be:
 - a) US \$2.939 billion for the SemCAMS plan;
 - b) US \$2.939 billion less C \$145 million for the SemCanada Crude plan, recognizing that the Secured Lenders would be entitled to receive C \$145 million in respect of a negotiated Lenders' Secured Claim under the SemCanada Crude plan; and
 - c) US \$2.939 billion less C \$108 million for the SemCanada Energy plan, recognizing that the Secured Lenders will receive that amount in respect of a negotiated Lenders' Secured Claim under the

SemCanada Energy plan.

At the conclusion of the classification hearing, the CCAA applicants proposed a revision to the proposed orders which stipulates that, if the approval of a plan by the creditors would be determined by the portion of the votes cast by the Secured Lenders that represents an amount of indebtedness that is greater than their estimated aggregate deficiency after taking into consideration the payments they are to receive under the U.S. plan and the Canadian plans, the Court shall determine whether the voting claim of the Secured Lenders should be limited to their estimated deficiency claim.

- 12. Only "Ordinary Creditors" receive any distribution under the Canadian Plans. Ordinary Creditors are defined as creditors holding "Affected Claims" other than the Secured Lenders, Noteholders, CCAA applicants and U.S. Debtors. Each plan provides that the Affected Creditors of the CCAA applicant will vote at the Creditors' Meeting as a single class.
- 13. The SemCAMS plan will be funded by a cash advance from SemCanada Crude and establishes two pools of cash. One pool will fund the full amount of secured claims which have not been paid prior to the implementation date of the plan up to the realizable value of the property secured, and the other pool will fund distributions to ordinary unsecured creditors. Ordinary unsecured creditors will receive cash subject to a maximum total payment of 4% of their proven claims. The Monitor estimates that the distribution will equal 4% of claims unless claims in excess of the current highest estimate are established.
- 14. The SemCanada Crude plan also establishes two pools of cash, one for secured claims and one for ordinary unsecured creditors. Again, the distribution to ordinary unsecured creditors is estimated to be 4% of claims unless claims in excess of the current highest estimate against SemCanada Crude are established.
- 15. Any cash remaining in SemCanada Crude after deducting amounts necessary to fund the above-noted payments to secured and unsecured ordinary creditors of SemCAMS and SemCanada Crude, unaffected claims and administrative costs, less a reserve for disputed claims, will be paid to the Secured Lenders through the U.S. plan as part of the payment on secured debt.
- 16. The SemCanada Energy distribution plan is funded from the cash received from the liquidation of the assets of the companies. It also establishes two pools of cash, one of which will be used to pay secured ordinary creditors and a one of which will be used to pay cash distributions to ordinary unsecured creditors. The Monitor estimates that the distribution to ordinary unsecured creditors will be in the range of 2.16% to 2.27% of their claims, unless claims in excess of the current maximum estimate are established. Any amounts outstanding after payment of these claims, unaffected claims and administration costs will be paid to the Secured Lenders. The proposed lower amount of recovery is stated to be in recognition of the fact that the SemCanada Energy Companies have been liquidated and have no going concern value.
- 17. As this summary indicates, the U.S. Plan and the Canadian plans are closely integrated and economically interdependent. Each of the plans requires that the other plans be approved by the requisite number of creditors and implemented on the same date in order to become effective. The receipt of at least \$160 million from the SemCanada Group is a condition precedent to the implementation of the U.S. Plan.

- 18. The Monitor reports that the SemCanada Group has indicated that there is no viable option to the proposed plans and that a formal liquidation under bankruptcy legislation would provide a lower recovery to creditors. The Monitor notes that the rationale for the treatment of the Secured Lenders and the ordinary unsecured creditors under the plans is that the Secured Lenders have valid and enforceable secured claims, and that, in the event of the liquidation of the Canadian companies, the Secured Lenders would be entitled to all proceeds, resulting in no recovery to ordinary creditors. Therefore, reports the Monitor, the CCAA plans are considered to be better than the alternative of a liquidation. The Secured Lenders derive some benefit from the plans through the preservation of the going concern value of SemCAMS and SemCanada Crude and by having a prompt distribution of funds held by the SemCanada Energy Companies.
- 19. The Monitor notes that the distribution to the SemGroup unsecured creditors under the U.S. plan is viewed as better than a liquidation, and that, therefore, given the effect of the U.S. Bankruptcy Code's "cram-down" provisions, it is likely that the U.S. plan will be confirmed. The Monitor comments that the proposed distribution to ordinary unsecured creditors under the CCAA plans is considered to be fair as it is comparable to and potentially slightly more favourable than the distributions being made to the U.S. ordinary unsecured creditors.

Positions of Various Parties

- 13 The SemCanada Group applied for orders
 - a) accepting the filing of, in the case of SemCAMS and SemCanada Crude, proposed plans of arrangement and compromise, and in the case of SemCanada Energy, a proposed plan of distribution;
 - b) authorizing the calling and holding of meetings of the Canadian creditors of these three CCAA applicants;
 - c) authorizing the establishment of a single class of creditors for each plan for the purpose of considering and voting on the plans;
 - d) approving procedures with respect to the calling and conduct of such meetings; and
 - e) other non-contentious enabling relief.
- 14 Certain unsecured creditors of the applicants objected to the proposed classification of creditors, submitting that the Secured Lenders should not be allowed a vote in the same class as the unsecured creditors either with respect to the secured portion of their overall claim or any deficiency in their claims that would remain unpaid, and that the Noteholders should not be allowed a vote in the same class as the rest of the unsecured creditors.
- As noted previously, the CCAA applicants proposed a revision to the proposed orders at the conclusion of the classification hearing which would allow the Court to consider whether the voting claim of the Secured Lenders should be limited to their estimated deficiency claim. The objecting creditors continued to object to the proposed classification, even if eligible votes were limited to the deficiency claim of the Secured Lenders.

Analysis

- Section 6 of the CCAA provides that, where a majority in number representing two-thirds in value of "the creditors or class of creditors, as the case may be" vote in favour of a plan of arrangement or compromise at a meeting or meetings, the plan of arrangement may be sanctioned by the Court. There is little by way of specific statutory guidance on the issue of classification of claims, leaving the development of this issue in the CCAA process to case law. Prior decisions have recognized that the starting point in determining classification is the statute itself and the primary purpose of the statute is to facilitate the reorganization of insolvent companies: Paperny, J. in *Canadian Airlines Corp.*, *Re* (2000), 20 C.B.R. (4th) 46 (Alta. C.A. [In Chambers]), leave to appeal refused (2000), 20 C.B.R. (4th) 46 (Alta. C.A. [In Chambers]), affirmed [2001] 4 W.W.R. 1 (Alta. C.A.), leave to appeal to SCC refused [2001] S.C.C.A. No. 60 (S.C.C.) at para. 14. As first noted by Forsyth, J. in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20, 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566 (Alta. Q.B.) at page 28, and often repeated in classification decisions since, "this factor must be given due consideration at every stage of the process, including the classification of creditors..."
- Classification is a key issue in CCAA proceedings, as a proposed plan must achieve the requisite level of creditor support in order to proceed to the stage of a sanction hearing. The CCAA debtor seeks to frame a class or classes in order to ensure that the plan receives the maximum level of support. Creditors have an interest in classifications that would allow them enhanced bargaining power in the negotiation of the plan, and creditors aggrieved by the process may seek to ensure that classification will give them an effective veto (see *Rescue: The Companies' Creditors Arrangement Act*, Janis P. Sarra, 2007 ed. Thomson Carswell at page 234). Case law has developed from the comments of the British Columbia Court in *Woodward's Ltd.*, *Re* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.) warning against the danger of fragmenting the voting process unnecessarily, through the identification of principles applicable to the concept of "commonality of interest" articulated in *Canadian Airlines Corp.*, *Re* and elaborated further in Alberta in *San Francisco Gifts Ltd.*, *Re*, 2004 CarswellAlta 1241, [2004] A.J. No. 1062 (Alta. Q.B.), leave to appeal refused (2004), 5 C.B.R. (5th) 300 (Alta. C.A.).
- The parties in this case agree that "commonality of interest" is the key consideration in determining whether the proposed classification is appropriate, but disagree on whether the plans as proposed with their single class of voters meet that requirement. It is clear that classification is a fact-driven inquiry, and that the principles set out in the case law, while useful in considering whether commonality of interest has been achieved by the proposed classification, should not be applied rigidly: *Canadian Airlines Corp.*, *Re* at para. 18; *San Francisco Gifts Ltd.*, *Re* at para. 12; *Stelco Inc.*, *Re* (2005), 15 C.B.R. (5th) 307 (Ont. C.A.) at para. 22.
- Although there are no fixed rules, the principles set out by Paperny, J. in para. 31 of *Canadian Airlines Corp.*, Re provide a useful structure for discussion of whether to the proposed classification is appropriate:

1. Commonality of interest should be viewed based on the non-fragmentation test, not on the identity of interest test.

- Under the now-rejected "identity of interest" test, all members of the class had to have identical interests. Under the non-fragmentation test, interests need not be identical. The interests of the creditors in the class need only be sufficiently similar to allow them to vote with a common interest: *Woodward's Ltd., Re* at para. 8.
- The objecting creditors submit that the creation of two classes rather than one cannot be considered to be fragmentation. The issue, however, is not the number of classes, but the effect that fragmentation of classes may have on the ability to achieve a viable reorganization. As noted by Farley, J. in para. 13 of his reasons relating to

the classification of creditors in Stelco Inc., Re, as endorsed by the Ontario Court of Appeal:

...absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid fragmentation - and in this respect multiplicity of classes does not mean that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.

- 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
- The classification of creditors is viewed with respect to the legal rights they hold in relation to the debtor company in the context of the proposed plan, as opposed to their rights as creditors in relation to each other: Woodward's Ltd., Re at para. 27, 29; Stelco Inc., Re at para. 30. In the proposed single classification, the rights of the creditors in the class against the debtor companies are unsecured (other than the proposed votes attributable to the secured portion of the debt of the Secured Lenders, which will be discussed separately).
- With respect to the Secured Lenders' deficiency claim, there is a clear precedent for permitting a secured creditor to vote a substantial deficiency claim as part of the unsecured class: Campeau Corp., Re (1991), 10 C.B.R. (3d) 100 (Ont. Gen. Div.); Canadian Airlines Corp., Re, supra.
- The classification issues in the Campeau Corp., Re restructuring were similar to the present issues. In Campeau Corp., Re, a secured creditor, Olympia & York, was included in the class of unsecured creditors for the deficiency in its secured claim, which represented approximately 88% of the value of the unsecured class. The Court rejected the submission that the legal interests of Olympia & York were different from other unsecured creditors in the class. Montgomery, J. noted at para. 16 that Olympic & York's involvement in the negotiation of the plan was necessary and appropriate given that the size of its claims would allow it a veto no matter how the classes were constituted and that its co-operation was necessary for the success of both the U.S. and Canadian plans.
- In the same way, the size and scope of the Secured Lenders claim makes their participation in the negotiation and endorsement of the proposed plans essential. That participation does not disqualify them from a vote in the process, nor necessitate their isolation in a special class. While under the integrated plans, the Secured Lenders will receive a different kind of distribution on their unsecured deficiency claim (a share of the litigation trust), that is an issue of fairness for the sanction hearing and does not warrant the establishment of a separate class.
- The interests of the Noteholders are unsecured. While it is true that under the integrated plans, the Noteholders would be entitled to a higher share of the distribution of assets than ordinary unsecured creditors, the rationale for such difference in treatment relates to the multiplicity of debtor companies that are indebted to the Noteholders, as compared to the position of the ordinary unsecured creditors. That difference, while it may be subject to submissions at the sanction hearing, is an issue of fairness, and not a difference material enough to warrant a separate class for the Noteholders in this case. A separate class for the Noteholders would only be necessary if, after considering all the relevant factors, it appeared that this difference would preclude reasonable consultation among the creditors of the class: San Francisco Gifts Ltd., Re at para. 24.
- 27 The question arises whether the fact that the Secured Lenders and the Noteholders have waived their

rights to recover under the Canadian plans should result in either the requirement of separate classes or the forfeiture of their right to vote on the Canadian plans at all.

- This is a unique case: a cross-border restructuring with separate but integrated and interdependent plans that are designed to comply with the restructuring legislation of two jurisdictions. As the applicants point out, the co-ordinated structure of the plans is designed to ensure that the Secured Lenders and the Noteholders receive sufficient recoveries under the U.S. plan to justify the sacrifices in recovery that result from their waiver of distributions under the Canadian plans. In considering the context of the proposed classification, it would be unrealistic and artificial to consider the Canadian plans in isolation, without regard to the commercial outcome to the creditors resulting from the implementation of the plans in both jurisdictions. Thus, the fact that the distributions to Secured Lenders and Noteholders will take place through the operation of the U.S. plan, and that the effective working of the plans require them to waive their rights to receive distributions under the Canadian plans does not deprive them of the right to an effective voice in the consideration of the Canadian plans through a meaningful vote.
- It is not sufficient to say that the Secured Lenders and the Noteholders have a vote in the U.S. plans. The "cram down" power which exists under Chapter 11 of the U.S. Bankruptcy Code includes a "best interests test" that requires that if a class of holders of impaired claims rejects the plan, they can be "crammed down" and their claims will be satisfied if they receive property of a value that is not less than the value that the class would receive or retain if the debtor were liquidated under Chapter 7 of the U.S. Bankruptcy Code. Thus, the votes available to the Secured Lenders and the Noteholders with respect to their claims under the U.S. Plan do not give them the right available to creditors under Canadian restructuring law to vote on whether a proposed plan should proceed to the next step of a sanction hearing There is no reason to deprive the Secured Lenders and the Noteholders of that right as creditors of the Canadian debtors, even if the distributions they would be entitled to flow through the U.S. plan. The question becomes, then, whether that right should be exercised in a class with other unsecured creditors as proposed or in a separate class.
- It is noteworthy that the proposed single classification does not have the effect of confiscating the legal rights of any of the unsecured creditors, or adversely affecting any existing security position. It is in fact arguable that seeking to exclude the Secured Lenders and the Noteholders from the class prejudices these similarly-placed creditors by denying them a meaningful voice in the approval or rejection of the plans in Canada.
- A number of cases suggest that the Court should also consider the rights of the parties in liquidation in determining whether a proposed classification is appropriate: *Woodward's Ltd.*, *Re* at para. 14; *San Francisco Gifts Ltd.*, *Re* at para. 12.
- Under a liquidation scenario, the Secured Lenders would be entitled to nearly all of the proceeds of the liquidated corporate group, other than the relatively few secured claims that have priority. This suggests that the Secured Lenders are entitled to a meaningful vote with respect to both the U.S. plan and the Canadian plans.
- 3. The commonality of interests is to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate organizations if possible.
- 4. In placing a broad and purposive interpretation on the CCAA, the Court should be careful to resist classification approaches that would potentially jeopardize viable plans.
- 33 The Ontario Court of Appeal in Stelco Inc., Re cautioned that, in addition to considering commonality of

interest issues, the court in a classification application should be alert to concerns about the confiscation of legal rights and should avoid "a tyranny of the minority", citing the comments of Borins, J. in *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.), where he warned against creating "a special class simply for the benefit of the opposing creditor, which would give that creditor the potential to exercise an unwarranted degree of power": *Stelco Inc., Re* at para 28.

- Excluding of the Secured Lenders and the Noteholders from the proposed single class would allow the objecting creditors to influence the voting process to a degree not warranted by their status. It is true that if the Secured Lenders and the Noteholders are not excluded from the class, even if only the votes related to the Secured Lenders' deficiency claim are tabulated, the positive vote will likely be enough to allow the proposed plans to proceed to a sanction hearing. It is also true that the Secured Lenders and the Noteholders may have been part of the negotiations that led to the proposed plans. Neither of those factors standing alone is sufficient to warrant a separate class unless rights are being confiscated or the classification creates an injustice.
- The structure of the classification as proposed creates in effect what was imposed by the Court in Canadian Airlines Corp., Re, a method of allowing the "voice" of ordinary unsecured creditors to be heard without the necessity of a separate classification, thus permitting rather than ruling out the possibility that the plans might proceed to a sanction hearing. Given that the votes of the Secured Lenders and the Noteholders on the U.S. plan will be deemed to be votes of those creditors on the Canadian plans, there will be perforce a separate tabulation of those votes from the votes of the remaining unsecured creditors. In accordance with the revision to the plans made at the end of the classification hearing, there will be a separate tabulation of the votes of the Secured Lenders relating to the secured portion of their claims and the votes relating to the unsecured deficiency.
- The situation in this classification dispute is essentially the same as that which faced Paperny, J. in Canadian Airlines Corp., Re. Fragmenting the classification prior to the vote raises the possibility that the plans may not reach the stage of a sanction hearing where fairness issues can be fully canvassed. This would be contrary to the purpose of the CCAA. This is particularly an issue recognizing that the U.S. plan and the Canadian plans must all be approved in order for any one of them to be implemented. Conrad, J.A. in denying leave to appeal in San Francisco Gifts Ltd., Re, 2004 ABCA 386 (Alta. C.A.) at para. 9 noted that the right to vote in a separate class and thereby defeat a proposed plan of arrangement is the statutory protection provided to the different classes of creditors, and thus must be determined reasonably at the classification stage. However, she also noted that "it is important to carefully examine classes with a view of protecting against injustice": para. 10. In this case, the goals of preventing confiscation of rights and protecting against injustice favour the proposed single classification.
- This is the "pragmatic" factor referred to in Campeau Corp., Re at para. 21. The CCAA judge must keep in mind the interests of all stakeholders in reviewing the proposed classification, as in any step in the process. If a classification prevents the danger of a veto of a plan that promises some better return to creditors than the alternative of a liquidating insolvency, it should not be interfered with absent good reason. The classification hearing is not the only avenue of relief for aggrieved creditors. If a plan received the minimum required level of approval by vote of creditors, it must still be approved at a hearing where issues of fairness must be addressed.

5. Absent bad faith, the motivations of the creditors to approve or disapprove [of the Plan] are irrelevant.

As noted in Canadian Airlines Corp., Re at para. 35, fragmenting a class because of an alleged conflict of interest not based on legal rights is an error. The issue of the motivation of a party to vote for or against a

plan is an issue for the fairness hearing. There is no doubt that the various affected creditors in the proposed single class may have differing financial or strategic interests. To recognize such differences at the classification stage, unless the proposed classification confiscates rights, results in an injustice or creates a situation where meaningful consultation is impossible, would lead to the type of fragmentation that may jeopardize the CCAA process and be counter-productive to the legislative intent to facilitate viable reorganizations.

6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

- The issue of meaningful consultation was addressed by both the supervising justice and the Court of Appeal in San Francisco Gifts Ltd., Re. In that case, Topolniski, J. noted that two corporate insiders that the proposed plan had included in the classification of affected creditors held claims that were uncompromised by the plan, that they gave up nothing, and that it "stretches the imagination to think other creditors in the class could have meaningful consultation [with them] about the Plan": para. 49. Her decision to place these parties in a separate class was confirmed by the Court of Appeal, which commented that Topolniski, J. was "absolutely correct" to find no ability to consult "between shareholders whose debts would not be cancelled and other unsecured creditors whose debts would be": para. 14.
- That is not the situation here. The deficiency claims of the Secured Lenders and the unsecured claims of the Noteholders are being compromised in the U.S. plan, and there is nothing to block consultations among affected creditors on the basis of dissimilarity of legal interests. While there are differences in the proposed distributions on the unsecured claims, they are not so major that they would preclude consultation.
- The objecting creditors point to statements made by counsel for the Secured Lenders during the classification application about the alternatives to approval of the plans, which they submit indicates the impossibility of consultation. These comments were made in the context of advocacy on behalf of the proposed classification, and I do not take them as a clear statement by the Secured Lenders that they would refuse to consult with the other creditors.

Secured Portion of Secured Lenders' Claim

- The CCAA applicants and the Secured Lenders submit that it would be unfair and inappropriate to limit the votes of the Secured Lenders in the Canadian plans to the amount of the deficiency in their secured claim, rather than the entire amount owing under the guarantee. They argue that, by endorsing the plans, the Secured Lenders have in effect elected to treat their entire claim under the guarantee as unsecured with respect to the Canadian plans, except for relatively small negotiated secured claims under the SemCanada Crude plan and the SemCanada Energy plan. They also submit that the fact that under bankruptcy law, a creditor of a bankrupt debtor is entitled to prove for the full amount of its debt in the estates of both the debtor and a bankrupt guarantor of the debt justifies granting the Secured Lenders the right to vote the full amount of the guarantee claim, even if part of the claim is to be recovered through the U.S. plan, as long as they do not actually recover more than 100 cents on the dollar.
- It became apparent during the course of the classification hearing that it may not matter whether the plans are approved by the requisite number of creditors and value of their claims if the Secured Lenders are only entitled to vote the deficiency portion of their claims or the full amount of their claims. It was this that led to the revision in the language of the voting provisions of the plans. I defer a decision on the question of whether or not the Secured Lenders are entitled to vote the entire amount of their guarantee claims until after the vote has

been conducted and the votes separately tabulated as directed. As noted by the Court of Appeal in *Canadian Airlines Corp.*, *Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) at para. 39, such a deferral of a voting issue is not an error of law and is in fact consistent with the purpose of the CCAA.

Recent Amendments

- The following amendment to the CCAA that has been proclaimed in effect from September 18, 2009 sets out certain factors that may be considered in approving a classification for voting purposes:
 - 22.2 (2) Factors For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account:
 - (a) the nature of the debts, liabilities or obligations giving rise to their claims;
 - (b) the nature and rank of any security in respect of their claims;
 - (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
 - (d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed. (R.S.C. 2005, c. 47, s. 131, amended R.S.C. 2007, Bill C -12, c.36, s.71)
- These factors do not change in any material way the factors that have been identified in the case law and discussed in these reasons nor would they have a material effect on the consideration of the proposed classification in this case.

Creditors with Claims in Process

Two creditors advised that, because their claims of secured status had not yet been resolved with the applicants and the Monitor, they were not in a position to evaluate whether or not to object to the proposed classification. The plans were revised to ensure that the votes of creditors whose status as secured creditors remains unresolved until after the meetings of creditors be recorded with votes of creditors with disputed claims and reported to the Court by the Monitor if these votes affect the approval or non-approval of the plan in question.

Conclusion

In summary, I have concluded that there is no good reason to exclude the Secured Lenders and the Note-holders from the single classification of voters in the proposed plans, nor to create a separate class for their votes. There are no material distinctions between the claims of these two creditors and the claims of the remaining unsecured creditors that are not more properly the subject of the sanction hearing, apart from the deferred issue of whether the Secured Lenders are entitled to vote their entire guarantee claim. No rights of the remaining unsecured creditors are being confiscated by the proposed classification, and no injustice arises, particularly given the separate tabulation of votes which enables the voice of the remaining unsecured creditors to be heard and measured at the sanction hearing. There are no conflicts of interest so over-riding as to make consultation impossible. While there are differences of interests and treatment among the affected creditors in the class, these are issues that will be addressed at the sanction hearing. Approval of the proposed classification in the context of

the integrated plans is in accordance with the spirit and purpose of the CCAA.

Applications granted.

END OF DOCUMENT

TAB 12

H

2004 CarswellAlta 1607, 2004 ABCA 386, [2005] A.W.L.D. 6, 5 C.B.R. (5th) 300, [2005] A.W.L.D. 710, 361 A.R. 220, 339 W.A.C. 220, 42 Alta. L.R. (4th) 371

San Francisco Gifts Ltd., Re

San Francisco Gifts Ltd., San Francisco Retail Gifts Incorporated (previously called San Francisco Gifts Incorporated), San Francisco Gift Stores Limited, San Francisco Gifts (Atlantic) Limited, San Francisco Stores Ltd., San Francisco Gifts & Novelties Inc., San Francisco Gifts & Novelty Merchandising Corporation (previously called San Francisco Gifts and Novelty Corporation), San Francisco (The Rock) Ltd. (previously called San Francisco Newfoundland Ltd.) and San Francisco Retail Gifts & Novelties Limited (previously called San Francisco Gifts & Novelties Limited) (Applicants) and Oxford Properties Group Inc., Ivanhoe Cambridge 1 Inc., 20 Vic Management Ltd., Morguard Investments Ltd., Morguard Real Estate Investments Trust, Riocan Property Services, and 1113443 Ontario Inc. (Respondents)

Alberta Court of Appeal

Conrad J.A.

Heard: November 24, 2004 Judgment: December 2, 2004 Docket: Edmonton Appeal 0403-0325-AC

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Proceedings: refused leave to appeal San Francisco Gifts Ltd., Re (2004), 2004 ABQB 705, 2004 CarswellAlta 1241 (Alta. Q.B.)

Counsel: R.T.G. Reeson, Q.C. for Applicants

J.H.H. Hockin for Respondents

M.J. McCabe, Q.C. for Court Appointed Monitor

Subject: Civil Practice and Procedure; Insolvency

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge

SF group of companies was composed of operating company and several nominee companies — Operating company held all of SF's assets and was one hundred per cent owned by L Corp. — L Corp. was wholly owned by BS, who was also president and sole director of nearly all SF group of companies — BS and L Corp. were operating company's only secured creditors — On January 7, 2004, SF group of companies was granted protection under

Companies' Creditors Arrangement Act ("CCAA") — On June 22, 2004, operating company was permitted to file plan of compromise or arrangement and submit it to its creditors for consideration and voting — Plan classified BS and L Corp. as "unaffected creditors", meaning that their claims survived reorganization and they would vote as unsecured creditors — On July 14, 2004, group of six objecting landlords asked court to create separate classes of creditors — Court removed BS and L Corp. from unsecured creditors class, placing them in separate class for voting purposes — SF group of companies applied for leave to appeal — Application dismissed — In arriving at her decision to place BS and L Corp. in separate class, chambers judge relied on different treatment afforded BS and L Corp. under plan — BS and L Corp. would be unaffected by bankruptcy of SF companies, whereas all other creditors in class would receive nothing — BS and L Corp. were in position to control vote and cancel all unsecured creditors' debt but their own — Under those circumstances, there would be no meaningful consultation about plan — Chambers judge correctly held that there was no "commonality of interest" between BS and L Corp. and other creditors — While questions of class in CCAA proceedings were important, application for leave failed to establish that appeal was prima facie meritorious.

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

SF group of companies was composed of operating company and several nominee companies — Operating company held all of SF's assets and was one hundred per cent owned by L Corp. — L Corp. was wholly owned by BS, who was also president and sole director of nearly all SF group of companies — BS and L Corp. were operating company's only secured creditors — On January 7, 2004, SF group of companies was granted protection under Companies' Creditors Arrangement Act ("CCAA") — On June 22, 2004, operating company was permitted to file plan of compromise or arrangement and submit it to its creditors for consideration and voting — Plan classified BS and L Corp. as "unaffected creditors", meaning that their claims survived reorganization and they would vote as unsecured creditors - On July 14, 2004, group of six objecting landlords asked court to create separate classes of creditors — Court removed BS and L Corp. from unsecured creditors class, placing them in separate class for voting purposes — SF group of companies applied for leave to appeal — Application dismissed — In arriving at her decision to place BS and L Corp. in separate class, chambers judge relied on different treatment afforded BS and L Corp. under plan — BS and L Corp. would be unaffected by bankruptcy of SF companies, whereas all other creditors in class would receive nothing - BS and L Corp. were in position to control vote and cancel all unsecured creditors' debt but their own — Under those circumstances, there would be no meaningful consultation about plan — Chambers judge correctly held that there was no "commonality of interest" between BS and L Corp. and other creditors — While questions of class in CCAA proceedings were important, application for leave failed to establish that appeal was prima facie meritorious.

Cases considered by Conrad J.A.:

Liberty Oil & Gas Ltd., Re (2003), 44 C.B.R. (4th) 96, 2003 ABCA 158, 2003 CarswellAlta 684 (Alta. C.A.) — followed

Royal Bank v. Fracmaster Ltd. (1999), 1999 CarswellAlta 539, (sub nom. UTI Energy Corp. v. Fracmaster Ltd.) 244 A.R. 93, (sub nom. UTI Energy Corp. v. Fracmaster Ltd.) 209 W.A.C. 93, 11 C.B.R. (4th) 230 (Alta. C.A.) — considered

Sovereign Life Assurance Co. v. Dodd (1892), [1891-94] All E.R. Rep. 246, [1892] 2 Q.B. 573 (Eng. C.A.) — considered

Statutes considered:

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

Generally - referred to

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

Generally — considered

Tariffs considered:

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

Sched. C, Tariff of Costs, column 1 — referred to

APPLICATION by insolvent group of companies for leave to appeal from judgment reported at San Francisco Gifts Ltd., Re (2004), 5 C.B.R. (5th) 92, 42 Alta. L.R. (4th) 352, 359 A.R. 71, 2004 ABQB 705, 2004 CarswellAlta 1241 (Alta. Q.B.) with respect to classes of creditors under Companies' Creditors Arrangement Act.

Conrad J.A.:

I. Introduction

The San Francisco group of companies ("San Francisco") seeks leave to appeal an order finding Barry Slawsky ("Slawsky") and Laurier Investments Corp. ("Laurier") do not share a "commonality of interest" with other unsecured creditors, and placing them in a separate class for purposes of voting on a plan of arrangement under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA").

II. Facts

- San Francisco is composed of the operating company, San Francisco Gifts Ltd., and several nominee companies. The operating company holds all of San Francisco's assets and is 100% owned by Laurier. Laurier is wholly owned by Slawsky, who is also the president and sole director of nearly all of the San Francisco group of companies. Slawsky and Laurier are San Francisco's only secured creditors. In addition, they have substantial unsecured debt with the company.
- On January 7, 2004, San Francisco was granted protection under the *CCAA*. The initial order was extended, and San Francisco remains in business. On June 22, 2004, San Francisco was permitted to file a Plan of Compromise or Arrangement ("Plan") and submit it to its creditors for consideration and voting. The Plan classified Slawsky and Laurier as "unaffected creditors," meaning that their claims survive the reorganization. Slawsky and Laurier would not share in the distribution of \$500,000.00; however, they would value their security and vote as unsecured creditors.
- On July 14, 2004, a group of six objecting landlords asked the Court to create a separate class or classes for landlords and any similarly-affected parties, to assist the Court-appointed monitor in identifying and preserving creditor claims, and to remove any "related parties" from the unsecured creditors class (or, alternatively, deny them a vote).

III. Decision Below

5 The motion was heard on September 1 and 2, 2004. In a reserved written judgment, the supervising chambers justice declined to create a separate class for landlords, but made provision for preserving certain landlords' claims

relating to the right to distrain. The decision removed Slawsky and Laurier from the unsecured creditors class, placing them in a separate class for voting purposes, and awarded costs against San Francisco under Column 1. It is the removal of Slawsky and Laurier from the unsecured creditors class for which San Francisco seeks leave to appeal. If granted leave to appeal, San Francisco asks this Court to also review the costs award.

The chambers justice focused on the lack of "commonality of interest" between Slawsky and Laurier and the rest of the unsecured creditors. Her concerns centred on the different treatment afforded Slawsky and Laurier. Although Slawsky and Laurier would not share in the \$500,000.00 distribution, their debt would not be compromised. If the reorganization failed and San Francisco became bankrupt, Slawsky and Laurier would be unaffected, whereas the rest of the unsecured creditors would receive nothing. The chambers justice concluded at para. 49 of her reasons that in light of their divergent interests, "[i]t stretches the imagination to think that other creditors in the class could have meaningful consultations about the Plan with Barry Slawsky and, through him with Laurier."

IV. Test for Leave to Appeal

Any person dissatisfied with an order under the *CCAA* is permitted an appeal of that order on obtaining leave: *CCAA*, s.13. The test for leave to appeal is set out in *Liberty Oil & Gas Ltd.*, *Re* (2003), 44 C.B.R. (4th) 96, 2003 ABCA 158 (Alta. C.A.) at paras. 15 and 16:

The test for granting leave, as articulated in this Court, involves a single criterion subsuming four factors. The single criterion is that there must be serious and arguable grounds that are of real and significant interest to the parties

The four factors subsumed in an assessment whether the criterion is present are:

- (1) Whether the point on appeal is of significance to the practice;
- (2) Whether the point raised is of significance to the action itself;
- (3) Whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
- (4) Whether the appeal will unduly hinder the progress of the action

V. Standard of Review

In considering whether the appeal is *prima facie* meritorious, it is necessary to consider the standard of review the Court would apply if leave was granted. This Court has stated that the supervising chambers justice in a *CCAA* matter is tasked with an ongoing management process similar to that of a judge in the course of a trial: *Liberty Oil & Gas Ltd., Re, supra* at para. 20. Consequently, the reviewing court will only interfere with the decision where the chambers justice "acted unreasonably, erred in principle or made a manifest error": *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) at para. 3.

VI. Decision

The applicants' main complaints are that the chambers justice erred in her application of the common-law "commonality of interests" test and she misunderstood the facts. The *CCAA* does not explicitly state what factors differentiate creditors so as to place them in separate classes for voting purposes. But in determining issues relating to class, it is important to recognize that the right to vote as a separate class and thereby defeat a proposed plan of arrangement is the statutory protection provided to the different classes of creditors. While fairness on many issues

is assessed again at a later stage, it is the initial placing within a separate class that provides this non-discretionary right to creditors.

- To give effect to this protection, a "commonality of interests" test was developed. The foundation for the "commonality of interests" test is that the classes must be structured so as to "prevent a confiscation and injustice" and to enable the members to "consult together with a view to their common interest": Sovereign Life Assurance Co. v. Dodd, [1892] 2 Q.B. 573 (Eng. C.A.), at 583. It follows that it is important to carefully examine classes with a view to protecting against injustice, and not simply rely on fairness being evaluated later.
- The means of preventing confiscation and injustice raises some very interesting issues when it comes to determining who should be in a separate class for voting purposes. Unlike the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the *CCAA* does not specifically provide for treatment of related parties. While unsecured creditors and shareholders have similar legal rights with respect to debts owing, a shareholder *qua* shareholder has other legal rights that may impact on, or make impossible, the ability of the class to hold a common interest. This is an important issue that has not yet been addressed by this Court. As interesting and important as that issue is, however, it is not the issue on this appeal and resolution of the issue must wait to another day.
- The chambers judge did not need to, and did not, make her decision on commonality of interest based merely on the fact that Slawsky and Laurier were shareholders. Rather, in arriving at her decision to place the shareholders in a separate class, the chambers judge relied on the different treatment afforded Slawsky and Laurier under the Plan. She stated (at para. 49):

Here, there is no compromise by Slawsky or Laurier. Further, they would, but for a security position shortfall, be unaffected by a bankruptcy of the companies, whereas all of the other creditors in the class would receive nothing. Slawsky has created a Plan which gives him voting rights that he doubtless wants to employ if he senses the need to sway the vote. In return, he gives up nothing. It stretches the imagination to think that other creditors in the class could have meaningful consultations about the Plan with Slawsky and, through him, with Laurier. For that reason, Slawsky and Laurier must be placed in a separate class.

- I do not accept the applicants' argument that the chambers judge failed to understand that Slawsky and Laurier *had* given up something in that the Plan did not provide for their participation in the \$500,000.00 available for distribution. This judge was alive to that element of the Plan. When she said that "he gives up nothing," she was referring to the fact that under the Plan the shareholders' debt remains outstanding and is not compromised, unlike the other unsecured creditors' debt. In short, Slawsky and Laurier may be in a position to control the vote and cancel all unsecured creditors' debt but their own. Under these circumstances, there would be no meaningful consultation about the Plan.
- In my view, the chambers judge was absolutely correct in her assessment that it stretches the imagination to think that there would be meaningful consultation about the Plan between shareholders whose debts would not be cancelled and other unsecured creditors whose debts would be. Certainly, bearing in mind the standard of review, there is absolutely no merit to this appeal.
- Thus, while I acknowledge that questions of class are important, both to the practice and the parties, this application for leave must fail because it fails to establish that the appeal is *prima facie* meritorious.
- In the result, the chambers judge did not err in principle, she did not misunderstand the evidence, and her decision to remove Slawsky and Laurier from the class of unsecured creditors was correct. In my view, any other decision would have resulted in an injustice to the other unsecured creditors. At a minimum, bearing in mind the standard of review, there is no chance of success on the appeal.

17 Leave to appeal is denied.

(Counsel speaks to costs)

Costs are allowed to the Respondent in Column 1 and I allow costs for the filing of their Memorandum, notwithstanding the red stamp.

Application dismissed.

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TAB 13

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2001 CarswellAlta 1488, 2001 ABQB 983, [2002] A.W.L.D. 43, 29 C.B.R. (4th) 236, [2002] 3 W.W.R. 373, 98 Alta. L.R. (3d) 277, 306 A.R. 124

Ontario v. Canadian Airlines Corp.

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

AND IN THE MATTER OF THE BUSINESS CORPORATIONS ACT (ALBERTA), S.A. 1981, c. B.-15, AS AMENDED, SECTION 185;

AND IN THE MATTER OF CANADIAN AIRLINES CORPORATION AND CANADIAN AIRLINES INTERNATIONAL LTD.;

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO (Applicant) and CANADIAN AIRLINES CORPORATION AND CANADIAN AIRLINES INTERNATIONAL LTD. (Respondents)

Alberta Court of Queen's Bench

Romaine J.

Judgment: November 16, 2001 Docket: Calgary 0001-05071

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Counsel: Larry B. Robinson, Michael D. Aasen, for Her Majesty the Queen in Right of the Province of Ontario

Chris Simard, for Canadian Airlines Corporation and Canadian Airlines International Ltd.

Sean Dunphy, for Air Canada

Subject: Corporate and Commercial; Insolvency; Provincial Tax

Banking and banks --- Letters of credit

Company self-assessed its tax liabilities and made instalment payments under provincial statutes — Province assessed company for taxes owing — Company filed notices of objections and appeals were ongoing — Company provided province with letters of credit to secure assessments under appeal — Until decisions were rendered in tax appeals, no amounts were payable and province was precluded from drawing on letters of credit — Company received protection under Companies' Creditors Arrangement Act — Company included province in list of "affected unsecured claims" — Province's claim was for greater amount than letters of credit — Company's plan of compro-

mise and arrangement was approved — Province brought application for declaration that debt secured by letters of credit was not compromised by plan — Issue arose as to appropriate characterization of portion of province's claim under letters of credit — Claim was secured — Letters of credit were not simply payment devices — Letters of credit provided province with form of security subject to conditions — That insolvency was irrelevant to letter of credit was reflected in s. 11.2 of Act — Province's forbearance in accepting letters of credit in lieu of cash was not waiver of anything other than immediate right to be paid — No evidence that in accepting letters of credit, province agreed to have its claims treated as unsecured — That no immediate enforcement rights of province were being compromised by plan did not convert nature of province's interest to unsecured claim — No implied agreement between province and company that debt underlying secured claims could be compromised by intervening events other than tax appeals — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.2.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — General

Company self-assessed its tax liabilities and made instalment payments under provincial statutes — Province assessed company for taxes owing — Company filed notices of objections and appeals were ongoing — Company provided province with letters of credit to secure assessments under appeal — Company received protection under Companies' Creditors Arrangement Act — Company included province in list of "affected unsecured claims" — Province's claim was for greater amount than letters of credit — Company's plan of compromise and arrangement was approved — Province brought application for declaration that debt secured by letters of credit was not compromised by plan — Application granted — Plan made no express reference to letters of credit — Company provided no evidence that compromise of entirety of province's claim was required for company's ongoing survival or formed integral part of whole plan — No evidence that interpreting plan in manner proposed by province would be prejudicial to company — No evidence of prejudice to company's creditors — No suggestion of damage to integrity of plan — Disregarding letters of credit in company's insolvent circumstances was inconsistent with rationale of particular security devices — Compromising entirety of province's claim was inconsistent with general concept of plan — Company's interpretation resulted in anomalous treatment of secured creditor under plan — No evidence that any other secured creditor was included in "affected unsecured creditors" list — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by Romaine J.:

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303 (Ont. C.A.) — considered

Algoma Steel Corp. v. Royal Bank (1992), 94 D.L.R. (4th) vii, 10 O.R. (3d) xv, (sub nom. Royal Insurance Co. of Canada v. Kelsey-Hayes Canada Ltd.) 145 N.R. 391 (note), (sub nom. Royal Insurance Co. of Canada v. Kelsey-Hayes Canada Ltd.) 59 O.A.C. 326 (note) (S.C.C.) — referred to

Armbro Enterprises Inc., Re (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.) — distinguished

Canada Deposit Insurance Corp. v. Canadian Commercial Bank, (sub nom. Barclays Bank of Canada v. Canadian Commercial Bank (Liquidation)) 232 A.R. 235, (sub nom. Barclays Bank of Canada v. Canadian Commercial Bank (Liquidation)) 195 W.A.C. 235, (sub nom. Barclays Bank of Canada v. Canadian Commercial Bank (Liquidator of)) 173 D.L.R. (4th) 309, (sub nom. Barclays Bank of Canada v. Canadian Commercial Bank (Liquidator of)) 70 Alta. L.R. (3d) 69, [1999] 10 W.W.R. 704, 10 C.B.R. (4th) 70 (Alta. C.A.) — referred to

Canadian Airlines Corp., Re, 2000 ABQB 442, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201 (Alta. Q.B.) — considered

Canadian Airlines Corp., Re (2000), 2001 ABCA 9, 2000 CarswellAlta 1556, 277 A.R. 179, 242 W.A.C. 179, 88 Alta. L.R. (3d) 8, [2001] 4 W.W.R. 1, [2000] A.J. No. 1028 (Alta. C.A.) — referred to

Canadian Airlines Corp., Re, 2001 CarswellAlta 888, 2001 CarswellAlta 889, [2001] S.C.C.A. No. 60 (S.C.C.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. Chef Ready Foods Ltd. v. Hongkong Bank of Canada) [1991] 2 W.W.R. 136 (B.C. C.A.) — considered

Horizon Village Corp., Canada, Re (1991), 8 C.B.R. (3d) 25, 82 Alta. L.R. (2d) 152, 122 A.R. 348 (Alta. Q.B.) — considered

Keddy Motor Inns Ltd., Re (1992), 90 D.L.R. (4th) 175, 13 C.B.R. (3d) 245, 6 B.L.R. (2d) 116, (sub nom. Keddy Motor Inns Ltd., Re (No. 4)) 110 N.S.R. (2d) 246, (sub nom. Keddy Motor Inns Ltd., Re (No. 4)) 299 A.P.R. 246 (N.S. C.A.) — considered

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

Lindsay v. Transtec Canada Ltd., 2 B.C.L.R. (3d) 304, [1995] 4 W.W.R. 364, 31 C.B.R. (3d) 157 (B.C. C.A.) — referred to

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

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 72 C.R. (N.S.) 20 (Alta. Q.B.) — considered

NsC Diesel Power Inc., Re (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (N.S. T.D.) — considered

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. Olympia & York Developments Ltd., Re) 12 O.R. (3d) 500 (Ont. Gen. Div.) — considered

Ontario v. Canadian Airlines Corp. (2000), (sub nom. Canadian Airlines Corp., Re) 276 A.R. 273 (Alta. Q.B.)
— considered

366604 Alberta Ltd. (Trustee of) v. Pensionfund Properties Ltd. (1996), 39 C.B.R. (3d) 134 (Alta. Q.B.) — considered

366604 Alberta Ltd. (Trustee of) v. Pensionfund Properties Ltd. (1998), (sub nom. 366604 Alberta Ltd. (Bankrupt) v. Pensionfund Properties Ltd.) 228 A.R. 59, (sub nom. 366604 Alberta Ltd. (Bankrupt) v. Pensionfund Properties Ltd.) 188 W.A.C. 59, 7 C.B.R. (4th) 42 (Alta. C.A.) — referred to

885676 Ontario Ltd. (Trustee of) v. Frasmet Holdings Ltd. (1993), 17 C.B.R. (3d) 64, 12 O.R. (3d) 62, 99 D.L.R. (4th) 1, 30 R.P.R. (2d) 1 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

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

Generally — considered

- s. 6 considered
- s. 7 considered
- s. 11.2 [en. 1997, c. 12, s. 124] considered

Corporations Tax Act, R.S.O. 1990, c. C.40

- s. 81 [rep. & sub. 1994, c. 14, s. 39(1)] considered
- s. 103 considered

Retail Sales Tax Act, R.S.O. 1990, c. R.31

- ss. 18-20 referred to
- s. 18(9) [en. 1994, c. 13, s. 13] referred to
- s. 19(1) [rep. & sub. 1999, c. 9, s. 186] referred to
- s. 19(4) [am. 1994, c. 13, s. 14(2)] referred to
- s. 20(10) [am. 1994, c. 13, s. 15(3)] referred to
- s. 37(2) considered

APPLICATION by province for declaraion that portion of debt secured by letters of credit was not compromised by company's plan of compromise and arrangement.

Romaine J.:

INTRODUCTION

- Her Majesty the Queen in Right of the Province of Ontario ("Ontario") seeks an order for the following relief:
 - a. a declaration that the portion of the debt owed by Canadian Airlines International Ltd. ("Canadian") to Ontario as secured by three letters of credit is not compromised by the Amended and Restated Plan of Compromise and Arrangement (the "Plan") filed by Canadian Airlines Corporation and Canadian Airlines International Ltd. on May 25, 2000;
 - b. in the alternative, a declaration that the Plan allows the tax liability secured by the letters of credit to be considered a secured claim and that Canadian is liable for the full amount thereof up to the face value of the letters of credit;

c. in the further alternative, an order varying the Plan to permit the tax liability secured by the letters of credit to be considered a secured claim and directing that Canadian is liable for the full amount thereof up to the value of the letters of credit.

FACTS

The relationship between the parties and the background to this application were set out succinctly by Paperny J.(as she then was) in an earlier, related application as follows:

Canadian Airlines International Ltd. ("Canadian") has followed a practice of self-assessing its tax liabilities and has made installment payments of tax under two Ontario statutes, the Retail Sales Tax Act and the Corporations Tax Act. Pursuant to an ongoing auditing process, Ontario has assessed Canadian for taxes owing under these two statutes. The assessments date back as far as 1981. Following the assessments, Canadian filed eight notices of objection and appeals are ongoing. Canadian has provided Ontario with three separate letters of credit to secure the assessments under appeal. The letters of credit have been renewed at least once.

Ontario estimates the total assessments at approximately \$2 million. This may be subject to adjustment due to ongoing audits and the failure of Canadian to have completed its 1999 and 2000 tax returns. Canadian has disputed these assessments from the outset and as stated in the affidavit of Nhan Le, Canadian's Director of Taxation, is of the view that its liability to Ontario for these taxes is contingent and negligible. In short, the tax liability of Canadian to Ontario has been in dispute for several years.

Canadian received court protection under the Companies' Creditors Arrangement Act on March 24, 2000.

Canadian included Ontario in its list of "Affected Unsecured Claims" and quantified Ontario's claim at zero. Contrary to paragraph 27 of the March 24, 2000 order, Ontario was not served with a copy.

Ontario did not receive a copy of the March 24, 2000 order until it received it as part of the voting package sent out in accordance with my April 7, 2000 order in these proceedings. The package was mailed on April 25, 2000, the last possible day under the terms of the April 7, 2000 order and arrived in the mail room of the Corporations Tax Branch of the Revenue Division of Ontario on May 2, 2000, three days before the Claims Bar Date set in that order. The Revenue Division has nine branches. According to the affidavit of Rosita Vinkovic, Senior Collections Officer for the Bankruptcy and Insolvency Unit in the Collections and Compliance Branch of the Ministry of Finance, the normal procedure is for insolvency related documents to be mailed directly to the Insolvency Unit, not to the Corporations Tax Branch. According to Ms. Vinkovic, a notice to this effect was published by the Minister of Finance in a 1997 newsletter of the Canadian Insolvency Practitioners' Association. . .

The voting package did not make its way to the Insolvency Unit until May 18, 2000. Despite extensive inquiries, Ms. Vinkovic has been unable to determine the reason for this delay. The collection officer in the Insolvency Unit that received the package on May 18, 2000 did not have an opportunity to review it in its entirety until May 23, 2000, the first business day after the long weekend (and the date that a second package was sent by the monitor to the Ministry of Finance public inquiry desk and directly routed to the Insolvency Unit).

As Senior Collections Officer, Ms. Vinkovic was assigned to handle the matter on May 25, 2000. She immediately noted the May 5, 2000 Claims Bar Date and a proof of claim along with copies of the letters of credit were faxed to the monitor that same day. The amount claimed was expressed as preliminary due to the ongoing audit, which was lengthy due to the extent of Canadian's operations and its failure to timely respond to requests for information and documents. The monitor initially advised Ms. Vinkovic that the claim would not be accepted as it was past the Claims Bar Date, but changed its position upon being advised of the related security.

On June 19, 2000, nearly one month later, Ontario received a letter from Canadian's counsel advising that its claim would not be accepted because it was submitted after the Claims Bar Date. Ms. Vinkovic was away on vacation from June 23, 2000 until July 10th. On her return on the 10th she read the June 19th letter and immediately sent a request for assistance to Joel Weintraub, Senior Legal Counsel in the Legal Services Branch. Mr. Weintraub contacted the Alberta firm that had handled a similar claim for the BC government and a request was sent to the Assistant Deputy Attorney General for Ontario to authorize the retention of outside counsel. Mr. Robinson advised that he was retained September 14, 2000 and immediately advised Canadian's counsel of his intention to bring [an application to extend time to file a proof of claim] but that it would take some time to prepare the necessary material and have it sworn. *Ontario v. Canadian Airlines Corp.* (2000), 276 A.R. 273 (Alta. Q.B.) paras.2 - 9;

- Paperny J. heard the application to extend time to file a proof of claim and granted leave to Ontario to file its claim on November 7, 2000. She found that in the circumstances, Ontario's delay in filing its claim was due to inadvertence and not an attempt to circumvent the CCAA process or gain an advantage over other creditors. She also found that Canadian had contributed to the delay by its conduct: Canadian failed to serve Ontario with the March 24, 2000 order, it did not mail the voting package until the last possible day, it mailed it to the wrong office and waited until the last day of the sanction hearing, nearly one month after receiving Ontario's claim, to notify Ontario that its claim was rejected. She found no prejudice to Canadian or Air Canada, the funder of the Plan as they were specifically aware of the existence of Ontario's claim, and were, in fact, attempting to use the delay to avoid resolving the dispute with Ontario. Paperny J. found for these reasons it was not unfair to the funder of the Plan, Air Canada, to deal with Ontario's claim after the claims bar date.
- The proof of claim faxed by Ontario to the monitor on May 25, 2000 divided Ontario's claim between an unsecured portion and a secured portion, and referred to a letter of credit. As it had been prepared in a hurry, the amount claimed was in error. Paperny J. allowed Ontario to file an amended claim and also allowed further amendments that may become necessary due to the late filing of Canadian's 1999 and 2000 tax returns. Ontario's amended claim is for \$2,064,444.19. The three letters of credit lodged with Ontario total \$1,248,324.84.
- Canadian's position is that the effect of its Plan is that the debt due to Ontario, once quantified, is compromised in its entirety from \$1.00 of proven claim to \$0.14, as with all other Affected Unsecured Claims, and that the letters of credit only facilitate the payment of the reduced indebtedness. Ontario's position is that the only amount that is compromised by the Plan is the deficiency remaining after applying the amount of security represented by the letters of credit held by Ontario.
- The Plan was approved at a meeting of affected creditors held on May 26, 2000, and was sanctioned by Paperny J. on June 27, 2000 after an extensive hearing that commenced on June 5, 2000. The last day of the hearing was June 19, 2000, the same day that Canadian advised Ontario that it was rejecting its claim as being out of time and not prepared in the proper form. Although there is no question that Canadian was aware of Ontario's claim and the provision of letters of credit, there is no reference to the letters of credit in the Plan or in the evidence that was put before the court in the sanction hearing.

ISSUES

- 7 The issues that arise in this application are as follows:
 - (1) What is the appropriate characterization of the letters of credit?
 - (2) What is the effect of the Plan on Ontario's claim and the letters of credit?
 - (3) If the Plan compromises the whole of Ontario's claim, should Ontario be granted relief from such compro-

mise, in the form of an amendment to the Plan?

ANALYSIS

1. What is the appropriate characterization of the letters of credit?

- 8 The parties agreed that the letters of credit held by Ontario are not obligations that are compromised by the Plan: *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 11 D.L.R. (4th) 576 (Alta. Q.B.); Section 11.2 of the *Companies Creditors Arrangement Act*, R.C.C. 1985 c.C-36, as amended. However, Canadian submitted that the Plan compromises the underlying debt, and the letters of credit operate only to facilitate the payment of Ontario's post-compromise debt and have no other effect on the nature of Ontario's claim. This interpretation of the nature of the letters of credit and the limitation of their effect is the expressed rationale for the inclusion of Ontario's claim in the "Affected Unsecured Claims" category and the lack of any reference to the letters of credit in the Plan that was put before the court for sanction.
- 9 Canadian submitted that such possession does not convert what it characterizes as an unsecured claim into some kind of secured claim. It argued that, since the letters of credit are not security interests in the assets of Canadian, but rather separate obligations between the relevant banks and Ontario, Ontario's claim is not secured.
- 10 I disagree with Canadian's characterization of the letters of credit and their effect on the nature of the relationship between Canadian and Ontario.
- In suggesting that Ontario's claim is unsecured, Canadian appears to be including in the definition of "secured" the requirement that any security must be in the assets of Canadian. While that may be so in the context of the Plan drafted by Canadian, letters of credit are commonly used and recognized by the courts as a form of security: 885676 Ontario Ltd. (Trustee of) v. Frasmet Holdings Ltd. (1993), 17 C.B.R. (3d) 64 (Ont. Gen. Div. [Commercial List]) at para. 35; Meridian Development Inc., supra, at pp. 585 and 587; Canada Deposit Insurance Corp. v. Canadian Commercial Bank (1999), 232 A.R. 235 (Alta. C.A.). As pointed out by Blair, J. in Frasmet, supra, at para. 27:

[t]here is a fundamental difference between a letter of credit, which is a very specialized form of security, and a guarantee, which is not a form of security at all (except in a loose, non-legal sense of the term).

Wachowich J. (as he then was) recognized the distinction between the use of letters of credit as security and as guarantees at p. 585 of *Meridian Development Inc.*:

[Aspen Planners Ltd. v. Commerce Masonry & Forming Ltd. (1979), 100 D.L.R. (3d) 546 (Ont. H.C.)], as do the English cases cited by counsel, exemplifies the more traditional use of the letter to guarantee payment in commercial transactions where goods and services are bought and sold.

Here, however, a more novel use has been made of the letter of credit as a security device...

13 Kevin McGuinness, in his text *The Law of Guarantee* (Scarborough: Carswell, 1996) emphasizes the difference between the payment and security functions of letters of credit at 815:

In the case of a traditional letter of credit...[it] provides a payment facilitating mechanism...Thus the letter of credit is not intended as a security for payment...

In contrast, a stand-by credit is not furnished as a means of making payment, but as a method of providing security against the possibility of default.

Although Canadian agreed that the letters of credit it posted are "standby" (or security) letters of credit, it attempts to characterize them as simply payment devices. I do not agree.

- While counsel for Air Canada also submitted that a letter of credit is basically a guarantee, that is not how it was characterized in *Frasmet*, supra and *Meridian Development Inc.*, supra and properly so, since an irrevocable standby letter of credit such as those held by Ontario represents the equivalent of cash, the advance of which is subject to the satisfaction of certain conditions.
- The legislation under which the tax is payable to Ontario and the letters of credit were posted confirm that the letters of credit were provided as security. The *Corporations Tax Act, R.S.O. 1990, c. C-40*, as amended by S.O. 1994, c. 14, s. 39(1) provides in s. 81 that:

Every corporation shall pay, immediately on receipt of a notice of assessment or reassessment or of a statement of account in respect of a taxation year, any part of the tax, interest, penalties and any other amounts then unpaid in respect of the taxation year, whether or not an objection to or an appeal from an assessment in respect of the taxation year is outstanding.

Section 103 of that Act provides that the Minister may accept security in lieu of this immediate payment:

The Minister may, if he or she considers it advisable, accept security for the payment of taxes by a corporation by way of a mortgage or other charge of any kind upon the property of the corporation or of any other person, or by way of a guarantee of the payment of the taxes by another person.

- The Retail Sales Tax Act, R.S.O. 1990, c. R-31, as amended by S.O. 1994, c. 13, ss 13, 14(2), 15(3), S.O. 1999, C. 9, s. 186 contains similar provisions for the immediate payment of assessed tax notwithstanding an objection by the taxpayer in ss. 18-20. Section 37(2) provides that "[w]here the Minister considers it advisable to do so, the Minister may accept security for the payment of taxes in any form that the Minister considers satisfactory".
- In short, although Ontario's claim may not have been characterized as "secured" by Canadian in the Plan, the letters of credit provide Ontario with a form of security, albeit subject to certain conditions.
- The letters of credit require Ontario to provide either a drawing certificate stating that the amount being drawn is "due and payable in accordance with the provisions of the [Ontario Retail Sales] Act" and remains unpaid, or a written demand stating that the amount demanded is "payable and the taxpayer has failed to pay it." The parties agreed that until decisions have been rendered in the tax appeals, no amounts are payable, and Ontario is therefore precluded from drawing on the letters of credit until that time. Canadian submitted that the effect of this agreed-upon forbearance by Ontario is that the underlying debt is subject, not only to potential reduction by virtue of the tax appeals in Ontario, but also to reduction by compromise in the CCAA proceedings. To hold otherwise, Canadian suggested, flies in the face of the explicit wording of the letters of credit and is an attempt to improve Ontario's pre-CCAA entitlement.
- A finding that the requirement to provide a written confirmation of the amount of debt owing prior to drawing on a letter of credit renders the underlying debt subject to compromise through CCAA proceedings would undermine the commercial purpose of such instruments and frustrate their objectives. It would render any security provided by a letter of credit meaningless in the very situation it has been obtained to alleviate. As stated by Blair J. in *Frasmet*, supra at para. 36:

In the case at bar, the stated purpose of the letter of credit is to secure Standford's obligations under the lease. It can scarcely be gain-said that an event which is sure to impair a tenant's ability to honour its obligations under

the lease is its bankruptcy. Why should Frasmet, which had obtained for itself a stand-by letter of credit as collateral security in connection with the lease transaction, be precluded from calling upon that security when the very kind of situation for which security is most likely necessary arises? In my view, in the circumstances of this case, it should not be so precluded.

In *Frasmet*, supra, while the tenant's bankruptcy terminated its continuing obligations to pay rent, Blair J. found that there were other obligations under the lease that arose upon default, including accelerated rent, damages arising out of the breach and the landlord's right to recoup capital expenditures on leasehold improvements made at the outset of the lease. Blair J. allowed the landlord to draw upon the letter of credit, stating at para. 40 that:

[w]hile the bankruptcy of Stanford and the subsequent disclaimer of the lease by the Trustee may release the Tenant and its Trustee from those obligations, they cannot in my opinion, deprive the landlord from having resort to the security for which it bargained in order to protect itself in the case of the very kind of eventuality which has occurred.

- Similarly, in 366604 Alberta Ltd. (Trustee of) v. Pensionfund Properties Ltd. (1996), 39 C.B.R. (3d) 134 (Alta. Q.B.), aff'd(1998), 7 C.B.R. (4th) 42 (Alta. C.A.), Smith J. found that the bankruptcy of a tenant did not affect the right of a landlord to call on a letter of credit issued as security for the repayment of a cash inducement. Smith J. found that the landlord was entitled to call on the letter of credit "irrespective of any dispute arising as to entitlement to the fund." (p.137). A letter of credit is "a form of security which may be called upon by the secured creditor when the event for which the security has been given occurs, without regard to the circumstances existing between the parties to the underlying transaction": Frasmet, para. 35.
- 23 That insolvency is irrelevant to a letter of credit is reflected in s. 11.2 of the CCAA:

No order may be made under section 11 staying or restraining any action, suit or proceeding against a person, other than a debtor company in respect of which an application has been made under this Act, who is obligated under a letter of credit or guarantee in relation to the company.

- Canadian submited that, as the provision of a letter of credit involves three separate contracts (<u>Meridian Development Inc.</u>, supra at 586), it is necessary that I determine the terms of the contract between Ontario and Canadian. Canadian suggested that, based on the specific wording of the letters of credit, I should find that one term of such contract is that Ontario could not call on the letters of credit as long as they were kept current and until the final amount of tax debt owing by Canadian to Ontario was determined. Canadian then submitted that I should take an additional step and find that Ontario's forbearance is subject, not only to the result of the tax appeals, but to reduction of the claims pursuant to compromise in these proceedings. The argument is that, since Ontario has by its forbearance waived its right to immediate payment of the tax assessed, it has somehow without more left itself open to reduction of its claim through the Plan.
- The answer to this argument again lies with the nature of the letters of credit and the nature of Canadian's obligation to the taxing authorities. Had Ontario not accepted the letters of credit from Canadian, Canadian would have been obliged to pay the entire amount of tax assessed pending the outcome of its appeals of the assessments, resulting in no debt to be compromised. Forbearance by Ontario in recognition of the possibility that Canadian's appeals of the assessments may be successful is not the equivalent of acceptance of the risk of Canadian's intervening insolvency. As set out by Lazar Sarna in the text *Letters of Credit: The Law and Current Practice* at p. 5-25 (quoted in 366604 Alberta Ltd. (Trustee of) v. Pensionfund Properties Ltd., supra at para. 11 (Q.B.):
 - ...[O]ne of the fundamental commercial reasons for the use of the letter of credit mechanism is to secure anticipated payments in a manner which would not rely upon the will, status or financial faith of the applicant.

- I cannot find that Ontario's forbearance in accepting the letters of credit in lieu of cash was a waiver of anything other than an immediate right to be paid. Its forbearance is to delay such right until after the appeals have been concluded, for the amount determined to be payable on appeal. There is no evidence of any greater forbearance, either in the letters of credit or otherwise before me, and certainly no evidence that, in accepting the letters of credit, Ontario agreed to have its claims treated as unsecured. The nature of the letters of credit dictates the opposite conclusion, as does Ontario's response to that characterization when it finally became aware of how it was being treated under the Plan.
- Canadian also sought to draw a distinction between Ontario's claim and other secured claims by noting that this is not a case in which Canadian has committed an act of default under a security agreement such that Ontario would be in a position to enforce its security rights. Ontario must still wait for the outcome of the tax appeals before drawing on the letters of credit. However, the fact that no immediate enforcement rights of Ontario are being compromised by the Plan does not convert the nature of Ontario's interest from a secured claim to an unsecured claim.
- Canadian submitted that Ontario is seeking relief from the terms of its own letters of credit, in that it is asking to change the terms of the bargain it struck with Canadian upon acceptance of the letters of credit. I reject that submission and find the converse; Ontario is asking that the bargain be honoured. Ontario did not ask for any amendment to the letters of credit, but for recognition of the secured nature of part of its claim. Ontario argued that once that question is settled, the letters of credit can be exercised in due course after the appeals have been concluded and any difficulty arising from the necessity of making representations in a draw-down certificate or written demand will be resolved.
- For the reasons discussed, I find that a portion of Ontario's claim is indeed secured, and that there was no implied agreement between Ontario and Canadian that the debt underlying the secured portion of the claims could be compromised by intervening events other than the tax appeals.
- Despite this, there is no reference to the letters of credit anywhere in the Plan, nor any suggestion that Ontario's claim may be anything other than entirely unsecured. It is clear that Canadian had full knowledge of the letters of credit, and of the position taken by Ontario in its May 25, 2000 form of claim, that it was secured for part of its claim.
- The court sanctioning the Plan did not have knowledge of Ontario's position, or the form of security that distinguished Ontario's claim from other, apparently unsecured claims in the same category. It is clear that the court proceeded on the assumption that Ontario's claim was completely unsecured, on the basis of an aggressive characterization of the letters of credit by Canadian. The question then becomes, what effect does the Plan have on Ontario's claim and the letters of credit? Specifically, it must be determined whether an interpretation of the Plan which disregards the security arrangements made between these parties should be adopted.

2. What is the effect of the Plan on Ontario's claim and the letters of credit?

- After court approval of a CCAA plan, an application for directions may be made if a difficulty arises in its interpretation or application: *Re Horizon Village Corp.*, *Canada* (1991), 8 C.B.R. (3d) 25 (Alta. Q.B.).
- In that case, Wachowich J. (as he then was) was asked to interpret a court-sanctioned plan with respect to a federal tax rebate that had arisen in favour of the debtor company. The court-appointed manager sought a declaration that the rebate formed part of the estate of the debtor company. A secured creditor argued that it was entitled to the rebate because it held an assignment of the rebate as collateral security. Wachowich J. found in favour of the secured creditor.
- He stated that as a starting point in such applications, the court must always keep in mind the purpose and

effect of the CCAA: para. 5. He referred to the wide scope of the legislation in granting protection to debtor companies and enabling them to continue carrying on business. Commensurate with the court's protection of debtors under the CCAA, Wachowich J. noted, is the court's desire not to prejudice creditors: para. 7, quoting from *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.) at p. 6: "[the CCAA] was, in my view, never intended to disadvantage any group which, but for the Act, would have enjoyed rights and priorities vis-a-vis the debtor or the debtor's assets."

- Wachowich J. found that the plan before him did not expressly refer to either the secured creditor's collateral security interest in the rebate, nor to the rebate itself. The rebate was not a source of funds contemplated by the plan. He considered, however, that the collateral security interest or the rebate might be impliedly included in the plan. He held that the court will be reluctant to imply terms which will alter the legal relationship between parties, but will do so if the purposes of the CCAA and any plan made under the CCAA will be defeated without such implied terms. He concluded that there were no implied inclusions in regard to the rebate, specifically rejecting that the rebate was impliedly caught by the plan's use of the words "proceeds of sale" or "funds generated".
- The aim of minimizing prejudice to creditors embodied in the CCAA is a reflection of the cardinal principle of insolvency law: that relative entitlements created before insolvency are preserved: R. Goode, *Principles of Corporate Insolvency Law*, 2nd ed. (London:Sweet & Maxwell, 1997) at 54. While the CCAA may qualify this principle, it does so only when it is consistent with the purpose of facilitating debtor reorganization and ongoing survival, and in the spirit of what is fair and reasonable.
- Paperny J. (as she then was) also discussed the purpose of the CCAA in *Re Canadian Airlines Corp.* (2000), 265 A.R. 201 (Alta. Q.B.), aff'd [2000] A.J. No. 1028 (Alta. C.A.), leave refused [2001] S.C.C.A. No. 60 (S.C.C.). At para. 95, she stated that the purpose of the CCAA is to facilitate the reorganization of debtor companies for the benefit of a broad range of constituents.
- Paperny J. also noted at para. 95 that, in dealing with applications under the CCAA, the court has a wide discretion to ensure the objectives of the CCAA are met. At para. 94, she identified guidance for the exercise of this discretion in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) at p. 9 as follows:

"Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction - although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity - and "reasonableness" is what lends objectivity to the process.

- In addition to the purposes of the CCAA and the principles which guide the court's role in proceedings under that statute, the overall purpose and intention of the plan in question will also be considered by the court when faced with disputes in interpretation: *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.), affd(1995), 31 C.B.R. (3d) 157 (B.C. C.A.)
- With these guiding principles in mind, I now turn to the interpretation of the Plan.
- As referenced above, Canadian submitted that the Plan must be interpreted as compromising the entirety of Ontario's claim, not just the portion remaining after the application of letters of credit. Its position is summarized in a letter sent by its counsel to Ontario's counsel, Exhibit "C" to the affidavit of Ontario's deponent, Susan Scarlett:
 - ...We note that, in Canadian's...Plan, ..., approved by the Order of Madam Justice M.S. Paperny dated June 27, 2000, all Affected Unsecured Creditors (i.e. holders of Affected Unsecured Claims- art. 1.1) are to receive

\$0.14 for each \$1.00 of Proven Unsecured Claim (arts. 1.1, 5.1(a)). "Affected Unsecured Claims" is defined in art. 1.1 as "all Claims listed in Part I of the Affected Unsecured Claims List or all Claims of any Person listed in Part II of the Affected Unsecured Claims List...". Your client is covered by each alternative branch in that definition. Listed at para. 2 of Part I of the Unsecured Claims List is "Claims in respect of any Tax Claims including, without limitation, those Claims listed on Part "II" to this Schedule "B". As well, Ontario is a person listed in Part II of the Affected Unsecured Claims List. The definition of "Tax Claim" (at art. 1.1 of the Plan) includes the following words:

"Tax Claims" means any and all Claims for Taxes by any...provincial...authority, agency or government (including, without limitation, any and all Claims for Taxes by ...Her Majesty the Queen in right of any province or territory of Canada...) ... in respect of any taxation year or period ending on or before the Effective Date...

Thus, the entirety of your client's claim is an Affected Unsecured Claim, and your client will receive in payment thereof, \$0.14 per \$1.00 of Proven Claim.

- Ontario suggested that the Plan should be interpreted as including the secured portion of its claim in the "Noteholders Claims List" under the Plan, which is characterized as secured. It pointed out that the Plan defines the "Noteholders Claims List" as "the list of Affected Secured Note Claims attached hereto as Schedule "C", as amended or supplemented from time to time as provided in the Creditors' Meetings Order". From that language, Ontario submitted that it is clear that the list of Noteholders was not intended to be complete or final. It also suggested that the secured portion of Ontario's claim could be considered to be an "unknown" claim in accordance with the definition of "Claims" under the Plan, and that, therefore, the addition of its claim to the Noteholders Claims List would not offend the Plan as sanctioned.
- I disagree with Canadian's suggestion that its interpretation is the only or most reasonable interpretation of the Plan. I also do not find the interpretation suggested by Ontario to be persuasive. I do agree, however, with Ontario's position as reflected in the first ground of relief sought in this application, as paraphrased at the outset of these reasons: the Plan only compromises the balance of Ontario's claim after the letters of credit are applied. In my view, the language of the Plan, the general concept of the Plan as a whole and the purpose and philosophy of the CCAA support this result.
- Although the Plan is capable of the interpretation that Canadian suggested, I find that interpretation should not be adopted in view of the purpose of the CCAA and the whole of the Plan itself. Specifically:
 - a. The Plan makes no express reference to the letters of credit. Implying that the treatment of Ontario's claim is entirely unsecured is not necessary to avoid defeating the purpose of the CCAA and the Plan. Canadian has not suggested nor provided any evidence that the compromise of the entirety of Ontario's claim is required for its ongoing survival, or formed an integral part of the whole of the Plan.
 - b. Not only is there is no evidence or suggestion that interpreting the Plan in the manner Ontario proposed would be prejudicial to Canadian or Air Canada, there is no evidence of prejudice to Canadian's creditors, nor can there be any suggestion of damage to the integrity of the Plan.
 - c. While certainly the alteration of legal relationships between creditors and debtors is a necessary incident of CCAA plans, the court also endeavours to minimize to the extent possible prejudice to creditors: *Horizon Village Corp.*, *Canada (Re)*, supra. Canadian's interpretation is inconsistent with this goal.
 - d. The premise of Canadian's position is that the Plan compromises only the underlying debt to Ontario and leaves intact the letters of credit, which are mere payment devices. This wholly disregards the reality of the se-

curity Canadian granted to Ontario pre-CCAA to avoid immediate payment of assessed tax, as well as the entire concept of the Plan, described below. This technical approach is to be discouraged in CCAA proceedings: *Lindsay v. Transtec Canada Ltd.*, supra at para. 26.

- e. Disregarding the letters of credit in Canadian's insolvent circumstances is wholly inconsistent with the rationale of these particular security devices. Letters of credit are obtained to secure payments in a manner that does not rely on the financial position of the applicant. As recognized in s. 11.2 of the CCAA, letters of credit are designed to operate outside and not be subject to the compromises typically involved in insolvency.
- f. Compromising the entirety of Ontario's claim, which in effect deprives Ontario of much of the value of its security, is inconsistent with the general concept of the Plan. This was to compromise the claims of certain of Canadian's unsecured creditors to the extent of 86 cents per dollar of proven claims (with no cap on total proven unsecured claims) and to compromise the claims of Affected Secured Noteholders to the extent of 3 cents per dollar of proven claims and allowing those secured creditors to receive the unsecured dividend on the deficiency.
- g. Canadian's interpretation results in anomalous treatment of a secured creditor and tax claimant under the Plan. It treats a secured creditor as an unsecured creditor in compromising its entire claim at 14 cents on the dollar, while only the deficiency portion of the other secured creditors under the Plan (Affected Secured Noteholders) are treated in this fashion. Further, there is no evidence that any other secured creditor is included in the Affected Unsecured Creditors list, except for Ontario and the Affected Secured Noteholders (and then only to the extent of the deficiency). Similarly, there is no evidence that any other tax claimant was secured but deprived of that security by having the entirety of its claim compromised.

For these reasons and the reasons that follow, Canadian's interpretation is not fair and reasonable.

- As noted, I am not persuaded by Ontario's suggested interpretation of the Plan. It would be a strained interpretation to include Ontario's secured claim with those of the Affected Secured Noteholders. It is not consistent with the overall concept of the Plan, as described above. It also appears that it is no longer possible to amend the Noteholders Claims List, since the power to do so expired on May 15, 2000.
- However, the Plan can and should be interpreted as excluding secured claims from compromise as "Affected Unsecured Claims". Rather, the only secured claims compromised under the terms of the Plan are those of the Affected Secured Noteholders. These notes represented a principal debt to Canadian of US\$ 175,000,000.00 with a provision that could increase the obligation to US \$190,000,000.00. It is obvious why the compromise of those secured claims was integral to the success of the Plan and the ability of Canadian to carry on business.
- While the Plan's definition of "Claim" is broad and refers to both unsecured and secured claims, the way the Plan was drafted requires that the term "Claim" be used in relation to both the secured (the "Affected Secured Note Claims") and the unsecured (the "Affected Unsecured Claims") claims. These two categories constitute the classification of compromised claims under the Plan (Section 5.1). It is true that "Tax Claims" are included within the definition of "Affected Unsecured Claims" and arguably the use of the word "Claims" in conjunction with "Tax" could incorporate a compromise of a secured claim. That result, however, amounts to including the whole of an apparently isolated secured claim, which is not an Affected Secured Note Claim, in a group of unsecured claims. There is no evidence before me to suggest that there are any other creditors in the Affected Unsecured Claims List that hold security, except for Ontario and creditors holding Senior Secured Notes, to the extent of any deficiency only. There is no other reference in the Plan that would suggest that the Affected Unsecured Creditors include secured claims.
- The interpretation of the Plan to exclude compromise of secured claims except for those of Affected Secured Noteholders is consistent with the purposes of the CCAA, as well as the Plan itself. The letters of credit are not Ca-

nadian's property and there is no evidence or suggestion that their intended use by Ontario will operate to defeat any aspect of the Plan, nor to prejudice Canadian's ongoing operations. The purpose of the CCAA to facilitate reorganization and ongoing survival of debtor companies is honoured. Honouring Ontario's secured claim is consistent with the general concept of compromising only the claims of unsecured creditors and Affected Secured Noteholders in the Plan.

- Interpretation of the Plan in this way does not result in an enhancement of Ontario's rights or special treatment under the Plan. It honours the clear security arrangements made prior to the CCAA proceedings and treats the deficiency in a manner identical to the unsecured claims of all affected creditors.
- Canadian emphasized in its written submissions that it was not compromising a secured claim in its proposed treatment of Ontario under the Plan. Not only did Canadian reject Ontario as a secured creditor, it stressed that the only compromise was of the underlying debt to Ontario. In substance, however, what Canadian hopes to achieve from its suggested interpretation is the effective disregard of Ontario's security. If Canadian had intended to compromise a secured claim within the Affected Unsecured Claims category, this should have been expressed clearly within the terms of the Plan, Ontario should have been expressly notified in a timely fashion, and the court should have been alerted to this anomalous treatment in the sanction hearing. Canadian did none of these things. It now relies on an interpretation of the language of the Plan to support its purported compromise of the whole of Ontario's claim without regard to its security. While I appreciate that CCAA proceedings necessarily change debtor-creditor relationships, this must be done clearly and fairly. Under the circumstances, the court cannot condone the change Canadian is seeking vis-a-vis Ontario's claim.
- In summary, the evidence is clear that the letters of credit were granted by Canadian well prior to the March 24, 2000 stay order. Ontario's secured claim is not mentioned in the Plan, and the security would be effectively stripped of its value by the application of the Plan as proposed by Canadian, in a fashion that is aberrant to the treatment of any other creditor under the Plan and inconsistent with its general concept. This cannot be right and can be avoided by a reasonable interpretation of the Plan that is consistent with the general concepts of both the CCAA and the Plan.
- This conclusion is strengthened by the role that Canadian played in the delay surrounding the submission of Ontario's claim, discussed further below.

3. Should Ontario be granted relief from the complete compromise of its claim under the Plan, in the form of an amendment to the Plan?

- If I was unable to interpret the Plan in a manner which compromises only the unsecured portion of Ontario's claim, I would in any event have considered it appropriate to direct an amendment to the terms of the Plan to effect this result.
- The Ontario Court of Appeal considered the question of whether the court has jurisdiction to amend a plan of arrangement in *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11 (Ont. C.A.), leave refused (1992), 10 O.R. (3d) xv (S.C.C.)
- In that case, the plan of arrangement had been voted upon by creditors and sanctioned by the court, subject to the outcome of the appeal. The court found that, generally speaking, a plan of arrangement is consensual and the result of agreement, and that a plan found to be fair and reasonable ought not be amended by the court unless jurisdiction is found in the CCAA and there are compelling reasons to do so. The court also found that, generally speaking, the court ought not interfere by amendment in situations where to do so would prejudice the interests of the company or the creditors. In the facts of the *Algoma* situation, the court found that an amendment would be insignificant and technical as far as other creditors were concerned, and allowed the plan to be amended.

- Sections 6 and 7 of the CCAA deal with the authority of the court to sanction a plan of arrangement, and to alter or modify its terms. Section 7 provides that, when an amendment is proposed at any time after meetings of creditors have been summoned, the court may adjourn those meetings or may direct that no adjournment of the meetings or convening of additional meetings is necessary if the court is of the opinion that the creditors or share-holders are not adversely affected by the amendment proposed. Section 7 also provides that any arrangement so altered or modified may be sanctioned under section 6. The Plan was in fact amended pursuant to the authority of Section 7 in this manner by Paperny, J. Section 6 and 7 offer no guidance on whether a court-sanctioned plan may be subsequently amended.
- As mentioned, the CCAA confers broad discretion on the court and is to be afforded a large and liberal interpretation: Re Canadian Airlines Corp., supra at para 95; Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.). It is silent, however, on many procedural issues. Given the lack of legislative guidance, the courts have used the basic purpose of the CCAA as a guide to its application and the exercise of its discretion in disposing of applications under the Act: Re Canadian Airlines Corp., supra at para. 95. The keynote concepts of fairness and reasonableness have been recognized as the driving force behind the CCAA and the court's interpretation and application of the Act: Re Canadian Airlines Corp. at para. 95, Olympia & York Developments Ltd. v. Royal Trust Co., supra at p. 9.
- I have already described that the purposes of the CCAA are honoured in the interpretation of the Plan that would compromise only the unsecured portion of Ontario's claim. Those purposes are equally honoured in an amendment to the Plan to achieve this result. Further, the concepts of fairness and reasonableness are also recognized in such an amendment, in contrast to the existing effect of the Plan if my interpretation were not possible.
- It would not be fair to Ontario, given the pre-existing arrangements made with Canadian to secure the payment of tax and the process by which it found itself faced with Canadian's attempt to compromise the entirety of its claim (discussed further below), to allow Canadian to succeed in this regard. Moreover, it is not unfair to either Canadian or Air Canada to allow an amendment to effect the result that only the deficiency portion of Ontario's claim is compromised as an unsecured claim. Canadian and Air Canada were well aware of the letters of credit and that Ontario had submitted a form of claim that recognized this security. There is no evidence or assertion of unfairness to any other party.
- It would similarly not be reasonable to deprive Ontario of its security, as I found would be the effective result if Canadian's interpretation of the Plan were to prevail. While Canadian argued that the security itself is not compromised, that argument does not recognize the reality that if the letters of credit are to be treated as the simple payment mechanisms that Canadian asserted they were, their value is essentially reduced, cent for cent, in a manner identical to unsecured claims under the Plan. Ultimately, the letters of credit would be deprived of their value by Ontario's treatment under the Plan. This is not a reasonable result in view of the whole of the Plan and the anomalous treatment Canadian would have the court inflict on Ontario's secured claim.
- The CCAA authorizes the court to amend a plan in appropriate circumstances, where there are compelling reasons to do so. Although the Act does not expressly state that such amendment could take place after the Plan is sanctioned, as pointed out in *Algoma*, supra there is no reason to suggest that the CCAA "contemplates a role for the court as a mere rubber stamp or one that is simply administrative rather than judicial." (p.103). While the circumstances justifying an amendment after a sanction hearing ought to be truly exceptional, in recognition of the potential violence done to the laudable goal of commercial certainty, there is no reason why subsequent amendments should be conclusively foreclosed in every case, without examination of the particular circumstances.
- Are there compelling circumstances in this case that would justify a subsequent amendment? Ontario submitted that there are, in that it would be unfair to compel Ontario to be bound by the unilateral characterization of its

claim by Canadian.

- The process established by the April 7, 2000 order setting out the claims procedure was unique, in that it allowed Canadian to list its creditors under categories reflecting its opinion of their status. A creditor that did not agree with Canadian's characterization of the nature or amount of its claim was required to file a Dispute Notice.
- In Ontario's case, for the reasons set out in Paperny J.'s findings of fact, the claims bar date intervened. Ontario filed a Dispute Notice on the basis of a partially secured claim. Ontario did not become aware that Canadian was rejecting its claim as being out of time until the last day evidence was presented at the sanction hearing, and no evidence of Ontario's position was presented to the court at the hearing.
- While Ontario must bear some responsibility for its systemic internal delays, and while it would have been prudent for Ontario to have been represented at the hearing or to have followed-up its Dispute Notice to ensure that Canadian was in agreement with its claim, it was not aware of the position Canadian would take with respect to the validity of its claim until after the time it would have had an opportunity to appear at the sanction hearing. I note that in Canadian's June 19, 2000 letter to Ontario, it did not suggest that it was also taking the position that the security would not be honoured as originally intended by the parties. This was only raised after Canadian failed to have Ontario's claim barred in the late claim application.
- Ontario never had a realistic opportunity to present its position to the court before the Plan was sanctioned, and the court was completely unaware of any issue involving the nature of Ontario's claim. It must surely never be the case that a creditor in CCAA proceedings is deprived of the opportunity to present its submissions on the nature and amount of its claim by reasons of procedural irregularities that do not arise from a lack of diligence or good faith. The wide scope and protection offered by the CCAA should not be allowed to operate to disadvantage or prejudice creditors without a fair hearing of their concerns and submissions.
- This is not a situation, as in *Re Armbro Enterprises Inc.* (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.), where the creditor had several opportunities to make submissions to the court and to appeal its classification and failed to pursue these options. While it is true that Ontario was aware of its proposed classification under the Plan, and also aware of the sanction hearing at which classification was to be approved, it had taken action to place its position on classification before the monitor and Canadian by filing its Dispute Notice. At the least, it was entitled to assume that, if Canadian disagreed with its position, it would give Ontario notice prior to the conclusion of the sanction hearing. It was not Ontario that was "lying in the weeds" in this case, delaying in the hopes of gaining an advantage.
- There is no prejudice to other creditors if the Plan is amended as sought by Ontario. As was the case in *Algoma*, supra, the letters of credit are not the property of Canadian and there is no evidence or suggestion that there will be any prejudice or impairment of operations as a result of drawing on the letters of credit. Both Canadian and Air Canada were aware of Ontario's claim, and cannot be said to be prejudiced except to the extent that they disagree with the characterization of the claim. Paperny, J. specifically found no prejudice in the late claim application and also found that Canadian and Air Canada were attempting to use the delay to avoid resolving the dispute with Ontario. As I have stated previously, this is not an attempt by Ontario to improve its pre-insolvency rights, but merely to enforce them.
- Canadian submitted that Ontario's request for amendment of the Plan is a procedurally improper method of attacking the sanction order. The Canadian process was unusual in that the classification of creditors was approved in the sanction order, and not previously. Canadian submitted that Ontario should have appealed the sanction order as it was the order approving the classification, relying on *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S. C.A.).
- The rationale of that case is that, while the proper procedure for attacking a classification order is by way of

appeal from that order and not a subsequent sanction order, because of the overall supervisory duty of the court to ensure fairness of a plan, the court can intervene in the subsequent appeal of the sanction order "if necessary to avert substantial injustice" (para.21). In *Re: Keddy Motor Inns*, supra, the court found the circumstances did not warrant intervention.

- Shortly before the sanction order was issued, Ontario was advised by Canadian that its claim would not be accepted because it was submitted after the claims bar date. Ontario's next step was to pursue its application for extension of time to file a proof of claim. It was successful in that application, and filed its amended claim, continuing to assert secured status. The decision of Paperny J. allowing Ontario's application does not restrict Ontario to making its claim as an "Affected Unsecured Creditor". In fact, in the decision, Paperny J. refers several times to the letters of credit as "security" for the assessments under appeal. It is arguable that, had Ontario chosen to appeal the sanction order because of the classification of its claim, it would have faced the objection that it lacked status as its claim was time-barred. The process followed by Ontario is not a collateral attack on the sanction order, but the logical outcome of the procedure followed to re-establish its claim.
- Canadian also submitted that Ontario's classification as an "Affected Unsecured Creditor" is appropriate because it is in the same classification as other Tax Claimants, citing the principle of "commonality of interest" as enunciated by Forsyth, J. in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.). This is not, however, a case of a secured creditor attempting to be distinguished from other secured creditors, but of a secured creditor attempting to be characterized as secured. The distinction between a secured claim and an unsecured claim is surely sufficient to overcome the "commonality of interest" test.
- Were it necessary, I would direct that the Plan be amended to provide that the portion of Ontario's claim that is secured by the letters of credit not be compromised.

CONCLUSION

In conclusion, I find that the Plan compromises only the unsecured portion of Ontario's claim. If I was unable to make that finding, I would have found compelling reasons in these very unusual circumstances for the court to take the extraordinary step of amending the Plan, even after its sanction. To do otherwise would be to allow Ontario to be prejudiced by a process that was flawed in its operation with respect to Ontario's claim. Canadian and Air Canada were aware both of Ontario's claim and its characterization of its security and there is no prejudice to either of them in the interpretation I have found, nor the amendment to effect it, if necessary. Canadian did not suggest nor is there any evidence of prejudice to the other creditors arising from this interpretation or amendment.

Application granted.

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TAB 14

1993 CarswellOnt 182, 17 C.B.R. (3d) 1, (sub nom. Olympia & York Developments Ltd., Re) 12 O.R. (3d) 500

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1993 CarswellOnt 182, 17 C.B.R. (3d) 1, (sub nom. Olympia & York Developments Ltd., Re) 12 O.R. (3d) 500

Olympia & York Developments Ltd. v. Royal Trust Co.

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re plan of arrangement of OLYMPIA & YORK DEVEL-OPMENTS LIMITED and all other companies set out in Schedule "A" attached hereto

Ontario Court of Justice (General Division)

R.A. Blair J.

Heard: February 1 and 5, 1993 Oral reasons: February 5, 1993 Written reasons: February 24, 1993 Judgment: February 24, 1993 Docket: Doc. B125/92

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Counsel: [List of counsel attached as Schedule "A" hereto.]

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Approval by Court — "Fair and reasonable".

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Plan of arrangement — Sanctioning of plan — Unanimous approval of plan by all classes of creditors not being necessary where plan being fair and reasonable.

Under the protection of the *Companies' Creditors Arrangement Act* ("CCAA"), O & Y negotiated a plan of arrangement. The final plan of arrangement was voted on by the numerous classes of creditors: 27 of the 35 classes voted in favour of the plan, eight voted against it. O & Y applied to the court under s. 6 of the CCAA for sanctioning of its final plan.

Held:

The application was allowed.

In considering whether to sanction a plan of arrangement, the court must consider whether: (1) there has been strict compliance with all statutory requirements; (2) all materials filed and procedures carried out are authorized by the CCAA; and (3) the plan is fair and reasonable.

The court found that the first two criteria had been complied with. O & Y met the criteria for access to the protection of the CCAA, the creditors were divided into classes for the purpose of voting and those classes had voted on the plan. All meetings of creditors were duly convened and held pursuant to the court orders pertaining to them. Further, nothing had been done or purported to have been done that was not authorized by the CCAA.

In assessing whether a plan is fair and reasonable, the court must be satisfied that it is feasible and that it fairly balances the interests of all of the creditors, the company and its shareholders. One important measure of whether a plan is fair and reasonable is the parties' approval of the plan and the degree to which approval has been given. With the exception of the eight classes of creditors that did not vote to accept the plan, the plan met with the overwhelming approval of the secured creditors and unsecured creditors.

While s. 6 of the CCAA makes it clear that a plan must be approved by at least 50 per cent of the creditors of a particular class representing at least 75 per cent of the dollar value of the claims in that class, the section does not make it clear whether the plan must be approved by *every* class of creditors before it can be sanctioned by the court. A court would not sanction a plan if the effect of doing so were to impose it upon a class or classes of creditors who rejected it and to bind them by it. However, in this case, the plan provided that the claims of the creditors who rejected the plan were to be treated as "unaffected claims" not bound by its provisions. Further, even if they approved the plan, secured creditors had the right to drop out at any time by exercising their realization rights. Finally, there was no prejudice to the eight classes of creditors that did not approve the plan because nothing was being imposed upon them that they had not accepted and none of their rights were being taken away.

Cases considered:

Alabama, New Orleans, Texas & Pacific Junction Railway Co., Re, 2 Meg. 377, [1886-90] All E.R. Rep. Ext. 1143, [1891] 1 Ch. at 231 (C.A.) — referred to

Campeau Corp., Re (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) — referred to

Canadian Vinyl Industries Inc., Re (1978), 29 C.B.R. (N.S.) 12 (Que. S.C.) — referred to

Dairy Corp. of Canada, Re, [1934] O.R. 436, [1934] 3 D.L.R. 347 (C.A.) — referred to

École Internationale de Haute Esthétique Edith Serei Inc. (Receiver of) c. Edith Serei Internationale (1987), Inc. (1989). 78 C.B.R. (N.S.) 36 (C.S. Qué.) — referred to

Keddy Motor Inns Ltd., Re (1992), 13 C.B.R. (3d) 245, 90 D.L.R. (4th) 175, 6 B.L.R. (2d) 116, 110 N.S.R. (2d) 246, 299 A.P.R. 246 (C.A.) — referred to

Langley's Ltd., Re, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) — referred to

Multidev Immobilia Inc. v. S.A. Just Invest, 70 C.B.R. (N.S.) 91, [1988] R.J.Q. 1928 (S.C.) — considered

NsC Diesel Power Inc. (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.) — referred to

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), affirmed (sub nom. Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada) 73 C.B.R. (N.S.) 195, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363 (C.A.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. Elan Corp. v. Comiskey) 41

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O.A.C. 282, 1 O.R. (3d) 289 (C.A.) — considered
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Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 193 (C.A.) [leave to appeal to S.C.C. refused (1991), 7 C.B.R. (3d) 164 (note), 55 B.C.L.R. xxxiii (note), 135 N.R. 317 (note)] — considered

Wellington Building Corp., Re, 16 C.B.R. 48, [1934] O.R. 653, [1934] 4 D.L.R. 626 (S.C.) — considered

Statutes considered:

Companies Act, The, R.S.O. 1927, c. 218.

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

- s. 4
- s. 5
- s. 6

Joint Stock Companies Arrangements Act, 1870 (U.K.), 33 & 34 Vict., c. 104.

Application for sanctioning of plan under Companies' Creditors Arrangement Act.

R.A. Blair J.:

- On May 14, 1992, Olympia & York Developments Limited and 23 affiliated corporations ("the Applicants") sought, and obtained an Order granting them the protection of the *Companies' Creditors Arrangement Act* [R.S.C. 1985, c. C-36] for a period of time while they attempted to negotiate a Plan of Arrangement with their creditors and to restructure their corporate affairs. The Olympia & York group of companies constitute one of the largest and most respected commercial real estate empires in the world, with prime holdings in the main commercial centres in Canada, the U.S.A., England and Europe. This empire was built by the Reichmann family of Toronto. Unfortunately, it has fallen on hard times, and, indeed, it seems, it has fallen apart.
- A Final Plan of Compromise or Arrangements has now been negotiated and voted on by the numerous classes of creditors. 27 of the 35 classes have voted in favour of the Final Plan; 8 have voted against it. The Applicants now bring the Final Plan before the Court for sanctioning, pursuant to section 6 of the *Companies' Creditors Arrangement Act*.

The Plan

- The Plan is described in the motion materials as "the Revised Plans of Compromise and Arrangement dated December 16, 1992, as further amended to January 25, 1993". I shall refer to it as "the Plan" or "the Final Plan". Its purpose, as stated in Article 1.2,
 - ... is to effect the reorganization of the businesses and affairs of the Applicants in order to bring stability to the Applicants for a period of not less than five years, in the expectation that all persons with an interest in the Applicants will derive a greater benefit from the continued operation of the businesses and affairs of the Applicants on such a basis than would result from the immediate forced liquidation of the Applicants' assets.

- The Final Plan envisages the restructuring of certain of the O & Y ownership interests, and a myriad of individual proposals with some common themes for the treatment of the claims of the various classes of creditors which have been established in the course of the proceedings.
- 5 The contemplated O & Y restructuring has three principal components, namely:
 - 1. The organization of O & Y Properties, a company to be owned as to 90% by OYDL and as to 10% by the Reichmann family, and which is to become OYDL's Canadian Real Estate Management Arm;
 - 2. Subject to certain approvals and conditions, and provided the secured creditors do not exercise their remedies against their security, the transfer by OYDL of its interest in certain Canadian real estate assets to O & Y properties, in exchange for shares; and,
 - 3. A GW reorganization scheme which will involve the transfer of common shares of GWU holdings to OYDL, the privatization of GW utilities and the amalgamation of GW utilities with OYDL.
- There are 35 classes of creditors for purposes of voting on the Final Plan and for its implementation. The classes are grouped into four different categories of classes, namely by claims of project lenders, by claims of joint venture lenders, by claims of joint venture co-participants, and by claims of "other classes".
- Any attempt by me to summarize, in the confines of reasons such as these, the manner of proposed treatment for these various categories and classes would not do justice to the careful and detailed concept of the Plan. A variety of intricate schemes are put forward, on a class by class basis, for dealing with the outstanding debt in question during the 5 year Plan period.
- In general, these schemes call for interest to accrue at the contract or some other negotiated rate, and for interest (and, in some cases, principal) to be paid from time to time during the Plan period if O & Y's cash flow permits. At the same time, O & Y (with, I think, one exception) will continue to manage the properties that it has been managing to date, and will receive revenue in the form of management fees for performing that service. In many, but not all, of the project lender situations, the Final Plan envisages the transfer of title to the newly formed O & Y Properties. Special arrangements have been negotiated with respect to lenders whose claims are against marketable securities, including the Marketable Securities Lenders, the GW Marketable Security and Other Lenders, the Carena Lenders and the Gulf and Abitibi Lenders.
- 9 It is an important feature of the Final Plan that secured creditors are ceded the right, if they so choose, to exercise their realization remedies at any time (subject to certain strictures regarding timing and notice). In effect, they can "drop out" of the Plan if they desire.
- The unsecured creditors, of course, are heirs to what may be left. Interest is to accrue on the unsecured loans at the contract rate during the Plan period. The Final Plan calls for the administrator to calculate, at least annually, an amount that may be paid on the O & Y unsecured indebtedness out of OYDL's cash on hand, and such amount, if indeed such an amount is available, may be paid out on court approval of the payment. The unsecured creditors are entitled to object to the transfer of assets to O & Y Properties if they are not reasonably satisfied that O & Y Properties "will be a viable, self-financing entity". At the end of the Plan period, the members of this class are given the option of converting their remaining debt into stock.
- The Final Plan contemplates the eventuality that one or more of the secured classes may reject it. Section 6.2 provides,
 - a) that if the Plan is not approved by the requisite majority of holders of any Class of Secured Claims before January 16, 1993, the stay of proceedings imposed by the initial CCAA order of May 14, 1992, as amended, shall be automatically

lifted; and,

- b) that in the event that Creditors (other than the unsecured creditors and one Class of Bondholders' Claims) do not agree to the Plan, any such Class shall be deemed not to have agreed to the Plan and to be a Class of Creditors not affected by the Plan, and that the Applicants shall apply to the court for a Sanction Order which sanctions the Plan only insofar as it affects the classes which have agreed to the Plan.
- Finally, I note that Article 1.3 Of the Final Plan stipulates that the Plan document "constitutes a separate and severable plan of compromise and arrangement with respect to each of the Applicants."

The Principles to be Applied on Sanctioning

In Nova Metal Products Inc. v. Comiskey (Trustee of) (sub nom. Elan Corp. v. Comiskey) (1990), 1 O.R. (3d) 289 (C.A.), Doherty J.A. concluded his examination of the purpose and scheme of the Companies' Creditors Arrangement Act, with this overview, at pp. 308-309:

Viewed in its totality, the Act gives the court control over the initial decision to put the reorganization plan before the creditors, the classification of creditors for the purpose of considering the plan, conduct affecting the debtor company pending consideration of that plan, and the ultimate acceptability of any plan agreed upon by the creditors. The Act envisions that the rights and remedies of individual creditors, the debtor company, and others may be sacrificed, at least temporarily, in an effort to serve the greater good by arriving at some acceptable reorganization which allows the debtor company to continue in operation: *Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce (No. 1)* (1989), 102 A.R. 161 (Q.B.), at p. 165.

- Mr. Justice Doherty's summary, I think, provides a very useful focus for approaching the task of sanctioning a Plan.
- 15 Section 6 of the CCAA reads as follows:
 - 6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
 - (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
 - (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy Act* or is in the course of being wound up under the *Winding-up Act*, on the trustee in bankruptcy or liquidator and contributories of the company. (Emphasis added)
- Thus, the final step in the CCAA process is court sanctioning of the Plan, after which the Plan becomes binding on the creditors and the company. The exercise of this statutory obligation imposed upon the court is a matter of discretion.
- The general principles to be applied in the exercise of the Court's discretion have been developed in a number of authorities. They were summarized by Mr. Justice Trainor in *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) and adopted on appeal in that case by McEachern C.J.B.C., who set them out in the following fashion at (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.), p. 201:

The authorities do not permit any doubt about the principles to be applied in a case such as this. They are set out over and over again in many decided cases and may be summarized as follows:

- (1) there must be strict compliance with all statutory requirements;
- (2) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the C.C.A.A.;
- (3) The plan must be fair and reasonable.
- In an earlier Ontario decision, *Re Dairy Corp. of Canada*, [1934] O.R. 436 (C.A.), Middleton J.A. applied identical criteria to a situation involving an arrangement under the Ontario *Companies Act.* The N.S.C.A. recently followed *Re Northland Properties Ltd.* in *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S.C.A.). Farley J. did as well in *Re Campeau Corp.*, [1992] O.J. No. 237 (Ont. Ct. of Justice, Gen. Div.) [now reported at 10 C.B.R. (3d) 104].

Strict Compliance with Statutory Requirements

- Both this first criterion, dealing with statutory requirements, and the second criterion, dealing with the absence of any unauthorized conduct, I take to refer to compliance with the various procedural imperatives of the legislation itself, or to compliance with the various orders made by the court during the course of the CCAA process: See *Re Campeau, supra*.
- At the outset, on May 14, 1992 I found that the Applicants met the criteria for access to the protection of the Act—they are insolvent; they have outstanding issues of bonds issued in favour of a trustee, and the compromise proposed at that time, and now, includes a compromise of the claims of those creditors whose claims are pursuant to the trust deeds. During the course of the proceedings Creditors' Committees have been formed to facilitate the negotiation process, and creditors have been divided into classes for the purposes of voting, as envisaged by the Act. Votes of those classes of creditors have been held, as required.
- With the consent, and at the request of, the Applicants and the Creditors' Committees, The Honourable David H.W. Henry, a former Justice of this Court, was appointed "Claims Officer" by Order dated September 11, 1992. His responsibilities in that capacity included, as well as the determination of the value of creditors' claims for voting purposes, the responsibility of presiding over the meetings at which the votes were taken, or of designating someone else to do so. The Honourable Mr. Henry, himself, or The Honourable M. Craig or The Honourable W. Gibson Gray both also former Justices of this Court as his designees, presided over the meetings of the Classes of Creditors, which took place during the period from January 11, 1993 to January 25, 1993. I have his Report as to the results of each of the meetings of creditors, and confirming that the meetings were duly convened and held pursuant to the provisions of the Court Orders pertaining to them and the CCAA.
- I am quite satisfied that there has been strict compliance with the statutory requirements of the *Companies' Creditors Arrangement Act*.

Unauthorized conduct

- I am also satisfied that nothing has been done or purported to have been done which is not authorized by the CCAA.
- Since May 14, the court has been called upon to make approximately 60 Orders of different sorts, in the course of exercising its supervisory function in the proceedings. These Orders involved the resolution of various issues between the creditors by the court in its capacity as "referee" of the negotiation process; they involved the approval of the "GAR" Orders negotiated between the parties with respect to the funding of O & Y's general and administrative expenses and restructuring

costs throughout the "stay" period; they involved the confirmation of the sale of certain of the Applicants' assets, both upon the agreement of various creditors and for the purposes of funding the "GAR" requirements; they involved the approval of the structuring of Creditors' Committees, the classification of creditors for purposes of voting, the creation and defining of the role of "Information Officer" and, similarly, of the role of "Claims Officer". They involved the endorsement of the information circular respecting the Final Plan and the mailing and notice that was to be given regarding it. The Court's Orders encompassed, as I say, the general supervision of the negotiation and arrangement period, and the interim sanctioning of procedures implemented and steps taken by the Applicants and the creditors along the way.

- While the court, of course, has not been a participant during the elaborate negotiations and undoubted boardroom brawling which preceded and led up to the Final Plan of Compromise, I have, with one exception, been the Judge who has made the orders referred to. No one has drawn to my attention any instances of something being done during the proceedings which is not authorized by the CCAA.
- In these circumstances, I am satisfied that nothing unauthorized under the CCAA has been done during the course of the proceedings.
- 27 This brings me to the criterion that the Plan must be "fair and reasonable".

Fair and reasonable

- The Plan must be "fair and reasonable". That the ultimate expression of the Court's responsibility in sanctioning a Plan should find itself telescoped into those two words is not surprising. "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the *Companies' Creditors Arrangement Act.* "Fairness" is the quintessential expression of the court's equitable jurisdiction although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation make its exercise an exercise in equity and "reasonableness" is what lends objectivity to the process.
- From time to time, in the course of these proceedings, I have borrowed liberally from the comments of Mr. Justice Gibbs whose decision in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.) contains much helpful guidance in matters of the CCAA. The thought I have borrowed most frequently is his remark, at p. 116, that the court is "called upon to weigh the equities, or balance the relative degrees of prejudice, which would flow from granting or refusing" the relief sought under the Act. This notion is particularly apt, it seems to me, when consideration is being given to the sanctioning of the Plan.
- If a debtor company, in financial difficulties, has a reasonable chance of staving off a liquidator by negotiating a compromise arrangement with its creditors, "fairness" to its creditors as a whole, and to its shareholders, prescribes that it should be allowed an opportunity to do so, consistent with not "unfairly" or "unreasonably" depriving secured creditors of their rights under their security. Negotiations should take place in an environment structured and supervised by the court in a "fair" and balanced or, "reasonable" manner. When the negotiations have been completed and a plan of arrangement arrived at, and when the creditors have voted on it technical and procedural compliance with the Act aside the plan should be sanctioned if it is "fair and reasonable".
- When a plan is sanctioned it becomes binding upon the debtor company and upon creditors of that company. What is "fair and reasonable", then, must be addressed in the context of the impact of the plan on the creditors and the various classes of creditors, in the context of their response to the plan, and with a view to the purpose of the CCAA.
- On the appeal in *Re Northland Properties Ltd., supra*, at p. 201, Chief Justice McEachern made the following comment in this regard:
 - ... there can be no doubt about the purpose of the C.C.A.A. It is to enable compromises to be made for the common bene-

fit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators. To make the Act workable, it is often necessary to permit a requisite majority of each class to bind the minority to the terms of the plan, but the plan must be fair and reasonable.

In Re Alabama, New Orleans, Texas & Pacific Junction Railway Co., [1891] 1 Ch. at 231 (C.A.), a case involving a scheme and arrangement under the Joint Stock Companies Arrangements Act, 1870 [(U.K.), 33 & 34 Vict., c. 104], Lord Justice Bowen put it this way, at p. 243:

Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation ... Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such.

Again at p. 245:

It is in my judgment desirable to call attention to this section, and to the extreme care which ought to be brought to bear upon the holding of meetings under it. It enables a compromise to be forced upon the outside creditors by a majority of the body, or upon a class of the outside creditors by a majority of that class.

- 34 Is the Final Plan presented here by the O & Y Applicants "fair and reasonable"?
- I have reviewed the Plan, including the provisions relating to each of the Classes of Creditors. I believe I have an understanding of its nature and purport, of what it is endeavouring to accomplish, and of how it proposes this be done. To describe the Plan as detailed, technical, enormously complex and all-encompassing, would be to understate the proposition. This is, after all, we are told, the largest corporate restructuring in Canadian if not, worldwide corporate history. It would be folly for me to suggest that I comprehend the intricacies of the Plan in all of its minutiae and in all of its business, tax and corporate implications. Fortunately, it is unnecessary for me to have that depth of understanding. I must only be satisfied that the Plan is fair and reasonable in the sense that it is feasible and that it fairly balances the interests of all of the creditors, the company and its shareholders.
- One important measure of whether a Plan is fair and reasonable is the parties' approval of the Plan, and the degree to which approval has been given.
- As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.
- This point has been made in numerous authorities, of which I note the following: Re Northland Properties Ltd. (1988), 73 C.B.R. (N.S.) 175, at p. 184 (B.C.S.C.), affirmed (1989), 73 C.B.R. (N.S.) 195, at p. 205 (B.C.C.A.); Re Langley's Ltd., [1938] O.R. 123 (C.A.), at p. 129; Re Keddy Motor Inns Ltd. (1992), 13 C.B.R. (3d) 245; École Internationale de Haute Esthétique Edith Serei Inc. (Receiver of) c. Edith Serei Internationale (1987) Inc. (1989), 78 C.B.R. (N.S.) 36 (C.S. Qué.).
- In *Re Keddy Motors Inns Ltd., supra*, the Nova Scotia Court of Appeal spoke of "a very heavy burden" on parties seeking to show that a Plan is not fair and reasonable, involving "matters of substance", when the Plan has been approved by the requisite majority of creditors (see pp. 257-258). Freeman J.A. stated at p. 258:

The Act clearly contemplates rough-and-tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat, but on the best terms they can get. What the creditors and the company

must live with is a plan of their own design, not the creation of a court. The court's role is to ensure that creditors who are bound unwillingly under the Act are not made victims of the majority and forced to accept terms that are unconscionable.

- In École Internationale, supra at p. 38, Dugas J. spoke of the need for "serious grounds" to be advanced in order to justify the court in refusing to approve a proposal, where creditors have accepted it, unless the proposal is unethical.
- In this case, as Mr. Kennedy points out in his affidavit filed in support of the sanction motion, the final Plan is "the culmination of several months of intense negotiations and discussions between the applicants and their creditors, [reflects] significant input of virtually all of the classes of creditors and [is] the product of wide-ranging consultations, give and take and compromise on the part of the participants in the negotiating and bargaining process." The body of creditors, moreover, Mr. Kennedy notes, "consists almost entirely of sophisticated financial institutions represented by experienced legal counsel" who are, in many cases, "members of creditors' committees constituted pursuant to the amended order of may 14, 1992." Each creditors' committee had the benefit of independent and experienced legal counsel.
- With the exception of the 8 classes of creditors that did not vote to accept the Plan, the Plan met with the overwhelming approval of the secured creditors and the unsecured creditors of the Applicants. This level of approval is something the court must acknowledge with some deference.
- Those secured creditors who have approved the Plan retain their rights to realize upon their security at virtually any time, subject to certain requirements regarding notice. In the meantime, they are to receive interest on their outstanding indebtedness, either at the original contract rate or at some other negotiated rate, and the payment of principal is postponed for a period of 5 years.
- The claims of creditors in this case, secured creditors who did not approve the Plan are specifically treated under the Plan as "unaffected claims" i.e. claims not compromised or bound by the provisions of the Plan. Section 6.2(C) of the Final Plan states that the applicants may apply to the court for a sanction Order which sanctions the Plan only insofar as it affects the classes which have agreed to the Plan.
- The claims of unsecured creditors under the Plan are postponed for 5 years, with interest to accrue at the relevant contract rate. There is a provision for the administrator to calculate, at least annually, an amount out of OYDL's cash on hand which may be made available for payment to the unsecured creditors, if such an amount exists, and if the court approves its payment to the unsecured creditors. The unsecured creditors are given some control over the transfer of real estate to O & Y Properties, and, at the end of the Plan period, are given the right, if they wish, to convert their debt to stock.
- Faced with the prospects of recovering nothing on their claims in the event of a liquidation, against the potential of recovering something if O & Y is able to turn things around, the unsecured creditors at least have the hope of gaining something if the Applicants are able to become the "self-sustaining and viable corporation" which Mr. Kennedy predicts they will become "in accordance with the terms of the Plan."
- Speaking as co-chair of the Unsecured Creditors' Committee at the meeting of that Class of Creditors, Mr. Ed Lundy made the following remarks:

Firstly, let us apologize for the lengthy delays in today's proceedings. It was truly felt necessary for the creditors of this Committee to have a full understanding of the changes and implications made because there were a number of changes over this past weekend, plus today, and we wanted to be in a position to give a general overview observation to the Plan.

The Committee has retained accounting and legal professionals in Canada and the United States. The Co-Chairs, as well as institutions serving on the Plan and U.S. Subcommittees with the assistance of the Committee's professionals have worked for the past seven to eight months evaluating the financial, economic and legal issues affecting the Plan for the unsecured creditors.

In addition, the Committee and its Subcommittees have met frequently during the CCAA proceedings to discuss these issues. Unfortunately, the assets of OYDL are such that their ultimate values cannot be predicted in the short term. As a result, the recovery, if any, by the unsecured creditors cannot now be predicted.

The alternative to approval of the CCAA Plan of arrangement appears to be a bankruptcy. The CCAA Plan of arrangement has certain advantages and disadvantages over bankruptcy. These matters have been carefully considered by the Committee.

After such consideration, the members have indicated their intentions as follows ...

Twelve members of the Committee have today indicated they will vote in favour of the Plan. No members have indicated they will vote against the Plan. One member declined to indicate to the committee members how they wished to vote today. One member of the Plan was absent. Thank you.

- After further discussion at the meeting of the unsecured creditors, the vote was taken. The Final Plan was approved by 83 creditors, representing 93.26% of the creditors represented and voting at the meeting and 93.37% in value of the Claims represented and voting at the meeting.
- As for the O & Y Applicants, the impact of the Plan is to place OYDL in the position of property manager of the various projects, in effect for the creditors, during the Plan period. OYDL will receive income in the form of management fees for these services, a fact which gives some economic feasibility to the expectation that the company will be able to service its debt under the Plan. Should the economy improve and the creditors not realize upon their security, it may be that at the end of the period there will be some equity in the properties for the newly incorporated O & Y Properties and an opportunity for the shareholders to salvage something from the wrenching disembodiment of their once shining real estate empire.
- In keeping with an exercise of weighing the equities and balancing the prejudices, another measure of what is "fair and reasonable" is the extent to which the proposed Plan treats creditors equally in their opportunities to recover, consistent with their security rights, and whether it does so in as non-intrusive and as non-prejudicial a manner as possible.
- I am satisfied that the Final Plan treats creditors evenly and fairly. With the "drop out" clause entitling secured creditors to realize upon their security, should they deem it advisable at any time, all parties seem to be entitled to receive at least what they would receive out of a liquidation, i.e. as much as they would have received had there not been a reorganization: See *Re NsC Diesel Power Inc.* (1990), 97 N.S.R. (2d) 295 (T.D.). Potentially, they may receive more.
- The Plan itself envisages other steps and certain additional proceedings that will be taken. Not the least inconsiderable of these, for example, is the proposed GW reorganization and contemplated arrangement under the OBCA. These further steps and proceedings, which lie in the future, may well themselves raise significant issues that have to be resolved between the parties or, failing their ability to resolve them, by the Court. I do not see this prospect as something which takes away from the fairness or reasonableness of the Plan but rather as part of grist for the implementation mill.
- For all of the foregoing reasons, I find the Final Plan put forward to be "fair and reasonable".
- Before sanction can be given to the Plan, however, there is one more hurdle which must be overcome. It has to do with the legal question of whether there must be unanimity amongst the classes of creditors in approving the Plan before the court is empowered to give its sanction to the Plan.

Lack of unanimity amongst the classes of creditors

- As indicated at the outset, all of the classes of creditors did not vote in favour of the Final Plan. Of the 35 classes that voted, 27 voted in favour (overwhelmingly, it might be added, both in terms of numbers and percentage of value in each class). In 8 of the classes, however, the vote was either against acceptance of the Plan or the Plan did not command sufficient support in terms of numbers of creditors and/or percentage of value of claims to meet the 50%/75% test of section 6.
- The classes of creditors who voted against acceptance of the Plan are in each case comprised of secured creditors who hold their security against a single project asset or, in the case of the Carena claims, against a single group of shares. Those who voted "no" are the following:
 - Class 2 First Canadian Place Lenders
 - Class 8 Fifth Avenue Place Bondholders
 - Class 10 Amoco Centre Lenders
 - Class 13 L'Esplanade Laurier Bondholders
 - Class 20 Star Top Road Lenders
 - Class 21 Yonge-Sheppard Centre Lenders
 - Class 29 Carena Lenders
 - Class 33a Bank of Nova Scotia Other Secured Creditors
- While section 6 of the CCAA makes the mathematics of the approval process clear the Plan must be approved by at least 50% of the creditors of a particular class representing at least 75% of the dollar value of the claims in that class it is not entirely clear as to whether the Plan must be approved by every class of creditors before it can be sanctioned by the court. The language of the section, it will be recalled, is as follows:
 - 6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors ... agree to any compromise or arrangement ... the compromise or arrangement may be sanctioned by the court. (Emphasis added)
- What does "a majority ... of the ... class of creditors" mean? Presumably it must refer to more than one group or class of creditors, otherwise there would be no need to differentiate between "creditors" and "class of creditors". But is the majority of the "class of creditors" confined to a majority within an individual class, or does it refer more broadly to a majority within each and every "class", as the sense and purpose of the Act might suggest?
- This issue of "unanimity" of class approval has caused me some concern, because, of course, the Final Plan before me has not received that sort of blessing. Its sanctioning, however, is being sought by the Applicants, is supported by all of the classes of creditors approving, and is not opposed by any of the classes of creditors which did not approve.
- At least one authority has stated that strict compliance with the provisions of the CCAA respecting the vote is a prerequisite to the court having jurisdiction to sanction a plan: See *Re Keddy Motor Inns Ltd., supra*, at p. 20. Accepting that such is the case, I must therefore be satisfied that unanimity amongst the classes is not a requirement of the Act before the court's sanction can be given to the Final Plan.
- In assessing this question, it is helpful to remember, I think, that the CCAA is remedial and that it "must be given a wide and liberal construction so as to enable it to effectively serve this ... purpose": *Elan Corp. v. Comiskey, supra*, per Do-

herty J.A., at p. 307. Speaking for the majority in that case as well, Finlayson J.A. (Krever J.A., concurring) put it this way, at p. 297:

It is well established that the CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Such a resolution can have significant benefits for the company, its shareholders and employees. For this reason the debtor companies ... are entitled to a broad and liberal interpretation of the jurisdiction of the court under the CCAA.

- Approaching the interpretation of the unclear language of section 6 of the Act from this perspective, then, one must have regard to the purpose and object of the legislation and to the wording of the section within the rubric of the Act as a whole. Section 6 is not to be construed in isolation.
- Two earlier provisions of the CCAA set the context in which the creditors' meetings which are the subject of section 6 occur. Sections 4 and 5 state that where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors (s. 4) or its secured creditors (s. 5), the court may order a meeting of the creditors to be held. The format of each section is the same. I reproduce the pertinent portions of s. 5 here only, for the sake of brevity. It states:
 - 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or *any* class of them, the court may, on the application in a summary way of the company or of any such creditor ... order a meeting of the creditors or class of creditors ... (Emphasis added)
- It seems that the compromise or arrangement contemplated is one with the secured creditors (as a whole) or *any* class—as opposed to *all classes* of them. A logical extension of this analysis is that, other circumstances being appropriate, the plan which the court is asked to approve may be one involving some, but not all, of the classes of creditors.
- Surprisingly, there seems to be a paucity of authority on the question of whether a plan must be approved by the requisite majorities in *all* classes before the court can grant its sanction. Only two cases of which I am aware touch on the issue at all, and neither of these is directly on point.
- In *Re Wellington Building Corp.*, [1934] O.R. 653 (S.C.), Mr. Justice Kingstone dealt with a situation in which the creditors had been divided, for voting purposes, into secured and unsecured creditors, but there had been no further division amongst the secured creditors who were comprised of first mortgage bondholders, second, third and fourth mortgagees, and lienholders. Kingstone J. refused to sanction the plan because it would have been "unfair" to the bondholders to have done so (p. 661). At p. 660, he stated:

I think, while one meeting may have been sufficient under the Act for the purpose of having all the classes of secured creditors summoned, it was necessary under the Act that they should vote in classes and that three-fourths of the value of each class should be obtained in support of the scheme before the Court could or should approve of it. (Emphasis added)

This statement suggests that unanimity amongst the classes of creditors in approving the plan is a requirement under the CCAA. Kingstone J. went on to explain his reasons as follows (p. 600):

Particularly is this the case where the holders of the senior securities' (in this case the bondholders') rights are seriously affected by the proposal, as they are deprived of the arrears of interest on their bonds if the proposal is carried through. It was never the intention under the act, I am convinced, to deprive creditors in the position of these bondholders of their right to approve as a class by the necessary majority of a scheme propounded by the company; otherwise this would permit the holders of junior securities to put through a scheme inimical to this class and amounting to confiscation of the vested interest of the bondholders.

Thus, the plan in Re Wellington Building Corp. went unsanctioned, both because the bondholders had unfairly been

deprived of their right to vote on the plan as a class and because they would have been unfairly deprived of their rights by the imposition of what amounted to a confiscation of their vested interests as bondholders.

- On the other hand, the Quebec Superior Court sanctioned a plan where there was a lack of unanimity in *Multidev Immobilia Inc. v. Société Anonyme Just Invest* (1988), 70 C.B.R. (N.S.) 91 (Que. S.C.). There, the arrangement had been accepted by all creditors except one secured creditor, Société Anonyme Just Invest. The company presented an amended arrangement which called for payment of the objecting creditor in full. The other creditors were aware that Just Invest was to receive this treatment. Just Invest, nonetheless, continued to object. Thus, three of eight classes of creditors were in favour of the plan; one, Bank of Montreal was unconcerned because it had struck a separated agreement; and three classes of which Just Invest was a member, opposed.
- The Quebec Superior Court felt that it would be contrary to the objectives of the CCAA to permit a secured creditor who was to be paid in full to upset an arrangement which had been accepted by other creditors. Parent J. was of the view that the Act would not permit the Court to ratify an arrangement which had been refused by a class or classes of creditors (Just Invest), thereby binding the objecting creditor to something that it had not accepted. He concluded, however, that the arrangement could be approved as regards the other creditors who voted in favour of the Plan. The other creditors were cognizant of the arrangement whereby Just Invest was to be fully reimbursed for its claims, as I have indicated, and there was no objection to that amongst the classes that voted in favour of the Plan.
- While it might be said that *Multidev, supra*, supports the proposition that a Plan will not be ratified if a class of creditors opposes, the decision is also consistent with the carving out of that portion of the Plan which concerns the objecting creditor and the sanctioning of the balance of the Plan, where there was no prejudice to the objecting creditor in doing so. To my mind, such an approach is analogous to that found in the Final Plan of the O & Y applicants which I am being asked to sanction.
- I think it relatively clear that a court would not sanction a plan if the effect of doing so were to impose it upon a class, or classes, of creditors who rejected it and to bind them by it. Such a sanction would be tantamount to the kind of unfair confiscation which the authorities unanimously indicate is not the purpose of the legislation. That, however, is not what is proposed here.
- By the terms of the Final Plan itself, the claims of creditors who reject the Plan are to be treated as "unaffected claims" not bound by its provisions. In addition, secured creditors are entitled to exercise their realization rights either immediately upon the "consummation date" (March 15, 1993) or thereafter, on notice. In short, even if they approve the Plan, secured creditors have the right to drop out at any time. Everyone participating in the negotiation of the Plan and voting on it, knew of this feature. There is little difference, and little different affect on those approving the Plan, it seems to me, if certain of the secured creditors drop out in advance by simply refusing to approve the Plan in the first place. Moreover, there is no prejudice to the eight classes of creditors which have not approved the Plan, because nothing is being imposed upon them which they have not accepted and none of their rights are being "confiscated".
- From this perspective it could be said that the parties are merely being held to or allowed to follow their contractual arrangement. There is, indeed, authority to suggest that a Plan of compromise or arrangement is simply a contract between the debtor and its creditors, sanctioned by the court, and that the parties should be entitled to put anything into such a Plan that could be lawfully incorporated into any contract: See *Re Canadian Vinyl Industries Inc.* (1978), 29 C.B.R. (N.S.) 12 (Que. S.C.), at p. 18; L.W. Houlden & C.H. Morawetz, *Bankruptcy Law of Canada*, vol. 1 (Toronto: Carswell, 1984) pp. E-6 and E-7.
- In the end, the question of determining whether a plan may be sanctioned when there has not been unanimity of approval amongst the classes of creditors becomes one of asking whether there is any unfairness to the creditors who have not approved it, in doing so. Where, as here, the creditors classes which have not voted to accept the Final Plan will not be bound by the Plan as sanctioned, and are free to exercise their full rights as secured creditors against the security they hold, there is

nothing unfair in sanctioning the Final Plan without unanimity, in my view.

- I am prepared to do so.
- A draft Order, revised as of late this morning, has been presented for approval. It is correct to assume, I have no hesitation in thinking, that each and every paragraph and subparagraph, and each and every word, comma, semi-colon, and capital letter has been vigilantly examined by the creditors and a battalion of advisors. I have been told by virtually every counsel who rose to make submissions, that the draft as is exists represents a very "fragile consensus", and I have no doubt that such is the case. It's wording, however, has not received the blessing of three of the classes of project lenders who voted against the Final Plan The First Canadian Place, Fifth Avenue Place and L'Esplanade Laurier Bondholders.
- Their counsel, Mr. Barrack, has put forward their serious concerns in the strong and skilful manner to which we have become accustomed in these proceedings. His submission, put too briefly to give it the justice it deserves, is that the Plan does not and cannot bind those classes of creditors who have voted "no", and that the language of the sanctioning Order should state this clearly and in a positive way. Paragraph 9 of his Factum states the argument succinctly. It says:
 - 9. It is submitted that if the Court chooses to sanction the Plan currently before it, it is incumbent on the Court to make clear in its Order that the Plan and the other provisions of the proposed Sanction Order apply to and are binding upon only the company, its creditors in respect of claims in classes which have approved the Plan, and trustees for such creditors.
- The basis for the concern of these "No" creditors is set out in the next paragraph of the Factum, which states:
 - 10. This clarification in the proposed Sanction Order is required not only to ensure that the Order is only binding on the parties to the compromises but also to clarify that if a creditor has multiple claims against the company and only some fall within approved classes, then the Sanction Order only affects those claims and is not binding upon and has no effect upon the balance of that creditor's claims or rights.
- The provision in the proposed draft Order which is the most contentious is paragraph 4 thereof, which states:
 - 4. THIS COURT ORDERS that subject to paragraph 5 hereof the Plan be and is hereby sanctioned and approved and will be binding on and will enure to the benefit of the Applicants and the Creditors holding Claims in Classes referred to in paragraph 2 of this Order in their capacities as such Creditors.
- Mr. Barrack seeks to have a single, but much debated word "only" inserted in the second line of that paragraph after the word "will", so that it would read "and will *only* be binding on the Applicants and the Creditors Holding Claims in Classes" [which have approved the Plan]. On this simple, single, word, apparently, the razor-thin nature of the fragile consensus amongst the remaining creditors will shatter.
- In the alternative, Mr. Barrack asks that para. 4 of the draft be amended and an additional paragraph added as follows:
 - 35. It is submitted that to reflect properly the Court's jurisdiction, paragraph 4 of the proposed Sanction Order should be amended to state:
 - 4. This Court Orders that the Plan be and is hereby sanctioned and approved and is binding only upon the Applicants listed in Schedule A to this Order, creditors in respect of the claims in those classes listed in paragraph 2 hereof, and any trustee for any such class of creditors.
 - 36. It is also submitted that an additional paragraph should be added if any provisions of the proposed Sanction Order are

granted beyond paragraph 4 thereof as follows:

This Court Orders that, except for claims falling within classes listed in paragraph 2 hereof, no claims or rights of any sort of any person shall be adversely affected in any way by the provisions of the Plan, this Order or any other Order previously made in these proceedings.

- These suggestions are vigorously opposed by the Applicants and most of the other creditors. Acknowledging that the Final Plan does not bind those creditors who did not accept it, they submit that no change in the wording of the proposed Order is necessary in order to provided those creditors with the protection to which they say they are entitled. In any event, they argue, such disputes, should they arise, relate to the interpretation of the Plan, not to its sanctioning, and should only be dealt with in the context in which they subsequently arise if arise they do.
- The difficulty is that there may or may not be a difference between the order "binding" creditors and "affecting" creditors. The Final Plan is one that has specific features for specific classes of creditors, and as well some common or generic features which cut across classes. This is the inevitable result of a Plan which is negotiated in the crucible of such an immense corporate re-structuring. It may be, or it may not be, that the objecting Project Lenders who voted "no" find themselves "affected" or touched in some fashion, at some future time by some aspect of the Plan. With a re-organization and corporate re-structuring of this dimension it may simply not be realistic to expect that the world of the secured creditor, which became not-so-perfect with the onslaught of the Applicants' financial difficulties, and even less so with the commencement of the CCAA proceedings, will ever be perfect again.
- I do, however, agree with the thrust of Mr. Barrack's submissions that the Sanction Order and the Plan can be binding only upon the Applicants and the creditors of the Applicants in respect of claims in classes which have approved the Plan, and trustees for such creditors. That is, in effect, what the Final Plan itself provides for when, in section 6.2(C), it stipulates that, where classes of creditors do not agree to the Plan,
 - (i) the Applicants shall treat such Class of Claims to be an Unaffected Class of Claims; and,
 - (ii) the Applicants shall apply to the Court "for a Sanction Order which sanctions the Plan only insofar as it affects the Classes which have agreed to the Plan.
- The Final Plan before me is therefore sanctioned on that basis. I do not propose to make any additional changes to the draft Order as presently presented. In the end, I accept the position, so aptly put by Ms. Caron, that the price of an overabundance of caution in changing the wording may be to destroy the intricate balance amongst the creditors which is presently in place.
- In terms of the court's jurisdiction, section 6 directs me to sanction the Order, if the circumstances are appropriate, and enacts that, once I have done so, the Order "is binding ... on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors ... and on the company". As I see it, that is exactly what the draft Order presented to me does.
- Accordingly, an order will go in terms of the draft Order marked "revised Feb. 5, 1993", with the agreed amendments noted thereon, and on which I have placed my fiat.
- These reasons were delivered orally at the conclusion of the sanctioning Hearing which took place on February 1 and February 5, 1993. They are released in written form today.

Application allowed.

Appendix "A" — Counsel for Sanctioning Hearing Order

David A. Brown, Q.C., Yoine Goldstein, Q.C., Stephen Sharpe and Mark E. Meland

-- For the Olympia & York Applicants

Ronald N. Robertson, Q.C. -- For Hong Kong & Shanghai Banking Corporation

David E. Baird, Q.C., and Ms Patricia Jackson

-- For Bank of Nova Scotia

Michael Barrack and S. Richard Orzy

-- For the First Canadian Place Bondholders, the Fifth Avenue Place Bondholders and the L'Esplanade Lauriere Bondholders

William G. Horton

-- For Royal Bank of Canada

Peter Howard and Ms J. Superina

-- For Citibank Canada

Frank J. C. Newbould, Q.C. -- For the Unsecured/Under-Secured Creditors Committee

J.J. Lucki

John W. Brown, Q.C., and -- For Canadian Imperial Bank of Commerce

-- For the Exchange Tower

Bondholders

Harry Fogul and Harold S. Springer

-- For the O & Y Eurocreditco

Allan Sternberg and Lawrence Geringer

> -- For Bank of Nova Scotia, Agent for Scotia Plaza

Lenders

Arthur O. Jacques and Paul M. Kennedy

-- For Credit Lyonnais,

Debenture Holders

Lyndon Barnes and

Credit Lyonnais Canada

J.E. Fordyce

J. Carfagnini

-- For National Bank of

Canada

J.L. McDougall, Q.C.

-- For Bank of Montreal

Carol V.E. Hitchman

-- For Bank of Montreal (Phase I First Canadian

Place)

James A. Grout

-- For Credit Suisse

Robert I. Thornton

-- For I.B.J. Market Security

Lenders

Ms C. Carron

-- For European Investment

Bank

W.J. Burden

-- For some debtholders of O & Y Commercial Paper II

Inc.

G.D. Capern

-- For Robert Campeau

Robert S. Harrison and

A.T. Little

-- For Royal Trust Co. as

Trustee

END OF DOCUMENT

TAB 15

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2009 CarswellOnt 2383, 2009 ONCA 377, 249 O.A.C. 58, 95 O.R. (3d) 767, 72 C.P.C. (6th) 1

Fantl v. Transamerica Life Canada

Joseph Fantl (Plaintiff / Respondent) and Transamerica Life Canada (Defendant / Respondent)

Ontario Court of Appeal

W.K. Winkler C.J.O., S.T. Goudge, J.M. Simmons JJ.A.

Heard: April 6, 2009 Judgment: May 7, 2009 Docket: CA C50166

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Proceedings: affirming Fantl v. Transamerica Life Canada (2008), 2008 CarswellOnt 7270, 66 C.P.C. (6th) 203, 244 O.A.C. 183 (Ont. Div. Ct.); affirming Fantl v. Transamerica Life Canada (2008), 2008 CarswellOnt 2249, 60 C.P.C. (6th) 326 (Ont. S.C.J.)

Counsel: Alan J. Lenczner, Q.C., Naomi Loewith for Appellant, Kim Orr Barristers P.C.

Bonnie A. Tough, Jennifer M. Lynch for Respondent, Joseph Fantl

Mary Jane Stitt for Respondent, Transamerica Life Canada

Subject: Civil Practice and Procedure; Public; Torts

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Conduct of class proceeding — Stay of other proceedings

Representative plaintiff, F, retained law firm REKO to prosecute class action against insurance company under Class Proceedings Act, 1992 (original action) — REKO lawyers, including K, worked on original action — REKO dissolved in pre-trial phase of original action — Certain lawyers formerly engaged on original action joined new law firm of REO, while others followed former REKO partner, K, to new law firm of KO — F served notice of change of solicitors naming REO as counsel — KO unsuccessfully brought motion for relief, including order striking notice of change of solicitors and order requiring F to retain KO, or alternatively, order removing F as representative plaintiff and substituting new representative plaintiffs (motion) — KO then commenced action against insurance company with one of new representative plaintiffs proposed on motion (competing action) — Competing action overlapped significantly with original action — KO's appeal from motion decision was dismissed — KO appealed and F and insurance company sought stay of competing action — Appeal dismissed; competing action stayed — Competing action amounted to abuse of process — KO com-

menced competing action following dismissal of motion, notwithstanding its admission before motions judge that such move would be disingenuous — Only possible purpose for bringing competing action was to provide platform for carriage motion to challenge original action — Competing action would inevitably be stayed in any event on ground that original action was more advanced — Further, as original action was on cusp of settlement, delay caused by carriage motion would only serve to postpone class members' access to justice — Class members were entitled to certainty.

Civil practice and procedure --- Parties — Representation by solicitor

Choice of new counsel by representative plaintiff — Representative plaintiff, F, retained law firm REKO to prosecute class action against insurance company under Class Proceedings Act, 1992 (CPA) — REKO lawyers worked on action, with K acting as lead counsel — REKO dissolved in pre-trial phase of action — Certain lawyers formerly engaged on action joined law firm of REO, while others followed former REKO partner, K, to law firm of KO — F served notice of change of solicitors naming REO as counsel — KO unsuccessfully brought motion for relief, including order striking notice of change of solicitors and order requiring F to retain KO — KO's appeal from decision of motions judge decision was dismissed — KO appealed — Appeal dismissed — There was no reason to interfere with F's choice of counsel — Competence of REO was not in issue — There was no evidence of improper purpose or considerations in F's choice of counsel — F's friendship with one of partners of REO did not constitute improper purpose — While this friendship was consideration, F was also attracted to REO because of undisputed competence of counsel and its reputation in class action work — There was no demonstrated prejudice to class from F's choice of counsel — F's choice of counsel was not prejudicial or unfair despite K's investment of time and effort as lead counsel — CPA does not provide lawyers with vested interest in subject matter of lawsuit entitling them to override choices of representative plaintiff.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Amendment of order for certification

Motion to replace representative plaintiff — Representative plaintiff, F, retained law firm REKO to prosecute class action against insurance company under Class Proceedings Act, 1992 — REKO dissolved in pre-trial phase of original action — Certain lawyers formerly engaged on original action joined law firm of REO, while others followed former REKO partner, K, to law firm of KO — F served notice of change of solicitors naming REO as counsel — KO unsuccessfully brought motion for relief, including order removing F as representative plaintiff and substituting new representative plaintiffs — KO's appeal from decision of motions judge was dismissed — KO appealed — Appeal dismissed — There was no basis to interfere with decision of motions judge not to remove or replace F as representative plaintiff — F had prosecuted action to point of settlement and there was no suggestion that he had been less than diligent in this respect — Further, F agreed to represent class after being approached by solicitors from REKO — While not determinative, REKO's choice to approach F indicated that none of its counsel had any concerns about his ability to perform role of representative plaintiff — Moreover, when F assumed representation of class, it must have been implicitly understood by his solicitors that he would be providing litigation instructions.

Cases considered by W.K. Winkler C.J.O.:

Cassano v. Toronto Dominion Bank (2007), 47 C.P.C. (6th) 209, 87 O.R. (3d) 401, 2007 ONCA 781, 2007 CarswellOnt 7341, 230 O.A.C. 224, (sub nom. Cassano v. Toronto-Dominion Bank) 287 D.L.R. (4th) 703 (Ont. C.A.) — referred to

Ford v. F. Hoffmann-La Roche Ltd. (2005), 74 O.R. (3d) 758, 12 C.P.C. (6th) 252, 2005 CarswellOnt 1095 (Ont. S.C.J.) — referred to

Heron v. Guidant Corp. (2007), 2007 CarswellOnt 9010 (Ont. S.C.J.) — considered

Heron v. Guidant Corp. (2008), 232 O.A.C. 366, 2008 CarswellOnt 47 (Ont. Div. Ct.) — referred to

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — followed

Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 37 C.P.C. (4th) 175, 46 O.R. (3d) 130, 1999 CarswellOnt 1851 (Ont. S.C.J.) — referred to

Parsons v. Canadian Red Cross Society (1999), 1999 CarswellOnt 2932, 40 C.P.C. (4th) 151, 103 O.T.C. 161 (Ont. S.C.J.) — referred to

Ricardo v. Air Transat A.T. Inc. (2002), 2002 CarswellOnt 1394, 21 C.P.C. (5th) 297 (Ont. S.C.J.) — referred to

Setterington v. Merck Frosst Canada Ltd. (2006), 26 C.P.C. (6th) 173, 2006 CarswellOnt 506 (Ont. S.C.J.) — referred to

VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd. (2000), 4 C.P.C. (5th) 169, 2000 CarswellOnt 4681 (Ont. S.C.J.) — referred to

Ward-Price v. Mariners Haven Inc. (2004), 3 C.P.C. (6th) 116, 2004 CarswellOnt 2238, 71 O.R. (3d) 664 (Ont. S.C.J.) — referred to

Western Canadian Shopping Centres Inc. v. Dutton (2001), (sub nom. Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere) 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — considered

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

- s. 5(1) referred to
- s. 12 referred to
- s. 13 referred to
- s. 20 referred to
- s. 29(1) referred to

- s. 29(2) referred to
- s. 32(2) referred to
- s. 33(1) considered
- s. 33(4) considered

Courts of Justice Act, R.S.O. 1990, c. C.43

APPEAL by law firm from judgment reported at *Fantl v. Transamerica Life Canada* (2008), 2008 CarswellOnt 7270, 66 C.P.C. (6th) 203, 244 O.A.C. 183 (Ont. Div. Ct.), dismissing its appeal from decision of motion judge refusing to grant orders requiring representative plaintiff to retain it as counsel or, alternatively, order replacing representative plaintiff.

W.K. Winkler C.J.O.:

Overview

- This appeal relates to a representative plaintiff's right to choose new counsel in a class proceeding, following the dissolution of the law firm originally retained by the plaintiff to prosecute the action.
- The appellant is a law firm, Kim Orr Barristers P.C. ("KO"). Joseph Fantl is the representative plaintiff in a class proceeding brought against the defendant Transamerica Life Canada ("Transamerica"). Both Mr. Fantl and Transamerica are respondents in this appeal.
- In 2006, Mr. Fantl retained the law firm of Roy Elliott Kim O'Connor ("REKO") to act in the prosecution of the intended class action lawsuit against Transamerica. A team of REKO lawyers worked on the matter. Toward the end of 2007, REKO dissolved.
- Certain of the team of lawyers formerly engaged on the file joined the newly formed law firm of Roy Elliott O'Connor ("REO"). Others followed one of REKO's former partners, Won Kim, to form the appellant law firm KO, while the remaining lawyer chose to go elsewhere. Because of the disbanding of REKO, Mr. Fantl was forced to decide what firm to retain to continue the matter. He chose REO because he knew and was a friend of Peter Roy, and because he had some experience with, and respected members of, the firm. As such, he trusted them to carry the case forward.
- Mr. Fantl served a notice of change of solicitors naming REO as counsel. KO brought a motion pursuant to s. 12 of the Class Proceedings Act 1992, S.O. 1992, c.6 (the "CPA"), asking for various forms of relief, including an order striking the notice of change of solicitors and an order requiring Mr. Fantl to retain KO. In the alternative, KO sought to have Mr. Fantl removed as representative plaintiff and two new representative plaintiffs (Yi-Yea (Riya) Kang and Jeong-Ae Seok) substituted in his stead. The motion judge dismissed the motion in its entirety. KO appealed the decision of the motion judge to the Divisional Court, which dismissed the appeal. KO appeals to this court, with leave. An expedited hearing was granted given that a settlement has been reached and the settlement approval hearing relating to the case is imminent.

- The motion judge, in refusing to grant the relief requested, held that a representative plaintiff has a right to retain counsel of his or her choice. He found that the test to be applied in determining whether the plaintiff's choice of counsel should stand is whether the counsel is adequate. Thus, he adopted the same test for counsel as is required by s. 5(1) of the CPA in determining whether a representative plaintiff may carry an action forward.
- In this context, the motion judge noted that while the court has a broad supervisory jurisdiction in class proceedings, it should not intervene in a plaintiff's choice of counsel unless the choice would deny putative class members adequate legal representation. He rejected the appellant's theory that the proper test to be applied is whether the plaintiff's choice is in the best interests of the class. Hence, he refused to engage in a comparison of the two law firms to determine which group was superior. The Divisional Court upheld the reasons of the motion judge on these central issues.
- Following the dismissal of the motion, KO brought a competing action against Transamerica, with Ms. Kang as the proposed representative plaintiff (the "Kang action"). The Kang action overlaps significantly with Mr. Fantl's action.
- The appellant advances the same arguments on this appeal as were made to the courts below, contending that the motion judge erred by applying the wrong test. The competence of REO to act as class counsel is not in issue. This notwithstanding, on a comparison basis applying the test of best interests of the class, the appellant submits that the plaintiff ought to be directed to retain the KO firm. Consequently, the plaintiff's choice of counsel ought to be set aside and new representative plaintiffs appointed in place of Mr. Fantl.
- The respondent submits that the motion judge applied the appropriate test and suggests that the key consideration in the analysis should be whether the plaintiff's decision caused any prejudice to the class members. Since there is no dispute as to the competence of REO counsel, and since the settlement discussions have advanced to the point of a settlement approval hearing, the motion judge's decision not to interfere with Mr. Fantl's choice of counsel should be upheld.
- I cannot accede to the appellant's submissions. In my view, the representative plaintiff is entitled to select, and is indeed responsible for selecting, class counsel. In a circumstance like this, when a decision properly comes before the supervisory court for review, the criteria to be considered in determining whether the plaintiff's choice of counsel can stand are: competence of counsel; whether the choice was based on any improper considerations; and whether the choice resulted in any prejudice to the class. In the present case, competence of counsel is conceded. There is no evidence of any improper purpose in the selection of counsel or of any prejudice to the class as a result of that decision. Furthermore, the Kang action, commenced after the motion judge dismissed the appellant's motion, is an abuse of process.
- I would dismiss the appeal, and exercise my discretion under s. 134(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "CJA") and s. 13 of the CPA, to stay the Kang action. My reasons, which differ from those of the motion judge, follow.

The Issues

There are three central issues on this appeal. First, is the representative plaintiff in an intended class proceeding, who is required to retain new counsel after the proceeding has been commenced, entitled to select counsel of his or her own choosing or is the court, in the exercise of its supervisory jurisdiction under the CPA, always required to approve class counsel?

- Second, regardless of the answer to the first question, if the selection of counsel comes before the court for review, what is the proper test to be applied in determining whether the plaintiff's selection of class counsel should stand?
- Third, the appellant has asked this court to review whether Mr. Fantl should be replaced as the representative plaintiff. This requested relief bears on the status of a competing action, launched by the appellant following the dismissal of its motion, in which Ms. Kang is the representative plaintiff.

Facts

- This appeal arises from a proposed class action against Transamerica that has yet to be certified. Mr. Fantl is not the original representative plaintiff in this action. The action was initially started by Michael Millman, a chartered accountant in British Columbia who owned an insurance policy issued by the company that is now Transamerica, and which contained an investment option known as the Can-Am Fund. Mr. Millman sought to sue Transamerica on the basis that: (1) Transamerica had overcharged him for management expenses; and (2) that the Can-Am fund had not tracked or replicated the results of the S&P 500 total return index as had been promised.
- The lawyer retained by Mr. Millman referred the claims to Sutts, Strosberg LLP in Ontario for the purpose of commencing a class action. On December 29, 2003, a statement of claim was issued by Mr. Millman's new counsel against Transamerica.
- Although there is disputed evidence as to the timing and roles of the parties, the motion judge found that by autumn 2005, the case had been transferred to the law firm REKO. He further found that, upon the transfer of the file, Mr. Kim became the supervising lawyer on the case. Shortly thereafter, Mr. Millman indicated that he was no longer prepared to act as the representative plaintiff in the case.
- Mr. Fantl was a long-standing friend of REKO partner Mr. Roy, and had been seeking legal advice from the firm on an unrelated matter at about the time that the original representative plaintiff removed himself from the file. During discussions, it emerged that Mr. Fantl was also an investor in the Can-Am Fund operated by Transamerica. REKO's lawyers invited him to act as the new representative plaintiff in the action and he accepted.
- In May 2006, Mr. Fantl signed a retainer agreement with REKO. The retainer agreement was between Mr. Fantl and the law firm, and not between Mr. Fantl and any of REKO's individual lawyers.
- Between September 2005 and April 2007, the case progressed. The statement of claim was amended, material for the certification was prepared and cross-examinations were conducted. The certification motion did not proceed in May 2007, as scheduled, because Mr. Kim and counsel for Transamerica began to explore the idea of consent certification and a settlement of the management expenses claim. The parties indicated in a case conference on September 12, 2007 that there was a prospect of settlement but that the scope of the funds implicated in the claim was growing significantly, beyond just the Can-Am fund.
- The motion judge found that Mr. Kim had been the partner at REKO with the most involvement in Mr. Fantl's case, and that Mr. Kim had been assisted in this work to varying degrees by six associate lawyers. The motion judge also noted Mr. Fantl's evidence that he had had minimal contact with Mr. Kim throughout the course of the class action and that Mr. Kim had not provided him with any reports or advice on the case, apart

from one brief conversation.

- For reasons not disclosed to the motion judge, REKO dissolved on December 31, 2007. Mr. Kim established the firm now known as KO, and REKO's other former partners established the new firm called REO.
- Mr. Roy wrote to Mr. Fantl to inform him of REKO's dissolution and to seek instructions with respect to carriage of the class action. On January 5, 2008, Mr. Fantl wrote to REO to say that he had chosen the firm to act as his lawyers for the class action. He cited his "personal knowledge of Mr. Roy, his abilities and integrity as a lawyer and my confidence in his judgment" as among the reasons for his choice. In this regard, the motion judge noted that Mr. Fantl had been the best man at Mr. Roy's wedding. In his affidavit evidence, Mr. Fantl also noted that his choice of counsel was influenced by the fact that "REO has extensive class action experience and the senior partners have a great deal of experience in complex litigation, including settlement of complicated cases." Mr. Fantl was not cross-examined on his affidavit. REO served the notice of change of solicitors and came on the record on January 18, 2008.
- KO subsequently brought a motion to set aside the notice of change of solicitors, and to disqualify Mr. Fantl from being the representative plaintiff in the class action. It argued before the motion judge that Mr. Fantl had breached his duty to the intended class members by choosing REO and that, based on the success and progress achieved by Mr. Kim in the action, it was in the best interests of the class that KO be appointed as solicitor of record. KO also argued that, in the alternative, the court should replace Mr. Fantl with two new proposed representative plaintiffs, Ms. Seok and Ms. Kang. Mr. Fantl argued that the court's jurisdiction to govern the solicitor-client relationship was limited to the post-certification phase and that, in any event, Mr. Fantl had fulfilled his duty to the intended class members by choosing adequate counsel.
- KO's motion was dismissed. The dismissal was upheld by the Divisional Court. Following the dismissal of the motion, KO brought a competing action against Transamerica, with Ms. Kang as the proposed representative plaintiff. The Kang action covers 25 of the 26 investment funds that are the subject of the proposed settlement agreement in the instant case. The only distinction between the two is that the Kang action does not include the Can-Am fund.

Decision of the motion judge

- In his reasons, the motion judge characterized the "overarching issue in the case" as being whether the court has the jurisdiction to supervise the relationships arising in a class proceeding, both pre- and post- certification: para. 56. He held that, on the basis of the court's inherent jurisdiction to control its own process and the powers derived from s. 12 of the CPA, the court's jurisdiction to supervise a class proceeding "exists from the outset of the litigation and the Court has the jurisdiction to make orders to protect putative class members as potential parties to the litigation": para. 58.
- Having determined that the court has the jurisdiction to supervise all relationships arising out of a class proceeding from the outset of the litigation, the motion judge turned specifically to a consideration of the solicit-or-client relationship. He recognized that in an ordinary action, well established principles dictate that a litigant has the autonomy to choose counsel without court interference. However, he noted that these principles cannot be transferred directly to the class action context due to the responsibilities owed by the representative plaintiff, class counsel and the court to absent class members.
- The motion judge acknowledged previous case law suggesting that a solicitor-client relationship with

all its concomitant duties and obligations - may not exist between class counsel and proposed class members in the pre-certification stage. However, he held that a *sui generis* relationship exists between class counsel and proposed class members, and that at least some of the responsibilities inherent in the solicitor-client relationship are owed by counsel to the proposed class.

- In considering the proper test for determining whether Mr. Fantl's choice of counsel should stand, the motion judge reviewed the case law that had developed in relation to the adequacy of the representative plaintiff, carriage motions and the removal or change of counsel. Ultimately, he likened the fact situation of the instant case as being akin to that of choosing a solicitor of record at the outset of litigation. He thus applied the standard applied by the court on a certification motion: whether the representative plaintiff has selected "competent counsel that will adequately represent the proposed class if the action is certified": para. 105.
- In so deciding, the motion judge noted that this standard did not require the representative plaintiff to choose the best or more superior counsel. In this respect, while he stated that "Mr. Kim might or might not be a better choice", Mr. Fantl's choice of REO as solicitor of record met the standard of competency and adequacy: para. 110. Accordingly, the motion was dismissed.

Decision of the Divisional Court

- On appeal, the appellant submitted before the Divisional Court that the motion judge had applied the wrong legal test when determining whether Mr. Fantl had properly appointed REO as the new class counsel.
- The Divisional Court reviewed the motion judge's conclusions and found that he had committed no error of law. In particular, the Divisional Court endorsed the motion judge's central conclusion that, "having selected competent counsel to represent the class, the fact there are other counsel who may be a better choice does not change the standard Mr. Fantl must meet": para. 37.

Positions of the Parties

- The thrust of the appellant's argument is that, even though the litigation is being conducted by a representative or intended representative plaintiff, where a decision is required in the conduct of the proceeding, including one that occurs at the pre-certification stage, the decision of the plaintiff must receive the court's approval.
- The appellant contends that this is necessitated by an overriding concern for the interests of the absent class members. Accordingly, in its submission, the test to be applied by the court is whether the decision made by the plaintiff is in the best interests of the class. This, says the appellant, is the test to be applied by a court throughout a class proceeding, regardless of the issue to be decided or the stage of the proceeding.
- The respondents advance a more limited view of the supervisory role of the court in the exercise of its jurisdiction under the CPA. They caution that it is not appropriate for the court to "descend into the arena" and assume the responsibility of the plaintiff in conducting the litigation.

Analysis

In addressing the issues raised in this appeal, I am guided by the reasons of the Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.), which sets out the standards of review in appeals from a judge's order.

Issue 1: Supervisory jurisdiction of the court

It is now well settled that class proceedings are *sui generis* litigation. In part, this is because of the existence of the proposed class in addition to the putative representative plaintiff. As stated by Cullity J. in *Heron v. Guidant Corp.*, [2007] O.J. No. 3823 (Ont. S.C.J.), leave to appeal refused (2008), 232 O.A.C. 366 (Ont. Div. Ct.), at para. 10:

From the commencement of a class proceeding the court, as well as the named plaintiff has responsibilities to members of the class....They are not parties to the proceeding but they are not strangers. Their rights are as much at stake as those of the plaintiffs. It is consistent with their *sui generis* status, and the objectives of the CPA, that their interests should not be vulnerable to the deficiencies in the ability of the named plaintiff to represent them.

[Citations omitted.]

- The existence of the absent class members, among other factors, is the reason that the court's supervisory jurisdiction is engaged from the inception of an intended class proceeding. It continues throughout the "stages" of the proceeding until a final disposition, including the implementation of the administration of a settlement or, where applicable, a resolution of all individual issues.
- The supervisory jurisdiction of the court over the class proceeding is not in issue on this appeal. The parties acknowledge that the court has supervisory jurisdiction throughout the proceeding. They do, however, posit markedly different theories as to the circumstances in which this jurisdiction must or ought to be exercised.
- While I do not agree with the appellant's position that the court must be actively engaged at every turn in the proceeding, I am equally circumspect about the "hands off" approach advocated by the respondents. Neither view accurately captures the role of the court in respect of a class proceeding.
- The CPA is specific as to certain matters arising out of litigation conducted under the aegis of the statute that require court approval. These include, *inter alia*, the abandonment or discontinuance of an action, approval of settlements, notice to class members and class counsel fees: see ss. 29(1), 29(2), 20, and 32(2) of the CPA respectively. In addition to such enumerated and specific matters requiring court approval, the legislature has also seen fit to provide the court, under s. 12 of the CPA, with a broad, discretionary jurisdiction to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination". Although the court's ongoing supervisory jurisdiction is manifest in the CPA, this is not to say that every decision made by the plaintiff or counsel in the prosecution of the class action lawsuit requires the sanction of the court.
- The motion under appeal was brought pursuant to s. 12 of the CPA. The appellant argues that a notice of change of solicitors should not have been delivered without first obtaining an order of the court on motion brought by the representative plaintiff, so as to have the court approve the new class counsel. Further, the appellant contends that this determination should only be made on the basis of the "best interests of the class".
- I disagree. The position advanced by the appellant appears to be an attempt to combine certain developed principles of class action jurisprudence so as to elevate the court's supervisory role over the proceeding to one of mandatory intervention. While it is true that the court has a responsibility to the absent class members, the prosecution of the action rests squarely with the representative plaintiff. The representative plaintiff in a class ac-

tion lawsuit is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report.

This is clear from a reading of the CPA. In order to obtain certification, s. 5(1) of the CPA requires that the court be satisfied that the representative plaintiff "has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class". In other words, as stated by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.), at para. 41:

In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class.

[Citations omitted.]

- As is also stated in this passage, an important part of this representative plaintiff's plan is the retention of "competent" counsel.
- I do not view it as necessary for the plaintiff to seek and obtain approval of the court for every decision involving the selection or change of counsel. However, I am of the view that the case management judge charged with responsibility for the supervision of the proceeding should be immediately and directly notified of such a change. Further, if this decision is contested and properly comes before the court on motion, the court is well within its jurisdiction to review the plaintiff's decision.

Issue 2: Test for reviewing a plaintiff's choice of counsel

- The parties vigorously disputed the test to be applied when the court reviews a representative plaintiff's choice of counsel. In his reasons, the motion judge correctly identified the issues and canvassed the relevant case law in deciding that question. In my view, he made no error in holding that the choice of counsel upon REKO's dissolution was a matter for Mr. Fantl to deal with and that his decision did not warrant interference by the court. Nonetheless, I would arrive at that result for different reasons and based on a different analysis than that of the motion judge.
- The appellant has argued that this court should evaluate Mr. Fantl's choice of counsel by determining whether he was acting in the "best interests of the class" in so choosing. On the other hand, the respondent contends that the motion judge was correct in applying a test of adequacy to Mr. Fantl's choice of counsel. In my view, both approaches miss the mark. Once the court's jurisdiction is engaged, any review by the court of a decision as to choice of counsel must be directed to three factors:
 - (1) Has the plaintiff chosen competent counsel?
 - (2) Were there any improper considerations underlying the choice made by the plaintiff? and
 - (3) Is there prejudice to the class as a result of the choice?
- 50 Unless this inquiry reveals something unsatisfactory to the court, it ought not to interfere with the choice

of counsel made by the plaintiff. The court is not a substitute decision maker for the plaintiff in the litigation. Accordingly, any intervention based on its supervisory jurisdiction must be limited to situations where there is cogent evidence that steps taken may have an adverse impact on the absent class members.

- In formulating these criteria for review of the choice of counsel by the plaintiff, I am necessarily rejecting the argument of the appellant that the only test to be applied by the court is whether the choice is "in the best interests of the class". It must be remembered that the broad and guiding "best interests" principle developed in recognition of the distinction that must be made between the interests of individual class members and the interests of the class as a whole when the court is considering certain issues: see *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.), Ford v. F. Hoffmann-La Roche Ltd. (2005), 74 O.R. (3d) 758 (Ont. S.C.J.), and Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130 (Ont. S.C.J.). Here, the context is very different.
- Moreover, where the issue before the court is the plaintiff's choice of counsel, insofar as the "interests of the class" must be considered, they are sufficiently addressed under the prejudice criterion. Where there is no prejudice, the choice of "competent counsel" who has not been selected for any improper purpose will also be in the interests of the class.
- By applying these criteria, the court avoids the "contest" approach proposed by the appellant, which pits two sets of competing lawyers against each other and undermines the role of the representative plaintiff in selecting counsel. Such an approach is neither necessary nor productive where, as here, competence is conceded and there is no evidence that the plaintiff has acted improperly or in a manner that prejudices the interests of the class.
- The appellant contends that the "contest" approach is appropriate in the present circumstances because the choice of counsel is analogous to a carriage motion. I disagree. A carriage motion is a motion to determine which of two or more overlapping, competing intended class actions should be allowed to proceed and which should be stayed. A carriage motion involves a competition which, of necessity, requires a comparison of the competing proceedings. Unlike a carriage motion, there is no competition between proceedings here. It is for this reason that any analogy between a carriage motion and the present circumstances breaks down.

Application of the test to the instant case

- The instant proceeding involves the choice of counsel upon dissolution of the class counsel law firm. The retainer agreement was entered into between Mr. Fantl and REKO, and not with Mr. Kim or any other individual lawyer. A team of lawyers at the predecessor firm dealt with the case.
- On dissolution, some of the team formed the appellant, some formed REO and one lawyer joined another firm. Lawyers in each of these factions had participated in the work on the file to varying degrees. The lawyer who did the most work on the file was the associate who left and went to an unrelated firm.
- The record indicates that, although Mr. Kim was the senior partner on the case, he did not take instructions from, or report to, Mr. Fantl, and that he only accompanied Mr. Fantl to cross-examinations. He attended one settlement meeting with the defendant at which defendant's counsel offered to settle the claim, expand the class definition and communicate this development to class members.
- In the context of this file, and in the eyes of Mr. Fantl, there was more to the REKO firm than just Mr.

Kim. Mr. Fantl was faced with three choices. He could go with the appellant, the REO firm or choose a different firm. He chose the REO firm.

- The appellant argues that the failure to retain KO was akin to a dismissal of counsel. I do not accept this characterization of the facts before this court. The appellant was not terminated by the plaintiff. Indeed, KO had no relationship with the plaintiff capable of termination. Rather, its complaint is that the plaintiff did not choose to retain its lawyers after REKO's dissolution.
- Turning to the first factor of the test, competence of counsel of choice was conceded in the present case. I note the appellant's submission that competence of counsel is not a useful benchmark since every lawyer in Ontario is competent and thus no motion challenging a plaintiff's choice of counsel is likely to ever be successful. I disagree. Where competence is a live issue, the court should consider under this head:
 - (1) The nature of the lawsuit;
 - (2) The complexity of the litigation;
 - (3) The fact that it was a class proceeding;
 - (4) The experience of counsel as to subject matter and class actions;
 - (5) The resources of counsel;
 - (6) The stage of the proceedings at which the review occurs; and
 - (7) Any other considerations the court might deem to be appropriate.
- Moreover, when considering competence of counsel, the court must take into account the fact that, after certification, class counsel will be in a solicitor-client relationship with the class members, with all of the responsibilities that entails, extending until the implementation of a settlement or final disposition of any individual issues. In other words, given that the class may include a large number of people, this obligation may be significant and prolonged: see generally *Cassano v. Toronto Dominion Bank* (2007), 87 O.R. (3d) 401 (Ont. C.A.), and *Ward-Price v. Mariners Haven Inc.* (2004), 71 O.R. (3d) 664 (Ont. S.C.J.), at para. 7.
- These criteria serve to advance an object of the CPA, namely to obtain first class representation for class members.
- Turning to the second factor, there is no evidence of any improper purpose or motive on the part of the plaintiff in making his decision to retain REO. The appellant points to the plaintiff's friendship with Mr. Roy, one of the partners of REO, as the driving factor in choice of counsel. While that was a consideration, it was not the only factor for the plaintiff's choice of counsel. As noted by the motion judge and as indicated in the record, Mr. Fantl was attracted to REO because of the competence of counsel, which is not disputed, and its reputation in class action work.
- In any event, I would not accept that the fact of an acknowledged friendship between the plaintiff and his counsel of choice would constitute an improper purpose in and of itself. An improper purpose would be one where the plaintiff was seeking to gain a personal advantage, the hope of an advantage not shared by the class members or was motivated in some way that was inconsistent with the interests of the class.

- Turning to the third factor, to the extent that prejudice was argued by the appellant, this line of argument focused on the economic prejudice to the appellant rather than on any prejudice to the interests of the class. The appellant emphasized what was characterized as the policy arguments in support of entrepreneurial lawyers, which were said to advance one of the goals of the CPA access to justice. Effectively, the appellant's argument is that it would be unfair for a plaintiff, upon dissolution of his or her counsel's law firm, to choose any lawyer other than the lawyer who had previously acted as the lead counsel. In other words, in a class action, the lawyer's time and effort on the file constitutes an equity investment by the lawyer in the case. It is argued that if representative plaintiffs are allowed to switch counsel at will, there will be less of an incentive for counsel to take on class actions and make an investment of time and effort that may be lost.
- There is no question that class proceedings are entrepreneurial in nature. However, the proposition advanced by the appellant would only be supportable if the creation of an entrepreneurial class action bar was a policy goal underpinning the CPA. This argument fails because as far as the CPA is concerned, the entrepreneurial lawyer is a means to an end, not an end in and of itself. Were it otherwise, one of the criticisms of the CPA, that it promulgates plaintiff-less litigation benefiting only the lawyers involved, would be well founded. Such is not the case.
- Sections 33(1) and (4) of the CPA, which provide for contingency fees and a multiplier effect on fees to reward risk and success, are intended to provide sufficient incentives for lawyers to take on class proceedings that would not otherwise be attractive. This is the entrepreneurial aspect of class proceedings legislation that enhances access to justice. The CPA does not, nor was it ever intended to, provide lawyers with a vested interest in the subject matter of the lawsuit entitling them to override the choices of the representative plaintiff in the litigation, including the choice of counsel.
- In any event, Mr. Kim's investment of time and effort in the action while at REKO will be protected through the process of dissolving that firm.
- In conclusion, in light of the three factors set out above, namely, that competence of counsel is not in issue, there is no evidence of any improper purpose or considerations in choice of counsel, and no demonstrated prejudice to the class, there is no reason to interfere with the choice of counsel by Mr. Fantl.

Issue 3: Substitution of the representative plaintiff and the status of the Kang action

- Before Perell J., the appellant sought an order adding Ms. Seok and Ms. Kang as potential representative plaintiffs to replace Mr. Fantl as the plaintiff. Perell J. denied its request.
- On appeal, the appellant argued that Mr. Fantl's decision not to retain the appellant, in the face of Mr. Kim's success on the file, suggests that Mr. Fantl will not best represent the class members, and, thus, ought to be removed. On behalf of Ms. Kang and Ms. Seok, it argued that they should be substituted as representative plaintiffs. The respondents opposed, saying that, as with the commencement of the Kang action, this is simply an attempt to determine who will represent the interests of the class.
- Mr. Fantl has prosecuted the action to the point of settlement. There is no suggestion that he has been less than diligent in this respect. Indeed, Mr. Fantl stepped in to represent the class when the original representative plaintiff chose to abandon that role. He did so after being approached by solicitors from REKO, some of whom now stand with opposing interests on this appeal.

- While not necessarily determinative, the choice to approach Mr. Fantl to act in the representative capacity indicates that none of the counsel had any concerns about his ability to perform that role at that time. Moreover, when the plaintiff assumed the representation of the class, it must have been implicitly understood by his solicitors that he would be the one providing instructions for the litigation of the action.
- In light of these factors and my conclusion above that Mr. Fantl chose competent counsel, did not act with an improper purpose or act to the prejudice of the class, there is no basis to interfere with the decision of the motion judge not to remove or replace Mr. Fantl as the representative plaintiff in this action.

Stay of Kang Action

The appellant commenced the Kang action following the dismissal of the motion to strike the notice of change of solicitors and replace the representative plaintiff, notwithstanding its admission before the motion judge that such a move would be "disingenuous": para. 99. Indeed, the Divisional Court commented on this development in the following terms at para. 11 of its reasons:

Most remarkable of all, and independent of this motion under appeal, the lawyer has started a separate class proceeding against Transamerica in the name of Ms. Kang, the proposed representative plaintiff. This is the same Ms. Kang whom the lawyer seeks to have added as representative plaintiff with Mr. Fantl, or, in the alternative, to replace Mr. Fantl, his former client, with Ms. Kang and Ms. Seok.

- I agree with the observation of the Divisional Court that the bringing of the Kang action after having lost the motion before the motion judge was "most remarkable". The only purpose for doing this can be to provide a platform for a carriage motion to challenge the instant proceeding as the proper proceeding to take the action forward to settlement on behalf of the class.
- Apart from the fact that the appellant brought the second duplicative proceeding, which would in my view be determinative in and of itself, a carriage motion would also involve the appellant in bringing a proceeding against its former client.
- The essence of the respondents' argument is that the Kang action amounts to an abuse of process. I agree. Accordingly, pursuant to the jurisdiction conferred upon this court under s. 134(1) of the CJA and s. 13 of the CPA, I would stay the Kang action.
- If allowed to proceed, the Kang action would inevitably be stayed in any event. Considering the factors outlined by Cumming J. in *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2000), 4 C.P.C. (5th) 169 (Ont. S.C.J.), at para. 49, there is no question that Mr. Fantl's action would proceed over the Kang action given that it is so "significantly more advanced than the other": *Setterington v. Merck Frosst Canada Ltd.* (2006), 26 C.P.C. (6th) 173 (Ont. S.C.J.), at para. 22, and *Ricardo v. Air Transat A.T. Inc.* (2002), 21 C.P.C. (5th) 297 (Ont. S.C.J.), at para. 24.
- Further, as this action is on the cusp of settlement, the delay caused by a carriage motion would only serve to postpone the class members' access to justice. Even the appellant recognized that time was of the essence in this case, given the imminent settlement approval hearing, when it sought and was granted an expedited hearing of this appeal. Therefore, regardless of whether the competing actions are analyzed through the lens of best interests of the class or through that of prejudice, I reach the same inevitable conclusion that the Kang action should be stayed. The class members are entitled to certainty.

Conclusion

In conclusion, I would dismiss the appeal. Further, I would grant a stay of the Kang action. Mr. Fantl shall receive costs of \$10,000 for the appeal and \$5,000 for the leave motion inclusive of disbursements and G.S.T. The appellant shall also pay to Transamerica its costs of \$6,350 for the appeal and \$2,000 for the leave motion, inclusive of disbursements and G.S.T.

S.T. Goudge J.A.:

I agree.

J.M. Simmons J.A.:

I agree.

Appeal dismissed.

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TAB 16

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2009 CarswellOnt 3028, 53 C.B.R. (5th) 196, 75 C.C.P.B. 206

Nortel Networks Corp., Re

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

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

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Heard: April 20, 2009 Judgment: May 27, 2009[FN*] Docket: 09-CL-7950

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Counsel: Janice Payne, Steven Levitt, Arthur O. Jacques for Steering Committee of Recently Severed Canadian Nortel Employees

Barry Wadsworth for CAW-Canada, George Borosh, Debra Connor

Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited

Alan Mersky, Derrick Tay for Applicants

Henry Juroviesky, Eli Karp, Kevin Caspersz, Aaron Hershtal for Steering Committee for the Nortel Terminated Canadian Employees Owed Termination and Severance Pay

M. Starnino for Superintendent of Financial Services or Administrator of the Pension Benefits Gurantee Fund

Leanne Williams for Flextronics Telecom Systems Ltd.

Jay Carfagnini, Chris Armstrong for Monitor, Ernst & Young Inc.

Gail Misra for Communication, Energy and Paperworkers Union of Canada

J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services

Mark Zigler, S. Philpott for Certain Former Employees of Nortel

G.H. Finlayson for Informal Nortel Noteholders Group

A. Kauffman for Export Development Canada

Alex MacFarlane for Unsecured Creditors' Committee (U.S.)

Subject: Insolvency

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

Appointment of representative counsel — Telecommunication company entered protection under Companies' Creditors Arrangement Act — Telecommunications company ceased paying former employees with unsecured claims — Several groups of employees claimed entitlement to assets of company, including current working employees, and pensioners — Several law firms maintained that different classes should be established representing employees with different interests, with different legal representatives for each — Five law firms brought motions regarding representation — Law firm KM appointed representative for all potential classes of employee — Court has broad power to appoint representative counsel — Employees and retirees were vulnerable creditors, and had little means to pursue claims beyond representative counsel — No party denied choice of counsel as employees entitled to obtain individual counsel — No current conflict of interest between pensioned and non-pensioned employees — Many classes of employee had similar interest in pension plan — Claims under pension, to extend it was funded, not affected by CCAA proceedings — Pension claims by terminated employees creating conflict with other claims was only hypothetical — All former employees had community of interest.

Cases considered by Morawetz J.:

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 12, 2000 CarswellAlta 623 (Alta. Q.B.) — considered

Stelco Inc., Re (2005), 2005 CarswellOnt 6818, 204 O.A.C. 205, 78 O.R. (3d) 241, 261 D.L.R. (4th) 368, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307 (Ont. C.A.) — considered

Statutes considered:

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

Generally - referred to

s. 11 — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally --- referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 10 — referred to

R. 10.01 — considered

R. 12.07 — considered

MOTIONS regarding appointment of counsel in proceedings under Companies' Creditors Arrangement Act.

Morawetz J.:

- 1 On May 20, 2009, I released an endorsement appointing Koskie Minsky as representative counsel with reasons to follow. The reasons are as follows.
- This endorsement addresses five motions in which various parties seek to be appointed as representative counsel for various factions of Nortel's current and former employees (Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation are collectively referred to as the "Applicants" or "Nortel").
- 3 The proposed representative counsel are:
 - (i) Koskie Minsky LLP ("KM") who is seeking to represent all former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in respect of a pension from the Applicants. Approximately 2,000 people have retained KM.
 - (ii) Nelligan O'Brien Payne LLP and Shibley Righton LLP (collectively "NS") who are seeking to be cocounsel to represent all former non-unionized employees, terminated either prior to or after the CCAA filing date, to whom the Applicants owe severance and/or pay in lieu of reasonable notice. In addition, in a separate motion, NS seeks to be appointed as co-counsel to the continuing employees of Nortel. Approximately 460 people have retained NS and a further 106 have retained Macleod Dixon LLP, who has agreed to work with NS.
 - (iii) Juroviesky and Ricci LLP ("J&R") who is seeking to represent terminated employees or any person claiming an interest under or on behalf of former employees. At the time that this motion was heard approximately 120 people had retained J&R. A subsequent affidavit was filed indicating that this number had increased to 186.
 - (iv) Mr. Lewis Gottheil, in-house legal counsel for the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW") who is seeking to represent all retirees of the Applicants who were formerly members of one of the CAW locals when they were employees. Approximately 600

people have retained Mr. Gottheil or the CAW.

- 4 At the outset, it is noted that all parties who seek representation orders have submitted ample evidence that establishes that the legal counsel that they seek to be appointed as representative counsel are well respected members of the profession.
- Nortel filed for CCAA protection on January 14, 2009 (the "Filing Date"). At the Filing Date, Nortel employed approximately 6,000 employees and had approximately 11,700 retirees or their spouses receiving pension and/or benefits from retirement plans sponsored by the Applicants.
- The Monitor reports that the Applicants have continued to honour substantially all of the obligations to active employees. However, the Applicants acknowledge that upon commencement of the CCAA proceedings, they ceased making almost all payments to former employees of amounts that would constitute unsecured claims. Included in those amounts were payments to a number of former employees for termination and severance, as well as amounts under various retirement and retirement transition programs.
- The Monitor is of the view that it is appropriate that there be representative counsel in light of the large number of former employees of the Applicants. The Monitor is of the view that former employee claims may require a combination of legal, financial, actuarial and advisory resources in order to be advanced and that representative counsel can efficiently co-ordinate such assistance for this large number of individuals.
- 8 The Monitor has reported that the Applicants' financial position is under pressure. The Monitor is of the view that the financial burden of multiple representative counsel would further increase this pressure.
- 9 These motions give rise to the following issues:
 - (i) when is it appropriate for the court to make a representation and funding order?
 - (ii) given the completing claims for representation rights, who should be appointed as representative counsel?

Issue 1 - Representative Counsel and Funding Orders

- 10 The court has authority under Rule 10.01 of the *Rules of Civil Procedure* to appoint representative counsel where persons with an interest in an estate cannot be readily ascertained, found or served.
- Alternatively, Rule 12.07 provides the court with the authority to appoint a representative defendant where numerous persons have the same interests.
- In addition, the court has a wide discretion pursuant to s. 11 of the CCAA to appoint representatives on behalf of a group of employees in CCAA proceedings and to order legal and other professional expenses of such representatives to be paid from the estate of the debtor applicant.
- In the KM factum, it is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a

reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.

- I am in agreement with these general submissions.
- The benefits of representative counsel have also been recognized by both Nortel and by the Monitor. Nortel consents to the appointment of KM as the single representative counsel for all former employees. Nortel opposes the appointment of any additional representatives. The Monitor supports the Applicants' recommendation that KM be appointed as representative counsel. No party is opposed to the appointment of representative counsel.
- In the circumstances of this case, I am satisfied that it is appropriate to exercise discretion pursuant to s. 11 of the CCAA to make a Rule 10 representation order.

Issue 2 - Who Should be Appointed as Representative Counsel?

- 17 The second issue to consider is who to appoint as representative counsel. On this issue, there are divergent views. The differences primarily centre around whether there are inherent conflicts in the positions of various categories of former employees.
- The motion to appoint KM was brought by Messrs. Sproule, Archibald and Campbell (the "Koskie Representatives"). The Koskie Representatives seek a representation order to appoint KM as representative counsel for all former employees in Nortel's insolvency proceedings, except:
 - (a) any former chief executive officer or chairman of the board of directors, any non-employee members of the board of directors, or such former employees or officers that are subject to investigation and charges by the Ontario Securities Commission or the United States Securities and Exchange Commission:
 - (b) any former unionized employees who are represented by their former union pursuant to a Court approved representation order; and
 - (c) any former employee who chooses to represent himself or herself as an independent individual party to these proceedings.
- Ms. Paula Klein and Ms. Joanne Reid, on behalf of the Recently Severed Canadian Nortel Employees ("RSCNE"), seek a representation order to appoint NS as counsel in respect of all former Nortel Canadian non-unionized employees to whom Nortel owes termination and severance pay (the "RSCNE Group").
- Mr. Kent Felske and Mr. Dany Sylvain, on behalf of the Nortel Continuing Canadian Employees ("NCCE") seek a representative order to appoint NS as counsel in respect of all current Canadian non-unionized Nortel employees (the "NCCE Group").
- J&R, on behalf of the Steering Committee (Mr. Michael McCorkle, Mr. Harvey Stein and Ms. Marie Lunney) for Nortel Terminated Canadian Employees ("NTCEC") owed termination and severance pay seek a representation order to appoint J&R in respect of any claim of any terminated employee arising out of the insolvency of Nortel for:
 - (a) unpaid termination pay;

- (b) unpaid severance pay;
- (c) unpaid expense reimbursements; and
- (d) amounts and benefits payable pursuant to employment contracts between the Employees and Nortel
- Mr. George Borosh and/or Ms. Debra Connor seek a representation order to represent all retirees of the Applicants who were formerly represented by the CAW (the "Retirees") or, alternatively, an order authorizing the CAW to represent the Retirees.
- The former employees of Nortel have an interest in Nortel's CCAA proceedings in respect of their pension and employee benefit plans and in respect of severance, termination pay, retirement allowances and other amounts that the former employees consider are owed in respect of applicable contractual obligations and employment standards legislation.
- Most former employees and survivors of former employees have basic entitlement to receive payment from the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan") or from the corresponding pension plan for unionized employees.
- Certain former employees may also be entitled to receive payment from Nortel Networks Excess Plan (the "Excess Plan") in addition to their entitlement to the Pension Plan. The Excess Plan is a non-registered retirement plan which provides benefits to plan members in excess of those permitted under the registered Pension Plan in accordance with the *Income Tax Act*.
- Certain former employees who held executive positions may also be entitled to receive payment from the Supplementary Executive Retirement Plan ("SERP") in addition to their entitlement to the Pension Plan. The SERP is a non-registered plan.
- As of Nortel's last formal valuation dated December 31, 2006, the Pension Plan was funded at a level of 86% on a wind-up basis. As a result of declining equity markets, it is anticipated that the Pension Plan funding levels have declined since the date of the formal valuation and that Nortel anticipates that its Pension Plan funding requirements in 2009 will increase in a very substantial and material matter.
- At this time, Nortel continues to fund the deficit in the Pension Plan and makes payment of all current service costs associated with the benefits; however, as KM points out in its factum, there is no requirement in the Initial Order compelling Nortel to continue making those payments.
- Many retirees and former employees of Nortel are entitled to receive health and medical benefits and other benefits such as group life insurance (the "Health Care Plan"), some of which are funded through the Nortel Networks' Health and Welfare Trust (the "HWT").
- Many former employees are entitled to a payment in respect of the Transitional Retirement Allowance ("TRA"), a payment which provides supplemental retirement benefits for those who at the time of their retirement elect to receive such payment. Some 442 non-union retirees have ceased to receive this benefit as a result of the CCAA proceedings.
- Former employees who have been recently terminated from Nortel are owed termination pay and severance pay. There were 277 non-union former employees owed termination pay and severance pay at the Filing Date.

- 32 Certain former unionized employees also have certain entitlements including:
 - (a) Voluntary Retirement Option ("VRO");
 - (b) Retirement Allowance Payment ("RAP"); and
 - (c) Layoff and Severance Payments
- The Initial Order permitted Nortel to cease making payments to its former employees in respect of certain amounts owing to them and effective January 14, 2009, Nortel has ceased payment of the following:
 - (a) all supplementary pensions which were paid from sources other than the Registered Pension Plan, including payments in respect of the Excess Plan and the SERP;
 - (b) all TRA agreements where amounts were still owing to the affected former employees as at January 14, 2009;
 - (c) all RAP agreements where amounts were still owing to the affected former employees as at January 14, 2009;
 - (d) all severance and termination agreements where amounts were still owing to the affected former employees as at January 14, 2009; and
 - (e) all retention bonuses where amounts were still owing to affected former employees as at January 14, 2009.
- The representatives seeking the appointment of KM are members of the Nortel Retiree and Former Employee Protection Committee ("NRPC"), a national-based group of over 2,000 former employees. Its stated mandate is to defend and protect pensions, severance, termination and retirement payments and other benefits. In the KM factum, it is stated that since its inception, the NRPC has taken steps to organize across the country and it has assembled subcommittees in major centres. The NRPC consists of 20 individuals who it claims represent all different regions and interests and that they participate in weekly teleconference meetings with legal counsel to ensure that all former employees' concerns are appropriately addressed.
- 35 At paragraph 49 of the KM factum, counsel submits that NRPC members are a cross-section of all former employees and include a variety of interests, including those who have an interest in and/or are entitled to:
 - (a) the basic Pension Plan as a deferred member or a member entitled to transfer value;
 - (b) the Health Care Plan;
 - (c) the Pension Plan and Health Care Plan as a survivor of a former employee;
 - (d) Supplementary Retirement Benefits from the Excess Plan and the SERP plans;
 - (e) severance and termination pay; and
 - (f) TRA payments.

- The representatives submit that they are well suited to represent all former employees in Nortel's CCAA proceedings in respect of all of their interests. The record (Affidavit of Mr. D. Sproule) references the considerable experience of KM in representing employee groups in large-scale restructurings.
- With respect to the allegations of a conflict of interest as between the various employee groups (as described below), the position of the representatives seeking the appointment of KM is that all former employees have unsecured claims against Nortel in its CCAA proceedings and that there is no priority among claims in respect of Nortel's assets. Further, they submit that a number of former employees seeking severance and termination pay also have other interests, including the Pension Plan, TRA payments and the supplementary pension payments and that it would unjust and inefficient to force these individuals to hire individual counsel or to have separate counsel for separate claims.
- Finally, they submit that there is no guarantee as to whether Nortel will emerge from the CCAA, whether it will file for bankruptcy or whether a receiver will be appointed or indeed whether even a plan of compromise will be filed. They submit that there is no actual conflict of interest at this time and that the court need not be concerned with hypothetical scenarios which may never materialize. Finally, they submit that in the unlikely event of a serious conflict in the group, such matters can be brought to the attention of the court by the representatives and their counsel on a *ex parte* basis for resolution.
- The terminated employee groups seeking a representation order for both NS and J&R submit that separate representative counsel appointments are necessary to address the conflict between the pension group and the employee group as the two groups have separate legal, procedural, and equitable interests that will inevitably conflict during the CCAA process.
- They submit that the pensioners under the Pension Plan are continuing to receive the full amount of the pension from the Pension Plan and as such they are not creditors of Nortel. Counsel submits that the interest of pensioners is in continuing to receive to receive their full pension and survivor benefits from the Pension Plan for the remainder of their lives and the lives of surviving spouses.
- In the NS factum at paragraphs 44 58, the argument is put forward as to why the former employees to whom Nortel owes severance and termination pay should be represented separately from the pensioners. The thrust of the argument is that future events may dictate the response of the affected parties. At paragraph 51 of the factum, it is submitted that generally, the recently severed employees' primary interest is to obtain the fastest possible payout of the greatest amount of severance and/or pay in lieu of notice in order to alleviate the financial hardships they are currently experiencing. The interests of pensioners, on the other hand, is to maintain the status quo, in which they continue to receive full pension benefits as long as possible. The submission emphasizes that issues facing the pensioner group and the non-pensioner group are profoundly divergent as full monthly benefit payments for the pensioner group have continued to date while non-pensioners are receiving 86% of their lump sums on termination of employment, in accordance with the most recently filed valuation report.
- The motion submitted by the NTCEC takes the distinction one step further. The NTCEC is opposed to the motion of NS. NS wishes to represent both the RSCNE and the NCCE. The NTCEC believes that the terminated employees who are owed unpaid wages, termination pay and/or severance should comprise their own distinct and individual class.
- The NTCEC seek payment and fulfillment of Nortel's obligations to pay one or several of the following:
 - (a) TRA;

- (b) 2008 bonuses; and
- (c) amendments to the Nortel Pension Plan
- Counsel to NTCEC submits that the most glaring and obvious difference between the NCCE and the NTCEC, is that NCCE are still employed and have a continuing relationship with Nortel and have a source of employment income and may only have a contingent claim. The submission goes on to suggest that, if the NCCE is granted a representation order in these proceedings, they will seek to recover the full value of their TRA claim from Nortel during the negotiation process notwithstanding that one's claim for TRA does not crystallize until retirement or termination. On the other hand, the terminated employees, represented by the NTCEC and RSCNE are also claiming lost TRA benefits and that claim has crystallized because their employment with Nortel has ceased. Counsel further submits that the contingent claim of the NCCE for TRA is distinct and separate with the crystallized claim of the NTCEC and RSCNE for TRA.
- Counsel to NTCEC further submits that there are difficulties with the claim of NCCE which is seeking financial redress in the CCAA proceedings for damages stemming from certain changes to the Nortel Networks Limited Managerial and Non-negotiated Pension Plan effective June 1, 2008 and Nortel's decision to decrease retirees benefits. Counsel submits that, even if the NCCE claims relating to the Pension Plan amendment are quantifiable, they are so dissimilar to the claims of the RSCNE and NTCEC, that the current and former Nortel employees cannot be viewed as a single group of creditors with common interests in these proceedings, thus necessitating distinct legal representation for each group of creditors.
- Counsel further argues that NTCEC's sole mandate is to maximize recovery of unpaid wages, termination and severance pay which, those terminated employees as a result of Nortel's CCAA filing, have lost their employment income, termination pay and/or severance pay which would otherwise be protected by statute or common law.
- 47 KM, on behalf of the Koskie Representatives, responded to the concerns raised by NS and by J&R in its reply factum.
- KM submits that the conflict of interest is artificial. KM submits that all members of the Pension Plan who are owed pensions face reductions on the potential wind-up of the Pension Plan due to serious under-funding and that temporarily maintaining of status quo monthly payments at 100%, although required by statute, does not avoid future reductions due to under-funding which offset any alleged overpayments. They submit that all pension members, whether they can withdraw 86% of their funds now and transfer them a locked-in vehicle or receive them later in the form of potentially reduced pensions, face a loss and are thus creditors of Nortel for the pension shortfalls.
- KM also states that the submission of the RSCNE that non-pensioners may put pressure on Nortel to reduce monthly payments on pensioners ignores the *Ontario Pension Benefits Act* and its applicability in conjunction with the CCAA. It further submits that issues regarding the reduction of pensions and the transfers of commuted values are not dealt with through the CCAA proceedings, but through the Superintendent of Financial Services and the Plan Administrator in their administration and application of the PBA. KM concludes that the Nortel Pension Plans are not applicants in this matter nor is there a conflict given the application of the provisions of the PBA as detailed in the factum at paragraphs 11 21.
- KM further submits that over 1,500 former employees have claims in respect of other employment and retirement related benefits such as the Excess Plan, the SERP, the TRA and other benefit allowances which are claims that have "crystallized" and are payable now. Additionally, they submit that 11,000 members of the Pension Plan are entitled to benefits from the Pensioner Health Care Plan which is not pre-funded, resulting in significant claims in Nortel's CCAA proceedings for lost health care benefits.

- Finally, in addition to the lack of any genuine conflict of interest between former employees who are pensioners and those who are non-pensioners, there is significant overlap in interest between such individuals and a number of the former employees seeking severance and termination pay have the same or similar interests in other benefit payments, including the Pension Plan, Health Care Plan, TRA, SERP and Excess Plan payments. As well, former employees who have an interest in the Pension Plan also may be entitled to severance and termination pay.
- With respect to the motions of NS and J&R, I have not been persuaded that there is a real and direct conflict of interest. Claims under the Pension Plan, to the extent that it is funded, are not affected by the CCAA proceedings. To the extent that there is a deficiency in funding, such claims are unsecured claims against Nortel. In a sense, deficiency claims are not dissimilar from other employee benefit claims.
- To the extent that there may be potentially a divergence of interest as between pension-based claims and terminated-employee claims, these distinctions are, at this time, hypothetical. At this stage of the proceeding, there has been no attempt by Nortel to propose a creditor classification, let alone a plan of arrangement to its creditors. It seems to me that the primary emphasis should be placed on ensuring that the arguments of employees are placed before the court in the most time efficient and cost effective way possible. In my view, this can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims.
- It is conceivable that there will be differences of opinion between employees at some point in the future, but if such differences of opinion or conflict arise, I am satisfied that this issue will be recognized by representative counsel and further directions can be provided.
- A submission was also made to the effect that certain individuals or groups of individuals should not be deprived of their counsel of choice. In my view, the effect of appointing one representative counsel does not, in any way, deprive a party of their ability to be represented by the counsel of their choice. The Notice of Motion of KM provides that any former employee who does not wish to be bound by the representative order may take steps to notify KM of their decision and may thereafter appear as an independent party.
- In the responding factum at paragraphs 28 30, KM submits that each former employee, whether or not entitled to an interest in the Pension Plan, has a common interest in that each one is an unsecured creditor who is owed some form of deferred compensation, being it severance pay, TRA or RAP payments, supplementary pensions, health benefits or benefits under a registered Pension Plan and that classifying former employees as one group of creditors will improve the efficiency and effectiveness of Nortel's CCAA proceedings and will facilitate the reorganization of the company. Further, in the event of a liquidation of Nortel, each former employee will seek to recover deferred compensation claims as an unsecured creditor. Thus, fragmentation of the group is undesirable. Further, all former employees also have a common legal position as unsecured creditors of Nortel in that their claims all arise out of the terms and conditions of their employment and regardless of the form of payment, unpaid severance pay and termination pay, unpaid health benefits, unpaid supplementary pension benefits and other unpaid retirement benefits are all remuneration of some form arising from former employment with Nortel.
- The submission on behalf of KM concludes that funds in a pension plan can also be described as deferred wages. An employer who creates a pension plan agrees to provide benefits to retiring employees as a form of compensation to that employee. An underfunded pension plan reflects the employer's failure to pay the deferred wages owing to former employees.
- In its factum, the CAW submits that the two proposed representative individuals are members of the Nortel Pension Plan applicable to unionized employees. Both individuals are former unionized employees of Nortel and were members of the CAW. Counsel submits that naming them as representatives on behalf of all retirees of Nortel who were members of the CAW will not result in a conflict with any other member of the group.

- Counsel to the CAW also stated that in the event that the requested representation order is not granted, those 600 individuals who have retained Mr. Lewis Gottheil will still be represented by him, and the other similarly situated individuals might possibly be represented by other counsel. The retainer specifically provides that no individual who retains Mr. Gottheil shall be charged any fees nor be responsible for costs or penalties. It further provides that the retainer may be discontinued by the individual or by counsel in accordance with applicable rules.
- Counsel further submits that the 600 members of the group for which the representation order is being sought have already retained counsel of their choice, that being Mr. Lewis Gottheil of the CAW. However, if the requested representative order is not granted, there will still be a group of 600 individual members of the Pension Plan who are represented by Mr. Gottheil. As a result, counsel acknowledges there is little to no difference that will result from granting the requested representation order in this case, except that all retirees formerly represented by the union will have one counsel, as opposed to two or several counsel if the order is not granted.
- In view of this acknowledgement, it seems to me that there is no advantage to be gained by granting the CAW representative status. There will be no increased efficiencies, no simplification of the process, nor any real practical benefit to be gained by such an order.
- Notwithstanding that creditor classification has yet to be proposed in this CCAA proceeding, it is useful, in my view, to make reference to some of the principles of classification. In <u>Stelco Inc., Re</u>, the Ontario Court of Appeal noted that the classification of creditors in the CCAA proceeding is to be determined based on the "commonality of interest" test. In <u>Stelco Inc., Re</u>, the Court of Appeal upheld the reasoning of Paperny J. (as she then was) in <u>Canadian Airlines Corp., Re</u> and articulated the following factors to be considered in the assessment of the "commonality of interest".

In summary, the case has established the following principles applicable to assessing commonality of interest:

- 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
- 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
- 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.
- 4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
- 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
- 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

Stelco Inc., Re (2005), 15 C.B.R. (5th) 307 (Ont. C.A.), paras 21-23; Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), para 31.

I have concluded that, at this point in the proceedings, the former employees have a "commonality of interest" and that this process can be best served by the appointment of one representative counsel.

- As to which counsel should be appointed, all firms have established their credentials. However, KM is, in my view, the logical choice. They have indicated a willingness to act on behalf of all former employees. The choice of KM is based on the broad mandate they have received from the employees, their experience in representing groups of retirees and employees in large scale restructurings and speciality practice in the areas of pension, benefits, labour and employment, restructuring and insolvency law, as well as my decision that the process can be best served by having one firm put forth the arguments on behalf of all employees as opposed to subdividing the employee group.
- The motion of Messrs. Sproule, Archibald and Campbell is granted and Koskie Minsky LLP is appointed as Representative Counsel. This representation order is also to cover the fees and disbursements of Koskie Minsky.
- The motions to appoint Nelligan O'Brien Payne and Shibley Righton, Juroviesky and Ricci, and the CAW as representative counsel are dismissed.
- I would ask that counsel prepare a form of order for my consideration.

Order accordingly.

FN* Additional reasons at *Nortel Networks Corp.*, Re (2009), 2009 CarswellOnt 3530 (Ont. S.C.J. [Commercial List]).

END OF DOCUMENT

TAB 17

C

2009 CarswellOnt 6169

Fraser Papers Inc., Re

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

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO FRASER PAPERS INC., FPS CANADA INC., FRASER PAPERS HOLDINGS INC., FRASER TIMBER LTD., FRASER PAPERS LIMITED and FRASER N.H.LLC (collectively, the "Applicants" or "Fraser Papers")

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Judgment: September 17, 2009 Docket: CV-09-8241-OOCL

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Counsel: M. Barrack, D.J. Miller for Applicants

- R. Chadwick, C. Costa for Monitor
- D. Wray, J. Kugler for Communications, Energy and Paper Workers Union of Canada
- D. Wray, J. Kugler (Agent) for Pink Larkin
- C. Sinclair for United Steelworkers
- T. McRae, S. Levitt for Steering Committee of Fraser Papers' Salaried Retirees Committee
- M.P. Gottlieb, S. Campbell for Committee for Salaried Employees and Retirees
- M. Sims for Her Majesty the Queen in Right of the Province of New Brunswick as represented by the Minister of Business of New Brunswick

Chriss Burr for CIT Business Credit Canada Inc.

D. Chernos for Brookfield Asset Management Inc.

2009 CarswellOnt 6169,

Subject: Insolvency; Civil Practice and Procedure

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous.

Cases considered by Pepall J.:

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 12, 2000 CarswellAlta 623 (Alta. Q.B.) — considered

Nortel Networks Corp., Re (2009), 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2005), 2005 CarswellOnt 6818, 204 O.A.C. 205, 78 O.R. (3d) 241, 261 D.L.R. (4th) 368, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Generally --- referred to

Chapter 15 — referred to

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

Generally - referred to

s. 11 - referred to

Employee Retirement Income Security Act, 1974, 29 U.S.C.

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally - referred to

Pepall J.:

Relief Requested

There are four motions before me that request the appointment of representatives and representative counsel for various groups of unrepresented current and former employees and other beneficiaries of the pension plans and other retirement and benefit plans of the Applicants ("Fraser Papers"). With the exception of the motion of the United Steel, Paper, Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union (the "USW"), all motions include a request that Fraser Papers pay the fees and disbursements of representative counsel.

- 2 The motions are brought by the following moving parties:
 - (a) the USW who seeks to represent its former members. It already represents its current members.
 - (b) the Communications Energy and Paperworkers Union of Canada (the "CEP") who also seeks to represent its former members. It too already represents its current members.
 - (c) the Steering Committee of Fraser Papers' Salaried Retirees Committee who request that Nelligan O'Brian Payne LLP and Shibley Righton LLP ("Nelligan/Shibley") be appointed to act for all non-unionized retirees and their successors.
 - (d) the Committee of Salaried Employees and Retirees who request that Davies Ward Phillips & Vineberg LLP ("Davies") be appointed to act for all unrepresented employees, be they active or retired, and their successors.
- A third union, the CMAW, did not bring a motion but Mr. Wray, counsel for the CEP, acted as agent for CMAW's counsel, Pink Larkin on these motions. He advised that the CMAW will represent its current members but not its retirees who are approximately 25 in number. [FN1] These retirees therefore would only be encompassed by the Davies proposed retainer.

Discussion

- The Applicants employ approximately 2,500 personnel. They are located in Canada and the U.S. A substantial majority is unionized. Of the 2,500, 1,729 employees participate in five defined benefit pension plans. In addition, 3,246 retirees receive benefits from these plans. Fraser Papers maintains certain other plans and benefits including supplementary employee retirement programmes ("SERPs").
- On June 18, 2009, the Applicants obtained an Initial Order pursuant to the provisions of the *CCAA*. On July 13, 2009, the U.S. Bankruptcy Court for the District of Delaware designated these proceedings as foreign main proceedings pursuant to Chapter 15 of the U.S. Bankruptcy Code.
- Fraser Papers is insolvent and is under significant financial pressure. Absent the DIP financing, a restructuring would be impossible. The Applicants have not generated positive cash flow from operations for three years. Their largest unsecured claims relate to the pension plans and the SERPs. Their accrued pension benefit obligations in these plans and the SERPs exceed the value of the plan assets by approximately USD \$171.5 million as at December 31, 2008.
- Representative counsel should be appointed in this case and I have jurisdiction to do so. Section 11 of the *CCAA* and the Rules of Civil Procedure provide the Court with broad jurisdiction in this regard. No one challenges either of these propositions. The employees and retirees not otherwise represented are a vulnerable group who require assistance in the restructuring process and it is beneficial that representative counsel be appointed. The balance of convenience favours the granting of such an order and it is in the interests of justice to do so. The real issues are who should be appointed and whether Fraser Papers should fund the proposed representation.

(A) USW and CEP Motions

Dealing firstly with the motions brought by the unions, the USW is the exclusive bargaining agent for the unionized employees of the Applicants working in Madawaska, Maine and Berlin-Gorham, New Hampshire. Personnel at these facilities participate in a defined benefit pension plan and a defined contribution pension plan. The U.S. law applicable to pension plans is the *Employee Retirement Income Security Act of 1974* ("ERISA")[FN2]. The evi-

dence filed by the USW suggests that a labour organization that negotiated a pension plan has a role in legal proceedings involving termination of that plan. If voluntary, consent of the union is required and if involuntary, an order of the bankruptcy court under the appropriate provisions of U.S. bankruptcy law is necessary. The USW has extensive experience representing the rights of employees and retirees in these sorts of proceedings. It is also noteworthy that, although the collective agreements between the USW and the Applicants do not provide for retiree health and life insurance benefits, the U.S. Bankruptcy Code provides that a labour organization is deemed to be the authorized representative of retirees, surviving spouses, and dependents receiving benefits pursuant to its collective bargaining agreements, unless the union opts not to serve as the authorized representative or the bankruptcy court determines that different representation is appropriate.

- In my view, the USW should be appointed as the representative for its former members who are retired subject to a retiree's ability to opt out of such representation should he or she so desire. The union already has a relationship with the USW retirees. It also has the means with which to communicate quickly with its members and former members. It is familiar with the relevant collective agreements and plans and has experience and a presence in both Canada and the U.S. De facto, the USW is already the representative of the USW retirees pursuant to the law in the U.S. Lastly, the Monitor and the Applicants support the USW's request to be appointed as representative counsel for its former members. As mentioned, the USW does not seek funding.
- Although CEP plays no role in Fraser Papers' U.S. operations, with that exception, for similar reasons and in the interests of consistency, the CEP should be appointed as the representative for its former members who are retirees subject to the aforementioned opt out provision. The Monitor and the Applicants are supportive of this position. Counsel for the CEP indicated that while it is unclear as a matter of law that the union is bound to represent former members in circumstances such as those facing Fraser Papers, the CEP would represent them with or without funding. Given Fraser Papers' insolvency, it seems to me that funding by the Applicants should only be provided for the benefit of those who otherwise would have no legal representation. The request for funding by CEP is refused.

(b) Nelligan/Shibley and Davies

- Turning to the requests of the Steering Committee of Fraser Papers Salaried Retirees Committee which favours the appointment of Nelligan/Shibley and the Committee for Salaried Employees and Retirees which favours Davies, firstly commonality of interest should be considered. In <u>Nortel Networks Corp., Re[FN3]</u>, Morawetz J. applied the Court of Appeal's decision in <u>Stelco Inc., Re[FN4]</u> and the decision of <u>Canadian Airlines Corp., Re[FN5]</u> to enumerate the following principles applicable to an assessment of commonality of interest:
 - 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test.
 - 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
 - 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.
 - 4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
 - 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the plan] are irrelevant.
 - 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

- Once commonality of interest has been established, other factors to be considered in the selection of representative counsel include: the proposed breadth of representation; evidence of a mandate to act; legal expertise; jurisdiction of practice; the need for facility in both official languages; and estimated costs.
- Davies is proposing to represent all unrepresented employees, former employees and their successors. In my view, there is a commonality of interest amongst the members of this group. In essence, they engage unsecured obligations. Arguably those proposed to be represented by the unions could also be included, and indeed absent a change of position by the CMAW, former members of the CMAW will be. That said, for the reasons outlined above, I am satisfied in this case that it is desirable to have the unions act for their members and former members if so willing. Indeed, no one took an opposing position.
- I am not persuaded that there is a need for separate representation as advocated by the Committee supporting the Nelligan/Shibley retainer. Appointing only Davies avoids excessive fragmentation and duplication and minimizes costs. In addition, no one will be excluded unless he or she so desires. Davies is also the only counsel whose retainer would extend to the CMAW retirees.
- Davies has already received a broad mandate in that it has close to 700 retainers from employees in each facet of Fraser Papers' operations and from all current and former employee groups. It has the necessary legal expertise and has offices in Toronto, Montreal and New York. It also has the necessary language capability.
- In contrast, Nelligan/Shibley is only proposing to represent retirees. It has a mandate of approximately 211 retirees. Clearly it has the requisite legal and language expertise but does not have the benefit associated with having offices in as many relevant jurisdictions. One may reasonably conclude from the evidence before me that the proposed fee structure would be less than that advanced by Davies although the scope of the retainer is more limited. Davies' appointment is not diminished because initially they were identified by the Applicants as appropriate counsel unlike Nelligan/Shibley whose group grew organically to use its counsel's terminology. Nor am I persuaded that Davies will be enfeebled as a result of the composition of the Steering Committee or due to past unrelated retainers by Brookfield Asset Management Inc. The Monitor supports the appointment of Davies as do the Applicants and the DIP lenders.
- In the event that a real as opposed to a hypothetical or speculative conflict arises at some point in the future, parties may seek directions from the Court. As with the unions, the order appointing Davies will allow anyone to opt out of the representation.
- Unlike the unions, absent funding, Davies would not be expected to serve as representative counsel. Accordingly, funding is ordered to be provided by Fraser Papers. Again, the funding request is supported by the Monitor, the Applicants and the DIP lenders.
- The objective of my order is to help those who are otherwise unrepresented but to do so in an efficient and cost effective manner and without imposing an undue burden on insolvent entities struggling to restructure. It seems to me that in the future, parties should make every effort to keep the costs associated with contested representation motions in insolvency proceedings to a minimum. In addition, as I indicated in open court, while a successful moving party may expect to recover a good portion of the legal fees associated with such a motion, there is an element of business development involved in these motions which in my view is a cost of doing business and should not be visited upon the insolvent Applicants. I will leave it to the Monitor to address what an appropriate reduction would be and this no doubt will be addressed very briefly in a subsequent Monitor's report.

Summary

2009 CarswellOnt 6169,

In summary, the USW, CEP and Davies representation requests are granted. Only the Davies funding request is granted. The motion relating to Nelligan/ Shibley is dismissed. Counsel submitted proposed orders without prejudice to the Applicants to make submissions. Counsel should confer on the appropriate form of orders and then a representative may attend before me at a 9:30 appointment to have them approved and signed.

<u>FN1</u> This is contrary to the contents of paragraph 24 of the Monitor's 4th Report but, being more recent, I accept counsel's oral representation as being accurate.

FN2 29 U.S.C.

FN3 (Ont. S.C.J. [Commercial List]).

FN4 (2005), 15 C.B.R. (5th) 307 (Ont. C.A.)

FN5 (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.).

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TAB 18

C

2010 CarswellOnt 1344, 2010 ONSC 1328, 65 C.B.R. (5th) 152

Canwest Publishing Inc./Publications Canwest Inc., Re

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Judgment: March 5, 2010 Docket: CV-10-8533-00CL

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Counsel: Lyndon Barnes, Alex Cobb for Canwest LP Entities

Maria Konyukhova for Monitor, FTI Consulting Canada Inc.

Hilary Clarke for Bank of Nova Scotia, Administrative Agent for Senior Secured Lenders' Syndicate

Janice Payne, Thomas McRae for Canwest Salaried Employees and Retirees (CSER) Group

M.A. Church for Communications, Energy and Paperworkers' Union

Anthony F. Dale for CAW-Canada

Deborah McPhail for Financial Services Commission of Ontario

Subject: Insolvency; Civil Practice and Procedure

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

In January 2010 LP Entities obtained order pursuant to Companies' Creditors Arrangement Act staying all proceedings and claims against them — Order permitted, but did not require, payments to employees and pension plans — There were approximately 45 non-unionized employees who were still owed termination and severance payments,

as well as accrual of pensionable service — There were further nine employees who were, or would be, entitled pursuant to executive pension plan to pension benefits in excess of those under main pension plan — Moving parties sought order permitting them to represent those employees, for appointment of counsel, and for funding of counsel - Respondents did not object to appointment representatives or counsel, but opposed funding of counsel - Motion granted - All four proposed representatives had claims against LP Entities that were representative of claims that would be advanced by former employees — Individuals at issue were unsecured creditors whose recovery expectations might be non-existent, however they found themselves facing legal proceedings of significant complexity — Evidence was that members of group had little means to pursue representation and were unable to afford proper legal representation at this time — Employees were vulnerable group and there was no other counsel available to represent their interests — Canadian courts did not typically appoint unsecured creditors committees — It would be of considerable benefit to have representatives and representative counsel who could represent interests of salaried employees and retirees — There were three possible sources of funding: LP Entities, Monitors, or senior secured lenders — Court had power to compel senior secured lenders to fund or alternatively to compel LP Administrative Agent to consent to funding — Source of funding other than salaried employees themselves should be identified now -Funding would be prospective in nature and would not extend to investigation of or claims against directors — Counsel were directed to communicate with one another to ascertain how best to structure funding and report back to court by certain date.

Statutes considered:

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

Generally - referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

MOTION by group of employees for funding for appointment of representatives, appointment of counsel, and funding of counsel.

Pepall J.:

Reasons for Decision

Relief Requested

- Russell Mills, Blair MacKenzie, Rejean Saumure and Les Bale (the "Representatives") seek to be appointed as representatives on behalf of former salaried employees and retirees of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., Canwest (Canada) and Canwest Limited Partnership and the Canwest Global Canadian Newspaper Entities (collectively the "LP Entities") or any person claiming an interest under or on behalf of such salaried employees or retirees including beneficiaries and surviving spouses ("the Salaried Employees and Retirees"). They also seek an order that Nelligan O'Brien Payne LLP and Shibley Righton LLP be appointed in these proceedings to represent the Salaried Employees and Retirees for all matters relating to claims against the LP Entities and any issues affecting them in the proceedings. Amongst other things, it is proposed that all reasonable legal, actuarial and financial expert and advisory fees be paid by the LP Entities.
- On February 22, 2010, I granted an order on consent of the LP Entities authorizing the Communications, Energy and Paperworker's Union of Canada ("CEP") to continue to represent its current members and to represent former members of bargaining units represented by the union including pensioners, retirees, deferred vested partici-

pants and surviving spouses and dependants employed or formerly employed by the LP Entities. That order only extended to unionized members or former members. The within motion focused on non-unionized former employees and retirees although Ms. Payne for the moving parties indicated that the moving parties would be content to include other non-unionized employees as well. There is no overlap between the order granted to CEP and the order requested by the Salaried Employees and Retirees.

Facts

- 3 On January 8, 2010 the LP Entities obtained an order pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") staying all proceedings and claims against the LP Entities. The order permits but does not require the LP Entities to make payments to employee and retirement benefit plans.
- There are approximately 66 employees, 45 of whom were non-unionized, whose employment with the LP Entities terminated prior to the Initial Order but who were still owed termination and severance payments. As of the date of the Initial Order, the LP Entities ceased making those payments to those former employees. As many of these former employees were owed termination payments as part of a salary continuance scheme whereby they would continue to accrue pensionable service during a notice period, after the Initial Order, those former employees stopped accruing pensionable service. The Representatives seek an order authorizing them to act for the 45 individuals and for the aforementioned law firms to be appointed as representative counsel.
- Additionally, seven retirees and two current employees are (or would be) eligible for a pension benefit from Southam Executive Retirement Arrangements ("SERA"). SERA is a non-registered pension plan used to provide supplemental pension benefits to former executives of the LP Entities and their predecessors. These benefits are in excess of those earned under the Canwest Southam Publications Inc. Retirement Plan which benefits are capped as a result of certain provisions of the *Income Tax Act*. As of the date of the Initial Order, the SERA payments ceased also. This impacts beneficiaries and spouses who are eligible for a joint survivorship option. The aggregate benefit obligation related to SERA is approximately \$14.4 million. The Representatives also seek to act for these seven retirees and for the aforementioned law firms to be appointed as representative counsel.
- 6 Since January 8, 2010, the LP Entities have being pursuing the sale and investor solicitation process ("SISP") contemplated by the Initial Order. Throughout the course of the CCAA proceedings, the LP Entities have continued to pay:
 - (a) salaries, commissions, bonuses and outstanding employee expenses;
 - (b) current services and special payments in respect of the active registered pension plan; and
 - (c) post-employment and post-retirement benefits to former employees who were represented by a union when they were employed by the LP Entities.
- The LP Entities intend to continue to pay these employee related obligations throughout the course of the CCAA proceedings. Pursuant to the Support Agreement with the LP Secured Lenders, AcquireCo. will assume all of the employee related obligations including existing pension plans (other than supplemental pension plans such as SERA), existing post-retirement and post-employment benefit plans and unpaid severance obligations stayed during the CCAA proceeding. This assumption by AcquireCo. is subject to the LP Secured Lenders' right, acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities.
- 8 All four proposed Representatives have claims against the LP Entities that are representative of the claims that would be advanced by former employees, namely pension benefits and compensation for involuntary terminations.

In addition to the claims against the LP Entities, the proposed Representatives may have claims against the directors of the LP Entities that are currently impacted by the CCAA proceedings.

- No issue is taken with the proposed Representatives nor with the experience and competence of the proposed law firms, namely Nelligan O'Brien Payne LLP and Shibley Righton LLP, both of whom have jointly acted as court appointed representatives for continuing employees in the Nortel Networks Limited case.
- Funding by the LP Entities in respect of the representation requested would violate the Support Agreement dated January 8, 2010 between the LP Entities and the LP Administrative Agent. Specifically, section 5.1(j) of the Support Agreement states:

The LP Entities shall not pay any of the legal, financial or other advisors to any other Person, except as expressly contemplated by the Initial Order or with the consent in writing from the Administrative Agent acting in consultation with the Steering Committee.

- 11 The LP Administrative Agent does not consent to the funding request at this time.
- On October 6, 2009, the CMI Entities applied for protection pursuant to the provisions of the CCAA. In that restructuring, the CMI Entities themselves moved to appoint and fund a law firm as representative counsel for former employees and retirees. That order was granted.
- Counsel were urged by me to ascertain whether there was any possibility of resolving this issue. Some time was spent attempting to do so, however, I was subsequently advised that those efforts were unsuccessful.

Issues

- 14 The issues on this motion are as follows:
 - (1) Should the Representatives be appointed?
 - (2) Should Nelligan O'Brien Payne LLP and Shibley Righton LLP be appointed as representative counsel?
 - (3) If so, should the request for funding be granted?

Positions of Parties

- In brief, the moving parties submit that representative counsel should be appointed where vulnerable creditors have little means to pursue a claim in a complex CCAA proceeding; there is a social benefit to be derived from assisting vulnerable creditors; and a benefit would be provided to the overall CCAA process by introducing efficiency for all parties involved. The moving parties submit that all of these principles have been met in this case.
- The LP Entities oppose the relief requested on the grounds that it is premature. The amounts outstanding to the representative group are prefiling unsecured obligations. Unless a superior offer is received in the SISP that is currently underway, the LP Entities will implement a support transaction with the LP Secured Lenders that does not contemplate any recoveries for unsecured creditors. As such, there is no current need to carry out a claims process. Although a superior offer may materialize in the SISP, the outcome of the SISP is currently unknown.
- 17 Furthermore, the LP Entities oppose the funding request. The fees will deplete the resources of the Estate without any possible corresponding benefit and the Support Agreement with the LP Secured Lenders does not au-

thorize any such payment.

- 18 The LP Senior Lenders support the position of the LP Entities.
- In its third report, the Monitor noted that pursuant to the Support Agreement, the LP Entities are not permitted to pay any of the legal, financial or other advisors absent consent in writing from the LP Administrative Agent which has not been forthcoming. Accordingly, funding of the fees requested would be in contravention of the Support Agreement with the LP Secured Lenders. For those reasons, the Monitor supported the LP Entities refusal to fund.

Discussion

- No one challenged the court's jurisdiction to make a representation order and such orders have been granted in large CCAA proceedings. Examples include Nortel Networks Corp., Fraser Papers Inc., and Canwest Global Communications Corp. (with respect to the television side of the enterprise). Indeed, a human resources manager at the Ottawa Citizen advised one of the Representatives, Mr. Saumure, that as part of the CCAA process, it was normal practice for the court to appoint a law firm to represent former employees as a group.
- 21 Factors that have been considered by courts in granting these orders include:
 - the vulnerability and resources of the group sought to be represented;
 - any benefit to the companies under CCAA protection;
 - any social benefit to be derived from representation of the group;
 - the facilitation of the administration of the proceedings and efficiency;
 - the avoidance of a multiplicity of legal retainers;
 - the balance of convenience and whether it is fair and just including to the creditors of the Estate;
 - whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
 - the position of other stakeholders and the Monitor.
- The evidence before me consists of affidavits from three of the four proposed Representatives and a partner with the Nelligan O'Brien Payne LLP law firm, the Monitor's Third Report, and a compendium containing an affidavit of an investment manager for noteholders filed on an earlier occasion in these CCAA proceedings. This evidence addresses most of the aforementioned factors.
- The primary objection to the relief requested is prematurity. This is reflected in correspondence sent by counsel for the LP Entities to counsel for the Senior Lenders' Administrative Agent. Those opposing the relief requested submit that the moving parties can keep an eye on the Monitor's website and depend on notice to be given by the Monitor in the event that unsecured creditors have any entitlement. Counsel for the LP Entities submitted that counsel for the proposed representatives should reapply to court at the appropriate time and that I should dismiss the motion without prejudice to the moving parties to bring it back on.

- In my view, this watch and wait suggestion is unhelpful to the needs of the Salaried Employees and Retirees and to the interests of the Applicants. I accept that the individuals in issue may be unsecured creditors whose recovery expectation may prove to be non-existent and that ultimately there may be no claims process for them. I also accept that some of them were in the executive ranks of the LP Entities and continue to benefit from payment of some pension benefits. That said, these are all individuals who find themselves in uncertain times facing legal proceedings of significant complexity. The evidence is also to the effect that members of the group have little means to pursue representation and are unable to afford proper legal representation at this time. The Monitor already has very extensive responsibilities as reflected in paragraph 30 and following of the Initial Order and the CCAA itself and it is unrealistic to expect that it can be fully responsive to the needs and demands of all of these many individuals and do so in an efficient and timely manner. Desirably in my view, Canadian courts have not typically appointed an Unsecured Creditors Committee to address the needs of unsecured creditors in large restructurings. It would be of considerable benefit to both the Applicants and the Salaried Employees and Retirees to have Representatives and representative counsel who could interact with the Applicants and represent the interests of the Salaried Employees and Retirees. In that regard, I accept their evidence that they are a vulnerable group and there is no other counsel available to represent their interests. Furthermore, a multiplicity of legal retainers is to be discouraged. In my view, it is a false economy to watch and wait. Indeed the time taken by counsel preparing for and arguing this motion is just one such example. The appointment of the Representatives and representative counsel would facilitate the administration of the proceedings and information flow and provide for efficiency.
- The second basis for objection is that the LP Entities are not permitted to pay any of the legal, financial or other advisors to any other person except as expressly contemplated by the Initial Order or with consent in writing from the LP Administrative Agent acting in consultation with the Steering Committee. Funding by the LP Entities would be in contravention of the Support Agreement entered into by the LP Entities and the LP Senior Secured Lenders. It was for this reason that the Monitor stated in its Report that it supported the LP Entities' refusal to fund.
- I accept the evidence before me on the inability of the Salaried Employees and Retirees to afford legal counsel at this time. There are in these circumstances three possible sources of funding: the LP Entities; the Monitor pursuant to paragraph 31 (i) of the Initial Order although quere whether this is in keeping with the intention underlying that provision; or the LP Senior Secured Lenders. It seems to me that having exercised the degree of control that they have, it is certainly arguable that relying on inherent jurisdiction, the court has the power to compel the Senior Secured Lenders to fund or alternatively compel the LP Administrative Agent to consent to funding. By executing agreements such as the Support Agreement, parties cannot oust the jurisdiction of the court.
- In my view, a source of funding other than the Salaried Employees and Retirees themselves should be identified now. In the CMI Entities' CCAA proceeding, funding was made available for Representative Counsel although I acknowledge that the circumstances here are somewhat different. Staged payments commencing with the sum of \$25,000 may be more appropriate. Funding would be prospective in nature and would not extend to investigation of or claims against directors.
- Counsel are to communicate with one another to ascertain how best to structure the funding and report to me if necessary at a 9:30 appointment on March 22, 2010. If everything is resolved, only the Monitor need report at that time and may do so by e-mail. If not resolved, I propose to make the structuring order on March 22, 2010 on a nunc pro tunc basis. Ottawa counsel may participate by telephone but should alert the Commercial List Office of their proposed mode of participation.

Motion granted.

END OF DOCUMENT

TAB 19

2009 CarswellOnt 9398,

2009 CarswellOnt 9398

Canwest Global Communications Corp., Re

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

In the Matter of a Proposed Plan of Compromise or Arrangement of Canwest Global Communications Corp. and the Other Applicants listed on Schedule "A"

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Judgment: October 27, 2009 Docket: CV-09-8396-00CL

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Counsel: Lyndon Barnes, Shawn Irving, for Applicants

Alan Merskey, for Special Committee of the Board of Directors

David Byers, Maria Konyukhova, for Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett, for Ad Hoc Committee of Noteholders

Hilary Clarke, for Bank of Nova Scotia

Steve Weisz, for CIT Business Credit Canada Inc.

Hugh O'Reilly, Amanda Darrach, for CHCH Retirees

Douglas Wray, Jesse Kugler, for Communications, Energy and Paperworkers Union of Canada

Deborah McPhail, for FSCO

Subject: Civil Practice and Procedure; Insolvency

Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous.

Statutes considered:

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

s. 11 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 10 — referred to

Pepall J.:

Relief Requested

- The CMI Entities seek an order appointing David Cremasco, Rose Stricker and Lawrence Schnurr as representatives of certain retirees ("Retirees"). The Retirees are all former employees of the CMI Entities (or their predecessors) or their surviving spouses who receive or are entitled to receive a pension from a pension plan sponsored by a CMI Entity or who, prior to October 6, 2009, were entitled to receive non-pension benefits from a CMI Entity. The proposed order would encompass former members of the Communications, Energy and Paper-workers Union of Canada ("CEP") who are entitled to benefits under the Global Communications Limited Retirement Plan for CH Employees (the "CH Employees Plan") but not otherwise. They are referred to as the CH Employees. Put differently, the proposed representatives do not plan to represent former unionized employees (or their surviving spouses) who were represented by CEP when they were active employees other than those who were entitled to benefits under the CH Employees Plan, namely the CH Employees. The CMI Entities also request an order appointing the law firm of Cavalluzzo Hayes Shilton McIntyre & Cornish LLP as representative counsel for the Retirees. It is proposed that the CMI Entities provide funding for this representation.
- The CEP seeks an order appointing it and the law firm of CaleyWray to represent current and former members of the CEP who are employed or who were formerly employed by the CMI Entities[FN1] but not including the aforementioned CH Employees. It also requests funding by the CMI Entities and a charge over their property for this representation. It further requests that the claims bar date established in my order of October 14,2009 be extended from November 19, 2009.

Brief Outline of Facts

- 3 Since the date of the Initial Order, the CMI Entities have paid and intend to continue to pay:
 - (a) salaries, commissions, bonuses and outstanding employee expenses;
 - (b) current service and special payments with respect to the active defined benefit pension plans; and
 - (c) post-employment and post-retirement benefit payments to former employees who were represented by a union when they were employed by the CMI Entities.
- That said, certain former employees are affected by the CMI Entities' discontinuance or proposed discontinuance of employee related obligations and it is intended that they be assisted by the granting of the order requested by the CMI Entities. Approximately 81 former non-unionized employees have been advised that the CMI Entities propose to cease making all post-employment and post-retirement benefit payments in relation to claims incurred after November 13,2009. There are also 2 out of IS beneficiaries of the Canwest Global Communications Corp. and Related Companies Retirement Compensation Arrangement Plan who will not have received the entire present value of

their entitlement under that plan.

- In addition, the CMI Entities purported to terminate the CH Employees Plan when they sold CHCH TV effective August 31, 2009. 120 former employees or spouses received a pension or were entitled to receive a deferred vested pension under this plan. OSFI has directed CMI to prepare without delay a valuation report for the CH Employees Plan effective as of December 31, 2008 to establish additional amounts to accrue from January 1, 2009 which may need to be funded through special payments. The CMI Entities anticipate that the valuation will identify an unfunded liability. Currently, special payments are not contemplated in the cash flow projections for that unfunded liability and a shortfall is anticipated to exist on the filing of the termination report for the plan.
- Some former employees of CHCH TV have established a committee representing union and non-unionized former employees. Committee members include the proposed representatives. Rose Stricker is a non-unionized deferred vested member of the CH Plan. David Cremasco is a formerly unionized retiree with entitlement to post-retirement benefits and Lawrence Schnurr is a formerly salaried employee with entitlement to post-retirement benefits. If appointed, they will seek to form a broader committee with a member from each of the major population centres in which the Retirees reside and with at least one additional formerly unionized member.
- 7 Cavalluzzo LLP acts for about 100 retired participants in the CH Employees Plan, 30 to 40 of whom were not previously represented by a union and 60 to 70 of whom were. Other than those 100, most other Retirees are not represented by counsel in this CCAA proceeding.
- 8 The CMI Entities request that Cavalluzzo LLP be appointed as representative counsel to assist the Retirees.
- CEP represents 1000 bargaining unit employees employed by the Applicants. It intends to facilitate and advance the claims of both its current members and its former members (but not including the CH Employees). CEP states that as a result of the current economic crisis, it has had to incur significant costs in representing its current and former members in CCAA proceedings. This is particularly so given the union's strong presence in the forestry and media industries and the degree to which they have been impacted by the state of the economy. CEP states mat the costs have been substantial and have adversely affected its financial position. CEP states that its ability to provide effective representation in these proceedings is dependent on receipt of funding. In the past 6 months, CEP has spent about \$250,000 on legal costs in connection with different CCAA proceedings. Furthermore, former members do not pay union dues and their representation, although part of the union's internal mandate, creates costs that are outside CEP's cost structure. In addition, over the past 12 months, CEP has lost approximately 12,000 members due to economic conditions. This obviously has a negative impact on union revenues. Faced with these conditions, CEP seeks funding.
- 10 CEP requests that CaleyWray be appointed as representative counsel. It also requests a charge or security over the property of the CMI Entities to cover the costs of CEP and its counsel although it did not press this point on learning that no such charge is proposed for the Cavaluzzo representation order.
- Lastly, CEP requests that the claims bar date be extended to provide it with additional time to identify, value and process claims.

Issues

- 12 The issues to consider are:
 - (a) Should the representatives and Cavalluzzo LLP be appointed to represent the interests of the Retirees and should Cavalluzzo LLP be provided with funding for such representation?

- (b) Should CEP and Caley Wray be appointed on behalf of CEP's current and former members (not including the CH Employees) and provided with funding and a charge over the property of the CMI Entities for such representation?
- (c) Should the claims bar date be extended as requested by CEP?

Discussion

(a) Cavalluzzo LLP

- No one opposes the motion of the CMI Entities. The Monitor and the Ad Hoc Committee of 8% Noteholders support the request and others are unopposed to the relief requested. CIT has agreed to a variation of the cash flow in this regard as well.
- Dealing firstly with the representation component of the order, in my view, the order requested should be granted. I have jurisdiction under Rule 10 of the Rules of Civil Procedure and section 11 of the CCAA. The balance of convenience favours the granting of the order and it is in the interests of justice to do so. The Retirees are a particularly vulnerable group and without professional and legal resources, they are likely at risk of being unable to understand and protect their interests in the restructuring. Clearly there is a social benefit associated with them being represented. The appointment of a single representative counsel will facilitate the administration of the proceedings and provide for efficiency. Cavalluzzo LLP is experienced in this area, has a considerable reputation, and is fully qualified to act.
- As for funding, the CMI Entities propose that, subject to fee arrangements agreed to by the CMI Entities and Cavalluzzo LLP, reasonable legal, actuarial and financial expert and advisory fees and other incidental fees and disbursements be paid by the CMI Entities on a monthly basis. Funding for such representation should be provided by the CMI Entities. I am satisfied that the moving parties have established that such an order is beneficial. I accept the evidence before me to the effect that most individual Retirees likely do not have the means to obtain actuarial and/or benefit experts and would benefit from the assistance offered by representative counsel and its pension expert. Absent such an order, there would likely be a multiplicity of lawyers acting for various Retirees, stress and inconvenience for those who could ill afford such representation, no representation for some, and the disorganization and inefficiency associated with multiple representation of substantially similar interests. A single counsel diminishes the likelihood of "overlawyering" and funding of such representation is a recognition of that desirable objective. It is fair and just to grant such an order.

(b) CEP and CaleyWray

- 16 CEP requests a separate representation order for all current and former CEP members other than the CH Employees and an order that CaleyWray be appointed as representative counsel funded by the CMI Entities.
- Again, there is no issue that CaleyWray is experienced and well equipped to act for these individuals. Similarly, the union may appropriately represent its members and former members.
- CEP intends to facilitate and advance the interests of both its members and former members. It is of the view mat it has no conflict of interest as all of the aforementioned may ultimately have unsecured claims. It clearly already represents its current members and plans to represent its former members. In that sense, they are not vulnerable. I do not see the need for a representation order particularly with respect to current members. To the extent, if any, that it is necessary to do so, and given that no one opposes the request, it and CaleyWray are authorized to represent CEP's current and former members (but not including the CH Employees).

- As for funding, as I indicated in the *Fraser Papers* case, it should only be provided for the benefit of those former employees who otherwise would have no legal representation. Here, CEP intends to represent its current and former members (except for the CH Employees). But for this desire and subject to the agreement of Cavalluzzo LLP to act, there is no principled reason for separate representation. It arises by choice not out of necessity. Furthermore, this is an insolvency. Absent a clear and compelling reason such as the existence of an obvious conflict of interest, the general rule should be that funding by applicant debtors should only be available for one representative counsel. Even if one disagrees with that proposition, in this case, the CMI Entities have paid and intend to continue to pay, amongst other things, salaries, current service and special payments with respect to the defined benefit pension plans and post-employment and post-retirement benefit payments. Based on the materials before me, there are approximately 9 CEP members who were recently terminated and who have been advised that they will no longer receive salary continuance. In essence, the evidentiary support that might merit a funding request is absent. As noted in the factum of the CMI Entities, if they should change their position with respect to employee related obligations, the need for funding could be addressed at that time. I am also not persuaded that funding should be granted to pay for CEP's costs for outstanding grievances. No one else including the Monitor supports the requested order and I do not believe that it should be granted.
- As mentioned, no charge is being requested or granted with respect to the Cavalluzzo representation order and none should be given here. In addition, the Term Sheet as described in the materials restricts the granting of a charge absent the agreement of others including the Ad Hoc Committee.

(c) Claims Bar Extension

21 The last issue to consider is whether the claims bar date contained in my order of October 14, 2009, should be extended as requested by CEP. Based on the evidence before me, I am not persuaded that such an extension is necessary at this time.

Conclusion

In conclusion, the CMI Entities' motion is granted except that the third and last sentences of paragraph 2 are to be subject to any further or other order. The CEP motion is dismissed although authorization to represent current and former members (excluding the CH Employees) is granted.

Pepall J.:

On a last unrelated issue, I would like counsel to give some thought to the following suggestion. For future time sensitive motions brought by the CMI Entities, it would be helpful in situations where interested parties do not have time to file a factum if, before the return date, those opposing filed with the court a 1 to 2 page memo (maximum) outlining their respective positions. Interested parties are not obliged to do so but the court would consider this to be of assistance.

FN1 In its materials, CEP uses the term "Applicants" but for consistency, I have used the term "CMI Entities".

END OF DOCUMENT

TAB 20

C

2008 CarswellOnt 6105, 48 C.B.R. (5th) 41, 44 E.T.R. (3d) 31, 171 A.C.W.S. (3d) 21

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENTS ACT, R.S.C. 1985, c. C-36

IN THE MATTER OF A PLAN OF ARRANGEMENT OF THE CANADIAN RED CROSS SOCIETY/LA SOCIETE CANADIENNE DE LA CROIX ROUGE

THE CANADIAN RED CROSS SOCIETY/LA SOCIETE CANADIENNE DE LA CROIX ROUGE

Ontario Superior Court of Justice

Cullity J.

Heard: September 3, 2008 Judgment: September 29, 2008 Docket: 98-CL-002970

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Counsel: Risa Kirshblum for Trustee under the Plan of Arrangement

Harvey T. Strosberg QC, Heather Rumble Peterson, Dawna Ring Q.C., Peter I. Waldmann, Thomas Sheppard, Kenneth Arenson, John Plater for Claimants under the Plan of Arrangement

Subject: Insolvency; Estates and Trusts; Civil Practice and Procedure

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

Jurisdiction — Pursuant to amended plan of compromise and agreement approved under Companies' Creditors Arrangement Act, trust was established for purpose of holding, administering and distributing fund in satisfaction of claims of persons infected with HIV virus who received blood products supplied by Canadian Red Cross Society prior to 1998 — No distributions from HIV trust were made — Trustee brought motion for advice and directions with respect to jurisdiction of court to relieve against late-filed or otherwise irregular applications for determination of damages by referee appointed in plan — Motion granted — Court has discretionary jurisdiction consistent with case law which is to be exercised sparingly in light of particular circumstances — Considerations that justified exercise of jurisdiction included structure of plan with its provisions of separate fund for HIV claimants and fact that no distributions from that fund were made — No prejudice would be suffered by society and other claimants, limitations issues created uncertainty, and circumstances of claimants distinguished them from commercial creditors — Adequate notice to claimants was essential for plan to be effective and application forms provided to claimants did not clearly indicate that they were required to identify each claimant in family group that included infected person

— Selection of appropriate methods of disseminating notice of deadline for applications may have been affected and unduly limited by misapprehension about number of potential claimants — Approach that most appropriately engaged jurisdiction of court and powers of trustee was for trustee to receive and dispose of late and irregular applications in accordance with guidelines provided in appendix to reasons.

Cases considered by Cullity J.:

Algoma Steel Corp. v. Royal Bank (1992), 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303, 11 C.B.R. (3d) 11, 1992 CarswellOnt 163 (Ont. C.A.) — referred to

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

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (2005), 19 E.T.R. (3d) 189, 2005 CarswellOnt 4773 (Ont. S.C.J.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (2006), 2006 CarswellOnt 4004, 23 C.B.R. (5th) 143, 25 E.T.R. (3d) 128, [2007] 1 C.T.C. 27 (Ont. S.C.J.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (2008), 2008 CarswellOnt 3075, 40 E.T.R. (3d) 256 (Ont. S.C.J.) — referred to

Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of) (2001), 21 C.B.R. (4th) 222, (sub nom. Juniper Lumber Co., Re) 233 N.B.R. (2d) 111, (sub nom. Juniper Lumber Co., Re) 601 A.P.R. 111, 2001 CarswellNB 21 (N.B. Q.B.) — referred to

Ivorylane Corp. v. Country Style Realty Ltd. (2004), 2004 CarswellOnt 2567 (Ont. S.C.J. [Commercial List]) — considered

McCarthy v. Canadian Red Cross Society (2001), 8 C.P.C. (5th) 350, 2001 CarswellOnt 2255, [2001] O.T.C. 470 (Ont. S.C.J.) — referred to

Noma Co., Re (2004), 2004 CarswellOnt 5033 (Ont. S.C.J. [Commercial List]) — considered

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

Pangeo Pharma inc., Re (2004), 2004 CarswellQue 292 (Que. S.C.) — referred to

Roman Catholic Episcopal Corp. of St. George's, Re (2007), 2007 CarswellNfld 198, 2007 NLTD 20, 801 A.P.R. 309, 264 Nfld. & P.E.I.R. 309, 32 C.B.R. (5th) 302 (N.L. T.D.) — referred to

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

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

Statutes considered:

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

Generally - referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6

ss. 17-19 — referred to

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

Generally -- referred to

Trustee Act, R.S.O. 1990, c. T.23

s. 60(2) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 9.01 — referred to

R. 10 - referred to

MOTION by trustee for advice and directions with respect to jurisdiction of court to relieve against late-filed or otherwise irregular applications for determination of damages by referee.

Cullity J.:

- The issues in this motion for advice and directions were previously raised in a motion heard on May 22 and 23 of this year. In my reasons, and in an endorsement, released on May 28, 2008, consideration of the issues was deferred pending the delivery of further material by the parties.
- The advice now requested relates to the jurisdiction of the court to relieve against late-filed, or otherwise irregular, applications for a determination of damages by the Referee appointed in the Amended Plan of Compromise and Arrangement (the "Plan") of the Canadian Red Cross Society (the "Society"). The Plan was approved by an order (the "Approval Order") of this court dated September 14, 2000 under the *Companies' Creditors Arrangement Act* (Canada) ("CCAA").

Background

Pursuant to the Plan, a Trust was established for the purpose of holding, administering and distributing a fund ("HIV Fund") in satisfaction of the claims of persons ("HIV Claimants") who were infected with the HIV virus from receiving blood, blood derivatives or blood products collected or supplied by the Society prior to September 28, 1998. Funds were also established to be administered by the Trustee for persons who contracted Creutzfeld-Jacob Disease and Hepatitis C. I will refer to the trusts attaching to the HIV Fund and the Hepatitis C Fund as the "HIV

Trust" the "HCV Trust" respectively.

- A Trust Agreement that sets out the powers and responsibilities of the Trustee was made as of September 24, 2001 with the Honourable Peter Cory as sole Trustee. On June 26, 2006, following Mr Cory's resignation, the Honourable John W. Morden was appointed by an order of Blair J. to replace him. Payments from the HIV Fund are to be made in accordance with damages assessments by a Referee the Honourable Robert S. Montgomery, Q.C. appointed pursuant to the provisions of the Plan.
- The HIV Trust has been bedevilled by problems and litigation since its inception, with the result that no distributions from the Trust have been made in the eight years since the Plan was approved. Several motions have been decided by the court. The most substantial of these raised limitations issues that could have a significant effect on the size of the class of HIV Claimants. This has been a matter of concern not only to those whose claims might be barred, but also to other Claimants whose entitlement would be reduced if the total damages awarded exceed the amount of the HIV Fund an amount that was originally approximately \$14 million but will have since been eroded by administration expenses and the costs of the litigation. It will undoubtedly be depleted further if the disputes continue.
- Independently of the limitations issues, it appears that the number of potential HIV Claimants was underestimated by at least some of the creditors involved in negotiating, and voting for, the relevant provisions of the Plan including the amount of the HIV Fund. These creditors had filed Proofs of Claim within time limits imposed by the court. Those who did not do so were barred from voting on the Plan but their claims against the Society were not thereby extinguished. Pursuant to paragraph 5.13 (b) of the Plan, this occurred on the Plan Implementation Date (October 5, 2001), when the rights of such Claimants against the Society were, in effect, converted into, or replaced by, rights to receive damages from the HIV Fund.
- The same concern about the number of HIV Claimants who may be entitled to share in the HIV Fund was reflected in the submissions of counsel in this motion. Each of them supported the existence of the jurisdiction to relieve against what were described as irregularities in applications, but they were not unanimous on the extent, if any, to which it extended beyond such cases. In Mr Strosberg's submission all of the other late-filed applications should be disallowed. It is tragic that a plan designed to provide compensation for innocent victims should be tied up in disputes over whether all, or only some of them, are to receive it disputes that many and, perhaps, most of the eligible HIV Claimants must find mystifying, and disheartening. Much of the impetus for the litigation has stemmed from an initial misapprehension that the number of the potential Claimants was significantly less than has since appeared to be the case.

The issues

The Plan provides for the Referee to receive and dispose of applications by HIV Claimants for an assessment of their damages. Article 5.10 provides in part:

HIV Claimants may apply to the Referee within 4 months following the Plan Implementation Date for a determination of damages with respect to their respective HIV Claim.

Although that language is, in form, permissive, it is provided later in the same article as follows:

Any surplus remaining after disposition of all references filed within the four month period following Plan Implementation Date shall be paid to the HCV Fund.

Read literally — and without regard to the possibility that the court could grant relief to Claimants whose applications were filed outside the deadline — the Plan provides that any surplus would be computed without refer-

ence to late applications. The disposition of surplus appears to be analogous to a gift over under a traditional testamentary trust, or trust *inter vivos*.

The four months' deadline referred to in article 5.10 expired on February 5, 2002. I am advised that timely applications were received in respect of the Claims — or derivative of the Claims — of 89 infected persons. I am now asked by the Trustee to advise whether the court has jurisdiction to extend the deadline or, otherwise to direct that additional late, or irregular, applications should be accepted. In paragraph 18 of his helpful affidavit, the Trustee's counsel, Mr Michael Royce, stated:

As previously indicated, we do not yet have information from all "Late Claimants" explaining why their applications were made after the deadline. For the purposes of this motion, however, which is simply to determine without reference to any particular case, the question of whether the court has the power to extend or otherwise relieve against the effect of the deadline, the Trustee assumes that among the Claimants there exist at least some whose reasons for submitting their applications after the deadline are compelling and represent circumstances that were entirely beyond their control.

- Having been advised that the existence of the jurisdiction would be disputed by other Claimants I endorsed this two-stage approach.
- In his affidavit, Mr Royce refers to a variety of explanations provided by HIV Claimants whose applications were irregular or out of time. The Trustee's records reveal that late applications have been received relating to the Claims of 38 persons who were either infected persons, or persons with derivative Claims as members of the families of infected persons. On the basis of communications from various haemophilia societies and other organisations, the Trustee believes that further late applications may be made in the future. In addition, there are a number of applications described by the Trustee's counsel as "irregular" in which timely applications for damages assessments were made on behalf of some, but not all, HIV Claimants of the same family. It appears that at least some of the omissions were the result of inadvertence, or a misunderstanding of the language of the application forms provided.
- Some of the Claimants whose applications were received after the deadline state that they did not receive notice of the HIV Fund before the deadline expired. This may have been due to inadequacies of the notice dissemination caused by what appears, with hindsight, to have been an initial erroneous assumption that there were no more than 35-40 infected Claimants and that these could be identified, and contacted, through various federal and provincial agencies. In addition, it is alleged that that one such agency did not send out notices it had agreed to provide. Other late-filed applications were made by, or on behalf of, individuals who state that they were unable to comply with the deadline as their HIV infection was discovered after the deadline had expired.
- The notice that informed HIV Claimants of the deadline stated that persons who decided to make "a claim on the *HIV Fund*", must do so by February 5, 2002. One Claimant who had previously provided a Proof of Claim to the Monitor appointed under the CCAA has stated that he believed that nothing further was required from him.
- In considering whether the court has jurisdiction to legitimise late and irregular applications, there are number of special features of the HIV Trust that distinguish it from trusts of a more traditional kind, and even the more closely analogous provisions of settlements of class proceedings under which because of the inevitable imperfection of notice-dissemination programs late-filed claims have been allowed from time to time.
- Most fundamentally, the Trust was created pursuant to the CCAA and was part of a compromise of the claims of the HIV Claimants and the Society that was approved by the order of September 14, 2000. Paragraph 12 of the Approval Order contemplates a continuing role for the court while the Plan is being implemented.

THIS COURT ORDERS that any interested party may apply to this court for directions or to seek relief in re-

spect of any matter arising out of or incidental to the Plan or this Order, including, without limitation, the interpretation of this Order and the Plan, the implementation of the Plan, and for any further Order that may be required for implementation of the Plan, on notice to any party likely to be affected by the Order sought.

Although the Trust Agreement provides that its provisions are subject to those of the Plan to the extent of any inconsistency, the Plan does not purport to deal with the terms of the HIV Trust except to the extent that it provides for the distribution of the HIV Fund. Paragraph 1.01 states:

"Trust Agreement" means that agreement among the Society, the Plan Participants and the Trustee, to be entered into on the Plan Implementation Date subject to the terms of this Plan, pursuant to which the Trust shall be established and governed.

- The terms of the Trust Agreement were evidently to be settled between the parties without any other assistance from the provisions of the Plan and without any requirement in it for court approval. The Agreement was, however, approved, and incorporated in the order of this court made in *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 2474 (Ont. S.C.J.) in a proceeding relating to the HCV Fund.
- Having imposed what is, in effect, a four-month limitation period for applications for damages assessments, the Plan does not address whether, or how, notice of this was to be given to HIV Claimants. The question of notice is dealt with under paragraph 8 (f) of the Trust Agreement that empowers the Trustee:

to authorize, prescribe, publish and distribute, at the cost of the Trust Fund, all forms and notices necessary for the administration of the Distribution Scheme including, without limitation, any advertising to potential beneficiaries as to the existence of the Trust Fund and the call for claims relating thereto.

- Again, unlike the position under section 17-19 of the Class Proceedings Act, 1992, S.O. 1992, c.6, there is no requirement for the Trustee to obtain the approval of the court for notices informing HIV Claimants of their rights.
- More generally, in addition to the detailed powers given to the Trustee for the purpose of administering the trust property, paragraph 8 of the Trust Agreement confers extensive powers and authority on the Trustee in connection with the administration of the "Distribution Scheme" in Article 5 of the Plan. These include power to decide all questions concerning the administration of the Distribution Scheme, to determine the persons who are to receive payments from HIV Trust, and to authorise such payments. In the exercise of these powers, the Trustee is, again, subject to the controlling jurisdiction of the court.
- Finally, I note that, In his reasons disposing of another motion, Blair J. opined that, for the purpose of providing access to the HIV Fund, the Plan should be given a liberal interpretation: [2005] O.J. No. 4177 (Ont. S.C.J.), para 15. In a subsequent motion he emphasised that the Plan was intended to be effective: [2006] O.J. No. 2675 (Ont. S.C.J.), para 24. The learned judge has also referred to the fact that the circumstances of the HIV Claimants are very different to those of commercial creditors affected by CCAA proceedings. While, as a general rule, the latter can be presumed to be knowledgeable, and ready and willing to assert their claims, the same cannot be said of the HIV Claimants who did not personally retain lawyers and did not participate in the CCAA proceeding. This was, I believe, reflected in the bar order that disqualified them from voting but did not purport to bar their Claims. Some, and perhaps most of them, prepared applications without professional assistance.

Heads of jurisdiction

I do not believe there is any doubt that the court has jurisdiction to intervene to give relief in at least some of the cases described by Mr Royce. To the extent that the responsibility to determine how potential HIV Claimants are

to be notified — and to supervise this process — is that of the Trustee, there is, *first*, the general jurisdiction of the court to exercise control over the administration of the trust and the exercise of a trustee's discretionary powers. If, as was suggested in the material filed on this motion, the application forms lacked clarity in material respects, or if the dissemination of notice was manifestly inadequate, the court would not be powerless to intervene.

- The jurisdiction in such cases is extended by paragraph 12 of the Approval Order which reserved to the court the authority to make orders required for the purpose of implementing the plan. In reasons delivered on a previous motion, I held that "required" for this purpose meant "reasonably required" and I accepted Ms Ring's submission that the paragraph was intended to continue the overall supervision of the court over proceedings under the CCAA: [2008] O.J. No. 2102 (Ont. S.C.J.), at para 29.
- Authorities under the CCAA support the existence of a third head of jurisdiction that is grounded in the supervisory role of the court under the statute. I do not think it matters whether the interpretation of paragraph 12 is considered to be informed by the existence of this more general jurisdiction, a reflection of it, or as supplemented by it.
- The question whether the general jurisdiction under the CCAA can be applied to relieve against late-filed, or otherwise irregular, claims or applications made in the course of negotiating or after an arrangement under the CCAA is not novel. The existence of the jurisdiction has been accepted by this court, as well as in the courts of other provinces. It is a discretionary jurisdiction that is, I believe, appropriately described as an equitable jurisdiction as it involves an extension of familiar principles of equity to cases under the statute.
- In *Blue Range Resource Corp.*, Re, [2000] A.J. No. 1232 (Alta. C.A.) the decision that has been most influential in the later cases all counsel conceded that the jurisdiction existed notwithstanding that an arrangement under the CCAA had been approved by creditors who had filed Proofs of Claim, and an unqualified provision in a claims bar order that claims filed out of time would be "forever barred".
- Although most of the discussion in the reasons for judgment was directed at the criteria to be applied in exercising the jurisdiction, I do not understand the discussion to be premised on counsel's agreement that it existed. The tenor of the reasons of the Court of Appeal suggests to me that it considered the concession to be correct. Having found assistance in authorities under the United States bankruptcy rules, the approach taken under the Bankruptcy and Insolvency Act (Canada), the application of procedural rules governing delays in the prosecution of actions, and the principles applied in dealing with applications for relief from forfeiture under insurance statutes, Wittmann J.A. concluded:

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

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

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

nonetheless warrant an order permitting late filing? (paras 26 and 41)

In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional.

- 30 Leave to appeal to the Supreme Court of Canada from the decision of the Court of Appeal was denied.
- I note that, in permitting a number of late-filed claims, the court in *Blue Range Resources* did not purport to amend the provisions of the bar order by imposing a new deadline. The jurisdiction supported was limited to determining whether, in individual cases, equitable relief should be given to those who for some reason had not filed in time.
- Blue Range Resources was cited and the court's apparent recognition of the jurisdiction was expressly accepted by Cumming J. in *Ivorylane Corp. v. Country Style Realty Ltd.*, [2004] O.J. No. 2662 (Ont. S.C.J. [Commercial List]), at para 47 where the jurisdiction was described as limited to "exceptional circumstances", and there is no suggestion that the point had been conceded by counsel. The analysis of Wittmann J.A. was applied again without any such suggestion by Cameron J. in *Noma Co.*, Re, [2004] O.J. No. 4914 (Ont. S.C.J. [Commercial List]), in which a late-filed claim was rejected.
- The jurisdiction was also discussed, and its exercise considered, in three unreported endorsements of Farley J. of September 20, 1999 in respect of a CCAA arrangement for Royal Oaks Inc. (relief granted); of December 1, 2000 on a motion in the liquidation of T. Eaton Company Limited (relief granted); and of July 22, 2003 in a CCAA application involving Algoma Steel Inc. (relief denied).
- Other cases in which the reasoning in *Blue Range Resources* was accepted, or was cited with apparent approval, include *Ontario v. Canadian Airlines Corp.*, [2000] A.J. No. 1321 (Alta. Q.B.); *West Bay SonShip Yachts Ltd.*, *Re*, [2007] B.C.J. No. 2287 (B.C. S.C. [In Chambers]), leave to appeal granted from the exercise of the discretion: [2007] B.C.J. No. 1813 (B.C. C.A. [In Chambers]); and *Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of)*, [2001] N.B.J. No. 20 (N.B. Q.B.); see, also, *Roman Catholic Episcopal Corp. of St. George's*, *Re*, [2007] N.J. No. 32 (N.L. T.D.) (bankruptcy); and *Pangeo Pharma inc.*, *Re*, [2004] J.Q. No. 706 (Que. S.C.). The earlier authorities are discussed in a helpful annotation by Mr Vern DaRe in 26 C.B.R. (4th) 142.
- Contrary to the submission of Mr Strosberg, I do not consider that the reasoning of the Court of Appeal in Algoma Steel Corp. v. Royal Bank, [1992] O.J. No. 889 (Ont. C.A.) precludes an application of the analysis in Blue Range Resources, and the cases in which it has been accepted, to the facts of this case. In Algoma Steel, the court gave leave to a creditor to bring proceedings against the appellant notwithstanding unambiguous language in a plan of arrangement that extinguished the claims of the creditor as a known designated unsecured creditor of the appellant. In the course of its reasons, the court stated, at paras 6-7:

The plan of arrangement is a matter of contract, it is argued, and the court's jurisdiction is limited to sanctioning or refusing to sanction the arrangement arrived at contractually. There is much merit in this argument but, in our view, it is not a complete answer.

[The creditor] does not deny that if the language of the plan of arrangement quoted above, extinguishing the claims of designated unsecured creditors is unambiguous, as we believe it is, to grant the relief which it seeks would require an amendment by the court of the plan arrangement. We accept the submission that, generally speaking, the plan of arrangement is consensual and the result of agreement and that if it is fair and reasonable (an issue for the court to decide) it is not to be interfered with by the court unless (a) the Act authorises the court to affect the plan and (b) there are compelling reasons justifying the court's action. ...

The CCAA must be the authority for the jurisdiction and the critical issue is whether there is any provision in

the Act that fairly gives rise to a power in the court to amend. In our view there is such a provision and that provision, s.11 (c), depending on the language of the plan itself, may by necessary inference, in an appropriate case, enable the court to make an order, the technical effect of which is that the plan is amended.

- In Algoma Steel, the creditor was seeking leave to proceed against a corporation that had been the subject of a plan of arrangement, and not simply seeking to enforce its rights under the plan. The extinguishment of claims against the corporation was an essential part of the plan that had been sanctioned by the court under the CCAA. The finding that the relief sought by the creditor would involve an amendment to the plan of arrangement which would require statutory authority does not, in my judgment, necessarily extend to late-filed applications to enforce the rights of claimants to share in a fund created pursuant to the provisions of a CCAA plan the only scenario that I am concerned with. Any analogy between the two sets of fact is, I believe, tenuous. In the absence of any indication that the Court of Appeal intended to address issues such as those in this motion, I do not believe that I am obliged to conclude that the jurisdiction discussed in Blue Range Resources requires explicit statutory justification for its existence in the circumstances of this case.
- The words of the Plan indicate that the "surplus" to be paid to the HCV Trust is to be computed without reference to claims that were out of time. I believe it is implicit in *Blue Range Resources* that such provisions of the Plan are not to be understood as ousting the equitable jurisdiction of the court to relieve against late, or irregular, applications but, rather, are to be read as subject to it. Immediately after his reference to counsel's concession, Wittmann J.A. stated, at para 10:

It necessarily follows that a claims bar order and its schedule should not purport to "forever bar" a claim without a saving provision. That saving provision could be simply worded with a proviso such as "without leave of the court", which appears to be not only what was contemplated, but what in fact occurred here.

- I emphasise, however, that, in the exercise of the jurisdiction, the provisions of a Plan that has been approved by the creditors and the court are to be respected. The jurisdiction is essentially a discretionary jurisdiction to grant relief from a strict application of those provisions. As Wittmann J.A. accepted, it involves an application of equitable principles analogous to those that in other situations and subject to other limitations enable the court to relieve against forfeiture.
- To the extent that some of the irregularities, and omissions, in otherwise timely applications submitted in this case were caused by inadequacies in the application forms provided, I agree with counsel that these could be remedied by an exercise of the authority in paragraph 12 of the Approval Order to make orders implementing the Plan without reference to any wider jurisdiction. I do not, however, accept that paragraph 12 is to be read as limited to such cases, or that a narrow interpretation of the concept of "implementation" should be considered to exclude the court's inherent equitable jurisdiction imposed on the bare-bones legislative scheme under the CCAA. If no notice had been given or if its dissemination and reach are now, with the benefit of hindsight, seen to have been inadequate the court must, in my opinion, be able to intervene. If the Plan was, as I believe, intended to make damages available to all persons who would be able to establish that they were HIV Claimants within the four months period, adequate notice to such persons was essential. Independently of the jurisdiction under the CCAA, the requirement of adequate notice could be enforced in the exercise of the court's supervisory jurisdiction over trustees and the consequences of failing to give such notice would not, in my opinion, be outside the control of the court.
- Cases where a Claimant was not diagnosed with HIV until after the deadline are more difficult. The jurisdiction to relieve against untimely applications is, in my opinion, limited to applications by persons who could have established their eligibility within the four months period. It would not apply to persons whose infection was not discovered before the expiration of the period. The intention to withhold damages from such persons is inherent in the imposition of the deadline and is not affected by deficiencies in, and the imperfection of, notice dissemination that, in a case such as this and in class proceedings, underlie the jurisdiction to relieve against untimely applications. The necessity for some cut-off date in respect of the time of a diagnosis is reinforced by the likelihood that the HIV

Fund will prove to be inadequate to satisfy all of the qualified HIV Claimants, with the result that distributions might need to be deferred until the maximum number of Claimants was ascertained. In my judgment, it is one thing to grant relief to persons who might have — but, for some reason, did not — claim within the four months' period and something fundamentally different to extend the class to persons who would not have been able to establish a claim within the period. The exclusion of the latter should, in my opinion, be considered to be part of the compromise effected by the Plan, and to that extent its provisions are to be respected.

Prejudice

In *Blue Range Resources*, prejudice to other creditors was recognised as an important factor that would militate against an exercise of the court's discretionary jurisdiction under the CCAA. At paragraph 40 of his reasons for judgment, Wittmann J.A. stated:

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

- In affidavits delivered for the purpose of this motion, Mr Strosberg's client relied on negotiations that preceded the acceptance of the plan by the HIV creditors voting as a separate class for that purpose. He stated that Mr Strosberg was instrumental in persuading other creditors represented by Mr Arenson to vote in support of the Plan and that without this it would have been defeated. He stated further that, at that time, he believed that there were no more than 34 eligible Claimants.
- Paragraph 18 of the client's original affidavit and paragraph 6 of a supplementary affidavit read as follows:
 - 18. Fundamental to my decision to support the plan of arrangement and to persuade Mr Arenson's clients to support the plan was the limited number of HIV Claimants who could come forward to claim and the short period of time these HIV Claimants had to apply under the plan of arrangement. Had I believed that there were more than 34 HIV claimants or that the period of time that potential HIV claimants had to pursue their claims by making application under the plan of arrangement would be extended, I would not have instructed Mr Strosberg to enter into negotiations with Mr Arenson and I too would have voted against the plan of arrangement thereby causing its rejection. It was for good reason that potential HIV claimants were required to apply under the plan of arrangement within four months.
 - 6. If the plan was rejected, I would have been in a position to bargain for a greater share of the available monies to compensate for the risk of an extension of the four-month period and the risk that additional claimants who would dilute the HIV Fund might claim after the expiration of the four-month period.
- I do not believe that the consequences of the client's mistake about the number of potential HIV Claimants should be regarded as the kind of prejudice that might weigh against an exercise of the court's jurisdiction. On the basis of the evidence such as it is and the findings made in earlier motions, I am prepared to accept that a number, and perhaps all, of the HIV Claimants who filed Proofs of Claim, and thereby were entitled to vote on the Plan, underestimated the number of persons with eligible HIV Claims. I am also prepared to accept that this may have influenced the decisions of the voting Claimants to approve the Plan, and the amount of the HIV Fund to be

established according to its terms. Even if there was evidence that their misapprehension was reasonable, it would not affect the eligibility of HIV Claimants to share in the Fund. This being the case, I do not consider that it is a factor that should militate against a discretionary decision to allow late-filed applications for payment out of the Fund if, for example, they would otherwise be allowed on the ground that the notice of the deadline provided to Claimants was found to be materially inadequate. In short, in applying the test of prejudice accepted in *Blue Range Resources*, the loss of an opportunity to vote against the Plan by reason of an erroneous belief that there were only 34 eligible Claimants is not a loss that would occur "by reason of the late filings".

Similarly, while, as in *Blue Range Resources* (at para 40, quoted above), knowledge of the possibility that late claims might be permitted may militate against a finding of prejudice, I do not think ignorance of this, of and by itself, is sufficient to establish it in the present circumstances. The client's statement that — even on the assumption that there were only 34 eligible Claimants — he would have voted against the Plan if he had known of the possibility that late-filed applications would be permitted appears to be based on his expectation that the short deadline would have the practical effect of excluding a number of eligible HIV Claimants. This expectation contemplated that the underlying purpose of the Plan would be frustrated. As mentioned earlier in these reasons, the bar order that restricted voting rights to Claimants who filed Proofs of Claim did not purport to extinguish the HIV Claims of others — known or unknown. All HIV Claimants who had not released the Society, and whose Claims were not barred by limitations defences, were intended to be eligible to file applications for damages assessments under the provisions of the Plan. Thus, in a motion in these proceedings, Blair J. — who had previously supervised the CCAA application and made the Approval Order — stated:

As I read the Plan, the reason for establishing the HIV Fund was not to provide recourse to a limited number of HIV Claimants. The reason was to make the HIV Fund available to *all* those who had an HIV Claim existing against the Society on July 20, 1998: [2005] O.J. No. 4177 (S.C.J.), at para 15 (*italics* in the original).

- In my judgment, a creditor who hopes, and bargains on the basis of a belief, that a plan of arrangement and compromise under the CCAA will not achieve its intended effect does not suffer material prejudice for the purpose of the court's equitable jurisdiction when the belief turns out to have been unfounded.
- In *Blue Range Resources*, the focus of the analysis was directed at prejudice to other creditors. Prejudice to the insolvent debtor corporation was not treated as in issue, and it is not in issue in this case in which the Society was released from all HIV Claims on the Plan Implementation Date. In another unreported case, prejudice to the debtor was emphasised by Blair J. where, in the course of a reconstructuring of T. Eaton Company Limited, a bar order had been made extinguishing the claims of creditors who did not file proofs of claim on or before a particular date. A creditor moved for leave to file a Proof of Claim after an arrangement had been approved by the court and implemented. She relied on her solicitor's failure to advise her of the bar order, and the fact that she filed a proof of claim as soon as she became aware of it and its effect. In an endorsement of May 5, 1999, Blair J. declined to grant an extension of time. The bar order specifically reserved to the court's jurisdiction to waive it, but it was held that to permit the creditor to have access to the debtor corporation's post-arrangement assets would be prejudicial to it, and citing *Algoma Steel* that the case was:

... not one for the "sparing" and "exceptional" jurisdiction to make such an order.

In contrast, the issue before me is confined to rights of claimants to share in the HIV Fund, and is not for recourse against the Society and its remaining assets.

Any prejudice that beneficiaries of the HCV Trust would suffer by the elimination, or reduction, of surplus in the Fund as a result of accepting late-filed applications appears now to be entirely theoretical.

Conclusion

- I am satisfied that the court has the discretionary jurisdiction discussed in *Blue Range Resources* and the cases that have followed the reasoning of the Alberta Court of Appeal. I accept also that it is a jurisdiction to be exercised sparingly in the light of the particular circumstances of each case. It is very much fact specific. The considerations that I consider will justify its exercise in this case can be summarised as follows:
 - (a) the structure of the Plan with its provision of a separate Fund for HIV Claimants;
 - (b) the fact that no distributions from the HIV Fund have yet been made;
 - (c) the absence of prejudice that would be suffered by the Society and other Claimants;
 - (d) the uncertainty created by the limitations issues;
 - (e) the circumstances of the Claimants that distinguish them from commercial creditors;
 - (f) the fact that adequate notice to them was essential if the Plan was to be effective;
 - (g) the application forms provided to Claimants did not clearly indicate that they were required to identify each Claimant in a family group that included an infected person. Similarly, I am of the opinion that it was not unreasonable for a Claimant who had filed a Proof of Claim to understand that this would be considered to be a claim against the HIV Fund to which the deadline was said to apply in the notice provided by the Trustee; and
 - (h). the selection of appropriate methods of disseminating notice of the deadline for applications may have been affected, and unduly limited, by the misapprehension as to the number of potential Claimants. It appears, also, that, as in the case of those in Nova Scotia, the chosen method may not have been completely successful in reaching Claimants whose identities were ascertainable.
- I have considered whether my decision should be simply that the jurisdiction exists, and that the manner of its exercise is to be determined by the court on the facts relating to each late or irregular application. I am satisfied that in, providing advice and directions to the Trustee, it is unnecessary to adopt such a restricted approach. The process of dealing with late and irregular applications will involve a degree of fact finding that is within the powers of the Trustee under paragraph 8 of the Trust Agreement. Those powers can be exercised with less formality and more expedition than the practice and procedure of the court would permit. I believe that the approach that most appropriately engages the jurisdiction of the court and the powers of the Trustee is for the Trustee to receive and dispose of late and irregular applications in accordance with the guidelines I will provide in an Appendix to these reasons.
- The guidelines do not address every possible situation and may be supplemented, or amended, by further orders of the court from time to time. If the Trustee is uncertain as to the application of the guidelines to particular cases or if particular applications are, in the opinion of the trustee, not covered by the guidelines they may be referred to the court in writing to be dealt with summarily. HIV Claimants whose applications are disallowed by the Trustee are to be informed of their right to have the decision reviewed by filing a motion record in the court for the purpose within 30 days, or such longer period as the court may order.
- Any further procedural issues that may arise including the question whether notice to HIV Claimants who have not filed applications is required can be disposed of at a case conference to be arranged as soon as practicable.

- As has been the case on previous motions, not all of the potential HIV claimants were served with the motion record and the counsel who appeared did not represent all of them. On motions for directions by a trustee in a case like this, it is unnecessary to name all beneficiaries as parties unless the court orders otherwise. This is provided by rule 9.01 of the Rules of Civil Procedure and it is reinforced by paragraphs 1 (f) and 17 of the Trust Agreement that require notice of applications to the court to be given only to Ms Ring and Mr Arenson. Despite these provisions, the Trustee attempted to notify as many of the Claimants as was practicable, and the issues on the motion were comprehensively addressed by his counsel and the other counsel appearing. In these circumstances, I did not find it expedient to deplete the HIV Fund further by ordering service of the motion record on the unrepresented claimants, to add them as parties, or to make a representation order pursuant to Rule 10. By virtue of section 60 (2) of the *Trustee Act* (Ontario), the Trustee will be protected in acting on the directions I have given.
- I appreciate the assistance that counsel have provided. The Trustee is to be fully indemnified out of the HIV Fund for his costs of the motion. Other parties represented at the hearing including Mr Plater's client are to have a substantial indemnity for their costs. Submissions in writing with respect to quantum may be made within 21 days of the release of these reasons.

- Appendix

Guidelines for Late and Irregular Applications

- 1. Applications made by one member of a family of an infected person are to be treated as applications by, and on behalf of, all members of the family who are HIV Claimants, and the personal representatives of deceased HIV Claimants.
- 2. Late applications by persons who had filed timely Proofs of Claim are to be allowed;
- 3. Applications by persons who did not receive notice of the deadline until after it had passed should be allowed if, in the opinion of the trustee, the applications were made within a reasonable time after notice was acquired;
- 4. Applications by HIV claimants whose failure to meet the deadline was due to matters that, in the opinion of the Trustee, should reasonably be considered to be beyond their control should be allowed;
- 5. Other late applications made by persons who had notice of the deadline before it expired should be disallowed unless, in the opinion of the Trustee, the timing of the receipt of such notice was inadequate for the purpose of making an application;
- 6. Late applications are to be allowed only if they are from, or in respect of, persons who, being aware of their infection during the four months period, could have established their eligibility as HIV Claimants before it expired; and
- 7. Any other late or irregular applications and those where the Trustee is uncertain as to the appropriate application of the above guidelines should be referred in writing to the court to be dealt with summarily.

Motion granted.

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2008 CarswellOnt 6105, 48 C.B.R. (5th) 41, 44 E.T.R. (3d) 31, 171 A.C.W.S. (3d) 21

TAB 21

Alberta Court of Queen's Bench Canadian Airlines Corp. (Re)

Date: 2000-05-12

- A.L. Friend, Q.C., H.M. Kay, Q.C., and R.B. Low, Q.C., for Canadian Airlines.
- V.P. Lalonde and Ms M. Lalonde, for AMR Corporation.
- S. Dunphy, for Air Canada.
- P.T. McCarthy, Q.C., for PricewaterhouseCoopers.
- D. Nishimura, for Resurgence Asset Management LLC.
- E. Halt, for Claims Officer.
- A.J. McConnell, for Bank of Nova Scotia Trust Company of New York and Montreal Trust Co. of Canada.

(Calgary No. 0001-05071)

May 12, 2000.

- [1] PAPERNY J. (orally): Resurgence Asset Management LLC "Resurgence" appeared on behalf of holders of approximately 60 percent of the unsecured notes issued by Canadian Airlines Corporation in the total amount of \$100 million U.S. These unsecured note holders are proposed to be classified as unsecured creditors in the plan that is the subject of these proceedings.
- [2] Resurgence applied for the following relief:
 - 1. An order lifting the stay of proceedings against Canadian Airlines Corporation and Canadian Airlines International Ltd. (respectively "CAC" and "CAIL" and collectively called "Canadian") to permit Resurgence to commence and proceed with an oppression action against Canadian, Air Canada and others.
 - 2. Further, and in the alternative, Resurgence sought the same relief described in item one above in the context of the C.C.A.A. proceedings.
 - 3. An order that any and all unsecured claims held or controlled, directly or indirectly by Air Canada shall be placed in a separate class and either not allowed to be voted at all, or, alternatively, allowed to be voted in separate class from all other affected unsecured claims.
 - 4. An order that there be a separation in class between creditors of CAC and CAIL
 - 5. An order striking Section 6.2(2)(ii) of the plan on the basis that it is contrary to the C.C.A.A.
- [3] Resurgence abandoned the application described in item 1 above, and the application in item 2 was addressed in my ruling given May 8, 2000, in these proceedings.

Standing

- Prior to dealing with the remaining issues of classification, voting and Section 6.2(2)(ii) of the plan, the issue of standing needs to be addressed. This was a matter of some debate, largely in the context of the first two applications. Canadian argued that Resurgence was only a fund manager and did not hold the unsecured notes, beneficially or otherwise, and, accordingly, did not have standing to make any of the applications. The evidence establishes that Resurgence is not the legal owner and the evidence of beneficial ownership is equivocal.
- [5] Canadian has not raised this issue on any of the previous occasions on which Resurgence has been before the court in these proceedings. There has been a consent order involving Resurgence and Canadian.
- [6] In my view, it is not appropriate now for Canadian to suggest that Resurgence does not represent the interests of the holders of 60 percent of the unsecured notes and essentially seek a declaration that Resurgence is a stranger to these proceedings.
- [7] I am not prepared to dismiss the applications of Resurgence on classification, voting and amending the plan out of hand on the basis of standing.
- [8] Resurgence was also supported in these applications by the senior secured note holders. For the purposes of these applications, I accept that Resurgence is representing the interests of 60 percent of the unsecured note holders.

Classification of Air Canada's Unsecured Claim

- [9] By my April 14, 2000 order in these proceedings, I approved transactions involving CAIL, a large number of aircraft lessors and Air Canada, which achieved approximately \$200 million worth of concessions for CAIL. In exchange for granting the concession, each creditor received a guarantee from Air Canada and the assurance that the creditor would immediately cease to be affected by the C.C.A.A. proceedings.
- [10] These concessions or deficiency claims were quantified and reflected in promissory notes which were assigned to Air Canada in exchange for its guarantee of the aircraft leases. The monitor approved the method of quantifying these claims and recognized the value of the concessions to Canadian. In that order I reserved the issue of classification and voting to be determined at some later date. The plan provides for two classes of creditors, secured and unsecured.

- [11] The unsecured class is composed of a number of types of unsecured claims, including aircraft financings, executory contracts, unsecured notes, litigation claims, real estate leases and the deficiencies, if any, of the senior secured note holders.
- [12] In one portion of the application, Resurgence seeks to have Air Canada vote the promissory notes in separate class and relied on several factors to distinguish the claims of other Affected, Unsecured Creditors from Air Canada's unsecured claim, including the following:
 - 1. The Air Canada appointed board caused Canadian to enter into these C.C.A.A. proceedings under which Air Canada stands to gain substantial benefits in its own operations and in the merged operations and ownership contemplated after the compromise of debts under the plan.
 - 2. Air Canada is providing the fund of money to be distributed to the Affected Unsecured Creditors and will, therefore, end up paying itself a portion of that money if it is included in the Affected Unsecured Creditors' class and permitted to vote.
 - 3. Air Canada gave no real consideration in acquiring the deficiency claims and manufactured them only to secure a 'yes' vote.
- [13] Air Canada and Canadian argue that the legal right associated with Air Canada's unsecured promissory notes and with the other Affected, Unsecured Claims, are the same and that the matters raised by Resurgence, as relating to classification, are really matters of fairness, more appropriately dealt with at the fairness hearing. Air Canada and Canadian emphasized that classification must be determined according to the rights of the creditors, not their personalities.
- The starting point in determining classification is the statute under which the parties are operating and from which the court obtains its jurisdiction. The primary purpose of the C.C.A.A. is to facilitate the re-organization of insolvent companies, and this goal must be given proper consideration at every stage of the C.C.A.A. process, including classification of claims; see, for example, *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.)
- [15] Beyond identifying secured and unsecured classes, the C.C.A.A. does not offer any guidance to the classification of claims. The process, instead, has developed in the case law.

- [16] A frequently cited description of the method of classification of creditors for the purposes of voting on a plan, under the C.C.A.A., is *Sovereign Life Assurance Co. v Dodd* (1891), [1892] 2 Q.B. 573 (Eng. C.A.).
- [17] At page 583 (Q.B.), Bowen, L.J. stated:

The word 'class' is vague and to find out what is meant by it, we must look at the scope of the section which is a section enabling the court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with the view to their common interest.

This test has been described as the "commonality of interest" test. All counsel agree that this is the test to apply in classification of claims under the C.C.A.A. However, there is a dispute on the types of interests that are to be considered in determining commonality.

- Generally, the cases hold that classification is a fact-driven determination unique to the circumstances of every case, upon which the court should be loathe to impose rules for universal application, particularly in light of the flexible and remedial jurisdiction involved; see, for example, *Re Fairview Industries Ltd.* (1991), 11 C.B.R. (3d) 71 (N.S. T.D.)
- The majority of the cases presented to me, held that commonality of the interest is to be determined by the rights the creditor has vis-a-vis the debtor. Courts have also found it helpful to consider the context of the proposed plan and treatment of creditors under a liquidation scenario. In the absence of bad faith, motivation for supporting or rejecting a plan is not a classification issue in the authorities.
- In considering what interests are included in the commonality of interest test, Forsyth J., in *Norcen Energy Resources Ltd.* (Supra) had to determine whether all the secured creditors of the company ought to be included in one class. The creditors all had first-charge security and the same method of valuation was applied to each secured claim in order to determine security value under the plan. The distinguishing features were submitted to be based on the difference in the security held, including ease of marketability and realization potential. In holding that a separate class was not necessary, Forsyth J., said at page 29:

Different security positioning and changing security values are a fact of life in the world of secured financing. To accept this argument would again result in a different class of creditor for each secured lender.

In doing so, Forsyth J. rejected the "identity of the interest" approach in which creditors in a class must have identical interests.

- It was also submitted in *Norcen Energy Resources Ltd.* that since the purchaser under the plan had made financing arrangements with the Royal Bank, the bank had an interest not shared by the other secured creditors. Forsyth J., held that in the absence of any allegation that the Royal Bank was not acting bona fide in considering the benefit of the plan, the secured creditors could not be heard to criticize the presence of the Royal Bank in their class.
- [22] Forsyth J., also emphasized in *Norcen Energy Resources Ltd.* that the commonality test cannot be considered without also considering the underlying purpose of the C.C.A.A., which is to facilitate reorganizations of insolvent companies. To that end, the court should not approve a classification scheme which would make a reorganization difficult, if not impossible, to achieve. At the same time, while the C.C.A.A. grants the court the authority to alter the legal rights of parties other than the debtor company without their consent, the court will not permit a confiscation of rights or an injustice to occur.
- [23] The *Norcen Energy Resources Ltd.* approach was specifically adopted in British Columbia in *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), where it was held that various mortgages with different mortgages against different properties were included in the same class.
- [24] In Savage v. Amoco Acquisition Co. (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.) the Alberta Court of Appeal rejected the argument that shareholders who have private arrangements with the applicant or who are brokers or officers or otherwise in a special position vis-a-vis the debtor company, should be put in a special category.
- [25] At page 158 the court stated in regard to the test applied to classification:

We do not think that this rule justifies the division of shareholders into separate classes on the basis of their presumed prior commitment to a point of view. The state of facts, common to all, is that they are all offered this proposal, face as an alternative the break-up of this apparently insolvent company and hold shares that appear to be worthless on break-up. In any event, any attempt to divide them on the basis suggested, would be futile. One would have as many groups as there are shareholders.

The commonality of interest test was addressed by the British, Columbia Supreme Court in Re Woodward's Ltd. (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.). Tysoe J. rejected the identity of interest approach and held that it was permissible to include creditors with

different legal rights in the same class, so long as their legal rights were not so dissimilar that it was still possible for them to vote with a common interest.

- [26] Tysoe J. went on to find that legal interests should be considered in the context of the proposed plan and that it was also necessary to examine the legal rights of creditors in the context of the possible failure of the plan.
- In other words, "interest" for the purpose of classification does not include the personality or identity of the creditor, and the interests it may have in the broader commercial sphere that might influence its decision or predispose it to vote in a particular way; rather, "interest" involves the entitlement of the debt holder viewed within the context of the provisions of the proposed plan. In that regard, see *Woodward's Ltd.* at page 212.
- In Fairview Industries Ltd., the court held that in classification there need not be a commonality of interest of debts involved, so long as the legal interests were the same. Justice Glube (as she then was) stated that it did not automatically follow that those with different commercial interests, for example, those with security on "quick" assets, are necessarily in conflict with those with security on "fixed" assets. She stated that just saying there is a conflict is insufficient to warrant separation.
- [29] In *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.) at 626 like *Norcen Energy Resources Ltd.*, the "identity of interests" approach was rejected. The court preserved a class of creditors which included debenture holders, terminated employees, realty lessors and equipment lessors.
- [30] Borins J. held that not every difference in the nature of the debt warrants a separate class and that in placing a broad and purposive interpretation on the C.C.A.A., the court should "take care to resist approaches which would potentially jeopardize a potentially viable plan." He observed that "excessive fragmentation is counterproductive to the legislative intent to facilitate corporate reorganization" and that it would be "improper to create a special class simply for the benefit of an opposing creditor which would give that creditor the potential to exercise an unwarranted degree of power." (p. 627).
- [31] In summary, the cases establish the following principles applicable to assessing commonality of interest:
 - 1. Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test;

- 2. The interests to be considered are the legal interests the creditor holds qua creditor in relationship to the debtor company, prior to and under the plan as well as on liquidation;
- 3. The commonality of these interests are to be viewed purposively, bearing in mind the object of the C.C.A.A., namely to facilitate reorganizations if at all possible;
- 4. In placing a broad and purposive interpretation on the C.C.A.A., the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans.
- 5. Absent bad faith, the motivations of the creditors to approve or disapprove are irrelevant.
- 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.
- [32] With this background, I will make several observations relating to the reasons asserted by Resurgence that distinguish Air Canada from the rest of the Affected Unsecured Creditors.
- [33] The first two reasons given relate to interests of Air Canada extraneous to its legal rights as a unsecured creditor. The third reason relates largely to the further assertion that Air Canada should not be allowed to vote at all. The matter of voting is addressed more specifically later in these reasons.
- The factors described by Resurgence distinguish between Air Canada and other unsecured creditors relate largely to the fact that Air Canada is the assignee of the unsecured debt. In my view, that approach is to be discouraged at the classification stage. To require the court to consider who holds the claim, as distinct from what they hold, at that point would be untenable. I note that Mr. Edwards recognizes in 1947 in his article, "Reorganizations under the Companies Creditors Arrangement Act", (1947), 25 Cdn. Bar Rev. 587, and observe this concern is heightened in the current commercial reality of debt trading.
- [35] Resurgence also asserted that a court should avoid placing creditors with a potential conflict of interest in the same class and relies on *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.), a case in which the court considered a potential conflict of interest between subcontractors and direct contractors. To the extent this case can be seen as decided on the basis of the distinct legal rights of the creditors, I agree with the result. To the extent that the case determined that a class could be separated based

on a conflict of interest not based on legal right, I disagree. In my view, this would be the sort of issue the court should consider at the fairness hearing.

- [36] Resurgence also relied on the decisions of the British Columbia Supreme Court in *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 166 (B.C. S.C.), a case decided prior to *Norcen Energy Resources Ltd.*. In that case the court held that a subsidiary wholly owned by Northland Bank was incorporated to purchase certain bonds from Northland in exchange for preferred shares and was not entitled to vote. The court found that would be tantamount to Northland Bank voting in its own reorganization and relied on *Re Wellington Building Corp.*, [1934] O.R. 653, 16 C.B.R. 48 (Ont. S.C.) In this regard. I would note that the passage relied upon at page 5 in that case, in *Wellington Building Corp* (Supra) dealt with whether the scheme, as proposed, was unfair.
- [37] All creditors proposed to be included in the class of Affected, Unsecured Creditors, are all unsecured and are treated the same under the plan. All would be treat similarly under the BIA. The plan provides that they will receive 12 cents on the dollar. The Monitor opined that in liquidation unsecured creditors would realize a maximum of 3 cents on the dollar. Their legal interests are essentially the same. Issue is taken with the presence of Air Canada, supporter and funder of the plan, also having taken an assignment of a substantial, unsecured claim. However, absent bad faith, who creditors are is not relevant. Air Canada's mere presence in the class does not in and of itself constitute bad faith.
- Further, all of these methods of distinguishing Air Canada's unsecured claim at their core are fundamentally issues of fairness which will be addressed by the Court at the fairness hearing on June 5, 2000. I am prepared to give serious consideration to these matters at that time and direct that there be a separate tabulation of the votes cast by Air Canada arising from any assignments of promissory notes they have taken, so that there is an evidentiary record to assist me in assessing the fairness of the vote when and if I am called upon to sanction the plan. This approach was taken by Justice Forsyth in *Norcen Energy Resources Ltd.*, and in my view is consistent with the underlying purpose of the C.C.A.A. I wish to emphasize that the concerns raised by Resurgence will form part of the assessment of the overall fairness of the plan.
- [39] Permitting the classification to remain intact for voting purposes will not result in a confiscation of rights of or injustice to the unsecured note holders. Their treatment does not at this point depart from any other Affected Unsecured Creditors and recognizes the similarity of legal rights. Although based on different legal instruments, the legal rights of

the unsecured note holders and Air Canada are essentially the same. Neither has security, nor specific entitlement to assets. Further, the ability of all of the Affected Unsecured Creditors to realize their claims against the debtor companies, depend in significant part, on the company's ability to continue as a going concern.

- [40] The separate tabulation of votes will allow the "voice" of unsecured creditors to be heard, while at the same time, permit rather than rule out the possibility that a plan might proceed.
- [41] It is important to preserve this possibility in the interests of facilitating the aim of the C.C.A.A. and protecting interests of all constituents. To fracture the class prior to the vote, may have the effect of denying the court jurisdiction to consider sanctioning a plan which may pass the fairness test but which has been rejected by one creditor. This would be contrary to the purpose of the C.C.A.A.

Separating the Claims Against CAC and CAIL

- [42] Resurgence briefly argued that since Air Canada's debt is owed by CAIL only, it could only look to CAIL's assets in a bankruptcy and would not be able to look to any CAC assets. In contrast, Resurgence suggested that the unsecured note holders are creditors of both CAIL under a guarantee, and CAC under the notes. Resurgence submitted that the resulting difference in legal rights destroys the commonality of interests.
- There is insufficient evidence to suggest that the unsecured note holders are also creditors of CAIL. Counsel referred only to a statement made by Mr. Carty on cross-examination that there was an "unsecured guarantee". However, no documents have been brought to my attention that would support this statement and, in of itself, the statement is not determinative. In any case, I do not have sufficient evidence before me to conclude that there would be a meaningful difference in recoveries for unsecured creditors of CAC and CAIL in the event of bankruptcy. I, therefore, cannot conclude on this basis that rights are being confiscated, unlike Tysoe J.'s ability to do so in *Re Woodward's Ltd.* Simply looking to different assets or pools of assets will not alone fracture a class; some unique additional legal right of value in liquidation going unrecognized in a plan and not balanced by others losing rights as well is needed on the analysis of Tysoe J.
- I recognize the struggle between the unsecured note holders, represented by Resurgence on one side, and Air Canada and Canadian on the other. Resurgence fears the inclusion of Air Canada and the Affected Unsecured Creditors' class will swamp the vote. Air Canada and Canadian fear that exclusion of Air Canada will result in the voting down of a plan which, in their view, otherwise stands a realistic chance of approval. As

unsecured creditors, they do share similar legal rights. As supporters or opponents of the plan, they may well have distinctly different financial or strategic interests. I believe that in the circumstances of this case, these other interests and their impact on the plan, are best addressed as matters of fairness at the June 5, 2000 hearing, and in this way, the concerns will be heard by the court without necessarily putting an end to the entire process.

Voting

- [45] Although my decision on classification makes it clear that I will permit Air Canada to vote on the plan, I wish to comment further on this issue. Air Canada submitted that it should be entitled to vote the face value of the promissory notes which represent deficiency claims assigned to it from aircraft lessors in the same fashion as any other creditor who has acquired the claims by assignment. All parties accept that deficiency claims such as these would normally be included and voted upon in an unsecured claims class. The request by Resurgence to deny them a vote would have the effect of varying rights associated with those notes.
- The concessions achieved in the re-negotiation of the aircraft leases, represent value to CAIL. The methodology of calculation of the claims and their valuation was reviewed by the Monitor and this is not being challenged. Rather, it is because it is Air Canada that now holds them, that it is objectionable to Resurgence. Resurgence asserts that Air Canada manufactured the assignment so it could preserve a 'yes' vote. This, in my view, is a matter going to fairness. Is it fair for Air Canada to vote to share in the pool of cash funded by it for the benefit of unsecured creditors? That matter is best resolved at the fairness hearing.
- [47] Resurgence relied on *Northland Properties Ltd.* in which a wholly owned subsidiary of the debtor company was not allowed to vote because to do so would amount to the debtor company voting in its own reorganization. The corporate relationship between Air Canada and CAIL can be distinguished from the parent and wholly owned subsidiary in *Northland Properties Ltd.*. Air Canada is not CAIL's parent and owns 10 percent of a numbered company which owns 82 percent of CAIL. Further, as noted above, the court in *Northland Properties Ltd.* apparently relied on the passage from *Wellington Building Corp* which indicated in that case the court was being asked to approve a plan as fair. Again, the basis on which Resurgence seeks to deprive Air Canada of its vote is really an issue of fairness.

Section 6(2)(2) of the Plan

- [48] Resurgence wishes me to strike out Section 6(2)(2) of the plan, which essentially purports to provide a release by affected creditors of all claims based in whole or in part on any act, omission transaction, event or occurrence that took place prior to the effective date in any way relating to the debtor companies and subsidiaries, the C.C.A.A. proceeding or the plan against:
 - 1. The debtor companies and its subsidiaries;
 - 2. The directors, officers and employees;
 - 3. The former directors, officers and employees of the debtor companies and its subsidiaries; or
 - 4. The respective current and former professionals of the entities, including the Monitor, its counsel and its current officers and directors, et cetera. Resurgence submits that this provision constitutes a wholesale release of directors and others which is beyond that permitted by Section 5.1 of the C.C.A.A. CAIL and CAC submit that the proposed release was not intended to preclude rights expressly preserved by the statute and are prepared to amend the plan to state this.
- [49] Section 5.1(3) of the C.C.A.A. provides that the court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.
- [50] In this application of Resurgence, the court must deal with two issues: One, what releases are permitted under the statute; and, two, what releases ought to be permitted, if any, under the plan.
- [51] In my view, I will be in a better position to assess the fairness of the proposed compromise of claims which is drafted in extremely broad terms, when I consider the other issues of fairness raised by Resurgence. Accordingly, I leave that matter to the fairness hearing as well.
- [52] In summary, the application contained in paragraph (d) of the Resurgence Notice of Motion is dismissed. The application in paragraph (e) is adjourned to June 5, 2000.

Application dismissed.

TAB 22

1986 CarswellBC 131, 3 B.C.L.R. (2d) 145, 17 C.C.L.I. 194, [1986] 4 W.W.R. 504, 28 D.L.R. (4th) 414, [1986] I.L.R. 1-2100

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1986 CarswellBC 131, 3 B.C.L.R. (2d) 145, 17 C.C.L.I. 194, [1986] 4 W.W.R. 504, 28 D.L.R. (4th) 414, [1986] I.L.R. 1-2100

Fredrikson v. Insurance Corp. of British Columbia

FREDRICKSON v. INSURANCE CORPORATION OF BRITISH COLUMBIA

British Columbia Court of Appeal

Seaton, Anderson and McLachlin JJ.A.

Judgment: May 15, 1986 Docket: Vancouver No. CA004438

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Counsel: R. B. Harvey, Q.C. for appellant.

J. E. Murphy, for respondent.

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

Choses in Action --- Assignability — Cause of action — In tort.

Choses in Action --- Assignability — Cause of action — In contract.

Insurance --- Claims — Settlement and release — General.

Insurance --- Actions on policies — Commencement of proceedings — Right of action — General.

Insurance — Automobile insurance — Actions — Plaintiff owner found 80 per cent liable for injuries suffered by intoxicated driver in automobile accident — Plaintiff insured by defendant up to \$500,000 — Defendant settling with driver for \$1.2 million — Plaintiff having no assets other than cause of action against defendant for failing to properly defend driver's claim — Plaintiff's cause of action properly assignable to driver.

Actions — Champerty and maintenance — Nature and scope — Plaintiff owner found 80 per cent liable for injuries suffered by intoxicated driver in automobile accident — Plaintiff insured by defendant up to \$500,000 — Defendant settling with driver for \$1.2 million — Plaintiff having no assets other than cause of action against defendant for failing to properly defend driver's claim — Plaintiff assigning cause of action to driver — Assignment not champertous since driver having pre-existing commercial interest in assignment.

N. was seriously injured while driving the plaintiff's automobile with the plaintiff's consent. A jury found the

plaintiff 80 per cent liable for N.'s injuries. N. was insured up to \$500,000 by the defendant I.C.B.C. Following the trial but prior to appeal, the plaintiff gave notice to I.C.B.C. that if it chose not to settle N.'s claim within the policy limits, then he expected I.C.B.C. to indemnify him fully. The court later approved a settlement as to quantum put forward by counsel for N., I.C.B.C. and the plaintiff at \$1.2 million. The plaintiff's appeal on the liability issue was dismissed. Because the plaintiff had no assets of significance other than the cause of action against I.C.B.C. for failure to properly defend N.'s claim against him, the plaintiff assigned that right of action to N., whereupon N. agreed to take no execution proceedings against him. N., in the plaintiff's name, commenced an action against I.C.B.C. who applied to strike out the action as being champertous, against public policy and in breach of s. 6.33 of the regulations because the assignment interfered with I.C.B.C.'s ability to negotiate and settle the claim. The application was dismissed and I.C.B.C. appealed.

Held:

Appeal dismissed.

An assignment of a cause of action for a non-personal tort is generally valid if the assignee has a pre-existing interest in the litigation sufficient to negate any taint of champerty or maintenance. In determining that issue the court should look at the totality of the transaction to discover whether the assignee had a genuine, pre-existing, commercial interest in the assignment, i.e., a commercial interest in the sense of a financial interest. In this case N. had a very real financial interest in the assignment: it represented her only means of obtaining satisfaction of her judgment. There was no breach of s. 6.33 of the regulations or interference with I.C.B.C. in its negotiations or legal proceedings, since the action had been concluded before the assignment took place. The enforcement of I.C.B.C.'s contractual duty to its insured to use reasonable care to protect him from unnecessary loss is a right deserving protection. The assignee had a legitimate interest in the enforcement of that right and there was no maintenance, champerty or collusion against the insurer; hence no objection could be made on grounds of public policy.

Cases considered:

Bourne v. Colodense Ltd., [1985] I.C.R. 291 (C.A.) — considered

Brown v. Hall, [1957] O.W.N. 15, 6 D.L.R. (2d) 460 (C.A.) [reversed 12 D.L.R. (2d) 529 (S.C.C.)] — referred to

Cohn v. Webber (1911), 24 O.L.R. 171 (C.A.) — referred to

Compania Colombiana de Seguros v. Pac. Steam Navigation Co., [1965] 1 Q.B. 101, [1964] 2 W.L.R. 484, [1964] 1 All E.R. 216 — referred to

County Hotel & Wine Co. v. London & North West. Ry. Co., [1918] 2 K.B. 251 [affirmed [1921] 1 A.C. 85 (H.L.)] — referred to

Dawson v. Great Northern & City Ry. Co., [1905] 1 K.B. 260 (C.A.) — distinguished

Defries v. Milne, [1913] 1 Ch. 98 (C.A.) — distinguished

Di Guilo v. Boland, [1958] O.R. 384, 13 D.L.R. (2d) 510 (C.A.) — referred to

Ellis v. Torrington, [1920] 1 K.B. 399 (C.A.) — referred to

1986 CarswellBC 131, 3 B.C.L.R. (2d) 145, 17 C.C.L.I. 194, [1986] 4 W.W.R. 504, 28 D.L.R. (4th) 414, [1986] I.L.R. 1-2100

Ellis-Don Ltd. v. Norton (1982), 5 C.L.R. 281 (Ont. H.C.) — considered

Fidelity & Casualty Co. v. Marchand, [1924] S.C.R. 86, [1924] 4 D.L.R. 157 [Que.] — considered

Fitzroy v. Cave, [1905] 2 K.B. 364 (C.A.) — referred to

453416 Ont. Inc. v. White (1984), 42 C.P.C. 209, leave to appeal to Ont. Div. Ct. granted 42 C.P.C. 215 — considered

Gedeon v. State Farm Mut. Auto. Ins. Co., 261 F. Supp. 122 (Pa. D.C., 1966) - referred to

Glegg v. Bromley, [1912] 3 K.B. 474 (C.A.) — considered

Groce v. Fidelity Gen. Ins. Co., 448 P. 2d 554 (Ore. S.C., 1968) — considered

Henfry & Co. v. Poplar Properties Ltd. (1986), 70 B.C.L.R. 23, 24 D.L.R. (4th) 313 — referred to

Kapoor Lumber Co. v. Can. North. Pac. Ry. Co., 45 B.C.R. 213, [1932] 2 W.W.R. 417, [1932] 3 D.L.R. 487 (C.A.) — considered

King v. Victoria Ins. Co., [1896] A.C. 250, 65 L.J.P.C. 38, 74 L.T. 206, 12 T.L.R. 285, 44 W.R. 592 (P.C.) — referred to

McNulty v. Nationwide Mut. Ins. Co., 221 So. 2d 208 (Fla. D.C.A., 1969) — referred to

Martell v. Consett Iron Co., [1955] Ch. 363, [1955] 2 W.L.R. 463, [1955] 1 All E.R. 481 (C.A.) — considered

Paterson Timber Co. v. Can. Pac. Lumber Co. (1909), 15 B.C.R. 225, 14 W.L.R. 598, affirmed 47 S.C.R. 398 — referred to

Performing Rights Soc. v. Thompson (1918), 34 T.L.R. 351 (K.B.) — considered

Peters v. Gen. Accident & Life Assur. Corp., [1938] 2 All E.R. 267 (C.A.) — referred to

Simpson v. Thomson (1877), 3 App. Cas. 279 (H.L.) — distinguished

Terrell v. Western Casualty & Surety Co., 427 S.W. 2d 825 (Ky. C.A., 1968) - referred to

Tolhurst v. Assoc. Portland Cement Mfr. (1900) Ltd., [1902] 2 K.B. 660 (C.A.) [affirmed [1903] A.C. 414 (H.L.)] — referred to

Trendtex Trading Corp. v. Crédit Suisse, [1980] Q.B. 629, [1980] 3 W.L.R. 367, [1980] 3 All E.R. 721, affirmed [1982] A.C. 679, [1981] 3 W.L.R. 766, [1981] 3 All E.R. 520 (H.L.) — referred to

Union Gas Co. v. Brown, [1968] 1 O.R. 524, 67 D.L.R. (2d) 44, reversed [1970] 1 O.R. 715, 9 D.L.R. (3d) 337 (C.A.) — referred to

Walter & Sullivan Ltd. v. J. Murphy & Sons Ltd., [1955] 2 Q.B. 584, [1955] 2 W.L.R. 919, [1955] 1 All E.R. 843 (C.A.) — referred to

1986 CarswellBC 131, 3 B.C.L.R. (2d) 145, 17 C.C.L.I. 194, [1986] 4 W.W.R. 504, 28 D.L.R. (4th) 414, [1986] I.L.R. 1-2100

Statutes considered:

Builders' Lien Act, R.S.B.C. 1979, c. 40.

Supreme Court of Judicature Act, 1873 (36 & 37 Vict.), c. 66.

Regulations considered:

Insurance (Motor Vehicle) Act, R.S.B.C. 1979, c. 204, B.C. Reg. 428/73, s. 6.33(a), (b).

Authorities considered:

Chitty on Contracts, 25th ed. (1983), pp. 293, 709-15.Fleming, The Law of Torts, 6th ed. (1983), p. 593.Fridman, The Law of Contract in Canada (1976), pp. 442-45.Treitel, The Law of Contract, 5th ed. (1979), pp. 519-23.Waddams, Law of Contracts, 2nd ed. (1984), pp. 197-98.

Appeal by defendant from order of Locke J. 64 B.C.L.R. 301, [1985] 5 W.W.R. 342, 15 C.C.L.I. 249, [1986] I.L.R. 1-1991, dismissing application for order striking out action.

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

1. Introduction

- The issue argued on this appeal [from judgment reported at 64 B.C.L.R. 301, [1985] 5 W.W.R. 342, 15 C.C.L.I. 249, [1986] I.L.R. 1-1991] is whether an insured person may validly assign to the person claiming against him a cause of action against his insurer for failure to properly defend and negotiate settlement of the action on his behalf.
- 2 The facts may be summarized as follows.
- 3 On 28th May 1977 Linda Nielsen was seriously injured while driving Fredrickson's automobile with his consent. In 1982 a jury found Mr. Fredrickson 80 per cent liable for Nielsen's injuries. Mr. Fredrickson held a certificate of insurance from I.C.B.C. with a \$500,000 limit for third party liability.
- Following the trial but prior to appeal, Mr. Fredrickson gave I.C.B.C. notice that if I.C.B.C. chose not to settle the Nielsen claim within the limits of the policy, then Mr. Fredrickson expected I.C.B.C. to indemnify him fully. On 26th October 1982 Berger J. approved a settlement as to quantum put forward by counsel for Nielsen, counsel for I.C.B.C. and counsel for Mr. Fredrickson subject to a pending appeal on the issue of liability. The quantum approved was approximately \$1.2 million. Mr. Fredrickson was personally responsible for all amounts in excess of \$500,000. On 14th October 1983 Mr. Fredrickson's appeal was dismissed [[1984] B.C.W.L.D. 2088].
- Mr. Fredrickson had no assets of significance other than cause of action against I.C.B.C. for failure to properly defend Miss Nielsen's action against him. At the suggestion of counsel for Miss Nielsen, an assignment agreement was executed between Mr. Fredrickson and the Public Trustee as committee of the estate of Miss Nielsen, purporting to assign to her this right of action. Pursuant to the assignment the Public Trustee commenced this action in the name of Fredrickson for a declaration that Mr. Fredrickson is entitled to indemnification for any money owed to Nielsen not payable under the policy, for an order that I.C.B.C. indemnify him for

those moneys owed to Miss Nielsen and for a judgment in the amount owed to Miss Nielsen not payable under the policy, i.e., the difference between the amount of the judgment and Mr. Fredrickson's policy limits.

- On 6th February 1984 I.C.B.C.'s counsel on behalf of Mr. Fredrickson applied for leave to appeal the personal injury action to the Supreme Court of Canada. That application was refused.
- Mr. Fredrickson's action against I.C.B.C. is set down for trial in June 1986. It is being pursued by the Public Trustee on Miss Nielsen's behalf. I.C.B.C. in its pleadings (para. 8) stated that the action must fail because Mr. Fredrickson has suffered no loss as a result of I.C.B.C.'s conduct because he has assigned his interest in the action to Miss Nielsen. I.C.B.C. also said (para. 9) that the action is ill-founded because the assignment is invalid. Based on these two contentions and the admissions of Mr. Fredrickson, it sought an order striking out Mr. Fredrickson's claim. The chambers judge held that the assignment constituted a valid equitable assignment and that it did not contravene the regulations of the Insurance (Motor Vehicle) Act. I.C.B.C. now appeals that decision.
- Notwithstanding that Miss Nielsen has not been joined as party, both parties have addressed the motion below and on this appeal on the basis that the real claimant is not Mr. Fredrickson, but Miss Nielsen. I am prepared to deal with the matter on that basis. I note, however, that it may be necessary to formally add Miss Nielsen as a plaintiff before the matter proceeds to trial. It appears that both the assignor and assignee of an equitable assignment of a legal chose in action must be made parties to the proceedings: Chitty on Contracts, 25th ed. (1983), p. 293, citing Walter & Sullivan Ltd. v. J. Murphy & Sons Ltd., [1955] 2 Q.B. 584, [1955] 2 W.L.R. 919, [1955] 1 All E.R. 843 (C.A.). Were this to be done, then the first defence which I.C.B.C. cited in support of its motion Mr. Fredrickson's lack of a person interest in the litigation could properly be raised against him, while the other defence cited the alleged invalidity of the assignment could properly be raised against the assignee, Miss Nielsen.
- With this reservation, I turn to the issue argued on appeal, the validity of the assignment. This issue raises two subsidiary questions:
 - 1. Whether the assignment violates Regulations, s. 6.33(a) and (b), of the Insurance (Motor Vehicle) Act;
 - 2. Whether the assignment was valid at law or equity.

I will consider each in turn.

II. Whether the Assignment Violates s. 6.33(a) and (b), of the Regulations

Section 6.33(a) and (b) provides:

Where indemnity under this part is, or may be, claimed, the insured shall not:

- (a) voluntarily assume any liability or settle any claim, except at his own cost; or
- (b) interfere with the corporation in any negotiation, settlement, or in any legal proceedings; but whenever requested by the corporation, the insured shall: ...
- This ground of appeal raises three issues: (1) whether Mr. Fredrickson's assignment constitutes a "settle-

- ment"; (2) if so, whether the settlement was at Mr. Fredrickson's "own cost" within s. 6.33(a); or, alternatively, (3) whether the assignment amounted to interference under s. 6.33(b). The chambers judge did not decide the first issue, having determined the second and third issues in Mr. Fredrickson's favour. I propose to approach the matter in the same way.
- I turn first to s. 6.33(a) and the question of whether the assignment, if it constituted a settlement, was at Mr. Fredrickson's "own cost". I am of the view that the chambers judge was correct in concluding that it was.
- It is conceded that, where doubt exists, the regulations should be interpreted in favour of the insured. This consideration leads me to conclude that the phrase "except at his own expense" was intended to permit the accused to settle claims, provided that the settlement does not involve cost to I.C.B.C. I do not think the section was intended to impose on the insured the obligation of showing that the settlement costs him something. That fact is irrelevant to I.C.B.C.'s concerns.
- In this case, the assignment cannot prejudice I.C.B.C. in the sense that it would be required to pay more money because of the assignment. The only difference it might make to I.C.B.C. is that, instead of paying the money to Mr. Fredrickson, its assured, upon proof that he had satisfied Miss Nielsen's judgment, it would pay it to Miss Nielsen directly.
- The next question is whether, assuming the assignment constituted a settlement, it amounts to an interference with I.C.B.C. in any negotiations, settlements or legal proceedings. I.C.B.C. does not allege specific interference but argues that to permit such assignments creates a disincentive to injured claimants to settle for less than the policy limits and removes the interest of the insured in having his defence succeed in whole or in part.
- I do not accept the contention of I.C.B.C. that the assignment interfered with its ability to negotiate, settle and defend this action. The action had been concluded before the assignment took place, save for an unsuccessful application for leave to appeal to the Supreme Court of Canada. Moreover, it cannot be contended on the facts of this case that the assignment or the prospect of an assignment provided any disincentive to Miss Nielsen settling the action. The Public Trustee on her behalf made seven offers to settle the case. I.C.B.C. rejected them all and made no offers of its own, except for one offer made after the appeal was dismissed.
- In support of its contention that the assignment violates s. 6.33(a) and (b) of the Regulations, I.C.B.C. conjures up the spectre of such assignments being given early in the litigation, allying the plaintiff and the defendant against the insurer in the litigation. In general, as Duff J. pointed out in *Fidelity & Casualty Co. v. Marchand*, [1924] S.C.R. 86, [1924] 4 D.L.R. 157 [Que.], the purpose of provisions such as s. 6.33(a) and (b) is to protect the insurer against the risk of collusion between the insured and the persons claiming damages for alleged torts. The assignment here in question does not violate this principle. Mr. Fredrickson cooperated fully with I.C.B.C. throughout the litigation. The agreement was entered into only after Miss Nielsen had made demands on him for payment of the balance of her judgment in excess of the policy limits and after the appeal had been dismissed and the litigation concluded for all practical purposes. In short, the assignment did not prejudice I.C.B.C.'s position and did not constitute collusion between the claimant and the assured.
- For these reasons, I conclude that the chambers judge was correct in concluding that I.C.B.C. had failed to establish that the assignment violated s. 6.33 of the regulations. Having so decided, I need not consider the contention of Mr. Fredrickson that I.C.B.C. is estopped from objecting to the alleged breach of the regulations.

III. Whether the Assignment was Valid in Law or Equity

- By the agreement of assignment, Mr. Fredrickson conferred on Miss Nielsen "any and all rights of action or actions he possesse[d] arising out of the defence by I.C.B.C." of Miss Nielsen's suit against him, and appointed her his attorney "with full power and authority ... to sue for, recover and receive, the proceeds of the action or actions ... assigned. ..." In return, Miss Nielsen agreed not to take execution proceedings against Mr. Fredrickson. The assignment was an equitable assignment, I.C.B.C. not being party to it. It is not disputed that I.C.B.C. has received notice of the assignment.
- The causes of actions purporting to be assigned are pleaded alternatively in contract and tort. Paragraph 55 of the statement of claim alleges that I.C.B.C. was in breach of the express and implied terms of its contract of insurance with Mr. Fredrickson in that it failed to act reasonably and properly in the adjustment and defence of Miss Nielsen's action against him. Paragraph 56 alleges that in the alternative I.C.B.C. was negligent in adjusting and defending the action and sets out detailed particulars of the negligence alleged. Since the plaintiff intends to proceed with both claims at trial, it is necessary to consider the assignability of both the cause of action in contract and the cause of action in tort.

A. Assignability of the Cause of Action in Tort

- It is frequently said that a bare cause of action in tort is not assignable. This rule is based mainly on strictures of the common law against maintenance and champerty. Anglo-Canadian jurisprudence has never countenanced trafficking in litigation.
- The exact ambit of the rule is elusive. Some of the cases commonly cited as authority for the rule prove, on analysis, not to have dealt with it except in obiter, if at all: Simpson v. Thomson (1877), 3 App. Cas. 279 (H.L.) (where the issue was subrogation, not assignment); Dawson v. Great Northern & City Ry. Co., [1905] 1 K.B. 260 (C.A.) (where the cause of action lay in contract or administrative law); Defries v. Milne, [1913] 1 Ch. 98 (C.A.) (where the cause of action lay in contract law). Other cases speak only of the non-assignability of personal torts, as opposed to torts involving property: Glegg v. Bromley, [1912] 3 K.B. 474 (C.A.); see also Union Gas Co. v. Brown, [1968] 1 O.R. 524, 67 D.L.R. (2d) 44 at 51 (H.C.), reversed on other grounds [1970] 1 O.R. 715, 9 D.L.R. (3d) 337 (C.A.). None of the authorities offer a comprehensive discussion of the ambit of the rule.
- On the assumption that, as a general rule, causes of action in tort are not assignable, it is clear that that rule is subject to a number of exceptions. In dealing with those exceptions it must be borne in mind that the categories of exceptions are not closed. In each case the court must ask itself whether the assignment can fairly be seen as prompted by a desire to advance the cause of justice rather than as intermeddling for some collateral reason: Fleming, The Law of Torts, 6th ed. (1983), p. 593.
- First, it is clear that the fruits of an action, as opposed to the action itself, are assignable. In $Glegg \ v$. Bromley, supra, the issue was the validity of an assignment by a wife to her husband of the damages of a slander action. The court accepted that an assignment of a tort action based on a "personal wrong" would be invalid. It held, however, that if there were words in the assignment which purported to convey the cause of action as opposed to the fruits of the action, those words would be inoperative, leaving intact the portion of the assignment conveying the right to the fruits of the action.
- The assignment in the case at bar purports to convey both the cause of action and the fruits of the action. If Miss Nielsen's only interest were in obtaining any damages which Mr. Fredrickson might obtain as a result of the suit, then the matter could be disposed of on the basis of this exception. However, it appears that she is desirous of prosecuting the action as well, through her agent, the Public Trustee. Her right to do so cannot be re-

solved on the basis of this exception.

- A second exception concerns cases where the assignee has either a pre-existing property interest or a legitimate commercial interest in the enforcement of the claim. An assignment where the assignee possesses such an interest will be valid, provided the action in tort is not based on a personal wrong, such as assault, libel or personal injury. The reason for the latter stricture appears to be that in cases of personal torts, the assignee can have no legitimate property or commercial interest in recovery: *Trendtex Trading Corp. v. Crédit Suisse*, [1980] Q.B. 629 at 656-57, [1980] 3 W.L.R. 367, [1980] 3 All E.R. 721, per Denning M.R., affirmed [1982] A.C. 679, [1981] 3 W.L.R. 766, [1981] 3 All E.R. 520 at 530 (H.L.).
- This raises the question of what constitutes a sufficient interest to support an assignment of a cause of action in tort. Certainly a property interest to which the cause of action is ancillary is sufficient: *Ellis v. Torrington*, [1920] 1 K.B. 399 (C.A.). However, a property interest is not essential. The nature of the interest required to support an assignment is perhaps best ascertained by considering some of the cases which have upheld assignments of actions in tort on the basis of the assignee's interest in pursuing the action.
- Assignments of causes of action in tort by the owners of damaged property to their insurers have been upheld on this ground: King v. Victoria Ins. Co., [1896] A.C. 250, 65 L.J.P.C. 38, 74 L.T. 206, 12 T.L.R. 285, 44 W.R. 592 (P.C.); Compania Colombiana de Seguros v. Pac. Steam Navigation Co., [1965] 1 Q.B. 101, [1964] 2 W.L.R. 484, [1964] 1 All E.R. 216. In these cases the insurer may be viewed as possessing a right by way of subrogation, of which the assignment is an extension: per Lord Roskill in Trendtex, supra.
- In Kapoor Lumber Co. v. Can. Nor. Pac. Ry. Co., 45 B.C.R. 213, [1932] 2 W.W.R. 417, [1932] 3 D.L.R. 487, this court considered whether an assignment of a cause of action in tort by an insured to his insurer was valid, entitling the defendants to pre-trial remedies against the insurance companies as true plaintiffs. Macdonald C.J.B.C., at p. 489, and Macdonald J.A. held that the assignment must fail because it assigned only part of the cause of action. Macdonald C.J.B.C., following King, supra, was of the view that otherwise the action would have been assignable, notwithstanding that it was an action in tort. McPhillips J.A. expressed the contrary view, stating [at p. 500] that it was "utterly impossible ... to assign a [cause of] action [in] tort". Martin J.A. held the assignment assigned the whole cause of action and was valid. In the upshot, while the case was decided on other grounds, two of the four justices would have upheld the assignment of the tort action. In my opinion, this is the better view.
- Other cases illustrate that a cause of action may be assigned even where the assignee has no ancillary property interest. Assignment of the right to sue for infringement of copyright to a society formed to protect the interests of its members was upheld in *Performing Rights Soc. v. Thompson* (1918), 34 T.L.R. 351 (K.B.). In an action for infringement, the defendants alleged the assignment violated the rules against champerty and maintenance and that the business of the society was that of "breedbates" and "trafficking in litigation" [p. 352]. Atkin J. rejected that contention. He found at p. 352 that the assignment constituted a "bona fide business arrangement" for "legitimate business reasons". The society and its members, he said, both had a "real and bona fide interest in the result of the litigation".
- Similarly, in *Martell v. Consett Iron Co.*, [1955] Ch. 363, [1955] 2 W.L.R. 463, [1955] 1 All E.R. 481 (C.A.), Danckwerts J. followed a "genuine interest in the litigation" test, in upholding maintenance by an association for the prevention of pollution to rivers of an action brought by owners and occupiers of fisheries.
- 32 Martell was approved in the House of Lords in Trendtex, supra. In the latter case, Lord Wilberforce at p.

- 524, held that, apart from subsequent dealings, an assignment of a cause of action would have been valid, because it did not offend the law of maintenance or champerty. This was so because the assignee had a "genuine and substantial interest" in the success of the litigation.
- Lord Roskill expressed the view at p. 531 that the assignment would be valid "If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee had a genuine commercial interest in taking the assignment and enforcing it for his own benefit ..." The other law lords agreed with both Lord Wilberforce and Lord Roskill. (It is immaterial that the cause of action assigned in *Trendtex* was in contract since the law on this point is the same for tort and contract.)
- Two Canadian cases subsequent to *Trendtex* must be considered. In *Ellis-Don Ltd. v. Norton* (1982), 5 C.L.R. 281 (Ont. H.C.), an assignment of lien claims by subcontractors to a general contractor was struck down on the ground that the contractor-assignee in taking the assignment was not protecting a legitimate commercial interest. It was noted that he had ample machinery under the Ontario Mechanics Lien Act to vacate the liens and protect his position apart from the assignment. (Liens may be assigned under the British Columbia Builders' Lien Act: *Henfrey & Co. v. Poplar Properties Ltd.*, No. CA002767 [now reported at 70 B.C.L.R. 23, 24 D.L.R. (4th) 313].
- A case closer to the facts of this case is 453416 Ont. Inc. v. White (1984), 42 C.P.C. 209 (Ont. H.C.), leave to appeal granted (1984), 42 C.P.C. 215, per Reid J., appeal dismissed 27th June 1985 (Ont. Div. Ct.), where the court upheld an assignment by an insured to a party who had recovered judgment against him on account of an accident for which the insured successfully denied coverage. The subject of the assignment was the insured's cause of action against its insurance agent for breach of fiduciary obligation and negligent misrepresentation in failing to obtain proper insurance. Smith J. concluded at p. 214 that the interest of the assignee was real, genuine and legitimate. He was also of the view that it constituted a commercial interest even though it did not arise from financing arrangements as in *Trendtex*.
- Most recently, in *Bourne v. Colodense Ltd.*, [1985] I.C.R. 291, the English Court of Appeal upheld the assignability of a cause of action of a union member for indemnification from his union for court costs to a receiver by way of equitable execution. The court found that the successful party in the litigation that gave rise to the costs had a commercial interest sufficient to negate any taint of champerty and thus to support the assignment. Lawton L.J. emphasized the fact that the assignee was not seeking to profit by the assignment, but was rather seeking only to obtain what it was entitled to under its order for costs. While the cause of action assigned was contractual, *Bourne* supports the view taken in other cases of the nature of the interest required to support an assignment.
- I would summarize the effect of these cases as follows. An assignment of a cause of action for nonpersonal tort is generally valid if the assignee has a sufficient pre-existing interest in the litigation to negate any
 taint of champerty or maintenance. In determining if this test is met, the court should look at the totality of the
 transaction: *Trendtex*, per Lord Roskill at p. 531. A property interest ancillary to the cause of action assigned is
 sufficient to support an assignment, but not essential. A genuine pre-existing commercial interest will suffice.
 The term "commercial interest" is used in the sense of financial interest; it need not arise from commercial dealings in the narrow sense. Assignment of a cause of action to a stranger will not be permitted, nor will the court
 uphold an assignment made for the purpose of obtaining more than what the assignee is legally entitled to. The
 conditions necessary to support the assignment of a cause of action in tort will be held to have been met where
 one party to litigation assigns to the other a cause of action arising out of the conduct of that litigation, with a

view to enabling the assignee to recover the judgment which the court has previously pronounced in his favour.

- The latter proposition flows from 453416 Ont. Inc. v. White and finds support in Bourne v. Colodense both supra. Those cases, like the case at bar, involved assignments by a person liable on a court order of a cause of action against a third party related to indemnification by the third party. Neither case involved a personal tort. There is only one significant difference between these cases and the case at bar, insofar as they touch on the question of the assignability of a cause of action. In 453416 Ont. Inc. v. White, if White had procured the proper insurance, the assignee would have benefited, for there would have been funds from the insurance to satisfy his judgment. Similarly, in Bourne, if the union had indemnified its employee, there would have been funds available to pay the applicant's costs. In the case at bar, however, if I.C.B.C. had acted as Mr. Fredrickson suggests it should have, the result would have been a settlement which would have given the assignee judgment for an amount substantially less than the judgment she now holds. In other words, there was no common interest between the assignee and assignor in the case at bar until shortly before the assignment, when it was clear that no compromise could be reached.
- In my opinion, this difference between the case at bar and 453416 Ont. Inc. and Bourne cases does not justify departing from the conclusion in those cases that the assignee possessed a sufficient interest in the action assigned to support the assignment. First, the fact the assignor's and assignee's interests were previously opposed does not make the assignment champertous. While the entire transaction must be looked to, the essential question to be considered in determining whether the assignment smacks of maintenance or champerty is whether the assignee possessed the requisite financial interest at the time of the assignment. In my view, the fact that at some earlier date the interests of the assignee and the assignor were opposed does not negate the fact that when the assignment here in question was made, Miss Nielsen had a very real financial interest in obtaining it. She had a judgment. The cause of action of which she took an assignment represented her only means of obtaining satisfaction of that judgment. Her interest in the cause of action assigned is not created by the assignment, in which case it might well be champertous, but antedated and existed independently of the assignment. The assignee, in pursuing the assigned cause of action, does not seek to make a profit but only to recover the amount of her judgment. Moreover, she is not a stranger to the action assigned. She was involved in the proceedings which give rise to it. She has a direct relationship under our legislation with I.C.B.C., as Mr. Fredrickson's insurer, in her own right. In these circumstances I cannot conclude that assignment of Mr. Fredrickson's cause of action against I.C.B.C. to Miss Nielsen renders her an officious intermeddler guilty of the improper maintenance of the litigation.
- In my view, if the fact that Miss Nielsen's and Mr. Fredrickson's interests were once opposed has any relevance, it must be on the ground that to permit a defendant to assign a cause of action against his insurer to a plaintiff whose interests are opposed to his is to promote improper collusion between the plaintiff and the defendant to the detriment of the insurer. If this assignment had taken place while the interests of the parties were opposed, it might be attacked as invalid on the ground that it violates the duty of the assured to cooperate with his insurer. I need not decide whether such an attack would succeed, since those are not the circumstances in the case at bar. Here the assignee had a judgment and was entitled to pursue Mr. Fredrickson in execution proceedings and all realistic prospect of compromise had vanished. The insured's duty to cooperate with his insurer had effectively been discharged. His interest at that point lay not with his insurer, but rather with the assignee; it was in their common interest to secure satisfaction of the judgment which had been rendered by the court and confirmed on appeal.
- In summary, I see no valid reason for declaring the assignment in the case at bar to be invalid on the

ground that at one point in time, the interests of the assignor and the assignee were opposed.

I conclude that the assignee had a legitimate pre-existing financial interest in the cause of action in tort assigned to her, and that consequently the assignment is valid. I have not found it necessary to discuss the American authorities in arriving at this conclusion. It may be observed, however, that the preponderance of American authority permits the assignment of causes of action in circumstances such as those here under consideration: Gedeon v. State Farm Mut. Auto. Ins. Co., 261 F. Supp. 122 (Pa. D.C., 1966); Terrell v. Western Casualty & Surety Co., 427 S.W. 2d 825 (Ky. C.A., 1968); Groce v. Fidelity Gen. Ins. Co., 448 Pac. 2d 554 (Ore. S.C., 1968); and McNulty v. Nationwide Mut. Ins. Co., 221 So. 2d 208 (Fla. D.C.A., 1969). Some of these authorities go so far as to suggest that any judgment creditor of the person assigning the cause of an action has a sufficient interest to support the assignment of the cause of action to him. It is not necessary to decide that question on this appeal. As discussed above, the relationship of the assignee in the case at bar to both Mr. Fredrickson and I.C.B.C. and her interest in the action between them places her in a position markedly superior to an ordinary judgment creditor.

B. Assignability of the Cause of Action in Contract

- The Courts of Common Law did not permit the assignment of choses in action generally speaking. Two reasons are usually given for this. The first is that contracts created obligations which were strictly personal, that is, intangible to the immediate parties, so their transfer was not understandable to the earlier Common Law lawyers. Once our law grew more sophisticated, the reason was attributed to a fear of maintenance and champerty: Di Guilo v. Boland, [1958] O.R. 384, 13 D.L.R. (2d) 510 at 513 (C.A.), per Morden J.A.
- However, the Courts of Equity generally speaking did recognize and enforce such assignments. This recognition was adopted in 1873 in the Judicature Act and today our courts uphold assignments which the Court of Equity would have previously enforced. Today there are six categories of contracts which are considered to be unassignable. They are:
- 1. Contracts which expressly by their terms exclude assignment;
- 2. Mere rights of action (assignments savouring of maintenance and champerty);
- 47 3. Contracts which by their assignment throw uncontemplated burdens on the debtor;
- 48 4. Personal contracts;
- 5. Assignments void by public policy (public officers' wages or salary and alimony or maintenance agreements); and
- 6. Assignments prohibited by statutory provisions. (Chitty on Contracts, 25th ed. (1983), pp. 709-15; Treitel, The Law of Contract, 5th ed. (1979), at pp. 519-23; Fridman, The Law of Contract in Canada (1976), pp. 442-45; and Waddams, Law of Contracts, 2nd ed. (1984), pp. 197-98.)
- For purposes of this case, I need concern myself with only two of these categories: No. 2 (mere rights of action), and No. 4 (personal contracts).
- The rule precluding the assignment of mere rights of action in contract is based on the rule against maintenance and champerty. As in the case of causes of action in tort, where the assignee possesses a sufficient pre-

existing interest in the cause of action assigned, the suggestion of maintenance is negated and the assignment is valid: *Trendtex Trading Co. v. Crédit Suisse*, supra. In considering the assignability of the cause of action in tort, I have concluded that the assignee in this case had a genuine pre-existing financial interest in the cause of action assigned and that the assignment did not savour of maintenance or champerty. The same conclusion applies to the cause of action in contract.

- I turn then to the rule against the assignment of personal contracts. As a general rule contracts for personal services cannot be assigned. The right to assign contractual rights without consent is confined to those cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it: Tolhurst v. Assoc. Portland Cement Mfr. (1900) Ltd., [1902] 2 K.B. 660 (C.A.); Paterson Timber Co. v. Can. Pac. Lumber Co. (1909), 15 B.C.R. 225, 14 W.L.R. 598, affirmed (1910), 47 S.C.R. 398. Motor vehicle insurance policies are regarded as personal contracts and hence as non-assignable, because it makes a difference to the insurer who the insured is: Peters v. Gen. Accident & Life Assur. Corp., [1938] 2 All E.R. 267 (C.A.). Thus, for example, had Mr. Fredrickson sold his car prior to the accident, he could not have assigned his policy of insurance to the purchaser.
- A distinction may be drawn, however, between the assignment of a contract and the assignment of a cause of action for damages arising out of an executed contract. Some cases suggest that if a contract is not assignable, a cause of action arising out of it is similarly not assignable: Cohen v. Webber (1911), 24 O.L.R. 171 at 173 (C.A.); Brown v. Hall, [1957] O.W.N. 15, 6 D.L.R. (2d) 460 at 464 (C.A.). However, the rationale which supports the non-assignability of personal contracts does not apply to causes of action for damages, when all that remains is the payment of money, since the assignment of a cause of action does not confer on the assignee the right to have services performed by the party who contracted with the assignor. This suggests that the fact that a personal contract cannot be assigned should not preclude assignment of a cause of action for damages based on a breach of that contract.
- This view has been taken in the United States. In Groce v. Fidelity Gen. Ins. Co., supra, Goodwin J. held at p. 559, in a case quite similar to this:

The policy contained a provision that "[a]ssignment of interest under this policy shall not bind the company until its consent is endorsed hereon ..." But the contention that such a clause prohibits the insured from assigning his cause of action need not detain us. It is well settled that such a provision does not preclude the assignment of a cause of action for damages for breach of a contract. [The italics are mine.]

- The authorities in England and Canada offer little assistance on the question of whether a cause of action for damages for breach of contract can be assigned. Clearly a cause of action in debt can be assigned, even though the debtor denies liability: Fitzroy v. Cave, [1905] 2 K.B. 364 (C.A.); County Hotel & Wine Co. v. London & North West. Ry. Co., [1918] 2 K.B. 251 at 258. However, the assignability of unliquidated claims admits of more doubt. Treitel, The Law of Contracts, 5th ed., after noting the different views on the question, concludes at p. 523 that "The best approach is to avoid generalisation and to ask in each case whether this assignment savours of maintenance".
- Adopting that approach, it is my conclusion for the reasons stated earlier that the assignment of the cause of action for breach of contract here at issue does not savour of maintenance. Nor, as already noted, can it make any difference to I.C.B.C., to whom it pays damages awarded in any judgment which may be entered against it.
- In these circumstances, I conclude that Mr. Fredrickson's cause of action in contract is assignable.

1986 CarswellBC 131, 3 B.C.L.R. (2d) 145, 17 C.C.L.I. 194, [1986] 4 W.W.R. 504, 28 D.L.R. (4th) 414, [1986] I.L.R. 1-2100

C. Public Policy

I.C.B.C.'s final submission is that the issue of the assignability of a cause of action in the circumstances of this case is one of public policy. It contends that assignments are contrary to the good faith required of the assured by his insurance contract. I cannot accept that contention. The enforcement of I.C.B.C.'s contractual duties to its insured to use reasonable care to protect him from unnecessary loss is an important right which deserves protection. The assignee has a legitimate interest in the enforcement of that right in the circumstances of this case. The assignment to her of Mr. Fredrickson's causes of action against I.C.B.C. does not smack of maintenance or champerty, and does not constitute collusion against the insurer. Accordingly, there can be no objection to the assignment on grounds of public policy.

IV. Conclusion

The appeal is dismissed.

Appeal dismissed.

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TAB 23

1984 CarswellOnt 671, 7 C.C.L.I. 231, 47 O.R. (2d) 472, 11 D.L.R. (4th) 516, [1984] I.L.R. 1-1800, 4 O.A.C. 209, 47 O.R.(2d) 472

Perry v. General Security Insurance Co. of Canada

PERRY et al. v. GENERAL SECURITY INSURANCE CO. OF CANADA et al.

Ontario Supreme Court, Court of Appeal

MacKinnon A.C.J.O., Arnup and Houlden JJ.A.

Heard: May 17, 1984 Judgment: July 25, 1984

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Counsel: Peter Webb, Q.C., and Steven Reisler, for appellants.

Brendan O'Brien, Q.C., for respondents.

Subject: Insurance; Civil Practice and Procedure; Torts

Barristers and Solicitors --- Negligence — In real estate transactions — Mortgages — Providing ineffective mortgage security.

Insurance --- Claims — Notice and proof of loss — Relief against forfeiture.

Insurance --- Actions on policies — Third party proceedings — Recovery by third party from insurer.

Claim for relief from forfeiture dismissed.

The plaintiffs obtained a default judgment against an insured lawyer for the loss they suffered as a result of the lawyer's failure to investigate properly the title to land. When execution on this judgment was returned unsatisfied, the plaintiffs brought an action under s. 109 of the Insurance Act (Ontario) against the lawyer's insurer. The insurers successfully defended this action on the grounds that the lawyer did not incur liability "for injury or damage to the person or property" of the plaintiffs within the meaning of s. 109 of the Insurance Act; that the lawyer had forfeited his right to be indemnified by breach of the conditions of the policy, and that the plaintiffs were not entitled to claim relief from forfeiture under s. 106 of the Insurance Act. The plaintiffs appealed.

Held:

The appeal was dismissed.

Per MacKinnon A.C.J.O. (Arnup J.A. concurring)

The words of s. 109 of the Act could not be interpreted to mean economic loss unrelated to physical damage to property. It would be a distortion of the language, and the legislative and judicial history of s. 109 and of the definition of the word "property" found in the Act to allow claimants in the position of the plaintiffs to recover against the insurer without any procedural protection or rights afforded to the insurer.

There was nothing in the agreed facts that would justify relief from forfeiture to the lawyer. This was a flagrant case of the flouting of the conditions of the policy by the lawyer. The plaintiffs "stood in the shoes" of the insured lawyer and their action was "subject to the same equities" as the insurer would have against the insured if the judgment had been satisfied by the insured and a claim then made under the policy against the insured.

Per Houlden J.A. (concurring in part)

The word "property" had no fixed legal meaning. The intention of the Legislature would be best achieved by giving the word a wide interpretation. The prime purpose of obtaining insurance coverage for all lawyers practising in Ontario, was to protect members of the public who suffer damage by acts or omissions of lawyers in the performance of their professional duties. If s. 109(1) of the Act did not extend to lawyers, liability insurance, then part of that protection would be lost. However, this was not a proper case to grant relief from forfeiture.

Cases considered:

Continental Casualty Co. v. Yorke, [1930] S.C.R. 180, [1930] 1 D.L.R. 609 — considered

Crone v. Orion Ins. Co., [1965] 2 O.R. 431, 51 D.L.R. (2d) 27 (H.C.), affirmed [1966] 1 O.R. 221, 53 D.L.R. (2d) 98 (C.A.), affirmed [1967] S.C.R. 157, 60 D.L.R. (2d) 630, [1967] I.L.R. 1-179 — considered

Findlay v. Madill, 28 O.R. (2d) 673, 111 D.L.R. (3d) 180, [1980] I.L.R. 1-1181 (H.C.) [varied 32 O.R. (2d) 413, 123 D.L.R. (3d) 765n, [1981] I.L.R. 1-1466 (C.A.)] — distinguished

Frederick v. Aviation & Gen. Ins. Co., [1966] 2 O.R. 356 (C.A.) — considered

Fun Seekers Int. Ltd. v. Can. Indemnity Co., [1976] I.L.R. 1-799 (Alta. Q.B.) — distinguished

Hildon Hotel (1963) Ltd. v. Dom. Ins. Corp., 66 W.W.R. 289, 1 D.L.R. (3d) 214, [1969] I.L.R. 1-256 (B.C. S.C.) — considered

Jordan House Ltd. v. Menow, [1974] S.C.R. 239, 38 D.L.R. (3d) 105 — followed

Kallos v. Sask. Govt. Ins., [1984] 2 W.W.R. 183, 30 Sask. R. 185 (sub nom. Junet v. Sask. Govt. Ins.), 3 C.C.L.I. 65, 4 D.L.R. (4th) 34, [1984] I.L.R. 1-1740 (Q.B.) — not followed

Lunness, Re (1919), 46 O.L.R. 320, 51 D.L.R. 114 (C.A.) — considered

Markus v. West. Union Ins. Co. (1964), 48 W.W.R. 428, 46 D.L.R. (2d) 193 (Alta. C.A.) — applied

Meretzky v. Can. Surety Co. (1932), 41 O.W.N. 156 (C.A.) — considered

Vandepitte v. Preferred Accident Ins. Corp. of New York, [1932] S.C.R. 22, [1932] 3 W.W.R. 573, [1933]

1 D.L.R. 289, affirmed [1933] A.C. 70 (P.C.) considered

Statutes considered:

(Automobile) Insurance Act, S.O. 1932, c. 25, ss. 183(a), (h).

Insurance Act, S.O. 1924, c. 50, s. 80.

Insurance Act, S.O. 1931, c. 49, s. 7.

Insurance Act, S.O. 1934, c. 22, s. 2.

Insurance Act, S.O. 1937, c. 256, s. 205.

Insurance Act, R.S.O. 1960, c. 190, s. 95(1).

Insurance Act, R.S.O. 1970, c. 224, s. 103.

Insurance Act, R.S.O. 1980, c. 218, ss. 1(54), (55), 99, 106, 109, 209, 226.

Interpretation Act, R.S.O. 1980, c. 219, s. 10.

Liquor Licence Act, R.S.O. 1960, c. 218, s. 67.

Liquor Licence Act, R.S.O. 1980, c. 244, s. 53.

Authorities considered:

Crossley Vaines on Personal Property (5th ed., 1973), p. 3.Griffiths, W.D., "Automobile Insurance — Part III", [1962] Special Lectures L.S.U.C., p. 57 at 72-75.MacGillivray & Parkington on Insurance Law (6th ed., 1975), pp. 934-35, paras. 2246-48.Mitchell, George L., Q.C., "Rights of Unnamed Insureds and Third Parties", [1962] Special Lectures L.S.U.C., p. 331 at 336-38.

APPEAL from a judgment, reported at 1 C.C.L.I. 227, 42 O.R. (2d) 514, 149 D.L.R. (3d) 272, [1983] I.L.R. 1-1669 (H.C.), dismissing judgment creditors' direct recourse action under s. 109 of the Insurance Act (Ontario) against a liability insurer.

MacKinnon A.C.J.O. (Arnup J.A. concurring):

- The issue before Mr. Justice R.E. Holland, sitting in Motions Court, and before this Court is whether, as clients and judgment creditors of a negligent solicitor, the appellants (plaintiffs) have a cause of action under s. 109 of the Insurance Act, R.S.O. 1980, c. 218, against the negligent solicitor's insurers (defendants/respondents). The learned Motions Court Judge, with obvious reluctance, came to the conclusion on an Agreed Statement of Facts that s. 109 conferred no cause of action upon the clients who had suffered loss as a result of the negligence of the solicitor and had successfully sued the solicitor for breach of contract. It is with equal reluctance that I have come to the same conclusion.
- As did the Motions Court Judge, I use the current section numbers of the Insurance Act. Although they were differently numbered at the time of the institution of the present action, the wording of the relevant sec-

tions is identical.

- The parties presented the Agreed Statement of Facts to the Motions Court, as well as a Statement of Issues which outlined the questions of law which the Court was requested to answer. The agreed facts are as follows:
 - 1. The Plaintiff, William Perry, resides in the City of Cambridge, in the Regional Municipality of Waterloo and Province of Ontario. The Plaintiff, Peter Stevens, resides in the Town of Collingwood, in the County of Simcoe and Province of Ontario.
 - 2. The Defendants, with the exception of F.C. Maltman & Co. Ltd., are the insurers of solicitors practising law in the province of Ontario, through a policy of insurance entered into between the said Defendants and The Law Society of Upper Canada.
 - 3. In or about the month of January, 1978, the Plaintiffs retained a solicitor, one James Kopinak, hereinafter referred to as 'Kopinak' to place a second mortgage in their favour against certain property located in the Regional Municipality of Waterloo. The Plaintiffs jointly advanced to the solicitor Kopinak, the sum of \$40,000.00 in order to obtain the said mortgage. At all material times, Kopinak was a solicitor duly licensed to carry on the practice of law within the Province of Ontario. Kopinak acted in a solicitor-client relationship toward the Plaintiffs and, in writing, certified to the Plaintiffs that he had registered a good and valid second charge against the lands described in the mortgage. In fact, Kopinak failed to register a second charge in favour of the Plaintiffs, there being three mortgages and an agreement of purchase and sale registered against the title to the property in question prior to the mortgage in favour of the Plaintiffs.
 - 4. As a result of power of sale proceedings taken by the first mortgagee, the sum of \$19,858.84 was paid into Court, pursuant to the Order of His Honour Judge Salhany dated September 18, 1979. Subsequently, pursuant to the Order of Her Honour Judge Elizabeth Robson dated November 6, 1979, this sum of money was paid out to the second and third mortgagees, there being nothing available for distribution to the Plaintiffs as a fourth mortgagee apart from a small amount for costs of the application before Her Honour Judge Robson. In Affidavits filed for the purpose of the application before Her Honour Judge Robson, the intervening mortgagees claimed that they had not received payment for their mortgages.
 - 5. On November 9, 1978, the solicitor for the Plaintiffs, being Steven Reisler, notified Kopinak in writing of the problem with respect to the second mortgage and requested that he notify F.C. Maltman & Co. Ltd. forthwith. On March 10, 1979, the said solicitor for the Plaintiffs telephoned F.C. Maltman & Co. Ltd. to notify them of the problem, and to ask if Kopinak had reported same. On April 23, 1979, the said solicitor for the Plaintiffs notified F.C. Maltman & Co. Ltd. in writing. This letter notified F.C. Maltman & Co. Ltd. that the plaintiffs had a claim against Kopinak, and requested Maltman's intervention.
 - 6. On May 11, 1979, the said solicitor for the Plaintiffs notified Kopinak, in writing, that the Plaintiffs' solicitor had notified Maltman's of the claim. On May 7, 1979, an employee of F.C. Maltman & Co. Ltd. met with Kopinak to discuss another claim, at which time the said employee briefly discussed the subject matter of this action, and the employee undertook to let Kopinak have a copy of the Plaintiffs' solicitor [sic] letter. Kopinak was advised to consider the matter, and decide what he wanted to do. This meeting was followed up by a letter from the said employee of F.C. Maltman & Co. Ltd. to Kopinak dated May 9, 1979, inviting him to report the claim.

- 7. On September 5, 1979, the said Plaintiffs' solicitor notified F.C. Maltman & Co. Ltd. that the property had been sold by the first mortgagee, and that the sum of \$19,858.84 was available for distribution to the subsequent encumbrancers. F.C. Maltman & Co. Ltd. were advised in the said letter that a Motion permitting the first mortgagee's solicitor to make the payment in would take place on September 18, 1979, in Kitchener.
- 8. On September 27, 1979, the Plaintiffs issued a Writ against Kopinak in the Supreme Court of Ontario. On the same date, the Plaintiffs' solicitor notified F.C. Maltman & Co. Ltd. that a Writ had been issued and, together with a Statement of Claim, was out for service on Kopinak. A copy of each of the said documents was forwarded to F.C. Maltman & Co. Ltd. under cover of a letter dated September 27, 1979.
- 9. On October 16, 1979, F.C. Maltman & Co. Ltd. was notified that the Defendant had not appeared nor filed a Statement of Defence, and the said F.C. Maltman & Co. Ltd. was invited to indicate its intention to defend the matter.
- 10. On October 30, 1979, F.C. Maltman & Co. Ltd. wrote to the Plaintiffs' solicitor, advising him that unless Kopinak reported the claim in accordance with condition 5 of the policy, F.C. Maltman & Co. Ltd. was unable to intervene. The letter also mentioned condition 7 of the policy. F.C. Maltman & Co. Ltd. reiterated its position, as above stated, in a letter dated January 15, 1980, to the Plaintiffs' solicitor.
- 11. On March 12, 1980, the Plaintiffs obtained a Default Judgment in the Supreme Court of Ontario against Kopinak in the amount of \$40,000.00, together with interest thereon at the rate of 15-1/2 percent per annum, from October 16, 1978 to the date of Judgment, such interest being \$9,249.09, for a total Judgment of \$49,249.09. The Judgment further provided for post-judgment interest on the above amount at the rate of 15-1/2 percent per annum, and costs.
- 12. On March 31, 1980, the original Judgment, Certificate of Taxation, and copy of Writ of Execution were sent to the F.C. Maltman & Co. Ltd. together with a request for payment of same.
- 13. On April 2, 1980, F.C. Maltman & Co. Ltd. wrote to the Plaintiffs' solicitor advising that Kopinak had still not reported, and that until such time as Kopinak did so, there was nothing F.C. Maltman & Co. Ltd. could do about the matter.
- 14. On April 11, 1980, the Plaintiffs' solicitor advised Kopinak by telephone of the existence of the above-mentioned Judgment and further that F.C. Maltman & Co. Ltd. had received no report of the claim from him. During the course of this conversation, Kopinak advised the Plaintiffs' solicitor that he would report the claim immediately to F.C. Maltman & Co. Ltd.
- 15. On July 23, 1980, Kopinak telephoned F.C. Maltman & Co. Ltd. and discussed the matter with an employee of F.C. Maltman. Kopinak remarked that a claim was being made against him because of the priority of mortgages problem. Kopinak denied that the mortgage in question was not a valid second mortgage, and added that he would compose a full report. Subsequent to this conversation, F.C. Maltman & Co. Ltd. wrote to Kopinak enclosing, for his signature, a Non-Waiver Agreement. The said Non-Waiver Agreement was never signed nor returned to F.C. Maltman & Co. Ltd.
- 16. On July 22, 1980, a Writ of Nulla Bona was returned from the Sheriff of the Judicial District of Water-loo.

- 17. It is not alleged that the policy was invalid by reason of non-payment of premiums.
- 18. On October 23, 1980, F.C. Maltman & Co. Ltd. reported in writing to Gestas Corporation, the manager for the insurers under the policy.
- 19. The general procedure of F.C. Maltman & Co. Ltd. when a lawyer reports a claim to it, is as follows: (a) a file is opened up,
- (b) an investigation is commenced,
- (c) a report is made to Gestas Corporation.

This is a procedure, generally speaking, where there are no coverage problems. If it appears that the report is late, or for some other reason the claim may not be covered, it is routine to obtain a signed Non-Waiver Agreement before proceeding further. The investigation would normally consist of interviewing the insured lawyer, reviewing his file and, if necessary, engaging counsel to advise on questions of law. On occasion, the claimant's solicitor is spoken to.

- 20. Apart from the meeting on May 7, 1979, the telephone conversation of July 23, 1980 was the only verbal communication which took place between F.C. Maltman & Co. Ltd. and Kopinak regarding this matter. F.C. Maltman & Co. Ltd. opened up a file on the matter and, as above stated, reported to Gestas Corporation.
- 21. Kopinak did not respond to letters from F.C. Maltman & Co. Ltd. nor did he return their phone calls to provide the information which he said he would provide in a telephone conversation of July 23, 1980.
- The questions of law which the parties outlined and asked the Court to determine are:
 - 1. Upon the facts disclosed in the Agreed Statement of Facts, did Kopinak incur a liability for injury or damage to the person or property of the Plaintiffs within the meaning of Section 106(1) of the Insurance Act, R.S.O. 1970, Chapter 224 and amendments (now Section 109(1) R.S.O., 1980, Chapter 218) so as to make the said provision of the Insurance Act apply to the Judgment obtained by the Plaintiffs against Kopinak?
 - 2. If the answer to the above question is in the affirmative, has Kopinak, by breach of the conditions of the insurance policy forfeited his right to be indemnified with respect to the said Judgment?
 - 3. If Kopinak has forfeited his right to indemnity, can the Plaintiffs avail themselves of the right to claim relief from forfeiture under Section 103 of the Insurance Act, R.S.O. 1970, Chapter 224 and amendments (now Section 106, R.S.O. 1980, Chapter 218)?
- As stated, the Motions Court Judge held that s. 109(1) did not apply to the judgment obtained by the appellants against their solicitor and he answered the first question in the negative. In view of his answer to question one, it was not necessary for him to answer questions two and three. However, in case the matter went further, the Motions Court Judge felt that he should state his views on questions two and three. He concluded that he was bound by Frederick v. Aviation & Gen. Ins. Co., [1966] 2 O.R. 356 (C.A.), and that, on the equities, the appellants could not be granted relief from forfeiture under s. 106 of the Insurance Act (then s. 103). Question

two was answered in the affirmative and question three in the negative. I should state that the appellants now agree that the solicitor had, by his breach of the conditions of the insurance policy, forfeited his right to be indemnified with respect to the appellants' judgment and that question two is properly answered in the affirmative. They argue, however, that that forfeiture does not, on the agreed facts, prevent the appellants from successfully claiming relief from forfeiture under s. 106. I shall deal with that argument later.

Section 109 of the Insurance Act

6 Section 109 reads:

- 109.-(1) Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of his liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.
- (2) This section does not apply to motor vehicle liability policies.
- From the Agreed Statement of Facts, it is clear that the solicitor, in breach of his instructions, failed to place the requested second mortgage as security for the \$40,000 advanced by the appellants to him for that purpose. The mortgage he did register was a fourth mortgage, subsequent as well to an agreement of purchase and sale. As a result of the exercise of its power of sale by the first mortgagee, there was no money available for distribution to the appellants.
- It appears that if the appellants' security had been a second mortgage as required, there still would have been a considerable shortfall in the moneys available to pay it off after the sale by the first mortgagee. However, Mr. O'Brien for the respondents agreed that in view of the subsequent judgment secured against the solicitor by the appellants for the full amount of \$40,000, the insurers, if liable under s. 109, would be liable for the total amount of the judgment.
- As the Motions Court Judge pointed out, the policy here is styled "Lawyers' professional liability policy", commonly called an "errors and omissions" policy. The named insured is "The Law Society of Upper Canada" and the insured are described as "eligible members of the Law Society of Upper Canada, including Partnerships. ..." The individual coverage is set out as follows:
 - To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of any act or omission of the Insured, or of any other person for whose acts or omissions the insured is legally responsible, and arising out of the performance or intended performance of professional services for others, or failure to perform such services as ought to have been performed, in the Insured's capacity as a lawyer except that, if the Insured is a member of any partnership, this coverage (A) shall not apply if one or more claims arising out of the same professional service are made (1) jointly or severally against two or more members of the partnership or against any member of the partnership and the partnership. (2) against the partnership or (3) against the Insured solely because he is a member of the partnership.
- The appellants' position, simply stated, is that the solicitor's failure to follow their instructions caused them to lose \$40,000. That loss was "injury or damage" to their "property" within the meaning of those words in s. 109. It is argued that the words "injury or damage to person or property" is the most comprehensive language

that could have been used by the Legislature and was intended to cover "all types" of monetary liability. Section 99 of the Insurance Act states that, except where otherwise provided, the part of the Act under which s. 109 falls applies to every contract of insurance made in Ontario other than contracts of accident and sickness insurance, life insurance, and marine insurance. Accordingly, the appellants submit, s. 109 applies to errors and omissions insurance and to the factual situation in the instant case.

"Property" is defined in the definition section [s. 1(54)] of the Insurance Act as follows:

'property' includes profits, earnings and other pecuniary interests, and expenditure for rents, interest, taxes and other outgoings and charges and in respect of inability to occupy the insured premises, but only to the extent of express provision in the contract;

The appellants argue that they have lost a "pecuniary interest" and therefore there was injury or damage to their property. However, it appears to me that the definition section militates against the position of the appellants. That section refers to "inability to occupy the insured premises", and it states further that it is only covered "to the extent of express provision in the contract". The section refers to "the" insured premises, not to insured property, and it is difficult to see how there could be injury or damage to rents and taxes. The section must be read as a whole and there is nothing in the cover of the Law Society contract of insurance which remotely fits this description. Counsel for the appellants, in arguing for a fair, large and liberal interpretation of s. 109, referred the Court to the definition of "property" used by Mr. Justice Riddell in Re Lunness (1919), 46 O.L.R. 320 at 332, 51 D.L.R. 114 (C.A.). The Court there was determining the intention of a testator when he spoke of "property situated in the Province of Ontario". Mr. Justice Riddell stated in this connection:

No doubt 'property' is the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have: Langdale, M.R., in Jones v. Skinner (1835), 5 L.J.N.S. Ch. 87, 90 — and no doubt in a proper case the word will be so interpreted.

- Counsel for the appellants pointed out that an Alberta trial Court had relied on this definition of "property" in Fun Seekers Int. Ltd. v. Can. Indemnity Co., [1976] I.L.R. 1-799, [1976] W.W.D. 153 (Alta. Q.B.). However, it is to be noted that, in that case, the insurance coverage was for loss of money, securities and other property, not liability for injury or damage to property.
- In looking at the scope of s. 109, I do not think the words of the section can be interpreted to mean economic loss unrelated to physical damage to property. As the Motions Court Judge pointed out, that view is supported by the interpretation placed on similar words found in the Liquor Licence Act by Laskin J., speaking for the majority of the Supreme Court of Canada in Jordan House Ltd. v. Menow, [1974] S.C.R. 239 at 246-47, 38 D.L.R. (3d) 105.
- The plaintiff Menow became intoxicated at the defendant hotel's (Jordan House) beverage room. He was ejected by an employee of the hotel and, while wandering home on foot, was struck near the centre line of the highway by a vehicle driven by Honsberger. Menow was awarded damages against the hotel and Honsberger under an equal apportionment of fault among all three parties.
- Section 67 of the Liquor Licence Act, R.S.O. 1960, c. 218 (now s. 53 of the Liquor Licence Act, R.S.O. 1980, c. 244) which was considered by the Court read:
 - s. 67 Where any person or his servant or agent sells liquor to or for a person whose condition is such that the

consumption of liquor would apparently intoxicate him or increase his intoxication so that he would be in danger of causing injury to his person or injury or damage to the person or property of others, if the person to or for whom the liquor is sold while so intoxicated,

- (a) commits suicide or meets death by accident, an action under The Fatal Accidents Act lies against the person who or whose servant or agent sold the liquor; or
- (b) causes injury or damage to the person or property of another person, such other person is entitled to recover an amount to compensate him for his injury or damage from the person who or whose servant or agent sold the liquor.
- On the appeal, counsel for Honsberger argued, as did counsel for the appellants in the instant case, that the word "property" found in s. 67(b) can have an extremely broad meaning and submitted that it could mean monetary loss of the kind claimed here. Laskin J., in dealing with this argument, said at pp. 246-47:

Before dealing in more detail with this central question, I wish to refer to an issue raised by counsel for Honsberger in reliance on s. 67(b) of The Liquor Licence Act. If the judgments below stand so far as the hotel's liability is concerned, Honsberger would have the benefit of the Ontario Negligence Act in respect of any claim over against the hotel for the damages assessed against both defendants. But on the assumption that the hotel is exonerated here, the submission on behalf of Honsberger is that the unappealed affirmation of the judgment against him amounts to 'injury or damage to the ... property' of Honsberger, within s. 67(b), and thus entitles him to recover from the hotel the amount for which he has been held liable to Menow. The Court did not require counsel for the hotel to respond to this submission. It was of the opinion that s. 67(b) cannot be so interpreted. That provision does not entitle a blameworthy defendant to cast himself in the role of a plaintiff claiming not for damage suffered by it but rather for that suffered by the intoxicated person and for which it is in part responsible. This is entirely apart from the attempt to read the word 'property' in a sense which is entirely foreign to its ordinary meaning as well as to the context in which it is used in s. 67(b).

(emphasis added.)

- Although the facts in the instant case are much more sympathetic to the appellants than the facts upon which Honsberger sought to rely in seeking to establish a claim under the then s. 67(b) of the Liquor Licence Act, to interpret the word "property" in s. 109 of the Insurance Act to cover the present claim would be, in the words of Laskin J., "an attempt to read the word 'property' in a sense which is entirely foreign to its ordinary meaning as well as to the context in which it is used. ..."
- Originally, s. 109 applied to all types of insurance. As a result of a series of cases in the 1920s and early 1930s, its deficiencies with respect to automobile accident victims became apparent. As a result, the Insurance Act was amended in 1932 and 1935 (found in the 1937 Consolidation: c. 256, s. 205) to make special provision for third-party rights in such cases by permitting a person not a party to the contract of insurance who had a claim against the insured, by virtue of an accident caused by one driving the insured's automobile with his permission, to claim against the insurer. This is now embodied in detail in ss. 209 and 226 of the Insurance Act which also allows for an insurer who denies liability to be made a third party to any action in which a claim is made against the insured (ss. 226(14) and (15)).
- The only authority to which we were referred that appears to have some resemblance to the case under

review is Kallos v. Sask. Govt. Ins., [1984] 2 W.W.R. 183, 30 Sask. R. 185 (sub nom. Junet v. Sask. Govt. Ins.), 3 C.C.L.I. 65, 4 D.L.R. (4th) 34, [1984] I.L.R. 1-1740, a recent judgment of the Saskatchewan Queen's Bench. In that case, a solicitor negligently failed to commence a motor-vehicle accident claim within the limitation period. The plaintiffs (clients) obtained a judgment against the solicitor. The learned trial Judge concluded that there was no reason for excluding claimants against an insurer pursuant to a solicitor's professional liability policy from the operation of s. 122 of the Saskatchewan [Insurance] Act, R.S.S. 1978, c. S-266, which is similar to s. 109 of our Insurance Act. He was of the view that, because s. 101 of the Saskatchewan Insurance Act (which is identical in its relevant parts to s. 99 of the Ontario Act) makes s. 122 applicable to every contract of insurance made in Saskatchewan, it therefore applied to solicitors' professional liability insurance. In considering the trial decision in the instant case, he felt that this argument had not been made before Holland J. and he refused to follow it, being of the view that there was no necessity for the clients to establish a causal connection between the act or omission of the solicitor and the damage or injury to persons or property.

We were advised that the successful argument made in Kallos was indeed made to the trial Judge in the instant case. In my view, no matter how sympathetic one may be to the appellants' position, it would be a distortion of the language, and the legislative and judicial history of s. 109, and of the definition of the word "property" found in the Act, to allow claimants in the position of the appellants to recover against the insurer without any procedural protection or rights afforded to the insurer. As previously stated, this problem was recognized and addressed with regard to third-party claims of motor-vehicle accident victims in the circumstances recited, and the Act was amended accordingly. Section 109, in its present form, does not allow the appellants to succeed in their claim against the insurer, and the first question must be answered in the negative.

Section 106 of the Insurance Act

- Having come to the same conclusion as the Motions Court Judge on the first question, it is not necessary to deal with the second and third questions posed. However, like the Motions Court Judge, I think it would be helpful to the parties and the profession to express my views on those questions, particularly on question three.
- As stated, counsel for the appellant conceded that question two had to be answered in the affirmative. He agreed that the solicitor, by his breach of the policy conditions, had forfeited his right to be indemnified with respect to the judgment against him. However, Mr. Webb, on behalf of the appellants, argued that this forfeiture by the solicitor did not bar the appellants' right to claim relief from forfeiture under s. 103 (now s. 106) of the Insurance Act. Section 106 reads:
 - 106. Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just.
- Section 109 makes any action against the insurer by a third party "subject to the same equities as the insurer would have if the judgment had been satisfied".
- From the Agreed Statement of Facts, the appellants did their best to make the insurers aware of the potential claim against their insured. The appellants' position is that, had the insurers chosen to do so, they could have intervened and had themselves added as third parties. But there is, at present, no rule or Act that permits the insurer in such situations to be added as of right. Mr. Webb did not argue that in all cases the conduct of the

lawyer in breach of the policy conditions would not prejudice the insurer, but submitted that there had to be, in each case, an assessment of the prejudice without laying down a general rule. In this connection, he pointed out that the Motions Court Judge had stated:

The insurer knew all about this claim and there is really little, if any, prejudice to the insurer by reason of not being advised of the claim by the insured and by the failure of the insured to cooperate.

- However, it is uncontested that this was a flagrant case of the flouting of the conditions of the policy by the solicitor. His ignoring of the claim and his failure to advise his insurers of the claim and to cooperate with them was, apparently, deliberate. There is nothing in the agreed facts that would justify granting relief from forfeiture to the solicitor. In Kallos, supra, the trial Judge held that the solicitor had not been in breach of any condition of the policy. He had given notice of the claim against him and offered to cooperate with the defendant insurer.
- I agree with the Motions Court Judge that the claimants here "stand in the shoes" of the insured solicitor and s. 109 makes their action "subject to the same equities" as the insurer would have against the insured if the judgment had been satisfied by the insured and a claim then made under the policy by the insured. The appellants sought to rely on Markus v. West. Union Ins. Co. (1964), 48 W.W.R. 428, 46 D.L.R. (2d) 193 at 201 (Alta. C.A.). But Smith C.J.A., speaking for the Court, made the position plain:

It was contended by the appellant that (a) there is not power in the Court to relieve from forfeiture in favour of a third party and (b) that in respect of the two alleged breaches of statutory condition by Nagy there was no compliance by him, that it is only in case of 'imperfect compliance' that relief can be granted, and that consequently there is no power in the Court to grant the respondent relief under s. 287.

The answer to the first of these two arguments, in my view, consists of statements of Kerwin, C.J.C., and Tritschler, J.A., in the Erickson case already quoted by me. In my view it is quite clear from that decision that the power to relieve from the forfeiture in favour of the third party is co-extensive with the power to relieve in favour of the insured. In the case at bar I am satisfied that the power to relieve could and would be exercised in favour of the insured if he were a party to this action.

(emphasis added.)

- Nor do I find Findlay v. Madill, 28 O.R. (2d) 673, 111 D.L.R. (3d) 180, [1980] I.L.R. 1-1181 (H.C.) [varied 32 O.R. (2d) 413, [1981] I.L.R. 1-1466, 123 D.L.R. (3d) 765n (C.A.)], referred to by counsel for the appellants, helpful in the context of this case. That was a claim under what is now s. 226 of the Insurance Act and different considerations applied. Under the Act, the insurer had the right to defend, but exercised its option not to and the Court held it had not suffered prejudice. The Insurance Act makes it clear that in motor-vehicle accident claims the third party is not prejudiced in his claim to the insurance money by any act or default of the insured (s. 226(4)(b)).
- Mr. Webb concedes that the onus is on the appellants to persuade the Court, if he is first able to persuade us that his clients are in a better position under s. 106 than is the solicitor, that there was no prejudice to the insurer. But, even accepting that the appellants are in a better position than the insured under s. 106, I am not persuaded that it can be said that there was no prejudice caused the insurer by the solicitor's failure to defend and to cooperate with the insurer. For one thing, on the face of the agreed facts, it appears that the judgment might, if defended, have been limited to some \$19,000, the money available after satisfying the claims of the first mort-

gagee, rather than the \$40,000 awarded.

In holding that the appellants stepped "into the shoes" of the insured solicitor, the Motions Court Judge was of the view, as noted earlier, that he was bound by the following statement of principle made by Schroeder J.A. in Frederick v. Aviation & Gen. Ins., supra, at p. 359:

The effect of the section quoted is to place the plaintiffs in the shoes of the insured Ottawa Aero Services Ltd., and it operates as a statutory assignment of the benefits of the insurance policy in their favour. They have no higher rights under the policy than the insured would have, and their right of recovery is subject to all the equities existing between the insurer and the insured. The defendant denies liability to the plaintiffs upon the ground that Ottawa Aero Services Ltd. committed breaches of the policy conditions which disentitled it to indemnity thereunder.

- Coursel for the appellants, in their Statement (although not in their oral submissions), argued that the Court in Frederick might have stated the law differently had the present s. 106 then been in force. However, when that case was decided, there was a provision for relief from forfeiture in the Act substantially the same as the present s. 106 and it cannot be distinguished on that basis.
- To grant relief from forfeiture to a person not a party to the contract, when the insured could not be granted such relief, is, in effect, to remove any consideration of the equities between insured and insurer in the issue. Under such an interpretation and application of s. 106, the words "but subject to the same equities as the insurer would have" found in s. 109 can have no effect or meaning. I can see no reason to differ from Schroeder J.A.'s statement of principle, supra, and the third question must be answered in the negative.
- On the facts of this case, the result is an unhappy one. It seems also to run counter to one of the purposes for the insistence by the Law Society of Upper Canada that its members assume this insurance as a condition of being licensed to practise. Surely one of the main reasons for such a condition was to ensure that members of the public, in the situation of the appellants, would be protected from loss caused by the negligent action or inaction of their solicitors. As noted during the course of the argument by my brother Arnup, it seems that the more negligent the solicitor is in carrying out his obligations to the insurer under the insurance contract (which could be, as in the instant case, merely an extension of the negligent manner in which he carries out his professional obligations generally), the less possibility there is for the client to recover moneys payable under the insurance contract.
- To deal with such situations as the present, it might be possible for the Law Society to be named in the policy, for the purpose of such claims, a partner of each practising solicitor. Its liability being limited to the amount of the cover in this way, it could be sued directly, with the solicitor, could advise the insurer of the claim, ensure the co-operation of the solicitor and, at the same time, ensure the fulfillment of one of the purposes of the compulsory insurance. Alternatively, the Legislature could amend the legislation, as it did for automobile accident victims, so that third parties will be enabled to claim against insurers regardless of the acts or defaults of the insured, subject to protection to the insurer similar to that afforded by the present s. 226 to motor vehicle liability insurers.
- The situation revealed by this claim cannot be unique, and it is to be hoped that a prompt solution is provided by legislation or otherwise.
- Mr. O'Brien advised the Court that his client would not be asking for costs, and the appeal is dismissed

without costs.

Houlden J.A. (concurring in part):

- I agree with MacKinnon A.C.J.O.'s interpretation of s. 106 of the Insurance Act, R.S.O. 1980, c. 218, and with his conclusion that this is not a proper case to grant relief from forfeiture. I do not, however, agree with his interpretation of s. 109(1) of the Insurance Act. Although the appeal must be dismissed, I would like to state briefly my views on the interpretation of the section.
- At common law, an injured party had no cause of action against an insurer for damages awarded to him against an insured. The right of the insured to be indemnified by his insurer was personal to the insured, and there was no privity between the injured person and the insurer: MacGillivray & Parkington on Insurance Law, (6th ed., 1975), pp. 934-35, paras. 2246-48.
- In 1924 a section was added to the Ontario Insurance Act to remedy this situation. Section 80 of the Insurance Act, S.O. 1924, c. 50 provided:
 - 80. In any case in which a person insured against liability for injury or damage to persons or property of others has failed to satisfy a judgment obtained by a claimant for such injury or damage and an execution against the insured in respect thereof is returned unsatisfied, such execution creditor shall have a right of action against the insurer to recover an amount not exceeding the face amount of the policy or the amount of the judgment in the same manner and subject to the same equities as the insured would have if the said judgment had been satisfied.

To take advantage of the remedy provided by s. 80, the injured party had to obtain judgment against the insured, issue execution and obtain a nulla bona return before he could take proceedings directly against the insurer.

- Section 80 and its successor sections applied to motor vehicle accident cases: see, for example, Continental Casualty Co. v. Yorke, [1930] S.C.R. 180, [1930] 1 D.L.R. 609, and Meretzky v. Can. Surety Co. (1932), 41 O.W.N. 156 (C.A.). In 1931, the section was amended to its present wording, and subs. (2), which provides that the section does not apply to motor vehicle liability policies, was added to the section: see the Insurance Act, S.O. 1931, c. 49, s. 7.
- The deletion of motor vehicle liability policies from the section resulted from the decision of the Privy Council in Vandepitte v. Preferred Accident Ins. Corp. of New York, [1933] A.C. 70. In that case, the Court was concerned with s. 24 of the Insurance Act, S.B.C. 1925, c. 20 which was identical in wording with s. 109(1) of the Insurance Act. The Privy Council held, affirming the judgment of the Supreme Court of Canada, [1932] S.C.R. 22, [1932] 3 W.W.R. 573, [1933] 1 D.L.R. 289, that s. 24 afforded no remedy to a person injured by an automobile driven by someone other than the insured, even though the driver was operating the vehicle with the permission of the insured. By ss. 183(a) and (h) of the (Automobile) Insurance Act, S.O. 1932, c. 25, this defect in the law was remedied: see article by W.D. Griffiths, "Automobile Insurance Part III," in [1962] Special Lectures L.S.U.C. 57, Claims Under Insurance Policies. In 1935, the Insurance Amendment Act, S.O. 1935, c. 29, s. 35, permitted an insurer which denied liability under a motor vehicle policy to have itself added as a third party so that it could protect its interests when the main action was being tried: see article by Griffiths, op. cit., pp. 72-75. The present sections of the Insurance Act dealing with motor vehicle liability policies are ss. 209, 226, and 227. (For the differences between a claim under s. 109(1) and a claim under s. 226, see article by

George L. Mitchell, Q.C., "Rights of Unnamed Insureds and Third Parties", in [1962] Special Lectures L.S.U.C. 331 at 336-38.) Section 109 of the Insurance Act reads as follows:

- 109. (1) Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of his liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.
- (2) This section does not apply to motor vehicle liability policies.
- The issue is: Did Kopinak incur a liability for damage to the property of the plaintiffs within the meaning of s. 109(1) when he failed to register the second mortgage for them against the property in Waterloo?
- The plaintiffs suffered a substantial pecuniary loss as a result of Kopinak's negligence. In support of his contention that "property" in s. 109(1) includes such a loss, Mr. Reisler, who argued this portion of the appeal, relied on the definition of property in s. 1(54) of the Insurance Act, which is to this effect:

'property' includes profits, earnings and other pecuniary interests, and expenditure for rents, interest, taxes and other outgoings and charges and in respect of inability to occupy the insured premises, but only to the extent of express provision in the contract;

This definition was added to the Act by the Insurance Act, S.O. 1934, c. 22, s. 2. If the definition of "property" applies to "property" in s. 109(1), then the damage sustained by the plaintiffs comes within the section, since s. 1(54) states that "property" includes "other pecuniary interests".

Mr. O'Brien submitted, however, that s. 1(54) is only intended to apply to "property damage insurance" which is defined by s. 1(55) as follows:

'property damage insurance' means insurance against loss of or damage to property that is not included in or incidental to some other class of insurance defined by or under this Act;

While the Act is not as clear as it might be, I agree with MacKinnon A.C.J.O.'s analysis of s. 1(54) and with his conclusion that the subsection has no application to a policy of professional liability insurance.

- There appear to be only two cases in which Courts have interpreted the word "property" in s. 109(1) or equivalent sections: one in Ontario and one in Saskatchewan. The Ontario case is Crone v. Orion Ins. Co., [1965] 2 O.R. 431, 51 D.L.R. (2d) 27 (H.C.). In that case two individual plaintiffs and a corporate plaintiff sustained damage in an airplane crash. The three plaintiffs sued the owner of the airplane. When the owner did not defend the action, the plaintiffs obtained judgment and issued execution. The execution was returned unsatisfied. The three plaintiffs then took proceedings against the owner's insurer pursuant to what is now s. 109(1) of the Insurance Act (then s. 95(1) of the Insurance Act, R.S.O. 1960, c. 190).
- The claims of the individual plaintiffs were for bodily injuries, and they were allowed recovery from the insurer. The claim of the corporate plaintiff was, however, for loss of profits, and Stewart J., the trial Judge, held

that the claim did not fall within the section. At p. 433 [O.R.] of his judgment, the learned Judge disposed of the claim of the corporate plaintiff in these words:

Section 95 of the Insurance Act, R.S.O. 1960, c. 190, reads as follows:

95(1) Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of his liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

I am invited to read the section so as to mean 'liability for injury to another or damage to the person or property of another' so that the loss of business of the company might come under the head of 'injury to another' but I do not feel that this is the true sense of the section, believing that the liability must be injury to the person or property of another or damage to the person or property of another. No claim for damage to the property, such as cameras etc., of the company was made in the original action and it is obvious that there was no damage to the person of the corporation.

It is clear that Stewart J. was of the opinion that "damage to property" in the section meant "damage to physical property".

- An appeal was taken by the insurer in the Crone case to the Court of Appeal and to the Supreme Court of Canada, but as both these Courts were careful to point out, there was no cross-appeal by the corporate plaintiff: see Crone v. Orion Ins. Co., [1966] 1 O.R. 221 at 222, 53 D.L.R. (2d) 98 (C.A.) and Orion Ins. Co. v. Crone, [1967] S.C.R. 157 at 160, 60 D.L.R. (2d) 630, [1967] I.L.R. 1-179; Stewart J.'s interpretation of s. 109 was thus not considered by the Appellate Courts.
- The Saskatchewan case is Kallos v. Sask. Govt. Ins., [1984] 2 W.W.R. 183, 30 Sask. R. 185 (sub nom. Junet v. Sask. Govt. Ins.), 3 C.C.L.I. 65, 4 D.L.R. (4th) 34, [1984] I.L.R. 1-1740 (Q.B.). This involved s. 122(1) of the Saskatchewan Insurance Act, R.S.S. 1978, c. S-266, a section similar in wording to s. 80 of the Insurance Act, 1924. The plaintiffs had been injured in an automobile accident. They retained a solicitor to bring an action on their behalf against the party who caused their injuries. The solicitor failed to commence the action within the prescribed limitation period so that the plaintiffs' cause of action became statute barred. The plaintiffs sued the solicitor for negligence and recovered judgment. When they were unable to obtain payment from him, they brought action against the defendant's liability insurer. Maurice J. held that s. 122(1) of the Saskatchewan Act was wide enough to include the claim. Although I do not agree entirely with Maurice J.'s reasons for arriving at this conclusion, I do agree with his conclusion.
- Mr. O'Brien sought to distinguish the Kallos case on the ground that in that case, unlike the present one, there had been actual injury or damage to the person and property of the plaintiffs. With respect, I do not think that this distinction is a valid one. The solicitor was not responsible for the property damage and bodily injuries sustained by the plaintiffs; rather, he was responsible for the pecuniary loss suffered by the plaintiffs by reason of his failure to bring the action in the limitation period.
- In support of his contention that "property" in s. 109(1) means physical property and does not include pecuniary loss, Mr. O'Brien relied on the decision of Laskin J. in Jordan House Ltd. v. Menow, [1974] S.C.R. 239,

- 38 D.L.R. (3d) 105. In that case, the plaintiff Menow, on the evening in question, drank to excess in the hotel of the defendant Jordan House Ltd. At about 10 p.m., the plaintiff was ejected from the hotel by the defendant's employees who knew that the plaintiff was unable to take care of himself by reason of intoxication and that he would have to go home, probably by foot, by way of a main highway. On the way home, Menow was struck by the motor vehicle of the defendant Honsberger. The trial Judge apportioned liability equally between the plaintiff and the two defendants. The defendant Honsberger did not appeal the finding of negligence or the apportionment of one-third of the fault against him. The defendant hotel did appeal the finding of negligence against it.
- Section 67(b) of the Liquor Licence Act, R.S.O. 1960, c. 218 (now s. 53 of the Liquor Licence Act, R.S.O. 1980, c. 244) provides:
 - s. 67 Where any person or his servant or agent sells liquor to or for a person whose condition is such that the consumption of liquor would apparently intoxicate him or increase his intoxication so that he would be in danger of causing injury to his person or injury or damage to the person or property of others, if the person to or for whom the liquor is sold while so intoxicated,

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(b) causes injury or damage to the person or property of another person, such other person is entitled to recover an amount to compensate him for his injury or damage from the person who or whose servant or agent sold the liquor.

In the Supreme Court of Canada, the defendant Honsberger argued that if the defendant hotel was exonerated of liability by the Court, then the judgment against him constituted injury or damage to his property within s. 67(b), and this entitled him to recover from the defendant hotel the amount for which he had been held liable to the plaintiff.

Laskin J. in holding that s. 67(b) could not be so interpreted said, at pp. 246-47:

That provision does not entitle a blameworthy defendant to cast himself in the role of a plaintiff claiming not for damage suffered by it but rather for that suffered by the intoxicated person and for which it is in part responsible. This is entirely apart from the attempt to read the word 'property' in a sense which is entirely foreign to its ordinary meaning as well as to the context in which it is used in s. 67(b).

- Notwithstanding the similarity of wording in the two statutes, I do not regard the above statement as a binding authority on the meaning of "property" in s. 109(1) of the Insurance Act. The context in which the words are used in the two statutes is quite different. Furthermore, s. 67(b) of the Liquor Licence Act applies to the situation where an intoxicated person "causes injury or damage to the ... property of another person" whereas s. 109(1) applies where a person "incurs a liability for injury or damage to the ... property of another". (The emphasis is mine.) In any event, Laskin J. did not purport to give a comprehensive definition of the word "property".
- In Ontario, the Law Society has taken an active role with respect to professional liability insurance. It has entered into a policy with the defendant insurers which provides coverage for all lawyers practising in Ontario. The prime purpose of obtaining this coverage was, I believe, to protect members of the public who suf-

fer damage by acts or omissions of members of the Society in the performance of their professional duties. If s. 109(1) does not extend to solicitors' liability insurance, then part of that protection is, of course, lost.

55 "Property" has no fixed legal meaning. As Crossley Vaines' Personal Property (5th ed., 1973) points out at p. 3:

'Property' is a word of different meanings. It may mean a thing owned (my watch or my house is 'my property'); it may mean ownership itself as when I speak of my 'property' in my watch which may pass to the person to whom I sell the watch before I actually hand the watch over (the rules as to the 'passing of the property' in this sense are set out in the Sale of Goods Act, 1893 (a)); or it may even mean an interest in a thing less than ownership but nevertheless conferring certain rights, as when we speak of the 'property' or 'special property' of a bailee in the thing bailed. Bailment is explained in Chapter 6 and these different senses in which the word 'property' is used should emerge as our discussion proceeds. In English law, therefore, 'property' comprehends tangibles and intangibles, movables and immovables; it means a tangible thing (land or a chattel) itself, or rights in respect of that thing, or rights, such as a debt, in relation to which no tangible thing exists.

I would refer also to Hildon Hotel (1963) Ltd. v. Dom. Ins. Corp., 66 W.W.R. 289, 1 D.L.R. (3d) 214, [1969] I.L.R. 1-256 (B.C.S.C.), and Fun Seekers Int. Ltd. v. Can. Indemnity Co., [1976] I.L.R. 1-799, [1976] W.W.D. 153 (Alta. Q.B.) on the meaning of "property". If damage to property in s. 109(1) is restricted to damage to physical property, then a claim against an insurer pursuant to a solicitors' professional liability insurance policy would not be covered. If the draftsman uses an abstract word, such as "property", without defining it, I believe that the Court should give the word the meaning which best carries out the purpose and intent of the statute: s. 10 of the Interpretation Act, R.S.O. 1980, c. 219. Section 109(1), as I have pointed out, was intended to overcome the defect in the common law which prevented an injured party from taking action directly against an insurer for damage caused by an insured. The intention of the Legislature is, I believe, best achieved by giving a wide interpretation to the word "property".

I would not, therefore, restrict damage to property in s. 109(1) to damage to the physical property of a third party. Rather I would interpret it as being wide enough to include damage to the pecuniary interests of a third party. If property in s. 109(1) is given this interpretation, then the section is wide enough to include within its operation the claim of a client against a solicitor pursuant to a professional liability insurance policy.

Arnup J.A. (concurring):

- I have read the reasons prepared by MacKinnon A.C.J.O. and by Houlden J.A. I agree with them that this appeal must be dismissed.
- I agree with the conclusion of MacKinnon A.C.J.O., concurred in by Houlden J.A., that the appellants can be in no better position than the insured solicitor with respect to forfeiture for breach of conditions of the policy, and that as the Insurance Act, R.S.O. 1980, c. 218 now stands, the appellants are not entitled to relief from forfeiture because the solicitor himself would not have been so entitled.
- This is an unjust result. It makes no sense that the clients of a remorseful solicitor, who co-operated with the insurer and the new solicitors of his former clients, might in an appropriate case get relief from forfeiture,

whereas the clients of a callous solicitor, who first botched his clients' affairs and then refused to lend them the slightest assistance in their efforts to recoup some of their loss, should find themselves helpless to secure relief from the forfeiture of his insurance, caused by him.

- My brothers are in disagreement as to the answer to the first question formulated by the parties. In concise form that issue is: where a client has lost the \$40,000 he gave his solicitor to put into a second mortgage, is that loss "injury or damage to ... [the client's] property" within the meaning of subs. 109(1) of the Insurance Act? It would be very satisfying to be able to answer that question: "Yes". One might support the answer, superficially, by saying: "Of course the loss is 'damage to property'. The client's assets have decreased by \$40,000, and that loss was caused by the solicitor."
- This can only be the correct answer if it is founded on subs. 109(1) of the Act. I am persuaded by the reasons of MacKinnon A.C.J.O. that the interpretation of "property" in that subsection, reading the subsection as a whole and in context, cannot be extended to cover the plaintiffs' loss. With great respect to my brother Houlden, he has agreed with MacKinnon A.C.J.O. that the definition of "property" in clause 1(54) of the Act (so as to include "other pecuniary interests") does not apply to a policy of professional liability insurance, but has then gone on to hold that "property" includes "pecuniary interests" even without the definition clause. I do not agree, because I think the conclusion is not consonant with a reading of subs. 109(1) as a whole.
- Finally, I heartily endorse the view of MacKinnon A.C.J.O. that immediate action should be taken by the Law Society or the Legislature, or both, so that the present unfairness to innocent clients of insured solicitors can be ended.

Appeal dismissed.

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

ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORITIES OF THE AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S SECURITIES, INCLUDING THE REPRESENTATIVE PLAINTIFFS IN THE ONTARIO CLASS ACTION

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