Court of Appeal File No.: M42404
S.C.J. Court File No.: CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

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

Court of Appeal File No.: M42404
S.C.J. Court File No.: CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT and ROBERT WONG

Plaintiffs

- and -

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PÖYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Banc of America Securities LLC)

Defendants

Proceeding under the *Class Proceedings Act, 1992*

BOOK OF AUTHORITIES OF THE MOVING PARTIES (APPELLANTS), INVESCO CANADA LTD., NORTHWEST & ETHICAL INVESTMENTS L.P., COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC., MATRIX ASSET MANAGEMENT INC., GESTION FÉRIQUE AND MONTRUSCO BOLTON INVESTMENTS INC.

(Motion for Directions)

April 22, 2013

KIM ORR BARRISTERS P.C.
19 Mercer Street, 4th Floor
Toronto, Ontario
M5V 1H2

Michael C. Spencer (LSUC #59637F)
Won J. Kim (LSUC #32918H)
Megan B. McPhee (LSUC #48351G)

Tel: (416) 596-1414
Fax: (416) 598-0601

Lawyers for the Moving Parties, Invesco Canada Ltd., Northwest & Ethical Investments L.P., Comité Syndical National de Retraite Bâtirente Inc., Matrix Asset Management Inc., Gestion Férique and Montrusco Bolton Investments Inc.

TO: THE SERVICE LIST

INDEX

Index
Book of Authorities

Tab	Case
1.	*Air Canada (Re),* [2003] O.J. No. 2207 (C.A.)
2.	*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587
3.	*Chiarelli v. Weins*, [2000] O.J. No. 296 (C.A.)
4.	*Consbec Inc. v. Walker*, 2006 CarswellOnt 8154 (S.C.J.)
5.	*Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 3622 (C.A.)
6.	*DIRECTV Inc. v. Gillott*, 2007 CarswellOnt 883 (S.C.J.)
7.	*Dyna Corp. Jamaica Ltd. v. 967413 Ontario Ltd.*, 2000 CarswellOnt 227 (S.C.)
8.	*Flitney v. Howard*, [1985] O.R. 701 (C.A.)
9.	*Forestall v. Toronto Police Services Board,* 2007 CarswellOnt 254 (Div. Ct.)
10.	*Garland v. Consumers' Gas Co.,* 2004 SCC 25, [2004] 1 SCR 629
11.	*Issasi v. Rosenzweig*, 2011 ONCA 112
12.	*Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2013 ONSC 1078
13.	*Monteith v. Monteith*, 2010 ONCA 78
14.	*Smith v. Sino-Forest Corp.*, 2012 ONSC 24, [2012] O.J. No. 88
15.	*Stelco Inc., Re*, 2005 CarswellOnt 829, 195 O.A.C. 74 (C.A.)
16.	*Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2012 ONSC 5398

TAB 1

Case Name:

Air Canada (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF Section 191 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended
AND IN THE MATTER OF a Plan of compromise or arrangement of Air Canada and those subsidiaries listed on Schedule "A"
APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as amended

[2003] O.J. No. 2207

173 O.A.C. 154

123 A.C.W.S. (3d) 426

Docket Nos. M29922 and M29923

Ontario Court of **Appeal**
Toronto, Ontario

Laskin J.A.

Heard: June 3, 2003.
Judgment: June 4, 2003.

(19 paras.)

Practice -- Appeals -- Leave to appeal -- Application for -- Hearing of appeal -- Expediting -- Consolidation of leave motion and appeal on the merits.

Motion by Global Payments to expedite its motion for leave to appeal, and to consolidate the hearing of the leave motion with its appeal from the dismissal of its application under the Companies' Creditors Arrangement Act regarding the insolvency of Air Canada. For a fee, Global provided immediate payment to Air Canada for services purchased by customers on certain credit cards. If the customers cancelled the services before final sale, Air Canada was obliged to return the funds to Global. However, the judge below refused to provide Global security, under s. 11.3 of the Act, for

continued payments to Air Canada during its insolvency. Air Canada agreed that the leave motion could be expedited, but argued that it should be dealt with separately from the appeal on the merits.

HELD: Motion allowed in part. The leave motion was to be expedited. However, if leave were granted, Global did not stand to be prejudiced if the leave and appeal motions were separately heard. Air Canada had reached advantageous agreements with its unions, and Global's exposure to chargebacks against Air Canada was decreasing because of decreased use of Air Canada services. Further, Global did not allege material risk because of the order below.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, ss. 11.3, 13.

Appeal From:

On appeal from the order of Justice James Farley of the Superior Court of Justice, dated May 7, 2003.

Counsel:

Frank J.C. Newbould, Michael J. MacNaughton and Tanya Kozak for the moving parties, Global Payments Direct Inc. and Global Payments Canada Inc.
Peter Howard, for the responding party, Air Canada.
Peter Osborne, for the responding party, Ernest and Young (Monitor).
Jeremy Dacks, for the responding party, GE Capital.

LASKIN J.A.:--

A. INTRODUCTION

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

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

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

4 Under s. 13 of the CCAA, Global can appeal a dismissal to this court, but only with leave. Our rules require leave motions to be in writing. If leave is granted, the appeal is then heard orally.

Global, however, asks that the leave motion and the appeal be heard orally and as a single proceeding before the same panel and that the hearing be expedited.

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

B. BACKGROUND FACTS

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

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

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

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

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

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

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

C. DISCUSSION

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

(a) Jurisdiction

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

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

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

(b) Should the order be made?

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

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

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

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

(2) Every time Air Canada flies a plane Global's chargeback exposure for tickets purchased for that flight on Visa or MasterCard is eliminated. Therefore, because of the decreased volume of Air Canada's business, Global's exposure to chargebacks is decreasing, not increasing;

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

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

D. DISPOSITION

18 I make the following orders:

1. Global's motion for leave to appeal shall be expedited and heard in writing by a panel of this court, unless the panel orders otherwise. Counsel may speak to me this afternoon to fix a date for the hearing of the motion and for the filing of material;
2. If leave is granted, the hearing of the appeal shall be expedited. If a panel is available, the appeal shall be heard before the end of June;
3. I will case manage the proceedings and arrange for the necessary hearing dates; and
4. As agreed by counsel, whichever party is successful on the appeal shall be entitled to the costs of this motion. Neither the Monitor nor GE Capital are asking for costs.

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

LASKIN J.A.

cp/e/nc/qw/qlgkw

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

TAB 2

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO (Applicants / Respondents in Appeal) and METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO (Respondents / Respondents in Appeal) and AIR TRANSAT A.T. INC., TRANSAT TOURS CANADA INC., THE JEAN COUTU GROUP (PJC) INC., AÉROPORTS DE MONTRÉAL INC., AÉROPORTS DE MONTRÉAL CAPITAL INC., POMERLEAU ONTARIO INC., POMERLEAU INC., LABOPHARM INC., DOMTAR INC., DOMTAR PULP AND PAPER PRODUCTS INC., GIRO INC., VÊTEMENTS DE SPORTS R.G.R. INC., 131519 CANADA INC., AIR JAZZ LP, PETRIFOND FOUNDATION COMPANY LIMITED, PETRIFOND FOUNDATION MIDWEST LIMITED, SERVICES HYPOTHÉCAIRES LA PATRIMONIALE INC., TECSYS INC. SOCIÉTÉ GÉNÉRALE DE FINANCEMENT DU QUÉBEC, VIBROSYSTM INC., INTERQUISA CANADA L.P., REDCORP VENTURES LTD., JURA ENERGY CORPORATION, IVANHOE MINES LTD., WEBTECH WIRELESS INC., WYNN CAPITAL CORPORATION INC., HY BLOOM INC., CARDACIAN MORTGAGE SERVICES, INC., WEST ENERGY LTD., SABRE ENERTY LTD., PETROLIFERA PETROLEUM LTD., VAQUERO RESOURCES LTD. and STANDARD ENERGY INC. (Respondents / Appellants)

Ontario Court of Appeal

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

J.I. Laskin, E.A. Cronk, R.A. Blair JJ.A.

Heard: June 25-26, 2008
Judgment: August 18, 2008[FN*]
Docket: CA C48969

Proceedings: affirming *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List])

Counsel: Benjamin Zarnett, Frederick L. Myers for Pan-Canadian Investors Committee

Aubrey E. Kauffman, Stuart Brotman for 4446372 Canada Inc., 6932819 Canada Inc.

Peter F.C. Howard, Samaneh Hosseini for Bank of America N.A., Citibank N.A., Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity, Deutsche Bank AG, HSBC Bank Canada, HSBC Bank USA, National Association, Merrill Lynch International, Merill Lynch Capital Services, Inc., Swiss Re Financial Products Corporation, UBS AG

Kenneth T. Rosenberg, Lily Harmer, Max Starnino for Jura Energy Corporation, Redcorp Ventures Ltd.

Craig J. Hill, Sam P. Rappos for Monitors (ABCP Appeals)

Jeffrey C. Carhart, Joseph Marin for Ad Hoc Committee, Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor

Mario J. Forte for Caisse de Dépôt et Placement du Québec

John B. Laskin for National Bank Financial Inc., National Bank of Canada

Thomas McRae, Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)

Howard Shapray, Q.C., Stephen Fitterman for Ivanhoe Mines Ltd.

Kevin P. McElcheran, Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia, T.D. Bank

Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada, BNY Trust Company of Canada, as Indenture Trustees

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

Usman Sheikh for Coventree Capital Inc.

Allan Sternberg, Sam R. Sasso for Brookfield Asset Management and Partners Ltd., Hy Bloom Inc., Cardacian Mortgage Services Inc.

Neil C. Saxe for Dominion Bond Rating Service

James A. Woods, Sebastien Richemont, Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc., Jazz Air LP

Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.

R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Subject: Insolvency; Civil Practice and Procedure

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

Releases — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — CCAA permits inclusion of third party releases in plan of compromise or arrangement to be sanctioned by court where those releases were reasonably connected to proposed restructuring — It is implicit in language of CCAA that court has authority to sanction plans incorporating third-party releases that are reasonably related to proposed restructuring — CCAA is supporting framework for resolution of corporate insolvencies in public interest — Parties are entitled to put anything in Plan that could lawfully be incorporated into any contract — Plan of compromise or arrangement may propose that creditors agree to compromise claims against debtor and to release third parties, just as any debtor and creditor might agree to such terms in contract between them — Once statutory mechanism regarding voter approval and court sanctioning has been complied with, plan becomes binding on all creditors.

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Miscellaneous cases

Leave to appeal — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — Criteria for granting leave to appeal in CCAA proceedings was met — Proposed appeal raised issues of considerable importance to restructuring proceedings under CCAA Canada-wide — These were serious and arguable grounds of appeal and appeal would not unduly delay progress of proceedings.

Cases considered by *R.A. Blair J.A.*:

Air Canada, Re (2004), 2004 CarswellOnt 1842, 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) — referred to

Anvil Range Mining Corp., Re (1998), 1998 CarswellOnt 5319, 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]) — referred to

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

Canadian Airlines Corp., Re (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — 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]) — 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

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — referred to

Cineplex Odeon Corp., Re (2001), 2001 CarswellOnt 1258, 24 C.B.R. (4th) 201 (Ont. C.A.) — followed

Country Style Food Services Inc., Re (2002), 158 O.A.C. 30, 2002 CarswellOnt 1038 (Ont. C.A. [In Chambers])

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

— followed

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — considered

Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd. (1976), 1976 CarswellQue 32, [1978] 1 S.C.R. 230, 26 C.B.R. (N.S.) 84, 75 D.L.R. (3d) 63, (sub nom. *Employers' Liability Assurance Corp. v. Ideal Petroleum (1969) Ltd.)* 14 N.R. 503, 1976 CarswellQue 25 (S.C.C.) — referred to

Fotinis Restaurant Corp. v. White Spot Ltd. (1998), 1998 CarswellBC 543, 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) — referred to

Guardian Assurance Co., Re (1917), [1917] 1 Ch. 431 (Eng. C.A.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — considered

Muscletech Research & Development Inc., Re (2006), 25 C.B.R. (5th) 231, 2006 CarswellOnt 6230 (Ont. S.C.J.) — considered

NBD Bank, Canada v. Dofasco Inc. (1999), 1999 CarswellOnt 4077, 1 B.L.R. (3d) 1, 181 D.L.R. (4th) 37, 46 O.R. (3d) 514, 47 C.C.L.T. (2d) 213, 127 O.A.C. 338, 15 C.B.R. (4th) 67 (Ont. C.A.) — distinguished

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1990 CarswellOnt 139, 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282 (Ont. C.A.) — 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, 1993 CarswellOnt 182 (Ont. Gen. Div.) — referred to

Pacific Coastal Airlines Ltd. v. Air Canada (2001), 2001 BCSC 1721, 2001 CarswellBC 2943, 19 B.L.R. (3d) 286 (B.C. S.C.) — distinguished

Quebec (Attorney General) v. Bélanger (Trustee of) (1928), 1928 CarswellNat 47, [1928] A.C. 187, [1928] 1 W.W.R. 534, [1928] 1 D.L.R. 945, (sub nom. *Quebec (Attorney General) v. Larue)* 8 C.B.R. 579 (Canada P.C.) — referred to

Ravelston Corp., Re (2007), 2007 CarswellOnt 2114, 2007 ONCA 268, 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]) — referred to

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

Reference re Companies' Creditors Arrangement Act (Canada) (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat 1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) — considered

Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces (1933), [1934] 1 D.L.R. 43, 1933 CarswellNat 47, [1933] S.C.R. 616 (S.C.C.) — referred to

Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces (1935), [1935] 1 W.W.R. 607, [1935] 2 D.L.R. 1, 1935 CarswellNat 2, [1935] A.C. 184 (Canada P.C.) — considered

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

Royal Penfield Inc., Re (2003), 44 C.B.R. (4th) 302, [2003] R.J.Q. 2157, 2003 CarswellQue 1711, [2003] G.S.T.C. 195 (Que. S.C.) — referred to

Skydome Corp., Re (1998), 1998 CarswellOnt 5914, 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]) — referred to

Society of Composers, Authors & Music Publishers of Canada v. Armitage (2000), 2000 CarswellOnt 4120, 20 C.B.R. (4th) 160, 50 O.R. (3d) 688, 137 O.A.C. 74 (Ont. C.A.) — referred to

Steinberg Inc. c. Michaud (1993), [1993] R.J.Q. 1684, 55 Q.A.C. 298, 1993 CarswellQue 229, 1993 CarswellQue 2055, 42 C.B.R. (5th) 1 (Que. C.A.) — referred to

Stelco Inc., Re (2005), 2005 CarswellOnt 6483, 15 C.B.R. (5th) 297 (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.) — considered

Stelco Inc., Re (2006), 210 O.A.C. 129, 2006 CarswellOnt 3050, 21 C.B.R. (5th) 157 (Ont. C.A.) — referred to

T&N Ltd., Re (2006), [2007] Bus. L.R. 1411, [2007] 1 All E.R. 851, [2006] Lloyd's Rep. I.R. 817, [2007] 1 B.C.L.C. 563, [2006] B.P.I.R. 1283 (Eng. Ch. Div.) — considered

Statutes considered:

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

Generally — referred to

Business Corporations Act, R.S.O. 1990, c. B.16

s. 182 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 192 — referred to

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

en général — referred to

Companies Act, 1985, c. 6

s. 425 — referred to

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

Generally — referred to

s. 4 — considered

s. 5.1 [en. 1997, c. 12, s. 122] — considered

s. 6 — considered

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91 ¶ 21 — referred to

s. 92 — referred to

s. 92 ¶ 13 — referred to

Words and phrases considered:

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

arrangement

"Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor.

APPEAL by opponents of creditor-initiated plan from judgment reported at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74 (Ont. S.C.J. [Commercial List]), granting application for approval of plan.

***R.A. Blair J.A.*:**

A. Introduction

1 In August 2007 a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of wide-spread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

2 By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

3 Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to Appeal

4 Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument we encouraged counsel to combine their submissions on both matters.

5 The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and — given the expedited time-table — the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

CCAA proceedings, set out in such cases as *Cineplex Odeon Corp., Re* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.), and *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30 (Ont. C.A. [In Chambers]), are met. I would grant leave to appeal.

Appeal

6 For the reasons that follow, however, I would dismiss the appeal.

B. Facts

The Parties

7 The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer, and several holding companies and energy companies.

8 Each of the appellants has large sums invested in ABCP — in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants — slightly over $1 billion — represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

9 The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies, and some smaller holders of ABCP product. They participated in the market in a number of different ways.

The ABCP Market

10 Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment — usually 30 to 90 days — typically with a low interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

11 ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

12 The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this pro-

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

ceeding relates to approximately $32 billion of non-bank sponsored ABCP the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

13 As I understand it, prior to August 2007 when it was frozen, the ABCP market worked as follows.

14 Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

15 The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

16 When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The Liquidity Crisis

17 The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

18 When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

19 The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes — partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

maturing ABCP Notes.

The Montreal Protocol

20 The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze — the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement — known as the Montréal Protocol — the parties committed to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

21 The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation, and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

22 Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

23 Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible, and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

The Plan

a) Plan Overview

24 Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution." The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper — which has been frozen and therefore effectively worthless for many months — into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

25 The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

the maturity provisions and interest rates on the new notes. Further, the Plan adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

26 Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

27 The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1-million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be designed to secure votes in favour of the Plan by various Noteholders, and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

b) The Releases

28 This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in Article 10.

29 The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers, and other market participants — in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" — from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest, and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

30 The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

31 The releases, in effect, are part of a *quid pro quo*. Generally speaking, they are designed to compensate various participants in the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

> a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;

b) Sponsors — who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information — give up their existing contracts;

c) The Canadian banks provide below-cost financing for the margin funding facility and,

d) Other parties make other contributions under the Plan.

32 According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation."

The CCAA Proceedings to Date

33 On March 17, 2008 the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25th. The vote was overwhelmingly in support of the Plan — 96% of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the Monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Recalculated on this basis the results remained firmly in favour of the proposed Plan — 99% of those connected with the development of the Plan voted positively, as did 80% of those Noteholders who had not been involved in its formulation.

34 The vote thus provided the Plan with the "double majority" approval — a majority of creditors representing two-thirds in value of the claims — required under s. 6 of the CCAA.

35 Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

36 The result of this renegotiation was a "fraud carve-out" — an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

37 A second sanction hearing — this time involving the amended Plan (with the fraud carve-out) — was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

38 The appellants attack both of these determinations.

C. Law and Analysis

39 There are two principal questions for determination on this appeal:

1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?

2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?

(1) Legal Authority for the Releases

40 The standard of review on this first issue — whether, as a matter of law, a CCAA plan may contain third-party releases — is correctness.

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company.[FN1] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

a) on a proper interpretation, the CCAA does not permit such releases;

b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;

c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;

d) the releases are invalid under Quebec rules of public order; and because

e) the prevailing jurisprudence supports these conclusions.

42 I would not give effect to any of these submissions.

Interpretation, "Gap Filling" and Inherent Jurisdiction

43 On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on *all* creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]). As Farley J. noted in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), at 111, "[t]he history of CCAA law has been an evolution of judicial interpretation."

45 Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

46 These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"[FN2] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools — statutory interpretation, gap-filling, discretion and inherent jurisdiction — it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

47 The Supreme Court of Canada has affirmed generally — and in the insolvency context particularly — that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26.

48 More broadly, I believe that the proper approach to the judicial interpretation and application of statutes — particularly those like the CCAA that are skeletal in nature — is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

49 I adopt these principles.

50 The remedial purpose of the CCAA — as its title affirms — is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 318, Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

> Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

51 The CCAA was enacted in 1933 and was necessary — as the then Secretary of State noted in introducing the

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

Bill on First Reading — "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.), *per* Doherty J.A. in dissent; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]); *Anvil Range Mining Corp., Re* (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]).

52 In this respect, I agree with the following statement of Doherty J.A. in *Elan, supra*, at pp. 306-307:

> . . . [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".[FN3] Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest*. [Emphasis added.]

Application of the Principles of Interpretation

53 An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

54 The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

55 This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP *Dealers*, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as *Asset Providers* and *Liquidity Providers*, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore — as the application judge found — in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and ... providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark at para. 50 that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The res-

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

> toration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

56 The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper ..." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor and creditors. His focus was on *the effect* of the restructuring, a perfectly permissible perspective, given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal."

57 I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The Statutory Wording

58 Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

> a) the skeletal nature of the CCAA;
>
> b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in
>
> c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

59 Sections 4 and 6 of the CCAA state:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> 6. Where a majority in number representing two-thirds 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 bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or Arrangement

60 While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N§10. It has been said to be "a very wide and indefinite [word]": *Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces*, [1935] A.C. 184 (Canada P.C.) at 197, affirming S.C.C. [1933] S.C.R. 616 (S.C.C.). See also, *Guardian Assurance Co., Re*, [1917] 1 Ch. 431 (Eng. C.A.) at 448, 450; *T&N Ltd., Re* (2006), [2007] 1 All E.R. 851 (Eng. Ch. Div.).

61 The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

62 A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employ-*

ers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., [1978] 1 S.C.R. 230 (S.C.C.) at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (Ont. C.A.) at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) at para. 6; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at 518.

63 There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan — including the provision for releases — becomes binding on all creditors (including the dissenting minority).

64 *T&N Ltd., Re*, *supra*, is instructive in this regard. It is a rare example of a court focussing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. *Companies Act 1985*, a provision virtually identical to the scheme of the CCAA — including the concepts of compromise or arrangement.[FN4]

65 T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

66 Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence — cited earlier in these reasons — to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example.[FN5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

> In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.* [Emphasis added.]

67 I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial third parties are making to the ABCP restructuring. The situations are quite comparable.

The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind *all* creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes[FN6] *and* obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The Required Nexus

69 In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70 The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

71 In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

a) The parties to be released are necessary and essential to the restructuring of the debtor;

b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it*;

c) The Plan cannot succeed without the releases;

d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan*; and

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72 Here, then — as was the case in *T&N* — there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

> [76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> [77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

73 I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The Jurisprudence

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Canadian Airlines Corp., Re* (2000), 265 A.R. 201 (Alta. Q.B.), leave to appeal

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

refused by (2000), 266 A.R. 131 (Alta. C.A. [In Chambers]), and (2001), 293 A.R. 351 (note) (S.C.C.). In *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

75 We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Canadian Airlines Corp., Re*, however, the releases in those restructurings — including *Muscletech Research & Development Inc., Re* — were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

76 In *Canadian Airlines Corp., Re* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*,[FN7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument — dealt with later in these reasons — that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Steinberg Inc. c. Michaud, supra*; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C. S.C.); and *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg Inc.*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg Inc.* does not express a correct view of the law, and I decline to follow it.

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

80 In *Pacific Coastal Airlines Ltd.*, Tysoe J. made the following comment at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

81 This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

82 The facts in *Pacific Coastal Airlines Ltd.* are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian — at a contractual level — may have had some involvement with the particular dispute. Here, however, the disputes that are the subject-matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

83 Nor is the decision of this Court in the *NBD Bank, Canada* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process — in short, he was personally protected by the CCAA release.

84 Rosenberg J.A., writing for this Court, rejected this argument. The appellants here rely particularly upon his following observations at paras. 53-54:

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the *CCAA* is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

> 54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

85 Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third party releases was not under consideration at all. What the Court was determining in *NBD Bank, Canada* was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in *NBD Bank, Canada* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank, Canada* the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release — as is the situation here. Thus, *NBD Bank, Canada* is of little assistance in determining whether the court has authority to sanction a plan that calls for third party releases.

86 The appellants also rely upon the decision of this Court in *Stelco I*. There, the Court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an intercreditor agreement one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves *and not directly involving the company*. [Citations omitted; emphasis added.]

See *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) at para. 7.

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

87 This Court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the Court were quite different from those raised on this appeal.

88 Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Stelco Inc., Re* (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) (*"Stelco II"*). The Court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

> In [*Stelco I*] — the classification case — the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company ... [*H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process.* [Emphasis added.]

89 The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third party releases here are very closely connected to the ABCP restructuring process.

90 Some of the appellants — particularly those represented by Mr. Woods — rely heavily upon the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*, *supra*. They say that it is determinative of the release issue. In *Steinberg*, the Court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 — English translation):

> [42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> . . . . .
>
> [54] The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> . . . . .
>
> [58] The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

> other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

91 Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' *and Their Officers and Employees* Creditors Arrangement Act — an awful mess — and likely not attain its purpose, which is to enable the company to survive in the face of *its* creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

92 Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature — they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company — rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para. 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms *encompass all that should enable the person who has recourse to it to fully dispose of his debts*, both those that exist on the date when he has recourse to the statute and *those contingent on the insolvency in which he finds himself* ... [Emphasis added.]

93 The decision of the Court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself," however. On occasion such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg Inc.*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act — an approach inconsistent with the jurisprudence referred to above.

94 Finally, the majority in *Steinberg Inc.* seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this Court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases — as I have concluded it does — the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

95 Accordingly, to the extent *Steinberg Inc.* stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in *Steinberg Inc.* considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 Amendments

96 *Steinberg Inc.* led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> **Exception**
>
> (2) A provision for the compromise of claims against directors may not include claims that
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> **Powers of court**
>
> (3) 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.
>
> **Resignation or removal of directors**
>
> (4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.
>
> 1997, c. 12, s. 122.

97 Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

court to sanction a plan including third party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

98 The maxim is not helpful in these circumstances, however. The reality is that there *may* be another explanation why Parliament acted as it did. As one commentator has noted:[FN8]

> Far from being a rule, [the maxim *expressio unius*] is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg Inc.*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden & Morawetz, vol.1, *supra*, at 2-144, E§11A; *Royal Penfield Inc., Re*, [2003] R.J.Q. 2157 (Que. S.C.) at paras. 44-46.

100 Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The Deprivation of Proprietary Rights

101 Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights — including the right to bring an action — in the absence of a clear indication of legislative intention to that effect: *Halsbury's Laws of England*, 4th ed. reissue, vol. 44 (1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., *supra*, at 183; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning

in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The Division of Powers and Paramountcy

102 Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the *Constitution Act, 1867*, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the *Civil Code of Quebec*.

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.). As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Quebec (Attorney General) v. Bélanger (Trustee of)*, [1928] A.C. 187 (Canada P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

104 That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action — normally a matter of provincial concern — or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion With Respect to Legal Authority

105 For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "Fair and Reasonable"

106 The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

107 Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Ravelston Corp., Re* (2007), 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]).

108 I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties — including leading Canadian financial institutions — that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

109 The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

110 The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

111 The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd* (1998), 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings — the claims here all being untested allegations of fraud — and to include releases of such claims as part of that settlement.

112 The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

113 At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analy-

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

sis concerning the fairness and reasonableness of the Plan. The application judge found that:

> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> c) The Plan cannot succeed without the releases;
>
> d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
>
> f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
>
> g) The releases are fair and reasonable and not overly broad or offensive to public policy.

114 These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

115 The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they — as individual creditors — make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

116 All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

117 In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are

required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

118 Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of *all* Noteholders, not just the interests of the appellants, whose notes represent only about 3% of that total. That is what he did.

119 The application judge noted at para. 126 that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized at para. 134 that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

120 In my view we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. Disposition

121 For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

J.I. Laskin J.A.:

I agree.

E.A. Cronk J.A.:

I agree.

Schedule A — Conduits

Apollo Trust

Apsley Trust

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

Schedule B — Applicants

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

ATB Financial

Caisse de dépôt et placement du Québec

Canaccord Capital Corporation

Canada Mortgage and Housing Corporation

Canada Post Corporation

Credit Union Central Alberta Limited

Credit Union Central of BC

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank of Canada/National Bank Financial Inc.

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

Schedule A — Counsel

1) Benjamin Zarnett and Frederick L. Myers for the Pan-Canadian Investors Committee

2) Aubrey E. Kauffman and Stuart Brotman for 4446372 Canada Inc. and 6932819 Canada Inc.

3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG

4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.

5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals)

6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor

7) Mario J. Forte for Caisse de Dépôt et Placement du Québec

8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada

9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)

10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.

11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank

12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees

13) Usman Sheikh for Coventree Capital Inc.

14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.

15) Neil C. Saxe for Dominion Bond Rating Service

16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.

18) R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Application granted; appeal dismissed.

FN* Leave to appeal refused at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.).

FN1 Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

FN2 Justice Georgina R. Jackson and Dr. Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Vancouver: Thomson Carswell, 2007).

FN3 Citing Gibbs J.A. in *Chef Ready Foods*, *supra*, at pp.319-320.

FN4 The Legislative Debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the *Companies Act 1985* (U.K.): see *House of Commons Debates (Hansard)*, *supra*.

FN5 See *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 192; *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s. 182.

FN6 A majority in number representing two-thirds in value of the creditors (s. 6)

FN7 *Steinberg Inc.* was originally reported in French: *Steinberg Inc. c. Michaud*, [1993] R.J.Q. 1684 (Que. C.A.). All paragraph references to *Steinberg Inc.* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055 (Que. C.A.)

FN8 Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp.234-235, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

END OF DOCUMENT

2008 CarswellOnt 4811, 2008 ONCA 587, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 296 D.L.R. (4th) 135, 240 O.A.C. 245, 92 O.R. (3d) 513

TAB 3

Indexed as:

Chiarelli v. Weins

Between
Cathy Chiarelli and Francesco Chiarelli, appellants, and
Elisabeth Weins, respondent

[2000] O.J. No. 296

46 O.R. (3d) 780

129 O.A.C. 129

43 C.P.C. (4th) 19

2000 CanLII 3904

94 A.C.W.S. (3d) 850

No. C32602

Ontario Court of Appeal
Toronto, Ontario

Catzman, Laskin and Rosenberg JJ.A.

Heard: January 14, 2000.
Judgment: February 9, 2000.

(19 paras.)

On appeal from the judgment of the Divisional Court (O'Leary J. (dissenting), Rosenberg and Ferguson JJ.) dated April 21, 1999.

Counsel:

Janet E. Gross, for the appellants.
John B. Graham, for the respondent.

The judgment of the Court was delivered by

1 **LASKIN J.A.**:-- The general issue on this appeal is whether the majority of the Divisional Court erred in holding that the motions judge had improperly exercised his discretion in extending the time for service of the statement of claim. In my view, the Divisional Court did err. I would therefore allow the appeal and restore the order of the motions judge.

A. Background

2 The main facts giving rise to the motion were not disputed. The plaintiff Cathy Chiarelli was injured in a car accident in a parking lot on October 26, 1988. She suffered a very severe whiplash injury. Only the parties witnessed the accident. A police report was prepared but there were no independent witnesses. The day after the accident occurred, it was reported to the defendant's insurer State Farm. State Farm's claims adjuster promptly took a statement from Ms. Chiarelli and from the defendant, had the plaintiffs' car appraised, and obtained a copy of the police report. From Ms. Chiarelli's statement, State Farm learned that she complained of pain in her neck, shoulders and back.

3 The plaintiffs retained a lawyer soon after the accident and by the end of November 1988 he had put State Farm on notice of a claim. Meanwhile, Ms. Chiarelli's condition deteriorated. She experienced numbness in her right arm and was diagnosed with disc damage in her lower back. Between December 1988 and November 1992 the plaintiffs' lawyer forwarded medical information - including 12 medical reports - to State Farm as the information became available. State Farm paid for the medical reports and never once indicated to the plaintiffs' lawyer that it was disputing liability. Medical reports in 1988 and 1989, which State Farm received, showed that Ms. Chiarelli's injury was much more serious than had originally been thought. She was diagnosed as having a severe long term back injury with permanent partial disability.

4 The statement of claim was issued on October 24, 1990 within the two-year limitation period under the Highway Traffic Act.[1] The dollar amount of the claim was well within the defendant's policy limits. The plaintiffs' lawyer gave the claim to the sheriff to serve on the defendant. Until this time the lawyer's handling of the claim on behalf of his clients was commendable.

5 Unfortunately the sheriff could not locate the defendant to serve her. She lived in the country, outside Niagara-on-the-Lake, and the address shown on the police report and at the Ministry of Transportation did not include the number of the street on which she lived. The plaintiffs' lawyer sent a copy of the statement of claim to State Farm and asked if it would accept service. State Farm refused to do so, and indeed did not even offer to seek instructions from its insured to accept service.

6 The six-month period for serving the statement of claim expired on April 24, 1991, without the defendant having been served and without the plaintiffs' lawyer having moved to extend the time for service. In October 1991 State Farm wrote the plaintiffs' lawyer to say that its insured had not been served and that it assumed the claim had been abandoned. The plaintiffs' lawyer wrote back to say that he could not find the insured and that he would seek an order to extend the time for service unless State Farm admitted service. State Farm would not admit service and the lawyer never moved to extend the time. In his affidavit, which was uncontradicted, the lawyer, a sole practitioner, said that he succumbed to the pressure of work, that he became embarrassed and depressed by his

negligence, and that instead of bringing a motion he "froze." State Farm closed its file in February 1994.

7 The plaintiffs, unhappy with the delay, retained a new lawyer in the fall of 1996. The file was transferred in February 1997. The motion was launched in May 1997 and was served on the defendant (at her corrected address) in August 1997.

B. The decision of the motions judge to extend the time for service of the statement of claim

8 The motions judge, Taliano J. gave lengthy reasons for exercising his discretion to extend the time for service of the statement of claim. I am not persuaded that the motions judge made any reviewable error in the exercise of that discretion, despite the long delay from the date the time for service expired.

9 After referring to the applicable rules of civil procedure - rules 1.04, 2.01, 3.02 and 14.08(1)[2] - the motions judge correctly stated that, on a motion to extend the time for service, the court should be concerned mainly with the rights of litigants, not with the conduct of counsel. He then took into account that the defendant had notice of the claim, that the defendant's address was inadequate for service, that the plaintiffs moved reasonably promptly once they learned the claim had expired, and that until then they had no knowledge of their lawyer's negligence.

10 Finally, the motions judge turned to the issue of prejudice, the key issue on the motion. He recognized that the court should not extend the time for service if to do so would prejudice the defendant, and that the plaintiffs bore the onus to show that the defendant would not be prejudiced by an extension. The motions judge canvassed in detail all possible areas of prejudice caused by the delay, but one. He considered the unavailability of witnesses, the eroding memory of the available witnesses, the failure of the defence to conduct neighbourhood interviews or surveillance on Ms. Chiarelli, the failure of the defence to interview the police officer, the lost documents of the appraiser, the difficulties in dealing with Ms. Chiarelli's pre-existing injury, the missing records and documents, the allegedly inaccurate productions, and the fact of the "inordinate delay." He made findings on each of these areas of possible prejudice and concluded generally that the defendant would not be prejudiced by the admittedly very long delay.

11 The one area not addressed by the motions judge was the possible prejudice arising from a delayed defence medical. State Farm had requested an independent medical assessment of Ms. Chiarelli in July 1989, not, however, to be considered its defence medical. The plaintiffs' lawyer refused saying there was not yet enough medical information. State Farm never renewed its request. Still, the defence was entitled to a defence medical and is still entitled to one if the action proceeds.[3] However, I consider any prejudice caused by a delayed defence medical to be slight. Because the defence typically is only entitled to one medical examination of the plaintiff, usually that examination takes place shortly before the trial when the most up-to-date medical information has been obtained. Thus, even if the statement of claim had been served on time, the defence medical would likely still have taken place several years after the accident. The added years caused by the delay in service will not appreciably affect the defence's position, especially considering the voluminous medical information on Ms. Chiarelli now available to State Farm. Therefore, in my view, a delayed defence medical provides no basis for interfering with the motions judge's order.

C. The decision of the Divisional Court

12 On appeal the Divisional Court divided. O'Leary J., dissenting, would have dismissed the appeal largely for the reasons of Taliano J. supplemented by his own brief reasons. Rosenberg and Ferguson JJ. allowed the appeal. Ferguson J., who wrote the majority reasons, discussed at great length the caselaw under both the current rules for extending the time for service and under former Rule 8. In my view, although the wording of the former and current rules differs, the guiding principles remain the same. As Lacourcière J.A. said in Laurin v. Foldesi: "The basic consideration ... is whether the [extension of time for service] will advance the just resolution of the dispute, without prejudice or unfairness to the parties."[5] And, the plaintiff has the onus to prove that extending the time for service will not prejudice the defence.

13 Taliano J. applied these guiding principles in extending the time for service. Nonetheless, the majority of the Divisional Court concluded that Taliano J. committed four errors in principle. Having so concluded, the majority made its own determination of prejudice, and decided that the defence would be prejudiced by extending the time for service. In my view, Taliano J. did not commit any error in principle and thus the Divisional Court should not have made its own determination of prejudice. I will briefly address the four errors found by the Divisional Court.

(i) The Divisional Court found that the motions judge had reversed the burden of proof on prejudice by requiring the defence to show that it would be prejudiced by the delay in service. In support of this finding Ferguson J. referred to several passages from the motions judge's reasons, in which the motions judge noted the defence's inability to specify, for example, what witnesses might not be available to testify or what doctors could no longer be found. I do not consider that these passages reflect any shift of the burden of proof on prejudice.

14 I make three observations in response to the Divisional Court's finding. First, the passages from the reasons of the motions judge have to be considered in their context. The motions judge was obviously unimpressed, as am I, with the defence's assertion of prejudice. The only allegation of prejudice in the material filed by the defence on the motion is the following very general statement in the affidavit of State Farm's claims adjuster:

> It is my belief that the defence of this action has been seriously prejudiced due to the passage of time and the strong possibility that pre-accident and post-accident records and witnesses may not be available or that their recollections may not be accurate.

Although the onus remains on the plaintiffs to show that the defendant will not be prejudiced by an extension, in the face of such a general allegation, the plaintiffs cannot be expected to speculate on what witnesses or records might be relevant to the defence and then attempt to show that these witnesses and records are still available or that their unavailability will not cause prejudice. It seems to me that if the defence is seriously claiming that it will be prejudiced by an extension it has at least an evidentiary obligation to provide some details. The defence did not do that in this case.

15 Second, the defence cannot create prejudice by its failure to do something that it reasonably could have or ought to have done. For example, the defence cannot complain about the lost opportunity to interview the police officer or to conduct surveillance on Ms. Chiarelli or to obtain the no-fault insurer's file. If, as the defence now maintains, it is contesting liability, then it should have interviewed the police officer at the time and cannot blame its failure to do so on the plaintiffs' delay.

Similarly, the defence knew in 1989 that Ms. Chiarelli's injury was serious and if surveillance on her was appropriate, that surveillance should have been undertaken at the time. The defence also had all the particulars of the file maintained by Ms. Chiarelli's no-fault insurer and could have requested it at any time.

16 Third, prejudice that will defeat an extension of time for service must be caused by the delay. Prejudice to the defence that exists whether or not service is delayed ordinarily is not relevant on a motion to extend the time for service. In this case the defence complains that the police officer's notes have been destroyed. However, they were destroyed within two years of the accident under a local police policy. Thus, the notes would have been unavailable to the defence even if the statement of claim had been served on time.

(i) The Divisional Court found that the motions judge erred by "focusing on what the defendant's insurer could have done to preserve evidence rather than on what prejudice had probably been caused by the delay." Ferguson J. held that the insurer's investigation, including, for example, its decision not to conduct surveillance, was reasonable. I see no merit in this criticism of the motions judge's reasons by the Divisional Court. Even if the insurer's decision not to conduct surveillance was reasonable, as the motions judge pointed out, the insurer could have undertaken surveillance for several years after the accident. Its failure to do so when it knew Ms. Chiarelli's injury was serious was not caused by any delay in serving the statement of claim.

(ii) The Divisional Court found that the plaintiffs' lawyer "deliberately" did not move to extend the time for service after he realized the time had expired, and that the motions judge erred by giving no weight to this fact. Moreover, Ferguson J. relied heavily on the lawyer's "deliberate delay" when considering whether an extension should be granted. In my view, the Divisional Court's finding is unwarranted. There is no evidence to support a finding that the lawyer acted deliberately. His evidence, unchallenged by the defence, was simply that he "froze."

(iii) Finally, the Divisional Court found that the motions judge erred in "not considering the factors relating to the policy of repose." Although Ferguson J. stated that the court should not set a fixed time limit beyond which an extension should be refused, he nonetheless was "inclined to think it would not be appropriate to grant an extension if after the deadline for service expires, there is absolute silence for a period longer than the limitation period." The limitation period in this case is two years. Therefore, if Ferguson J.'s suggestion were followed the plaintiffs could not obtain an extension after April 1993. However, I see no rational basis for refusing to extend the time for service simply because the delay is longer than the applicable limitation period.

17 The court should not fix in advance rules or guidelines when an extension should be refused. Each case should be decided on its facts, focusing as the motions judge did in this case, on whether the defence is prejudiced by the delay. Undoubtedly the delay in this case - over six years from the expiry date for serving the claim - was significant, much longer than in most if not all of the decided cases where an extension has been granted. However, the motions judge recognized this delay and still found no prejudice. As I have already said, I am not persuaded that he erred in making that

finding. Thus, the motions judge did not err in principle by granting an extension though the length of the delay exceeded the two year limitation period under the Highway Traffic Act.

18 I therefore conclude that the majority of the Divisional Court was wrong in holding that Taliano J. erred in principle in exercising his discretion to extend the time for service. I add one final observation. In refusing to grant an extension, Ferguson J. found it "very significant" that the defendant herself never knew that a statement of claim had been issued. I would give no weight to this consideration. State Farm took a statement from its insured and then negotiated on her behalf with the plantiffs' lawyer for nearly three years. The plaintiffs cannot be held accountable if, for tactical reasons, State Farm chose not to tell its own insured that an action had been started, and refused to accept service of the statement of claim for her or even seek instructions from her to accept service.

D. Conclusion

19 I would allow the appeal, set aside the order of the Divisional Court and in its place dismiss the appeal from the order of Taliano J. The plaintiffs are entitled to their costs of the appeal in the Divisional Court and in this court, including the costs of the motion for leave to appeal.

cp/e/nc/qlrme/qlalm/qlced

1 R.S.O. 1990, c. H.8.

2 R.R.O. 1990, Reg. 194.

3 Courts of Justice Act, R.S.O. 1990, c. C.43, s. 105.

4 (1979), 23 O.R. (2d) 321.

TAB 4

Case Name:
Consbec Inc. v. Walker

Between
Consbec Inc., Plaintiff, and
Peter Walker, Rock Construction & Mining Inc. and
P & T Capital Ltd., Defendants

[2006] O.J. No. 5044

154 A.C.W.S. (3d) 287

Court File No. C-9848-06

Ontario Superior Court of Justice

L.L. Gauthier J.

Heard: December 15, 2006.
Judgment: December 18, 2006.

(29 paras.)

Counsel:

Ms. Goldie Bassi, for the Plaintiff

Marc A.J. Huneault, for the Defendants

L.L. GAUTHIER J.:--

Facts

1 On April 10, 2003, the Plaintiff commenced an action under Court File No. C-7383-03, against Peter Walker and Rock Construction & Mining Inc. The action arose from the employment relationship, which had existed between Consbec and Walker.

2 The Plaintiff alleged, among other things, that Walker wrongfully resigned his position with Consbec, without notice and unlawfully interfered with the employees, agents, contractors and suppliers of the Plaintiff. In addition, the Claim alleged that Walker and the other Defendant had in-

duced or atempted to induce and conspired to induce breaches of contract between the Plaintiff and its employees, agents, contractors and suppliers, and had interfered with the Plaintiff's business. The Claim also alleged that Walker had diverted business away from the Plaintiff.

3 On July 21, 2003, a Statement of Defence and Counterclaim was delivered in that action. It alleged that Consbec had unilaterally altered a fundamental term of the employment contract, effectively constructively dismissing Walker.

4 On August 29, 2005, the Plaintiff delivered a Defence to Counterclaim.

5 On June 23, 2006, Meehan J. ordered that the Plaintiff serve a further and better Affidavit of Documents and provide answers to its undertakings by July 14, 2006, failing which its Statement of Claim would be struck.

6 On October 27, 2006, I heard a Motion by the Defendants, in the above action, for an Order striking the Statement of Claim and dismissing the action. I ordered that the Plaintiff's Claim in action C-7383-03 be struck in accordance with the Order of Justice Meehan, and I ordered that the Plaintiff pay costs fixed at $4,500, inclusive of disbursements. Counsel were able to agree to the amount of costs, which should be paid by the Plaintiff. There was also a motion by the Plaintiff for leave to amend its Statement of Claim, which was not granted given the striking of the Claim.

7 On November 17, 2006, the Plaintiff commenced a new action by way of Statement of Claim against Peter Walker, Rock Construction & Mining Inc., and P & T Walker Capital Ltd. The Plaintiff claims damages for wrongful resignation, intentional interference with economic relations, unlawful interference with the Plaintiff's corporate opportunities and legitimate business interests, breach of fiduciary duty, breach of duty of good faith and fidelity, and alleges that Walker solicited Consbec clients both during and after his employment with the Plaintiff.

8 Also on November 17, 2006, the Plaintiff brought a motion to consolidate the within action with action C-7383-03.

9 On November 23, 2006, the Defendants Walker, Rock Construction and P & T Walker Capital brought a cross-motion for dismissal of the Plaintiff's Claim.

10 On November 24, 2006, an Order was made by Poupore J., on the consent of the parties, that the Counterclaim, under action C-7383-03, on the running list for December 4, 2006, be removed from the trial list and adjourned to the January 2007 Assignment Court.

11 On December 15, 2006, I heard the Defendants' motion for dismissal and the Plaintiff's motion for consolidation of the actions.

Issues:

12 The issues are:

(a) Whether or not the Plaintiff's Claim should be dismissed as an abuse of process of the court or as a collateral attack upon the Orders of June 23 and October 27, 2006
(b) If not, whether actions C-7383-03 and C-9848-06 should be consolidated

Analysis:

Issue (a):

13 The Defendants' position is that the Plaintiff is effectively "stepping around" the Orders of June 23 and October 27, 2006 by issuing a new claim. It is further suggested that if the Plaintiff 's action is allowed to proceed, then the Plaintiff will have been permitted to avoid the effects of the aforesaid Orders and this would bring the administration of justice into disrepute. The Defendants argue that the Plaintiff's new Claim is an abuse of process and/or a collateral attack on the earlier Orders.

14 The doctrine of abuse of process is invoked to prevent the misuse of the court's procedure

> "in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute ....
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined."
>
> See *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.).

15 As was stated in *Toronto (City) v. C.U.P.E., Local 79* (2003), 232 D.L.R. (4th) 385 (S.C.C.), the concept of abuse of process connotes proceedings which are oppressive or vexatious, and which violate the fundamental principles underlying the community's sense of decency and fair play; they are proceedings that are "unfair to the point that they are contrary to the interest of justice". See para. 35.

16 The primary focus of the doctrine is "the integrity of the adjudicative functions of courts." See para. 43.

17 A "collateral attack" is "an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment." See para. 33.

18 It is my conclusion that the issuance of the new Statement of Claim by the Plaintiff, Consbec, following the striking of its earlier Statement of Claim in court file C-7383-03, is neither an abuse of process nor a collateral attack of the orders of June 23 and October 27, 2006.

19 In the earlier proceedings, the Plaintiff's failure to abide by the Order of June 23, 2006 attracted the sanction of the striking of the Statement of Claim, and costs. There was no adjudication on the merits of the Claim itself, and therefore the new action does not entail any relitigation of the matter. Nor does it call into question the earlier orders.

20 At the time of the striking of the earlier Claim, the limitation period for the Plaintiff to bring an action had not expired. That fact was clearly communicated to me during the hearing of the motion on October 27.

21 The possibility of a new action being instituted was known to the Defendants. It was discussed during the hearing of the motion. Counsel for the Defendants actually agreed that the Plaintiff would be free to bring a fresh action, with clearer pleadings. The real issue for the Defendants was the costs they had incurred to date. I asked counsel to have some discussion about the amount of costs that the Defendants should be awarded, and counsel came back with an agreed to amount.

22 The motion before me is brought pursuant to Rule 21.01(3)(d). The request for dismissal is based on the ground that the action is an abuse of process.

23 An action will be dismissed upon those grounds only in the clearest of cases. This is not one of them, given the fact that:

(a) there was no adjudication of the merits of the case in the earlier proceeding;
(b) the original pleadings were flawed, a fact which was recognized by both counsel; and
(c) the delay caused by the failure of the Plaintiff to provide a full and complete Affidavit of Documents did not extend beyond the limitation period;
(d) the Defendants, through counsel, agreed that it was appropriate to strike the earlier claim, award substantial costs, and have the Plaintiff start fresh with better pleadings.

24 For those reasons, I am not prepared to dismiss the within action.

25 I turn now to the Plaintiff's motion for consolidation, which is brought pursuant to Rule 6.01 of the *Rules of Civil Proceedings*.

26 The Plaintiff's current Claim and the Counterclaim in the earlier proceedings do have a number of questions of fact and law in common. The matters at issue between the parties arise from the employment relationship between Consbec and Walker, the nature of that relationship, and the circumstances surrounding the termination of that relationship.

27 The consolidation will save expense and avoid multiplicity of proceedings. The Defendants themselves, in their factum filed on this motion, indicated that, if the Plaintiff's new action was permitted to continue, there was a risk of inconsistent verdicts or judgments. This risk will be eliminated by an Order for consolidation.

Order:

28 I order the following:

1. The Defendants' motion for dismissal is denied.
2. The Plaintiff's motion for consolidation is granted.

29 If counsel are unable to agree on costs, they should communicate with the Trial Co-Ordinator within 20 days of this Order, to set a date for a hearing on the issue of costs.

L.L. GAUTHIER J.

cp/e/qlesm/qlslc

TAB 5

Indexed as:

Dabbs v. Sun Life Assurance Co. of Canada

Between
Paul Dabbs, plaintiff (respondent) moving party, and
Sun Life Assurance Company of Canada, defendant (respondent),
and
Jack Maclean, class member (appellant)

[1998] O.J. No. 3622

41 O.R. (3d) 97

165 D.L.R. (4th) 482

113 O.A.C. 307

7 C.C.L.I. (3d) 38

27 C.P.C. (4th) 243

[1999] I.L.R. I-3629

82 A.C.W.S. (3d) 638

Docket Nos. C30326, M22971 and M23028

Ontario Court of Appeal
Toronto, Ontario

Laskin, Charron and O'Connor JJ.A.

Heard: August 26, 1998.
Judgment: September 14, 1998.

(9 pp.)

Practice -- Persons who can sue and be sued -- Individuals and corporations, status or standing -- Class actions, members of class -- Status to appeal from approval of settlement -- Statutes -- Opera-

tion and effect -- Effect on earlier statutes -- Contrariety or conflict between statutes -- General and special statutes.

This was a motion by Dabbs to quash an appeal from an order that this action be certified as a class action and a motion for leave to appeal by Maclean from the certification order. Dabbs was a representative plaintiff in a class proceedings against the defendant Sun Life Assurance Company. The parties entered into a settlement agreement. Maclean, a member of the class, participated in the settlement approval proceedings. He did not ask for party status. Maclean objected to the approval of the settlement. The agreement affected 400,000 class members across Canada and had been approved by British Columbia and Quebec courts. The trial judge approved the settlement pursuant to the Class Proceedings Act and found it to be fair, reasonable and in the best interest of those affected by it. Dabbs argued that Maclean had no standing to bring an appeal.

HELD: The motion by Dabbs was allowed and the motion by Maclean was dismissed. The appeal was quashed. Maclean had no right of appeal pursuant to section 30(3) of the Act as he was not a party and had not applied to be a representative plaintiff or to intervene as an added party. As well, he had no right of appeal under section 6(1)(b) of the Courts of Justice Act, which permitted appeals from final orders of a judge of the Ontario Court (General Division). Section 30(3) took precedence over section 6(1)(b) as section 30(3) was the more recent enactment and specifically addressed the rights of appeal in class proceedings. It was not appropriate to grant Maclean leave to act as a representative party under section 30(5) of the Act for the purpose of allowing him to appeal. There was nothing indicating that Maclean would adequately represent the interests of the class on an appeal. The wishes of one class member was not to govern the interests of the entire class. As well, Maclean could opt out of the class and pursue his claim against Sun Life personally.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5, 8(3), 9, 10(1), 12, 14, 16(1), 18, 19, 25, 29, 30(3), 30(5).
Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 6(1)(b), 134.
Ontario Rules of Civil Procedure, Rule 13.

Counsel:

Michael S. Deverett, for the appellant.
H. Lorne Morphy, Q.C. and Patricia D.S. Jackson, for the respondent, Sun Life.
Michael A. Eizenga and Michael J. Peerless, for the plaintiff, respondent.

The judgment of the Court was delivered by

1 **O'CONNOR J.A.**:-- These reasons deal with two motions. The first is a motion by the representative plaintiff in this class proceeding, Paul Dabbs, to quash an appeal brought by a class member, Jack Maclean. The second is a motion by Maclean for leave to appeal.

THE MOTION TO QUASH

2 Maclean seeks to appeal the judgment of Sharpe J. dated July 3, 1998 in which he ordered that this action be certified as a class proceeding and that a settlement agreement entered into between Dabbs and others as proposed representatives of the plaintiff class and the defendant Sun Life Assurance Company of Canada ("Sun Life") be approved under s. 29 of the Class Proceedings Act, 1992, S.O. 1992, c. 6 (the "Act").

3 Maclean is a member of the class and had been permitted under s. 14 of the Act to participate in the settlement approval proceedings. He did not ask for and was not granted party status. Maclean objected to the approval of the settlement, raising essentially the same arguments as he makes in the material filed with this court.

4 Sharpe J. rejected those arguments, approved the settlement and found it to be fair, reasonable and in the best interest of those affected by it. The courts in British Columbia and Quebec have also approved the settlement agreement. In all, it affects the interests of an estimated 400,000 class members across Canada.

5 Maclean's notice of appeal raises issues relating to procedural rulings made by Sharpe J. and to the fairness and adequacy of the settlement agreement. Dabbs moves under s. 134 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended, to quash the appeal primarily on the basis that Maclean is not a party to the proceeding and therefore has no standing to bring the appeal. Sun Life supports the motion. For the reasons set out below, I agree with their position.

6 One of the objects of the Act is to achieve the efficient handling of potentially complex cases of mass wrongs. See Abdool et al. v. Anaheim Management Limited et al. (1995), 21 O.R. (3d) 453 (Div. Ct.), per O'Brien J. at p. 455. This efficiency is accomplished, in part, by the court appointment of one or more class members under s. 5 to be representative plaintiffs or defendants as the case may be. The criteria for appointment include the ability to fairly and adequately represent the interests of the class. A representative plaintiff or defendant is a party to the proceeding and has the specific rights and responsibilities for the carriage of the litigation on behalf of the class that are set out in the Act.

7 The Act makes a clear distinction between the role of a party and that of a class member.[1] Section 14 gives the court a broad discretion to permit class members to participate in a proceeding and to provide for the manner and terms upon which the participation is permitted. Not surprisingly, s. 14 does not provide that class members who are permitted to participate thereby become parties to the proceeding. The section does not restrict participation to those class members who are able to fairly and adequately represent the class. Indeed, the court may permit participation by those who oppose the manner in which the party representing the class is conducting the proceeding and who assert positions that differ from those of the majority of the class. While the court may consider it useful to hear from these class members and to permit them to participate in a limited manner, it could frustrate the orderly and efficient management of the proceeding if they became parties simply because of their participation.

8 If class members are dissatisfied with the conduct of a proceeding or do not wish to be bound by the result, they may opt out under s. 9 and pursue their claims or defences in a personal capacity.

9 The rights of appeal to the Court of Appeal in class proceedings are set out in s. 30(3) of the Act. It provides:

> 30(3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members.

10 These rights are conferred on parties. Section 30(5) permits class members in certain circumstances to move for leave to act as representative parties for purposes of bringing an appeal under s. 30(3). It provides:

> (5) If a representative party does not appeal as permitted by subsection(3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as a representative party for the purposes of subsection 3.

Absent leave, class members have no standing to bring an appeal to this court under the Act.

11 Maclean is not a party to this proceeding. He did not apply to be a representative plaintiff nor did he apply to intervene as an added party under Rule 13.[2] He participated in the settlement approval proceedings as a class member not as a party. He therefore has no right of appeal under s. 30(3).

12 Maclean argues that because Sharpe J.'s judgment is a final order of the Ontario Court (General Division), he has a right of appeal under s. 6(1)(b) of the Courts of Justice Act, R.S.O. 1990, c. C.4. Section 6(1)(b) provides:

> 6(1) An appeal lies to the Court of Appeal from,
>
> ...
>
> (b) a final order of a judge of the Ontario Court (General Division), except an order referred to in clause 19(1)(a) or an order from which an appeal lies to the Divisional Court under another Act.

He argues that if the Act does not provide him with a right of appeal, either because he is not a party to the class proceeding or because s. 30(3) does not provide for a right of appeal from a judgment approving a settlement[3], then s. 6(1)(b) operates to confer a right where the Act has failed to do so. I do not accept that argument.

13 In my view, s. 30(3), which grants specific rights of appeal to this court in class proceedings, takes precedence over and excludes provisions of general application such as s. 6(1)(b) of the Courts of Justice Act. Two rules of statutory interpretation assist in determining the intention of the Legislature. First, a "general statute is made to 'yield' by regarding the special statute as an exception to the general."[4] Second, a more recent statute takes precedence over prior legislation because "the more recent expression of the will of the legislature should be retained."[5] In this case, the Act is the more recent enactment and specifically addresses the rights of appeal in class proceedings. The Courts of Justice Act was enacted earlier and is of more general ambit. These rules support the conclusion that the appeal provisions in s. 30(3) of the Act take precedence over s. 6(1)(b).

14 This conclusion is consistent with the dicta of Doherty J.A. in 792266 Ontario Ltd. v. Monarch Trust Co. (Liquidation) (1996), 94 O.A.C. 384 (C.A.). At p. 389, he said:

> ... I would, however, observe that this court has held that statutory provisions granting a specific right of appeal take precedence over and exclude provisions of more general application: Overseas Missionary Fellowship v. 578369 Ontario Ltd. (1990), 73 O.R. (2d) 73 at 75 (C.A.). that conclusion is consistent with the well-recognized principle of statutory interpretation which provides that where a statutory provision in specific legislation appears to conflict with a provision in a general statutory scheme, the former is seen as an exception to the latter: R. v. Greenwood (1992), 7 O.R. (3d) 1 at 6-7 (C.A.), leave to appeal to S.C.C. refused, [1992] 1 S.C.R. viii.

I agree with that statement.

15 The logic of this interpretation is apparent in this case. The intent of the Act is clear that the rights of appeal to this court are conferred on parties, not class members. A class member requires leave under s. 30(5) to act as a representative party for the purpose of bringing an appeal under s. 30(3). If, as Maclean argues, a class member has a right of appeal under s. 6(1)(b) of the Courts of Justice Act, that intent would be defeated. Further, assuming, as Dabbs and Sun Life argue, that s. 30(3) does not confer a right to appeal a judgment approving a settlement, it would make no sense for the Legislature to have provided for specific limited rights of appeal in s. 30(3) if the general right of appeal in s. 6(1)(b) was also to apply. Section 30(3) would be redundant and whatever limits result from its specific wording would be frustrated.

16 Relying upon the case of Re O'Donohue and Silva et al. (1995), 27 O.R. (3d) 162 (C.A.), Maclean argues that the right of appeal in s. 6(1)(b) can only be excluded by express statutory provision. In that case, the court considered appeal rights under the Municipal Elections Act, R.S.O. 1990, c. M.53, as amended, which provides for an appeal from a judicial recount to a judge of the Ontario Court (General Division). The Municipal Elections Act does not provide for a further appeal. The court found that in the absence of an express statutory exclusion of an appeal from a final order of a General Division judge, the Legislature could not be deemed to have limited the jurisdiction granted to the Court of Appeal by s. 6(1)(b). Significantly, there was no right of appeal to the Court of Appeal set out in the Municipal Elections Act. It is the inclusion of the specific appeal provisions in the Act which, in my view, operate to exclude the jurisdiction under s. 6(1)(b) for proceedings under the Act.

17 In summary I am of the view that s. 30(3) of the Act provides the rights of appeal to this court for class proceedings and that s. 6(1)(b) of the Courts of Justice Act does not supplement those rights.

MACLEAN'S MOTION

18 Maclean brought a motion for leave, if necessary, to appeal the judgment of Sharpe J. During the course of argument he requested that the court consider this motion as a motion for leave under s. 30(5) of the Act to permit him to act as a representative party for purposes of bringing his appeal under s. 30(3). The court indicated that it was prepared to deal with the motion on this basis. In my view, this is not an appropriate case for leave.

19 The court's discretion to grant leave under s. 30(5) is guided by the best interests of the class and in particular by a consideration whether the class member applying would fairly and adequately represent the interests of the class. There is nothing in the record which indicates that Maclean would adequately represent the interests of this class by bringing an appeal which seeks to set aside

the settlement agreement. Courts in three jurisdictions have approved the agreement. Maclean is the only class member of an estimated 400,000 who now seeks to set it aside. The wishes of one class member ought not to govern the interests of the entire class.

20 Importantly, if Maclean is dissatisfied with this settlement, he has the opportunity under the terms of Sharpe J.'s judgment and s. 9 of the Act to opt out of the class and pursue his claim against Sun Life in his personal capacity.

21 I would therefore dismiss the motion brought by Maclean under s. 30(5) of the Act. For the reasons above, I would allow the motion under s. 134 of the Courts of Justice Act and quash the appeal. Because the motions involved a novel point raised by an individual class member, I would make no order as to costs.

O'CONNOR J.A.
LASKIN J.A. -- I agree.
CHARRON J.A. -- I agree.

cp/d/ln/mii/DRS

1 See ss. 8(3), 10(1), 12, 16(1), 18, 19 and 25.

2 Section 35 of the Act provides that the rules of court apply to class proceedings.

3 Dabbs and Sun Life argued that even if Maclean is a party, s. 30(3) does not confer a right of appeal from a judgment approving a settlement under s. 29 of the Act.

4 Elmer Driedger, Construction of Statutes, 2nd ed. (1983), at p. 227.

5 Pierre-André Côté, The Interpretation of Legislation in Canada, 2nd ed. (1991), at p. 301.

TAB 6

DIRECTV Inc. v. Gillott; Gillott v. National Bank of Canada
[Indexed as: DIRECTV Inc. v. Gillott]

84 O.R. (3d) 595

Ontario Superior Court of Justice,

Perell J.

February 20, 2007

Civil procedure -- Payment into court -- Plaintiff alleging that defendant unlawfully sold devices to decrypt plaintiff's broadcast signal in Canada -- Charges made against defendant's credit card for purchases from plaintiff -- Defendant claiming that charges were unauthorized and bringing action against bank seeking reimbursement -- Bank charging back sum of money to plaintiff -- On motion for summary judgment in defendant's action against bank, court ordering that same sum of money to be paid to defendant's solicitors in trust -- Sum constituting "specific fund" for purpose of rule 45.02 -- Plaintiff entitled to order for payment of sum into court -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 45.02.

The plaintiff brought an action against the defendant alleging that the defendant unlawfully sold devices to decrypt the plaintiff's broadcast signals in Canada and that he was a party to a fraudulent scheme by which subscriptions for the plaintiff's television programming were sold to Canadian residents. The plaintiff sought injunctive relief, damages, an accounting, an equitable tracing of profits and a declaration that the plaintiff possessed an equitable interest in the [page596] defendant's property on the basis of a constructive, resulting, implied and/or express trust. The defendant's credit card was charged with a total of $361,931.40 for charges for the plaintiff's services. The defendant claimed that the plaintiff had obtained his credit card and had placed those charges against it. He demanded that his bank reimburse him for the unauthorized charges and, when they refused to do so, he sued the bank. The bank initiated a chargeback procedure under its credit card arrangements, charging back $172,432.87 to the plaintiff. The plaintiff did not resist the chargeback. The defendant moved for summary judgment in his action against the bank. The motion judge ordered the bank to pay the amount of the chargeback to the defendant's solicitors, in trust. The plaintiff commenced a second action against the defendant, submitting that his allegations that he did not know about the charges to his credit card were not credible. The plaintiff brought a motion for an order consolidating its two actions and for an order for the payment into court of the chargeback amount held by the defendant's solicitors.

Held, the motion should be granted.

A consolidation order was appropriate as the actions had common parties and questions of law and fact, and the claims for relief arose out of the same transactions and occurrences.

The plaintiff was entitled to an order for payment into court under rule 45.02 of the Rules of Civil Procedure if it established that it claimed a right to a specific fund; that there was a serious issue to be tried regarding its claim to that fund; and that the balance of convenience favoured granting the relief sought. Those three prerequisites were met. The plaintiff was not attempting to obtain execution of a judgment before trial. The $172,432.87 had been the plaintiff's property. It was, in effect, taken away from the plaintiff as a part of its agreement with the bank. The plaintiff also had proprietary claims and trust claims to that money based on unjust enrichment or conversion or perhaps waiver of tort if it established that the defendant was a participant in the black market, gray market or activation fraud schemes. The plaintiff had shown a prima facie claim for numerous causes of action against the defendant, and the balance of convenience favoured granting the relief sought.

Cases referred to

Rotin v. Lechcier-Kimel, [1985] O.J. No. 466, 3 C.P.C. (2d) 15 (H.C.J.), consd

Other cases referred to

838388 Ontario Ltd. v. Wellington Inc., [1990] O.J. No. 3118, 45 C.P.C. (2d) 222 (H.C.J.); Assante Financial Management Ltd. v. Dixon, [2004] O.J. No. 2237, 8 C.P.C. (6th) 57 (S.C.J.); Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 93 C.R.R. (2d) 189, 18 C.P.R. (4th) 289, 2002 SCC 42; Bell Expressvu Ltd. Partnership v. Souphanthong, [2005] O.J. No. 2090, 139 A.C.W.S. (3d) 434 (S.C.J.); Bocian v. Toronto Kitchen Equipment Ltd., [2005] O.J. No. 4893, [2005] O.T.C. 967, 2005 CarswellOnt 6606 (S.C.J.); Leung Estate v. Leung, [2004] O.J. No. 1417, 130 A.C.W.S. (3d) 218 (S.C.J.); Lister & Co. v. Stubbs, [1886-90] All E.R. 797, 45 Ch.D. 1(C.A.); Maybank Foods Inc. Pension Plan v. Gainers Inc. (1988), 63 O.R. (2d) 687, [1988] O.J. No. 80, 25 C.P.C. (2d) 248 (H.C.J.) (sub nom. Micallof et al. v. Gainers Inc.); Miller v. Carley, [2006] O.J. No. 1813, 2006 CarswellOnt 2802 (S.C.J.); Mutual Tech Canada Inc. v. Law, [2003] O.J. No. 1015, 121 A.C.W.S. (3d) 252 (S.C.J.); News Canada Marketing Inc. v. TD Evergreen, a Division of TD Securities Inc., [2000] O.J. No. 3705, 100 A.C.W.S. (3d) 45 (S.C.J.); R. v. D'Argy, [2006] J.Q. no 11267, J.E. 2006-1918 (C.A.), revg [2005] J.Q. no 7840, 140 A.C.W.S. (3d) 642 (C.A.), affg [2005] J.Q. no 2499, J.E. 2005-1008 (C.S.Q.), affg [2004] J.Q. no 11142, [2005] R.J.Q. 857, J.E. 2005-475 (C.Q.) [Leave to appeal to S.C.C. pending [2006] C.S.C.R. no 458]; [page597] R. v. LeBlanc, [1997] N.S.J. No. 476 (S.C.); Serhan (Estate Trustee) v. Johnson & Johnson, [2006] O.J. No. 2421, 213 O.A.C. 298, 24 E.T.R. (3d) 265, 28 C.P.C. (6th) 83 (Div. Ct.)[Leave to appeal to the C.A. refused October 16, 2006], affg (2004), 72 O.R. (3d) 296, [2004] O.J. No. 2904, 49 C.P.C. (5th) 283 (S.C.J.); Soulos v. Korkontzilas, [1997] 2 S.C.R. 217, [1997] S.C.J. No. 52, 32 O.R. (3d) 716, 146 D.L.R. (4th) 214, 212 N.R. 1, 46 C.B.R. (3d) 1, 17 E.T.R. (2d) 89, 9 R.P.R. (3d) 1; Stearns v. Scocchia, [2002] O.J. No. 4244, 27 C.P.C. (5th) 339 (S.C.J.); Taribo Holdings Ltd. v. Storage cess Technologies Inc., [2002] O.J. No. 3886, 27 C.P.C. (5th) 194 (S.C.J.); Toronto Port Authority v. Canada Auto Parks-Queenpark Ltd., [2000] O.J. No. 4297, 3 C.P.C. (5th) 104 (S.C.J.)

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), Radiocommunications Act, R.S.C. 1985, c. R-2, s. 9 [as am.] Repair and Storage Liens Act, R.R.O. 1990, c. R.25

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 6.01, 45, 45.02

MOTION for an order for the consolidation of two actions and for an order for the payment into court of a sum of money.

Ira Nishisato and Nur Muhammed-Ally, for DIRECTV, Inc.

Charles Wagman, for Martyn Gillott.

PERELL J.: --

Introduction

[1] DIRECTV, Inc. is the plaintiff, and Mr. Martyn Gillott is the defendant in what I will call the "Credit Card Action". In the Credit Card Action, DIRECTV moves for an order, amongst other things: (1) requiring the law firm of Wagman, Sherkin to pay $172,475.63 that it is currently holding in trust into court; and (2) consolidating the Credit Card Action with another action in which DIRECTV is the plaintiff and John Doe, Jane Doe, eleven corporations, and 28 individuals, including Mr. Gillott, are the defendants. The short style of cause in this action is DIRECTV, Inc. v. Zed Marketing Inc. et al., but I will call it the "Radiocommunications Action".

[2] Mr. Gillott is the plaintiff in another action, which I will call the "Chargeback Action". The defendant in that action is the National Bank of Canada. In the Chargeback Action, Mr. Gillott brings what is described as a cross-motion for an order directing the law firm of Wagman, Sherkin to pay the money that it is currently holding in trust to Mr. Gillott. [page598] The National Bank takes no position with respect to this cross-motion and did not appear before me.

[3] As the discussion below will shortly reveal, this will all become quite complicated, quite nasty, and quite extraordinary, but the comparatively minor dispute that I must resolve is whether the Credit Card Action should be consolidated with the Radiocommunications Action, and the major dispute that I must resolve is whether the $172,475.63 currently being held by Wagman, Sherkin is to be paid to their client, Mr. Gillott, or into court.

[4] In asking that the money be paid into court, DIRECTV relies on rule 45.02 [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] (Interim Preservation of Property -- Specific Fund), but Mr. Gillott submits that the money belongs to him, and he argues that the prerequisites of rule 45.02 have not been satisfied and that DIRECTV is actually seeking a Mareva injunction, which it is not entitled to obtain.

[5] Rule 45.02 states: "Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just."

[6] Thus, the resolution of the major dispute on the motion and the counter-motion ultimately depends upon whether the $172,475.63 is a "specific fund". DIRECTV argues that it is a "specific fund" because it is a reasonably identifiable fund earmarked for litigation or that it constitutes the

very subject matter of the dispute. Another way of viewing the major dispute is that it is about whether DIRECTV's claim to the $172,475.63 is proprietary or in personam.

[7] Mr. Gillott argues, however, that the $172,475.63 is not a specific fund and that DIRECTV has no proprietary interest in it. Rather, he submits that all DIRECTV has is a cause of action for the payment of $172,475.63 and the law of Ontario stands against pre-judgment execution for this unresolved cause of action.

[8] In my opinion, to determine who is correct about the resolution of the major dispute, it is necessary to examine carefully the nature of DIRECTV's claim and how it came about that Wagman, Sherkin is holding the $172,475.63. This means that the discussion that follows must examine the factual background to all of the Radiocommunications Action (which came first), the Chargeback Action (which came second) and Credit Card Action (which came last).

[9] Based on that examination and for the reasons that follow, I conclude that DIRECTV's motion should succeed and Mr. Gillott's cross-motion should be dismissed. [page599]

[10] The result is that there should be an order consolidating the Radiocommunications Action and the Credit Card Action and directing Wagman, Sherkin to pay the sum it is holding in trust in court to the account of the consolidated actions.

Discussion -- Factual Background

[11] DIRECTV is the largest provider of satellite-delivered subscription television programming in the United States to customers equipped with specialized receiving equipment capable of decrypting DIRECTV's broadcast signal.

[12] DIRECTV's broadcasting signal penetrates Canadian territory, but it is not licensed by Canadian regulatory authorities to provide its programming to persons in Canada.

[13] In the Radiocommunications Action and in the Credit Card Action, it is alleged that Mr. Gillott unlawfully sells devices to decrypt DIRECTV'S broadcast signal in Canada, but, for present purposes, more significant is the nasty allegation that he is a party to a fraudulent scheme by which DIRECTV subscriptions are sold to Canadian residents. This scheme involves deceiving DIRECTV into believing that it is providing services to subscribers in the United States. This allegation is more significant because it concerns the moneys now being held in trust by Wagman, Sherkin.

[14] The modus operandi of the alleged fraudulent scheme is that DIRECTV is given U.S. billing addresses for customers who are Canadian residents. This scheme is sometimes described as the gray market. Another scheme is known as "activation fraud", which involves a false representation that a customer with a full priced subscription for his or her primary television is purchasing a discounted price subscription that is available for a second or third television set in the same customer's home. The discounted subscription is actually provided to another customer at another home.

[15] Mr. Gillott flatly denies that he is involved in any of these schemes, but this is disputed by DIRECTV, which, as already noted, in the Radiocommunications Action sues Mr. Gillott as one of 41 corporate and individual defendants, and in the Credit Card Action it sues him to recover moneys associated with the alleged scheme.

[16] In the Radiocommunications Action, as a remedy for the alleged illegal gray market or activation fraud activities, DIRECTV seeks a lengthy list of injunctive orders and, amongst other

things, it seeks: (a) damages in the amount of $10 million for breaches of the Radiocommunications Act, R.S.C. 1985, c. R-2, fraud, conspiracy, conversion, unlawful interference with economic [page600] relations and unjust enrichment; (b) an accounting of all profits from the defendants' wrongful activities; (c) an equitable tracing of the profits from the defendants' wrongful activities into the assets, property, and interests of the defendants; and (c) a declaration that DIRECTV possesses an equitable interest in the real and personal property of the defendants, on the basis of a constructive, resulting, implied and/or express trust.

[17] It is important to point out that DIRECTV's claim for damages is an in personam claim, but its claims for equitable tracing, or some form of trust are proprietary in nature. Its claim for unjust enrichment would support a proprietary remedy, and I add that pursuant to the doctrine of waiver of tort, the tort of conversion and perhaps the other torts pleaded would also support a constructive trust. See Serhan (Estate Trustee) v. Johnson & Johnson (2004), 72 O.R. (3d) 296, [2004] O.J. No. 2904 (S.C.J.), affd [2006] O.J. No. 2421, 213 O.A.C. 298 (Div. Ct.), leave to appeal to the C.A. refused October 16, 2006. A constructive trust may also be available as a remedy for the wrongful appropriation of another's property: see Soulos v. Korkontzilas, [1997] 2 S.C.R. 217, [1997] S.C.J. No. 52, 146 D.L.R. (4th) 214; Bell ExpressVu Ltd. Partnershhip v. Souphanthong, [2005] O.J. No. 2090, 139 A.C.W.S. (3d) 434 (S.C.J.).

[18] Against these points, however, there is the submission of Mr. Gillott that DIRECTV has lost nothing because it was not entitled to enjoy revenues from Canadian consumers.

[19] In the Radiocommunications Action, five of the corporate defendants, including Zed Marketing Inc., and seven of the individual defendants, including Mr. Gillott, have joined together to deliver a statement of defence and counterclaim. Amongst other things, they deny any illegal activities and they assert that the black market and the gray market are not illegal in Canada. They assert that DIRECTV has no cause for complaint because it does not want subscriptions from Canadians and "to the extent Canadians in Canada subscribe to DIRECTV, DIRECTV is not being defrauded of any income. To the contrary, it is getting income that it would not otherwise be receiving." (See statement of defence, para. 40.)

[20] In any event, in the Credit Card Action, Mr. Gillott states that he and his business corporations have never been involved, either directly or indirectly, in the sale of DIRECTV programming. The truth of that assertion remains to be determined, but taking him at his word, it makes what took place between August 2004 to April 2005 quite astonishing. [page601]

[21] During the nine months between August 2004 and April 2005, Mr. Gillott's credit card with the National Bank was charged $369,473.05, all of which was paid by Mr. Gillott. Of that sum, $361,931.40 was paid for DIRECTV charges. For reasons that will become apparent later, it is important to note that DIRECTV does not require a signature from customers ordering [servers] by telephone or over the Internet, which is the way these charges were made against Mr. Gillott's credit card.

[22] In the Chargeback Action Mr. Gillott admits that his credit card limit was $25,000. To keep his card in good standing, Mr. Gillott made payments several times a month. He made these payments to the National Bank online. He deposes that when he pays credit cards on line, there are no particulars of the various charges given. He says nothing about whether he received written credit card statements.

[23] In his affidavit material delivered for these motions, Mr. Gillott deposes that it was not until February 24, 2005 when he discovered that he had paid for well over $350,000 on unauthorized purchases from DIRECTV and that he paid his credit card charges not knowing that they included these substantial charges from DIRECTV.

[24] In his affidavit material and pleadings, Mr. Gillott provides only one explanation as to how it came about that $369,473.05 of DIRECTV charges were made against his credit card, and it is a nasty allegation. He alleges that DIRECTV obtained his credit card information and unlawfully and without any justification or lawful cause placed charges against his credit card in the amount of $369,473.05. By way of counterclaim in the Credit Card Action, he claims recovery of $197,041.18 of the sums allegedly improperly charged by DIRECTV.

[25] If the discovery of the allegedly unauthorized charges was a surprise to Mr. Gillott, he got another one on February 24, 2004. On that day, DIRECTV executed an Anton Pillar Order and Interim Injunction on him and certain other defendants in the Radiocommunications Action. The order was granted by Farley J., who concluded that DIRECTV had established "an extremely strong prima facie case of piracy and conspiracy to commit piracy". Farley J. also concluded that DIRECTV had made out claims for civil conspiracy, conversion, unlawful interference with economic relations and unjust enrichment against the defendants.

[26] DIRECTV executed the Anton Pillar Order and among the material seized at Mr. Gillott's home were DIRECTV receivers and numerous decryption devices. [page602]

[27] On the same day that his home was being searched under the authority of the Anton Pillar Order, Mr. Gillott reported that his National Bank credit card had been lost and that he had just discovered that numerous unauthorized charges for DIRECTV services had been made to his credit card.

[28] Mr. Gillott demanded that National Bank reimburse him for the unauthorized charges, and when they initially did not do so, on April 28, 2005, he sued the National Bank for $369,473.05. This is the Chargeback Action.

[29] Meanwhile, National Bank initiated what is called a chargeback procedure under its credit card arrangements. It charged back $172,432.87 to DIRECTV and according to the agreement between the National Bank and DIRECTV, the latter had 45 days to contest the chargeback. The chargeback process was initiated on May 6, 2005 and completed on May 9, 2005. DIRECTV did not dispute the chargeback.

[30] At this point in the account of the factual background, it is necessary to pause to make three points about the chargeback procedure. The first point is that the National Bank initiated a chargeback only for the period for January and February 2005 and the chargeback was $172,432.87 for 794 transactions on the credit card that took place during this period. The second point, already noted, is that DIRECTV did not resist the chargeback, which lack of resistance Mr. Gillott relies on as an indication that DIRECTV does not have a claim to those funds. However, the third point is that to resist the chargeback procedure initiated by the National Bank, DIRECTV would have to establish that Mr. Gillott had authorized the charges made on his credit card, but since DIRECTV did not obtain signatures for telephone and Internet purchases and Mr. Gillott was denying that he had had anything to do with DIRECTV, this obviously would be difficult.

[31] In any event, DIRECTV did not contest the chargeback, and without notice to DIRECTV, Mr. Gillott moved for summary judgment in the Chargeback Action as against the National Bank. Technically speaking, DIRECTV was not a party to that action, but the National Bank alerted DIRECTV, which appeared on the return of the motion. DIRECTV requested that the motion for summary judgment be adjourned to permit it to file materials.

[32] The motion for summary judgment, however, went ahead and on October 26, 2006, Klowak J. made an order which contained the following terms:

1. THIS COURT ORDERS THAT the defendant National Bank of Canada shall pay Messrs. Wagman, Sherkin in Trust, the sum of $172,475.63 (the "chargeback funds"); [page603]
2. THIS COURT ORDERS THAT the chargeback funds may be held by Wagman, Sherkin in an interest-bearing account;
3. THIS COURT ORDERS THAT subject to the above payment being made, that the action and counterclaim be dismissed without costs;
4. THIS COURT ORDERS THAT Direct TV shall have until December 1, 2006 to deliver a motion seeking such relief as it deems advisable, with respect to this action and/or the chargeback funds;
5. THIS COURT ORDERS THAT in the event Direct TV fails to deliver a motion by no later than December 1, 2006, Messrs. Wagman, Sherkin shall be at liberty to disperse the chargeback funds;
6. THIS COURT ORDERS THAT if Direct TV delivers a motion in accordance with paragraphs 4 & 5 herein, such motion shall be heard on February 14, 2007, and the chargeback funds in shell not be disbursed until further order of this court or by signed agreement between Messrs. Wagman, Sherkin and counsel for Direct TV. . . .

[33] It is also worth noting that the summary judgment was on consent and was part of a settlement reached between Mr. Gillott and the National Bank in which National Bank neither paid nor received costs.

[34] In the aftermath of the Klowak J.'s order, on November 30, 2006, DIRECTV commenced the Credit Card Action against Mr. Gillott. In that action, DIRECTV submits that Mr. Gillott's allegations that he did not know about the DIRECTV charges are not credible. DIRECTV alleges, amongst other things, that Mr. Gillott intentionally used his credit card to subscribe for DIRECTV services for others and that he has falsely asserted that the use of the card was unauthorized. DIRECTV further submits that Mr. Gillott knew that it would be unable to assert its claim to the chargeback funds because DIRECTV does not require a signature from customers ordering services by telephone or over the Internet.

[35] It is worth noting that although Mr. Gillott's original claim against the National Bank was for $369,473.05, the summary judgment that brought the Chargeback Action to an end was for $172,432.87. It is that sum that DIRECTV seeks in the Credit Card Action. The balance of $197,041.18 is the subject of Mr. Gillott's counterclaim in the Credit Card Action.

[36] Before moving on to resolve the minor and major issues before me, I pause here to note that: (a) in his statement of defence in the Credit Card Action, Mr. Gillott takes the position that it remains to be determined whether it is unlawful to decode, authorize or facilitate the decoding of DIRECTV's programming signal in Canada because it is unsettled whether s. 9 of the Radiocom-

munications Act is inoperative as a result as being contrary to freedom of expression under s. 2(b) of the [page604] Canadian Charter of Rights and Freedoms; and (b) in his cross-motion, Mr. Gillott has filed an affidavit from Mr. Cator, who is the director of the defendant Zed Marketing Inc. in the Radiocommunications Action, and Mr. Cator's evidence is that DIRECTV was a willing and active participant in the Canadian gray market and profited handsomely from that involvement. It is alleged that DIRECTV has knowingly accepted subscriptions for programming from Canadian retailers, including but not limited to Zed Marketing Inc., and enjoyed revenues and paid commissions with respect to those subscriptions.

[37] I will return later to the significance of the allegation that DIRECTV was a knowing participant in the gray market, but Mr. Gillott's position about the legal status of the gray market is, with respect, a half-truth.

[38] In Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, the Supreme Court of Canada ruled that s. 9(1)(c) of the Radiocommunications Act prohibited the decryption of encrypted signals emanating from U.S. and other foreign broadcasters. Because of the absence of an adequate factual record, the Supreme Court of Canada declined to decide whether s. 9(1)(c) of the Radiocommunications Act contravened the Canadian Charter of Rights and Freedoms as an infringement of freedom of expression, whether any infringement could be justified under s. 1 of the Charter, and, if not justified, whether s. 9(1)(c) should be struck out of the statute.

[39] However, the current law in Canada is that the activities of gray marketers are unlawful. That there is an uncertain Charter issue about freedom of expression does not alter that truth. Moreover, Mr. Cator's affidavit gives an inaccurate account of the current state of the law. As he deposed, it is true that on the day that the Anton Pillar Order was executed, there was a decision of the Court of Québec that s. 9(1) of the Radiocommunications Act violated freedom of expression under the Charter. See R. v. D'Argy, [2004] J.Q. no 11142, [2005] R.J.Q. 857 (C.Q.), and it is also true that after the Anton Pillar Order, the Québec Superior Court overruled the judgment; see [2005] J.Q. no 2499, J.E. 2005-1008 (C.S.Q.) and that leave to appeal to the Québec Court of Appeal was granted; see [2005] J.Q. no 7840, 140 A.C.W.S. (3d) 642 (C.A.); however, my research reveals that it is not true that a decision has not yet been reached.

[40] The Court of Appeal of Québec affirmed the judgment overturning the trial judgment in R. v. D'Argy; see [2006] J.Q. no 11267, J.E. 2006-1918 (C.A.), and what is now pending is a motion for leave to appeal to the Supreme Court of Canada; see [2006] C.S.C.R. no 458. The Québec appellate courts ruled that [page605] given the nature of the charges the trial judge need not have addressed the Charter point at all.

[41] This leaves Mr. Gillott to rely on a 1997 decision of the Nova Scotia Supreme Court, R. v. LeBlanc, [1997] N.S.J. No. 476 (S.C.), where Haliburton J. made some obiter comments about freedom of expression. However, in para. 11 of his judgment he stated: that the Charter issues were not extensively argued; that he did not intend to deal with them; and that the Charter issue need not be decided.

[42] In any event, for present purposes, the relevance of the legality or not of the black or gray markets is somewhat beside the point because Mr. Gillott's ultimate position is that he was not involved and that the moneys held in trust by Wagman, Sherkin belong to him because he did not authorize any purchases of services from DIRECTV.

Analysis

[43] With this factual background, I turn to the minor and major issues that must be determined on the motion and the counter-motion. As for the minor issue, I can be quite brief. In my opinion, it is appropriate pursuant to rule 6.01 of the Rules of Civil Procedure to consolidate the Credit Card Action with the Radiocommunications Action. The actions have common parties and questions of fact and law, and the claims for relief arise out of the same transactions and occurrences. The circumstances of the Credit Card Action are essentially a subset of the circumstances of the Radiocommunications Action.

[44] As for the major issue, as noted in the introduction to these reasons for decision, DIRECTV relies on rule 45.02. The case law establishes that the test for granting an order preserving a specific fund is threefold: (1) the plaintiff claims a right to the specific fund; (2) there is a serious issue to be tried regarding the plaintiff's claim to the fund; and (3) the balance of convenience favours granting the relief sought. See: News Canada Marketing Inc. v. TD Evergreen, a Division of TD Securities Inc., [2000] O.J. No. 3705, 100 A.C.W.S. (3d) 45 (S.C.J.); Assante Financial Management Ltd. v. Dixon, [2004] O.J. No. 2237, 8 C.P.C. (6th) 57 (S.C.J.); Taribu Holdings Ltd. v. Storage @cess Technologies Inc., [2002] O.J. No. 3886, 27 C.P.C. (5th) 194 (S.C.J.).

[45] There is no doubt that DIRECTV claims the fund now held in the Wagman, Sherkin trust account; however, in my opinion, the decisive element in the case at bar is whether DIRECTV claims a right to a "specific fund" within the meaning of rule 45.02. [page606]

[46] This element is decisive because in my opinion there is a serious issue to be tried regarding DIRECTV's claim to the moneys and the balance of convenience favours granting the relief sought.

[47] In my opinion, DIRECTV has a prima facie claim against Mr. Gillott. Although Mr. Gillott denies that he authorized the purchases, over a nine-month period, there is evidence that $369,473.05 of purchases were made using his credit card and now as a result of the chargeback made by the National Bank, $172,432.87 of those payments is outstanding. That is a serious claim. In the Credit Card Action, there is at least circumstantial evidence that Mr. Gillott authorized the charges on his credit card or at least have been involved, because it defies common sense that someone would pay $369,473.05 and not know something about what he or she was buying. While Mr. Gillott directly blames DIRECTV for the purchases made on his credit card, he offers no explanation of what else he thought he was paying for when he went on line and paid $369,473.05 to the National Bank.

[48] Mr. Gillott submits that DIRECTV has not presented a strong prima facie case because its only evidence is that Mr. Gillott is a principal of EONME.com Inc., a business corporation that operated a web site that included advertisements from other corporations that sold DIRECTV programming services. I agree that standing alone, the reciprocal Internet banner advertising of a company associated with Mr. Gillott is just a small matter of circumstantial evidence, and I also agree that references to withdrawn criminal charges for an alleged violation of the Radiocommunications Act against Mr. Gillott are no evidence at all, but it is not correct to say that that these are the only evidence to support DIRECTV's claims against Mr. Gillott. For instance, DIRECTV has evidence from the material seized in the execution of the Anton Pillar Order that connects Mr. Gillott to DIRECTV, but, in any event, DIRECTV's claim in the Credit Card Action ultimately rests on proving that Mr. Gillott directly or indirectly authorized $369,473.05 of purchases and that seems to me a serious issue to be tried and one in which DIRECTV has established a prima facie case.

[49] Mr. Gillott also says that DIRECTV does not have a case because it did not resist the chargeback procedure. In my opinion, it does not logically follow that because DIRECTV did not make a claim in the chargeback procedure it cannot pursue Mr. Gillott for the purchases that appear to have been made using his credit card. Moreover, it is alleged that it was part of the design of the fraudulent scheme that Mr. Gillott placed [page607] himself in a position that he could deny that he authorized the charges.

[50] Further, and in any event, in the Radiocommunications Action, by obtaining an Anton Pillar Order, DIRECTV has shown a prima facie claim for numerous causes of action against Mr. Gillott.

[51] As for the balance of convenience, the evidence on this point is unsubstantial from both sides. I know very little about Mr. Gillott's financial circumstances save for the fact that he was able to pay $369,473.05 in less than a year on his personal credit card.

[52] He says that he was harmed by the execution of the Anton Pillar Order and says his businesses suffered damages in the hundreds of thousands of dollars, which may be true, but I do not see how that helps me decide the balance of convenience with respect to the treatment of the moneys held by Wagman, Sherkin that may belong to DIRECTV or Mr. Gillott. Further, DIRECTV gave an undertaking for damages with respect to the Anton Pillar Order, and although it may not be obliged to do so, DIRECTV has given an undertaking as to damages should Mr. Gillott be injured by the payment of $172,475.63 into court.

[53] In essence, Mr. Gillott says not much more than he has now paid a balance of $172,475.63 for services he did not authorize and the money belongs to him. He throws some mud at DIRECTV by relying on Internet and other reports about allegedly offensive billing practices and alleged high handedness as a litigant. This evidence is hearsay and has no probative value to the issues I must decide.

[54] Given its commercial size and presence, I assume that DIRECTV does not need the money held by Wagman, Sherkin to carry on its business in the United States. In essence, DIRECTV says not much more than that it provided goods and services, was paid for them, and it would be inconvenient and wrong to have $172,475.63 of its paid accounts taken away because Mr. Gillott could dissipate the money.

[55] Based on the paucity of evidence, in my opinion, the balance of convenience favours granting the relief sought provided that DIRECTV establishes that it has a claim to a right to a "specific fund" within the meaning of rule 45.02. If it does, then the potential dissipation of that fund tips the balance of convenience in its favour.

[56] Thus, as already indicated, in my opinion the decisive element in the case at bar is whether DIRECTV claims a right to a "specific fund" within the meaning of rule 45.02. In general, [page608] Rule 45 provides the court with authority to preserve a particular piece of property or fund: Taribu Holdings Ltd. v. Storage @cess Technologies Inc., supra.

[57] Rotin v. Lechcier-Kimel, [1985] O.J. No. 466, 3 C.P.C. (2d) 15 (H.C.J.) is one of the early cases about what was then the newly enacted rule 45.02. In the Rotin case, White J. defined "specific fund" to be a reasonable identifiable fund earmarked to the litigation in issue. In Rotin, the defendant Lechcier-Kimel managed the defendant Taur Management with whom the plaintiff Rotin had advanced moneys to be invested in syndicated mortgages. Rotin sued the defendants for breach of fiduciary duty and, as it happened, the defendant Taur Management had received the proceeds

from the discharge of one of the syndicated mortgages. White J. held that these proceeds were a "specific fund". In contrast, the outstanding indebtedness on another mortgage was not a "specific fund". The Rotin case was applied in 838388 Ontario Ltd. v. Wellington Inc., [1990] O.J. No. 3118, 45 C.P.C. (2d) 222 (H.C.J.), where Honey L.J.S.C. held that in contrast to a normal deposit a "refundable deposit" was not a specific fund.

[58] The Rotin case demonstrates a theme that will reappear in other cases that I will soon mention. The theme is that rule 45.02 is not to be used simply as a mechanism to obtain security for a debt or potential indebtedness of the defendant. The principle linked to the case of Lister & Co. v. Stubbs, [1886-90] All E.R. 797, 45 Ch. D. 1 (C.A.) that a plaintiff is not entitled to execution or security for a what is just a potential judgment remains the general rule; however, rule 45.02 is an exception to the general rule and is available if the plaintiff can combine an identifiable fund and a proprietary claim to those funds referable to the litigation. The result in Rotin demonstrates both aspects of the operation of rule 45.02.

[59] That the plaintiff may have a claim against the defendant and that the defendant comes into funds is not enough. To succeed under rule 45.02, the plaintiff must have a proprietary claim against the specific funds beyond their utility to satisfy his or her claim against the defendant. Thus, in Bocian v. Toronto Kitchen Equipment Ltd., [2005] O.J. No. 4893, 2005 CarswellOnt 6606 (S.C.J.), pursuant to the Repair and Storage Liens Act, R.R.O. 1990, c. R.25, the defendant Toronto Kitchen Equipment allegedly wrongfully sold the plaintiff Mr. Bocian's hot dog stand. Thomas J. held that Mr. Bocian did not have a claim under rule 45.02 for the proceeds of the sale. The proceeds of sale were not a specific fund earmarked for the litigation. [page609]

[60] In Assante Financial Management Ltd. v. Dixon, supra, defendant Dixon had an agreement to provide services on behalf of the plaintiff Assante Financial to its clients. Assante Financial alleged that Dixon breached the agreement and through his corporation began to treat its clients as his own. Assante Financial brought a motion pursuant to rule 45.02 to claim the accounts receivable that Dixon and his corporation had collected and deposited into a general bank account. Wilton-Siegel J. held that Assante Financial had not demonstrated any identifiable fund nor even a certain amount that might be owed by the defendants. A similar type of case is Toronto Port Authority v. Canada Auto Parks-Queenpark Ltd., [2000] O.J. No. 4297, 3 C.P.C. (5th) 104 (S.C.J.), where the defendant operated a parking lot for the plaintiff and the plaintiff sought payment of the monthly rental receipts into court. Croll J. held that the anticipated and unascertained rent revenue was not a specific fund and the motion pursuant to rule 45.02 was an attempt to obtain execution before judgment.

[61] In Miller v. Carley, [2006] O.J. No. 1813, 2006 CarswellOnt 2802 (S.C.J.), the defendant Carley won a lottery and received the proceeds only after which the plaintiff Miller claimed that he had an agreement with Carley to pool lottery tickets and to share any winnings. Miller moved pursuant to rule 49.02 for an order that the half of the lottery winnings be paid into court, but Taliano J. held that Miller had not established a right to a specific fund. Significantly, Taliano J. held that prior to the payment of the winnings, the lottery constituted a specific fund that was readily available as such and would have been subject to a Rule 45 order.

[62] In Stearns v. Scocchia, [2002] O.J. No. 4244, 27 C.P.C. (5th) 339 (S.C.J.), the plaintiff Stearns sold a property to the defendant Cottingham for $120,000. Cottingham resold the property to Kennedy Rentals for $341,617.50. Both sales closed on the same day, but when Stearns found out about the resale, he sued Cottingham and the real estate agents involved in the sale for breach of

fiduciary duty. A year after the closing of the transaction, Cottingham received $50,000 from Kennedy Rentals, which was paying down the mortgage that it had granted as part payment of the purchase price. Stearns moved pursuant to rule 45.02 to have the $50,000 paid into court. Smith J. dismissed the motion and held that the mortgage money payable by Kennedy Rentals was not a specific fund "earmarked for the litigation" and that to have the money paid into court would be to grant execution of judgment before trial.

[63] In my opinion, in the circumstances of the case at bar DIRECTV is not attempting to obtain execution of judgment [page610] before trial and the circumstances satisfy the requirement that there be a specific fund. The $172,432.87 that DIRECTV seeks to be paid into court had been DIRECTV's property. This money (and more) had been paid to it by the National Bank who reclaimed the money as part of the charge back procedure. The $172,432.87 was, in effect, taken away from DIRECTV as a part of its agreement with the National Bank. As it happens, DIRECTV also has proprietary claims and trust claims to this particular money based on unjust enrichment or conversion or perhaps waiver of tort if it is established that Mr. Gillott was a participant in the black market, gray market or activation fraud schemes.

[64] I appreciate that Mr. Gillott says that DIRECTV has suffered no loss because it was never entitled to earn money in Canada. To my mind that is a matter that may or may not provide a defence to DIRECTV's claim, but for present purposes, all that DIRECTV need do is establish a serious proprietary claim to these moneys. Similarly, it may ultimately be established that Mr. Gillott did not authorize the charges or have any involvement in any of the alleged schemes, in which case he would have a defence to DIRECTV's claim to the money.

[65] Finally, Mr. Gillott says that DIRECTV's case does not meet the requirements for a Mareva injunction. I need not decide the point because I have concluded that DIRECTV's case does meet the standard for an order under rule 45.02. While a Mareva injunction and an order under rule 45.02 share several policy concerns about pre-judgment remedies, they are discrete or mutually exclusive interlocutory remedies, and a plaintiff does not have to satisfy the requirements for a Mareva injunction in order to obtain a remedy under rule 45.02. In this regard, see News Canada Marketing Inc. v. TD Evergreen, a Division of TD Securities Inc., supra; Stearns v. Scocchia, supra; Maybank Foods Inc. Pension Plan v. Gainers Inc. (1988), 63 O.R. (2d) 687, [1988] O.J. No. 80 (H.C.J.); Mutual Tech Canada Inc. v. Law, [2003] O.J. No. 1015, 121 A.C.W.S. (3d) 252 (S.C.J.); Leung Estate v. Leung, [2004] O.J. No. 1417, 130 A.C.W.S. (3d) 218 (S.C.J.).

Conclusion

[66] For the above reasons, there should be an order consolidating the Radiocommunications Action and the Credit Card Action and directing Wagman, Sherkin to pay the sum it is holding in trust in court to the account of the consolidated actions. [page611]

[67] If the parties cannot agree as to the matter of costs, they may make submissions to me in writing beginning with submissions from DIRECTV within 20 days of the release of these reasons with Mr. Gillott's submissions to follow within 20 days.

Motion granted.

TAB 7

2000 CarswellOnt 227, 2000 CarswellOnt 227

C

2000 CarswellOnt 227, 2000 CarswellOnt 227

Dyna Corp. Jamaica Ltd. v. 967413 Ontario Ltd.

Dyna Corporation Jamaica Limited, Plaintiff and 967413 Ontario Limited, Mark Gagro and The Canadian Imperial Bank of Commerce, Defendant and 967413 Ontario Limited, Mark Gagro and The Canadian Imperial Bank of Commerce, Plaintiff by Counterclaim and Dyna Corporation Jamaica Limited, Defendant by Counterclaim

967413 Ontario Limited c.o.b. Dyna and Mark Gagro, Plaintiff and Dyna Corporation Jamaica Limited, Defendants

Ontario Superior Court of Justice

Cameron J.

Judgment: February 1, 2000
Heard: January 18, 2000
Docket: 99-CV-167528SR, 99-CV-181340

Counsel: *M. Simaan*, for Dyna Corporation.

Enzo DiIorio, for 967413 Ontario Limited, Mark Gagro.

Laurie MacFarlane, for Canadian Imperial Bank of Commerce.

Subject: Civil Practice and Procedure

Practice --- Pre-trial procedures — Consolidation or hearing together — Consolidation

DJ Ltd. was plaintiff and defendant by counter-claim in first Ontario action, and defendant in second Ontario action — DC Ltd. was defendant and plaintiff by counter-claim in first Ontario action and plaintiff in second Ontario action — DJ Ltd. was in financial trouble and property in first Ontario action was likely only asset — DC Ltd. brought motion to consolidate two Ontario actions — Motion dismissed — Evidence in first Ontario action limited to narrow

and discrete issue — Saving expense and avoiding multiplicity of proceedings not achieved if consolidation ordered on eve of trial — Restraining disposition of property in first action required mareva injunction and was not valid reason for consolidation — Courts of Justice Act, R.S.O. 1990, c. C.43, s. 107 — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 6.01.

Practice --- Pleadings — Amendment — Grounds for refusal — Delay

DJ Ltd. was plaintiff and defendant by counter-claim in first Ontario action, and defendant in second Ontario action — DC Ltd. was defendant and plaintiff by counter-claim in first Ontario action and plaintiff in second Ontario action — Four directors of DJ Ltd. were additional defendants in second Ontario action — Claims in second Ontario action required extensive discoveries and would likely take years before ready for trial — DC Ltd. knew of claim in second Ontario action months prior to pleading in first Ontario action — DC Ltd. brought motion to amend counter-claim in first Ontario action to include claims in second Ontario action — Motion dismissed — Counterclaim would unduly complicate and delay trial of first action — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rules 26.01, 27.07(2) and 27.08.

Practice --- Pleadings — Amendment — Grounds for refusal — Prejudice or injustice

DJ Ltd. was plaintiff and defendant by counter-claim in first Ontario action, and defendant in second Ontario action — DC Ltd. was defendant and plaintiff by counter-claim in first Ontario action and plaintiff in second Ontario action — DJ Ltd. was in financial trouble and property in first Ontario action was likely only asset — Claims in second Ontario action required extensive discoveries and would likely take years before ready for trial — DC Ltd. brought motion to amend counter-claim in first Ontario action to include claims in second Ontario action — Motion dismissed — Freezing what was likely DJ Ltd.'s only asset before trial without obtaining a mareva injunction would cause undue prejudice not compensible by costs — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rules 26.01, 27.07(2) and 27.08.

Practice --- Pleadings — General requirements — Where constituting abuse of process

DJ Ltd. was plaintiff and defendant by counter-claim in first Ontario action, and defendant in Jamaican and second Ontario actions — DC Ltd. was defendant and plaintiff by counter-claim in first Ontario action and plaintiff in Jamaican and second Ontario actions — DC Ltd. knew of claim in second Ontario action months prior to pleading in first Ontario action — Second Ontario action commenced subsequent to Jamaican action and only when trial of first action imminent — Same damages claimed in both Jamaican second Ontario actions — DC Ltd. brought motion to amend counter-claim in first Ontario action to include claims in second Ontario action — Motion dismissed — DC Ltd. chose to assert claims via Jamaican action rather than in counter-claim in first action — DC Ltd.'s attempt to delay trial of first action by amending pleading constituted abuse of process — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rules 26.01, 27.07(2) and 27.08.

Cases considered by *Cameron J.*:

Flitney v. Howard, [1958] O.R. 701, 15 D.L.R. (2d) 534 (Ont. C.A.) — referred to

Haikola v. Arasenau (1996), 46 C.P.C. (3d) 292, 27 O.R. (3d) 576 (Ont. C.A.) — referred to

Hales Contracting Inc. v. Towland-Hewitson Construction Ltd. (1996), 46 C.P.C. (3d) 299 (Ont. Gen. Div.) — referred to

Statutes considered:

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

s. 107 — referred to

Rules considered:

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

R. 6.01 — considered

R. 16.08 — referred to

R. 26.01 — considered

R. 27.07(2) — considered

R. 27.08 — referred to

R. 76 [en. O. Reg. 533/95] — referred to

MOTION for consolidation of two actions, or in alternative for leave to amend statement of defence and counter-claim

***Cameron J.*:**

Motion

1 This is a motion by 967413 Ontario Limited, which carries on business as Dyna Canada, and Mark Gagro for:

(a) an order consolidating the application in Court File No. 99-CV-167528SR (the "Bank Account Action") in which Dyna Canada is a respondent, with the application in Court File No. 99-CV-181340 (the "Licensing and Royalty Action") in which it is the plaintiff; and, in the alternative

(b) leave under Rule 26.01 to amend the statement of defence and counterclaim in the Bank Account Action to add the claim and allegations contained in the licensing and Royalty Action; and

(c) an order under Rule 16.08 validating service of this motion in respect of the Licensing and Royalty action on Dyna Corporation Jamaica Limited ("Dyna Corporation Jamaica Limited ("Dyna Jamaica") by service on their solicitors in the Bank Account Action; and

(d) an order for substitutional service of the statement of claim in the Licensing and Royalty Action on the defendant Dyna Jamaica by service on their solicitors.

Facts

2 The Bank Account Action turns on the ownership of an account with Canadian Imperial Bank of Commerce in which there is about $35,000. The Bank Account Action was commenced by Dyna Jamaica as an application in April 1999. In May 1999 Dyna Canada brought a cross application for the same relief.

3 On June 1, 1999, on consent of the parties, this court ordered that the proceedings be converted into an action on the issue of the entitlement to the monies in the bank account, Dyna Jamaica to be plaintiff and defendant by counterclaim and Dyna Canada to be the defendant and plaintiff by counterclaim. The affidavits in the applications were to constitute the pleadings and the parties were to cross-examine on the affidavits. The trial of the issue was to be governed by the simplified procedure under Rule 76.

4 On September 4, 1999 the judge hearing the pretrial set the trial date for the week of December 8, 1999 to allow sufficient time for Dyna Canada to implement its stated intention to:

(a) move for security for costs;

(b) commence a separate action for damages for licensing fees and royalties alleged owing under an agreement between the parties ("Licence") respecting the manufacturer and sale of Dyna Canada's adhesive products for the construction industry in the West Indies;

(c) consolidate the two actions.

5 On October 14, 1999 Dyna Canada commenced an action against Dyna Jamaica in Jamaica (the "Jamaican Action") for:

(a) damages for amounts alleged owing under the Licence;

(b) an injunction to restrain the defendant passing off building products and material from a source other than the plaintiff by use of the mark "DYNA";

(c) an injunction to restrain the defendant from using or disclosing the plaintiffs secret formula;

(d) an order for delivery or destruction of printed material, the use of which would be in breach of the injunction.

6 On November 22, 1999 Dyna Jamaica filed a defence in the Jamaican action.

7 On the same date Dyna Jamaica paid $3000 into court as security for costs in the Licensing and Royalty Action pursuant to an order obtained in October by Dyna Canada. Dyna Canada says it was not aware of the payment until about a week later.

8 On December 6, 1999, at the request of Dyna Canada, I adjourned the trial date set for December 8, 1999 to February 14, 2000, peremptory to Dyna Canada. I ordered Dyna Canada to pay to Dyna Jamaica $1,500 for trial preparation costs thrown away.

9 On the same day, December 6, 1999, Dyna Canada commenced the Licensing and Royalty Action in this court claiming $1,000,000 in damages form breach of the Licence against Dyna Jamaica and four of its directors, 2 of whom reside in Canada and 2 of whom reside in Jamaica. The other director of Dyna Jamaica is Mark Gagro, the principal of Dyna Canada.

10 At the time of the adjournment I was not aware of the proposed Licensing and Royalty Action.

11 These motions were commenced December 21, 1999.

12 At the time of hearing this motion the claim for damages was still included in the Jamaican Action, although Jamaican counsel for Dyna Canada has undertaken not to press the claim for damages in that action. Dyna Canada has taken no steps to obtain interim or interlocutory injunctive relief in the Jamaican Action.

13 Dyna Canada is concerned that the only asset of Dyna Jamaica in Canada may be the bank account and that if Dyna Jamaica succeeds in the Bank Account Action there will be no assets in Canada to satisfy its damage claims in the other actions.

14 These proceedings do not include any motion to stay the Licensing and Royalty action in Ontario.

15 The uncontroverted evidence before me suggests that Dyna Jamaica is experiencing severe financial hardship in Jamaica and that it is extremely unlikely that Dyna Canada will be in a position to collect or enforce any judgment for damages obtained by Dyna Canada in Jamaica. Two of the individual defendants in the Licensing and Royalty Action have assets in Ontario.

Motion to Consolidate or Try Together

16 In considering the motion for consolidation or hearing together of the two Ontario actions under Rule 6.01 there is no law and there are few facts in common in the two actions. The relief claimed arises out of related but different transactions. The evidence in the Bank Account Action is limited to the narrow and discrete issue of title to the bank account. The evidence and result in that action will be of little or no consequence to the damage claim based on liability under the Licence for fees and royalty payments based on sales of product. I am not persuaded that any inconsistent findings or judgments could result or time could be saved at trial.

17 The Licensing and Royalty Action has four defendants who are not party to the Bank Account Action. The Licensing and Royalty action will require extensive discoveries and will take many months, if not several years, to come to trial. The Bank Account Action is ready for trial. The only reason for delaying the trial of the Bank Account Action set for February 14, 2000 is to retain the bank account as an asset of Dyna Jamaica against which a judgment for damages could be set off or executed. This is not a valid consideration under Rule 6.01 or the *Courts of Justice Act*, s.107. Dyna Canada has an order for security for costs. If it wants the extraordinary remedy of restraining disposition of an asset before trial it should move for a *mareva* injunction and satisfy the test for that extraordinary remedy.

18 Fewer witnesses will be required in the Bank Account Action than in the Licensing and Royalty Action. Resolution of title to the bank account now will save time at the trial.

19 Counsel for Dyna Canada says the delay in bringing the motion for security for costs was because of the plaintiff's hope the action would not proceed in face of its threat to move for security for costs as early as June 1999. The motion for security for costs was intended to deter Dyna Jamaica from proceeding with the Bank Account Action. The plaintiff's bluff was called when the payment of the security was made. The payment caught Dyna Canada by surprise and necessitated the application for adjournment of the trial.

20 I consider the commencement of the Licensing and Royalty action by Dyna Canada an abuse of the process of this court since the same claim was included in Dyna Canada's action already commenced against Dyna Jamaica and its directors in Jamaica. A defence was filed in the Jamaican action before the Licensing and Royalty Action was commenced here.

21 I believe the Licensing and Royalty Action was commenced here in an attempt to overcome my order of December 6, 1999 that the trial of the Bank Account Action be held on February 14, 2000 peremptory to Dyna Canada and to preserve the asset for set-off or execution.

22 In exercising my discretion under Rule 6.01 I would dismiss the motion. It would delay a set trial date. The Licensing and Royalty Action is an abuse of this court's process. Granting the motion would allow Dyna Canada to freeze a possible asset of Dyna Jamaica before trial without satisfying the test for a *mareva* injunction.

23 The purpose of consolidation is to save expense and avoid multiplicity of pleadings and proceedings. This purpose can only be achieved by ordering consolidation at an early stage, to order it on the eve of trial does not accomplish this purpose: *Flitney v. Howard*, [1958] O.R. 701 (Ont. C.A.).

Motion to Amend Pleadings

24 Rule 26.01 provides:

> 26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

25 The moving party is entitled to the amendment, in this case of its counterclaim, unless the defendant by counterclaim satisfies the onus on it to show that it would suffer prejudice that could not be addressed by appropriate terms as to costs and adjournment. *Haikola v. Arasenau* (1996), 46 C.P.C. (3d) 292 (Ont. C.A.); *Hales Contracting Inc. v. Towland-Hewitson Construction Ltd.* (1996), 46 C.P.C. (3d) 299 (Ont. Gen. Div.).

26 What the defendant Dyna Canada really seeks in this motion is to add to its counterclaim in the Bank Account Action a counterclaim against the plaintiff Dyna Jamaica and claims against four of its directors who are not now parties to the Bank Account Action. This relief is addressed in Rule 27.07(2). That Rule permits the defendant to amend its statement of defence to add the counterclaim if it obtains leave of the court. Rule 27.07(2) does not mandate amendment. Further, Rule 27.08 provides:

> 27.08(1) A counterclaim shall be tried at the trial of the main action, unless the court orders otherwise.
>
> (2) Where it appears that a counterclaim may unduly complicate or delay the trial of the main action, or cause undue prejudice to a party, the court may order separate trials or order that the counterclaim proceed as a separate action.

27 I find the counterclaim will unduly complicate and delay the trial of the Bank Account Action. Further it will cause undue prejudice to Dyna Jamaica by freezing before trial what may become its asset without obtaining a *mareva* injunction. This result is not compensible by costs or delay. Further, Dyna Canada has known of this claim since November 1998 when it allegedly revoked the Licence. It chose not to add the damages claim to its counterclaim in the Bank Account Action in May 1999. Dyna Canada elected, instead, to assert the damages claim by a separate action in Jamaica. Only when trial was imminent in Ontario did it seek an adjournment of trial and commence the Licensing and Royalty action for the same damages sought in the Jamaican action. It now seeks to delay the trial of the Bank Account Action by asserting a counterclaim which it earlier chose not to assert by counterclaim but rather by way of separate action against the plaintiff Dyna Jamaica in another jurisdiction.

28 This court should not encourage this game playing with the Rules of Practice which, in my opinion, is an abuse of process.

29 The defendant in the Jamaican Action has filed its defence in that action. This court has no jurisdiction to award costs thrown away in that action.

30 I dismiss the motion to add the claims and allegations in the Licensing and Royalty Action to the counter-claim in the Bank Account Action.

31 Costs may be spoken to.

Motion dismissed.

END OF DOCUMENT

TAB 8

Flitney v. Howard.

[1958] O.J. No. 625

[1958] O.R. 701

15 D.L.R. (2d) 534

Ontario
Court of APPEAL.

Laidlaw, Gibson and Morden, JJ.A.

October 3, 1958.

J.S. Midanik, for defendant, appellant: The actions should be consolidated and for the following reasons. (1) The writes are numbered consecutively and most of the claims are the same or similar. [LAIDLAW, J.A.: There is no absolute right to consolidate. The master felt it right to set the actions down separately and the trial Judge may still consolidate. Unless you have an absolute right we cannot change the order.] Generally when there are the same parties, solicitors and juries in each case the action will be consolidated: Goldberg v. Gardner, [1944] O.W.N. 292, Mowder v. Roy, [1946] O.R. 154, at p.174. (2) The practice in the Courts is to consolidate two actions of these kinds. French, Court Forms showns the two causes in one action. (3) The master proceeded on wrong ground in saying that there would be difficulties at trial. The cases are difficult but this is always so. (4) The Evidence Act, R.S.O. 1950, c.119, s.8: see Livingstone v. Livingstone, [1945] O.W.N. 623. Section 8 is a protective section: Bradburn v. Bradburn, [1953] O.R. 882, per Hogg, J.A., at p.886, McCarthy v. Morrison-Lamothe Bakery, [1956] O.W.N. 690. I can find no case where there was consolidation of these types of action but in one English case a divorce and a nullity action were consolidated. In a nullity action questions about adultery can be asked but not in a divorce action: Taylor v. Tayloe (1923), 39 T.L.R. 173. Where evidence in one matter is not admissible in another this is not a bar to consolidation: Jud Whitehead Heater Co. v. Obler (1952), 245 P. 2d 608. (5) It is a rule of this Court and of common law and in the Judicature Act that there shall be no multiplicity of actions if possible: McCartney v. Morison, [1945] O.W.N. 24.

F.J. Sparham, for the plaintiff. This is an attempt to get the protection of s.8 of the Evidence Act. The rules of practice were not meant to interfere with substantive rights. See the difficulties of joining the actions in Boykowych v. Boykowych, [1955] S.C.R. 151, at p.158, Taylor v. Neil (1896), 17 P.R. 134, Livingstone v. Livingstone, supra. [LAIDLAW, J.A.: If the cases are not joined what questions could you ask that otherwise under s.8 you could not?] I have read cases where practically any question showing familiarity with the wife was ruled out as it might tend to show adultery so

that discovery in the Crim. Con. action is practically done away with. In Ottawa S.S. Trustees v. Quebec Bank (1917), 39 O.L.R. 118, Middleton, J., says the purpose of the section is to do away with multiplicity of actions but not with the causes of action. The trial Judge is under difficulty to know what questions to allow and it is difficult to instruct the jury. In Goldberg v. Gardner, supra, Kellock, J., siad there should be no indiscriminate joinder of actions. The burden is on the defendant to show that consolidation would simplify matters. An action for alienation of affections is not concerned with adultery: Brune v. Stensto, [1938] 1 W.W.R. 746, at p.751. [LAIDLAW, J.A.: There seem strong reason to have the whole complaint of the plaintiff tried and the whole damages assessed by one tribunal.] The examination for discovery would be useless, Pascoe v. Pascoe, [1937] O.W.N. 645, at p.646, Elliot v. Elliot, [1933] O.R. 206, per Logie, J., at p.210, Lang v. Lang, [1951] O.W.N. 72, at p.74. See Livingstone v. Livingstone, supra, per McRuer, C.J.H.C., at p.626, Bradburn v. Bradburn supra, at p.886. If the actions are joined the whole trial is made more difficult for the plaintiff. Consolidation takes away the trial Judge's right to dispense with the jury in the alienation case. The rules give the master a right to exercise his discretion. The Court of Appeal should not substitute its discretion for that of the master without very good reasons, Martin v. Deutch, [1943] O.R. 683, at p.692.

J.S. Midanik in reply.

Cur. adv. vult.

---

1 **MORDEN, J.A.**:-- The plaintiff issued two writs against the same defendant and has delivered his statements of claim. The defences have not been delivered. In the first action the plaintiff claims damages for enticement, alienation of affections and harbouring of his wife and in the second action damages for crim. con. The facts alleged in both statements are almost identical. In both the plaintiff pleads the loss of his wife's love, affection, consortium, cohabitation, society and services and the loss of the benefit of her earnings of approximately $2,000 to $2,500 a year. The principal differences between the claims are that there is no allegation of adultery in the alienation action which, of course, appears in the crim. con. statement of claim and there is an allegation in the latter action that the plaintiff has suffered and will suffer permanently a blow to his marital honour, injury to his feelings and serious hurt to his matrimonial and family life, which allegation does not appear in the alienation claim. The alleged improper conduct of the defendant is stated in both claims to have occurred in the same period of time.

2 Jury notices have been served by the plaintiff in both actions. The crim. con. action must be tried by a jury unless the parties waive such trial: Judicature Act, R.S.O. 1950, c.190, s.54.

3 Adultery is not a necessary element in an alienation action and loss of consortium and pecuniary loss are not necessary elements in an action for crim. con. However the plaintiff pleads, as he is entitled to do, in both actions loss of consortium and pecuniary loss. He could have with equal propriety pleaded adultery in the alienation action which would have been a proper element in aggravation of damages.

4 Upon the statements of claim and the law applicable to these causes of action, the claims for damages in both actions are based upon the value of the wife's affections, love and society, which is the consortium aspect and the loss of her services and earnings which is the pecuniary aspect. In

addition, in the crim. con. action the husband can claim compensation for injury to his feelings and the blow to his martial honour. Proof of adultery can aggrevate the damages in an alienation action and proof of alienation can aggravate the damages in a crim. con. action. Moss, J.A., is reported as saying in Bailey v. King (1900), 27 A.R. 703, at p.712:--

> It has long been the law that if a wife is separated from her husband without his consent, and while separate is guilty of adultery, the adulterer is liable to the husband. This is upon the ground that the action does not rest upon the deprovation of the wife's affections, society, and services, though this may properly be shewn in aggravation of the damages, but upon the injury done to the husband by the defilement of his wife, the invasion of his exclusive right to marital intercourse, and the consequences resulting therefrom.

See also Gwynne, J., in the same case, 31 S.C.R. 338, at p. 339-40. In both actions the whole character and conduct of both the wife and the husband are relevant facts and the possible defences are similar. This si fully discussed in the instructive and authoritative reasons of Laidlaw, J.A., in Mowder v. Roy, [1946] O.R. 154. It is sufficient to say that in the actions now under consideration the admissible evidence will be practically the same and the damages will be based on very much the same factors. The only distinction will be the issue of adultery and if that be found in the plaintiff's fovour in the crim. con. action, the jury in that action will be entitled to consider in assessing the damages the same facts as the jury would in the alienation action. If the actions are tried by different juries there would be a very real danger, approaching a certainty, of the plaintiff, if successful in both actions, being compensated twice-over for the same injuries. In the course of the second trial there would be bound to be references to the testimony at the first trial and the result of that trial, which would be confusing and perplexing to the second jury however carefully they were charged by the trial Judge. There would be also a possibility of inconsistent findings upon similar evidence and the certainty of multiplicity of proceedings and costs.

5 Actions combining these causes have often been tried in Ontario and trial Judges, perhaps with some difficulty, have instructed juries to separate the damages resulting from each cause of action. For example, in Maguire v. Maguire (1921), 50 O.L.R. 579, the jury assessed the damages for alienation at $5,000 and for crim. con. at $10,000. On appeal it was contended on behalf of the defendant that the basis of damages for both causes of action was loss of consortium and that therefore there should not have been two assessments. In dismissing the appeal, Ferguson, J.A., speaking for the Court said, at p.584:--

> Reading the verdict along with the charge, I am of the opinion that the jury intended to award $5,000 for the alienation and necessary loss of consortium and $10,000 compensation to the husband for the injury to his feelings, the blow to his marital honour, and the serious hurt to his martimonial and family life.

If the two cases in Maguire had been tried by different juries, it would have been impossible for the Court of Appeal to have been satisfied that the damages had been assessed on the proper basis and to have affirmed the judgment on the ground it did. In these types of actions there is always a real danger of overlapping damages as is illustrated by Bannister v. Thompson (1913), 29 O.L.R. 562, 32 O.L.R. 34. There the jury awarded the plaintiff $500 for enticement and $1,000 for alienation and on appeal it was held that the plaintiff had suffered no damage beyond the loss of his wife's af-

fections, love, services and society and his recovery should therefore be confined to the damages assessed for alienation. See also Menon v. Menon, [1936] P. 200.

6 Although the causes of action in the two actions now under consideration are not identical, the measure of damages, in view of the pleadings, would depend on practically the same considerations in both actions. Adultery is not alleged in the alienation action; nevertheless, it is necessarily alleged in the other action as having occurred during the same period of time as the alleged alienation of the wife's affections. It would be impossible, in my opinion, to regard the alleged adultery, if proved, as something altogether extrinsic to the alleged enticement, alienation and harbouring. In actions in which the character and conduct of the husband, wife and the defendant are important factors, their character and conduct and the other important issues common to both actions should be passed upon by the same tribunal of fact at the same time.

7 In the circumstances of these actions, it would be vexations and an abuse of the process of the Court to permit them to be tried separately, and, in my opinion, they should be consolidated unless there are cogent and compelling reasons against it.

8 Mr. Sparha, founded his arguemtn against consolidation upon the difficulties he would encounter upon discovery and at the trial of the claim for alienation if the actions were consolidated, because of the Evidence Act, R.S.O. 1950, c.119, s.8, consequence of adultery shall be liable to be asked or bound to answer any question tending to show that he or she is guilty of adultery unless scuh witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery. He conceded that s.8 would bar all such questions in the crim. con. action but it would not bar any such question in the alienation action because that action is not, as the pleadings now stand, one brought in consequence of adultery. If the actions were consolidated then, many questions which would not have been otherwise privileged -- for example, directed to the association of the plaintiff's wife and the defendant on the issue of alienation -- would be barred. And in support of this result he cited Livingston v. Livingston, [1945] O.W.N. 623, in which McRuer, J.A., (as he then was) said, after discussing the effect of s.8, at p.626:--

> In the counterclaim for alinomy it is alleged that the defendand Livingstone, during the period of her married life, has conducted herself properly and and decorously, and discharged all the duties of a wife. There are also allegations of cruelty on the part of the plaintiff. In the defence to the counterclaim, and the particulars thereof, these allegations are denied. In may well be that the questions may have a two-fold effect. The answer may tend to prove some other issue and at the same time tend to prove adultery. If an answer tends to prove adultery, it is barred, notwithstanding that it may tend to prove something else at the same time.

This statement was expressly approved by this Court in Bradburn v. Bradburn, [1953] O.R. 882, and must be taken as settled law in this Province. I therefore agree with Mr. Sparham's submission that in a consolidated action there would be many questions which, although directed to the alienation issue, would tend to show that the defendant was guilty of adultery and would therefore be barred. This was the effect given to the section in a consolidated petition for nullity and divorce in Taylor v. Taylor (1923), 39 T.L(R. 173, and this was the reason given by the learned senior master for refusing consolidation.

9 While i recognize a party's right to full discovery in the absence of any claim of privilege, nevertheless the plaintiff pleaded adultery in the crim. con. action as having occurred during the same period of time as the alleged alienation of affections. Although he will be limited in the scope of his questions on the alienation issue in a consolidated action, I do not consider that he will be placed under any unfair disability. There is no reason, in my view, why this plaintiff in his examination of the defendant should be as untrammelled as a plaintiff who sues for damages for alienation of affections and does not allege adultery in the same or in a concurrent action. In my opinion, the argument on behalf of the plaintiff fails to displace the strong reasons for consolidating these actions.

10 The order of Aylen, J., dismissing the appeal from the senior master is "without prejudice to the right of the appellant to apply to the trial Judge for consolidation of these actions upon proper notice to the plaintiff in each of the above actions." The purpose of consolidation is to save expense and avoid multiplicty of pleadings and proceedings and this purpose can only be achieved by ordering consolidation at a very early stage. To order it on the very eve of trial would not accomplish that purpose.

11 I would, therefore, allow the defendant's appeal and set aside the orders of Aylen, J., and the senior master. In place of the order of the senior master, there should be an order staying the second action with leave to the plaintiff to amend within 10 days his statement of claim in the first action by including therein his claims in the second action and the statement of defence in the consolidated action will be delivered ten days after the delivery of the amended statement of claim. The costs of the application before the senior master and Aylen, J., will be costs in the cause in the consolidated action and the costs of this appeal and of the motion for leave to appeal will be payable to the defendant forthwith after taxation.

12 Appeal allowed.

13 Solicitors for the appellant: Sherman & Midanik, Toronto.

14 Solicitor for the plaintiff: F.J. Sparham, Toronto.

[Argument reported by MRS. N.L. CARNWATH & MR. G.W. BRIGDEN, Barristers-at-law.]

TAB 9

Case Name:

Forestall v. Toronto Police Services Board

Re: Gregory Forestall et al., and Toronto Police Services Board and Toronto Chief of Police, William Blair
And between
PC Steven Correia #1081 et al., and Toronto Police Services Board and Toronto Chief of Police, William Blair

[2007] O.J. No. 184

154 A.C.W.S. (3d) 545

Court File Nos. 370/06 and 388/06

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

K.E. Swinton J.

Heard: January 18, 2007.
Judgment: January 19, 2007.

(8 paras.)

Counsel:

Owen Rees for the Chief of Police, Moving Party (Respondent).

Sharmila M. Clark for the Toronto Police Services Board.

Frank Addario for Forestall et al., Responding Parties (Applicants).

Joanne E. Mulcahy for Correia et al., Responding Parties (Applicants).

ENDORSEMENT

1 **K.E. SWINTON J.**:-- The Toronto Chief of Police moves for an order to hear the applications for judicial review in Court Files No. 370/06 and 388/06 at the same time pursuant to rule 6.01(1).

2 Both applications for judicial review arise from a decision of the Toronto Police Services Board dated July 10, 2006, in which the Board considered the Chief's application pursuant to s. 69(18) of the *Police Services Act*, R.S.O. 1990, c. P.15. That provision requires the Board's approval to serve notices of hearing under the Act after six months have elapsed since the facts on which a complaint is based first came to the attention of the Chief or Board. The Board held that it was not unreasonable, based on the totality of material before it, to delay serving the notices of hearing and directed that the notices be served on the subject officers forthwith.

3 The applicants in Court File No. 388/06 have all been charged with criminal offences ("the charged officers"), while some of those in Court File No. 370/06 were named in the Chief's application as unindicted co-conspirators in the criminal count against the charged officers alleging conspiracy to obstruct justice. All the applicants in Court File No. 370/06 will likely be Crown witnesses in the criminal trial of the charged officers ("the witness officers").

4 Rule 6.01(1) confers a discretion on the Court to order joinder if (a) the proceedings have a question of law or fact in common, or (b) the relief claimed in them arises out of the same transaction or occurrence.

5 In my view, this is an appropriate case to order that the two applications be heard together, as both applications arise out of the same transaction or occurrence - namely, the decision of the Board on July 10, 2006 resulting from the application of the Chief of Police.

6 Moreover, there are questions of law or fact in common in both applications. Both seek to quash the Board's decision, raising issues of lack of disclosure by the Chief of Police, lack of fairness in the Board's proceedings, a reasonable apprehension of bias by the Board, insufficient reasons, and an unreasonable or patently unreasonable decision on the merits. Similar remedies are sought in both applications.

7 While the parties are not the same in the two applications, nor is the factual material filed before the Board and included in the application records identical, it is desirable that these two applications be heard by the same panel of the Divisional Court. This will avoid a multiplicity of proceedings and avoid the danger of two panels reaching different results arising out of the same decision of the Board where the applications raise the same or similar issues of fact and law.

8 Therefore, the motion is granted, and I order that the applications for judicial review in Court Files No. 370/86 and 388/06 be heard at the same time. As agreed by the parties, no costs are awarded.

K.E. SWINTON J.

cp/e/qlmxd/qlbxs