Court of Appeal File Numbers: C56118 / C56115 / C56125
Superior 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

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# SUPPLEMENTARY AUTHORITIES OF SINO-FOREST CORPORATION

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# Tab 1

# Companies' Creditors Arrangement Act

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

...

Application

**3.** (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

...

**11.8** (1) Despite anything in federal or provincial law, if a monitor, in that position, carries on the business of a debtor company or continues the employment of a debtor company's employees, the monitor is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

(*a*) that is in respect of the employees or former employees of the company or a predecessor of the company or in respect of a pension plan for the benefit of those employees; and

(*b*) that exists before the monitor is appointed or that is calculated by reference to a period before the appointment.

Status of liability

(2) A liability referred to in subsection (1) shall not rank as costs of administration.

Liability of other successor employers

(2.1) Subsection (1) does not affect the liability of a successor employer other than the monitor.

Liability in respect of environmental matters

(3) Notwithstanding anything in any federal or provincial law, a monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(*a*) before the monitor's appointment; or

(*b*) after the monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the monitor's gross negligence or wilful misconduct.

Reports, etc., still required

(4) Nothing in subsection (3) exempts a monitor from any duty to report or make disclosure imposed by a law referred to in that subsection.

Non-liability re certain orders

(5) Notwithstanding anything in any federal or provincial law but subject to subsection (3), where an order is made which has the effect of requiring a monitor to remedy any environmental condition or environmental damage affecting property involved in a proceeding under this Act, the monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(*a*) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed or during the period of the stay referred to in paragraph (*b*), the monitor

(i) complies with the order, or
(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(*b*) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (*a*) or within ten days after the order is made or within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the monitor to contest the order, or
(ii) the court having jurisdiction under this Act for the purposes of assessing the economic viability of complying with the order; or

(*c*) if the monitor had, before the order was made, abandoned or renounced any interest in any real property affected by the condition or damage.

Stay may be granted

(6) The court may grant a stay of the order referred to in subsection (5) on such notice and for such period as the court deems necessary for the purpose of enabling the monitor to assess the economic viability of complying with the order.

Costs for remedying not costs of administration

(7) Where the monitor has abandoned or renounced any interest in real property affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

Priority of claims

(8) Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remedying any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge

(*a*) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and

(*b*) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.

Claim for clean-up costs

(9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

1997, c. 12, s. 124;

2007, c. 36, s. 67.

...

Duties and functions

**23.** (1) The monitor shall

(*a*) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and
(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

...

Certain rights limited

**34.** (1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent.

Lease

(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid rent in respect of any period before the commencement of those proceedings.

Public utilities

(3) No public utility may discontinue service to a company by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid for services rendered or goods provided before the commencement of those proceedings.

Certain acts not prevented

(4) Nothing in this section is to be construed as

(*a*) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of proceedings under this Act;

(*b*) requiring the further advance of money or credit; or

(*c*) preventing a lessor of aircraft objects under an agreement with the company from taking possession of the aircraft objects

(i) if, after proceedings commence under this Act, the company defaults in protecting or maintaining the aircraft objects in accordance with the agreement,
(ii) 60 days after the day on which proceedings commence under this Act unless, during that period, the company

(A) remedied the default of every other obligation under the agreement, other than a default constituted by the commencement of proceedings under this Act or the breach of a provision in the agreement relating to the company's financial condition,

(B) agreed to perform the obligations under the agreement, other than an obligation not to become insolvent or an obligation relating to the company's financial condition, until the proceedings under this Act end, and

(C) agreed to perform all of the obligations arising under the agreement after the proceedings under this Act end, or

(iii) if, during the period that begins on the expiry of the 60-day period and ends on the day on which proceedings under this Act end, the company defaults in performing an obligation under the agreement, other than an obligation not to become insolvent or an obligation relating to the company's financial condition.

Provisions of section override agreement

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

Powers of court

(6) On application by a party to an agreement or by a public utility, the court may declare that this section does not apply — or applies only to the extent declared by the court — if the applicant satisfies the court that the operation of this section would likely cause the applicant significant financial hardship.

Eligible financial contracts

(7) Subsection (1) does not apply

(*a*) in respect of an eligible financial contract; or

(*b*) to prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Payments Act* and the by-laws and rules of that Association.

Permitted actions

(8) The following actions are permitted in respect of an eligible financial contract that is entered into before proceedings under this Act are commenced in respect of the company and is terminated on or after that day, but only in accordance with the provisions of that contract:

(*a*) the netting or setting off or compensation of obligations between the company and the other parties to the eligible financial contract; and

(*b*) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

Restriction

(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

Net termination values

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

...

Statutory Crown securities

**39.** (1) In relation to proceedings under this Act in respect of a debtor company, a security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or a province or a workers' compensation body is valid in relation to claims against the company only if, before the day on which proceedings commence, the security is registered under a system of registration of securities that is available not only to Her Majesty in right of Canada or a province or a workers' compensation body, but also to any other creditor who holds a security, and that is open to the public for information or the making of searches.

Effect of security

(2) A security referred to in subsection (1) that is registered in accordance with that subsection

(*a*) is subordinate to securities in respect of which all steps necessary to setting them up against other creditors were taken before that registration; and

(*b*) is valid only in respect of amounts owing to Her Majesty or a workers' compensation body at the time of that registration, plus any interest subsequently accruing on those amounts.

2005, c. 47, s. 131;

2007, c. 36, s. 79.

# Tab 2

*Indexed as:*

# Dilcon Constructors Ltd. v. ANC Developments Inc. (Alta. C.A.)

**Between**
**Dilcon Constructors Ltd., Plaintiff/Defendant by Counterclaim (Appellant), and**
**ANC Developments Inc., Defendant/Plaintiff by Counterclaim (Respondent), and**
**NLK-CELPAP Canada Inc., Nystrom, Lee, Kobayashi & Associates Inc. and Nystrom, Lee, Kobayashi & Associates, Third Parties on Counterclaim (Not parties to Appeal)**

[1994] A.J. No. 571

117 D.L.R. (4th) 156

155 A.R. 314

30 C.P.C. (3d) 389

49 A.C.W.S. (3d) 261

Appeal No. 14493

Alberta Court of Appeal

**Kerans, Hetherington and McFadyen JJ.A.**

July 20, 1994.

(7 pp.)

**Statutes, Regulations and Rules Cited:**

Alberta Rules of Court, Rule 66(1).

*Practice -- Third party procedure -- Nature and scope -- -- When available -- Return of monies.*

Appeal from a decision confirming the order of a Master striking a third party notice issued by a defendant by counter-claim. The plaintiff was the general contractor on a construction project in which the appellant participated as a subcontractor. The proposed third parties were the mechanical engineers on the project. The counter-claim involved a demand for return of monies paid by the general contractor in response to a billing from it for unauthorized extras. In its third party notice, the appellant alleged that the engineers had authorized these extras and if they did not have authority to do so, the appellant was entitled to contribution or indemnity by reason of their breach of warranty of authority. Given that a claim for relief as a result of a breach of a warranty of authority was in the nature of a claim for damages, the critical issue was whether the Rule permitting a third party notice applied only to claims for indemnity.

HELD: Appeal allowed. A purposive interpretation of the applicable Rule did not require it to be read down to authorize third party claims only in cases of indemnity. The purpose of the Rule being to avoid the extra expense of duplicate lawsuits, the third party notice was sustainable where the appellant's claim, if pursued in a separate action, would certainly have been consolidated, or at least tried together, with the plaintiff's action.

L.A. Westersund and C.W. Ford, for the Appellant.
C.J. Popowich, for the Respondent.

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1 **KERANS J.**:-- This is an appeal by a defendant-by-counterclaim whose Third Party Notice was struck by a master-in-chamgers of the Court of Queen's Bench of Alberta, an order later confirmed by a judge of that Court.

2 The counterclaim is not part of the record before us, but it seems to be common ground that the respondent counterclaimant ANC Developments Inc. was the general contractor on a construction project, and the appellant and defendant-by-counterclaim Dilcon was a sub-contractor. The proposed third party NLK-CELPAP Canada Inc. and others were the mechanical engineers on the project. The proposed notice alleges that the counterclaim involves a demand for return of monies paid by the general contractor to Dilcon in response to a billing from it for unauthorized extras. The notice also alleges that the engineers had authorized these extras, and, as one alternative, it alleges that, if they did not have authority to do so, Dilcon seeks "contribution and indemnity ... by reason of ... breach of warranty of authority". [A.B. 4-5].

3 The learned chambers judge correctly observed that a claim for relief as a result of a breach of a warranty of authority is in the nature of a claim for damages, and is not a claim for contribution or indemnity. I agree that the term "indemnity" customarily means a commitment, express or implied, to save a person harmless from the claims of another. See Birmingham and District Land Company v. London and Northwestern Railway Company, (1887), 34 Ch. D. 261. Here, there is no allegation of such a commitment, and it would be novel to suggest that the relief for a breach of a warranty of authority is anything other than damages.

4 The critical issue, however, is not whether this claim can fairly be classified as one seeking indemnity. It is, rather, whether the Rule permitting a third party notice applies only to claims for indemnity. In my view, it does not. I would therefore vacate the quashing order. As a result, I need

not press against the outer limits of the doctrine of implied indemnity, as the appellant has suggested.

Rule 66(1) provides:

> When a defendant claims against any person (whether or not that person is already a party to the action) that the person is or may be liable to him for all or part of the plaintiff's claim against him he may serve a third party notice.

**5** I observe that the words "contribution" and "indemnity" do not appear in the Rule. Also, the notice before us falls within the words of the Rule: it is a claim that the proposed third party "... is or may be liable to him for all or any part of the plaintiff's claim ...". That is so, in this case, because the measure of the award to Dilcon against the third party, if that claim succeeds, would be the damage award in the suit by the plaintiff-by-counterclaim against Dilcon. A good test, then, might be to ask if the judgment obtained in the original action might decide an issue raised by the third party procedure. I would not, however, offer this as an exhaustive test.

**6** The real question, then, is whether a purposive interpretation of the Rule would require it to be read down to authorize third party procedure only in cases of indemnity. In my view, it does not. The purpose of the rule is to avoid the extra expense of duplicate lawsuits. See Watson et el "Third-Party Practice" (1970) 4 Ottawa L. Rev. 132, at 139. Nothing can prevent Dilcon from suing the engineers. The only question is whether this suit can or should be combined with the counterclaim to avoid "multiplicity of proceedings and inconsistent findings". See C.C.B. v. Carpenter [1990] 1 W.W.R. 323 at 336. Also, the United States Court of Appeals, Second Circuit, in Dery v. Wyer (1959), Ca2 N.Y., 265 F2d 804, 2FR Serv. 2d 172, said that the general purpose of third party procedure is:

> ... to avoid two actions which should be tried together to save the time and cost of reduplication [sic] of evidence, to obtain consistent results from identical evidence, and to do away with a handicap to a defendant of a time difference between a judgment against him and a judgment in his favour against the third party defendant.
> [p.804]

**7** In this case, it is unthinkable that, if Dilcon tomorrow issued a separate claim against the engineers, the two suits would not be consolidated or, at least, tried together. Third party procedure is a simple method of consolidation in cases that cry out for it. It may be seen by a plaintiff as a distracting cause of delay, but that is not the only consideration. The proper administration of justice is also a factor. It is therefore not in keeping with the object of the rule to limit its application in the arbitrary way suggested by the respondent.

**8** In fairness to the learned chambers judge, a brief history of this issue is required. In the 1914 Rules, third party procedure was limited to claims for contribution or indemnity. See then Rule 48,

and Sask. Co-op Elevator Co. Ltd. v. Grand Trunk Railway Co. [1923] 1 W.W.R. 445 at 446. But this rule was seen as too narrow, and was replaced in 1944 by then Rule 81. That rule affirmed that there can be a third party proceeding for indemnity, but added two additional categories: cases where relief is sought that is "connected with the original subject matter ... or remedy ... claimed by the plaintiff" and also any claim against anybody which raises the same "subject matter" and a substantially similar issue. Then, in Patey v. Papley (1956) 20 W.W.R. 289 (Alta. C.A.), at p. 293, this Court said the later rule permits a third party notice in any case "... based upon the same or substantially the same facts as will emerge at the trial of the plaintiff's action". That view seems to have gone too far for general acceptance. Indeed, it might be said that it warranted a third party proceeding that was but remotely connected to the original claim, and where trial together is not necessarily warranted. In 1968, the Rule was again amended, to say what it now says. This change was commented upon by J. H. Laycraft and W.A. Stevenson (as they then were) in an article about the 1968 rules. See "The Alberta Rules of Court - (1969)" (1969) 7 Alta. Law Rev. 190. They said, at p.191 that "... the third party notice is now available only for a claim over in the strictest sense."

**9** It would appear that some judges took this comment to mean that the scope of the rule had been narrowed all the way back to the 1914 rule. See, for example, Petro-Canada Inc. v. Singer Valve (1993), 13 Alta. L.R. (3d) 252 (Q.B.) at 234 and Penn West Petroleum Ltd. v. Koch Oil Co. Ltd. (1992), 134 A.R. 314 (M.C.) at 316; approved on appeal (1993), 142 A.R. 169 (Q.B.) at 173. I do not agree. The 1968 amendment was intended to narrow the rule from the wide position taken by this Court in 1961, but was not a return to the old Rule.

**10** The history of this matter is complicated by the fact that the redoubtable Master Funduk, in 1986, discovered a restatement of the 1944 rule in the Judicature Act, R.S.A. 1980, c. J-1. See All Lift Consultants v. Adam Crane Service (1980) (1986) 45 Alta. L.R. (2d) 29, 69 A.R. 313. That provision was repealed in 1991.

**11** For these reasons, I would allow the appeal and allow the third party notice to proceed.

KERANS J.A.
HETHERINGTON J.A.:-- I concur.
McFADYEN J.A.:-- I concur.

**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 OR COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION**

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