CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL
No. : 500-09-020594-107
(S.C. #500-11-036133-094)

COURT OF APPEAL

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC., a legal person incorporated under the laws of the State of Delaware, having its principal executive offices at 1155 Metcalfe Street, in the City and District of Montréal, Province of Quebec, H3B 5H2;

And

ABITIBI-CONSOLIDATED INC., a legal person incorporated under the laws of Canada, having its principal executive offices at 1155 Metcalfe Street, in the City and District of Montréal, Province of Quebec, H3B 5H2;

And

BOWATER CANADIAN HOLDINGS INC., a legal person incorporated under the laws of the Province of Nova Scotia, having its principal executive offices at 1155 Metcalfe Street, in the City and District of Montréal, Province of Quebec, H3B 5H2;

And

the other Petitioners listed on Appendices "A", "B" and "C";

Petitioners

And

ERNST & YOUNG INC., a legal person under the laws of Canada, having a place of business at 800 René-Lévesque Blvd. West, Suite 1900, in the City and District of Montréal, Province of Quebec, H3B 1X9;

Monitor

BRIEF OF AUTHORITIES OF THE MONITOR

MAY 10, 2010

INDEX

TAB 1

CANADA	**SUPERIOR COURT**
PROVINCE OF QUEBEC **DISTRICT OF MONTRÉAL**	Commercial Division *Sitting as a court designated pursuant to the Companies' Creditors Arrangement Act, R.S.C., c. C-36, as amended*
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Monitor

THIRTY-FOURTH REPORT OF THE MONITOR

February 19, 2010

INTRODUCTION

1. On April 17, 2009, Abitibi-Consolidated Inc. ("**ACI**") and its subsidiaries listed in Appendix "A" hereto (collectively with ACI, the "**ACI Petitioners**") and Bowater Canadian Holdings Incorporated ("**BCHI**") and its subsidiaries and affiliates listed in Appendix "B" hereto (collectively with BCHI, the "**Bowater Petitioners**") (the ACI Petitioners and the Bowater Petitioners are collectively referred to herein as the "**Petitioners**") filed for and obtained protection from their creditors under the *Companies' Creditors Arrangement Act* (the "**CCAA**" and the "**CCAA Proceedings**") pursuant to an Order of this Honourable Court (the "**Initial Order**"). Pursuant to an Order of this Honourable Court dated November 10, 2009, Abitibi-Consolidated (U.K.) Inc., a subsidiary of ACI, was added to the list of ACI Petitioners.

2. Pursuant to the Initial Order, Ernst & Young Inc. ("**EYI**") was appointed as monitor of the Petitioners (the "**Monitor**") under the CCAA and a stay of proceedings in favour of the Petitioners was granted until May 14, 2009 (the "**Stay Period**"). The Stay Period has been extended until March 15, 2010 pursuant to further Orders of this Honourable Court.

3. On April 16, 2009, AbitibiBowater Inc. ("**ABH**"), Bowater Inc. ("**BI**"), and certain of their direct and indirect U.S. and Canadian subsidiaries, including BCHI and Bowater Canadian Forest Products Inc. ("**BCFPI**") (collectively referred to herein as "**U.S. Debtors**"), filed voluntary petitions (collectively, the "**Chapter 11 Proceedings**") for relief under Chapter 11 of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101 et seq. (the "**U.S. Bankruptcy Code**") in the United States Bankruptcy Court for the District of Delaware (the "**U.S. Bankruptcy Court**").

4. BCHI, Bowater Canada Finance Corporation, Bowater Canadian Limited, AbitibiBowater Canada Inc., BCFPI, Bowater LaHave Corporation and Bowater Maritimes Inc. have commenced both CCAA Proceedings and Chapter 11

Proceedings and are referred to herein collectively as the "**Cross-Border Petitioners**" and are also included in the definition of "**Petitioners**".

5. The Petitioners are all subsidiaries of ABH (ABH, collectively with its subsidiaries, are referred to as the "**ABH Group**").

6. On April 17, 2009, ABH and the Petitioners listed on Appendix "C" hereto (collectively with ABH, the "**18.6 Petitioners**") obtained Orders under Section 18.6 of the CCAA in respect of voluntary proceedings initiated under Chapter 11 and EYI was appointed as the information officer in respect of the 18.6 Petitioners.

7. On April 16, 2009, ACI and ACCC filed petitions for recognition under Chapter 15 of the U.S. Bankruptcy Code. On April 21, 2009, the U.S. Bankruptcy Court granted the recognition orders under Chapter 15 of the U.S. Bankruptcy Code.

8. On April 22, 2009, the Court amended the Initial Order to extend the stay of proceedings to the partnerships listed in Appendix "D" hereto (the "**Partnerships**").

BACKGROUND

9. ABH is one of the world's largest publicly traded pulp and paper manufacturers. It produces a wide range of newsprint and commercial printing papers, market pulp and wood products. The ABH Group owns interests in or operates pulp and paper facilities, wood products facilities and recycling facilities located in Canada, the United States, the United Kingdom and South Korea.

10. Incorporated in Delaware and headquartered in Montreal, Quebec, ABH functions as a holding company and its business is conducted principally through four direct subsidiaries: BI, Bowater Newsprint South LLC ("**Newsprint South**") (BI, Newsprint South and their respective subsidiaries are collectively referred to as the "**BI Group**"), ACI (ACI and its subsidiaries are collectively referred to as the

"**ACI Group**") and AbitibiBowater US Holding LLC ("**ABUSH**") (ABUSH and its respective subsidiaries are collectively referred to as the "**DCorp Group**").

11. ACI is a direct and indirect wholly-owned subsidiary of ABH. ABH wholly owns BI which in turn, wholly owns BCHI which, in turn, indirectly owns BCFPI which carries on the main Canadian operations of BI.

12. ACCC, a wholly-owned subsidiary of ACI, and BCFPI hold the majority of ABH's Canadian assets and operations.

PURPOSE

13. This is the thirty-fourth report of the Monitor (the "**Thirty-Fourth Report**") in the CCAA Proceedings, the purpose of which is to report to this Honourable Court with respect to (i) the motion (the "**Motion**") by Her Majesty the Queen in the right of the Province of Newfoundland and Labrador (the "**Province**") for a declaration regarding Orders issued pursuant to the *Environmental Protection Act*, S.N.L. 2002, c. E-14.02 (the "**EPA**") for which Her Majesty the Queen in the right of the Province of British Columbia ("**BC**") has intervened and (ii) the Petitioners amended contestation with respect to the Motion (the "**Contestation**").

TERMS OF REFERENCE

14. In preparing this Thirty-Fourth Report, the Monitor has been provided with and, in making comments herein, has relied upon unaudited financial information, the ABH Group's books and records, financial information and projections prepared by the ABH Group and discussions with management of the ABH Group and its advisers (the "**Management**"). The Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of such information and, accordingly, the Monitor expresses no opinion or other form of assurance in respect of such information contained in this Thirty-Fourth Report. Some of the information referred to in this Thirty-Fourth Report consists of forecasts and projections. An examination or review of the financial forecast and projections,

as outlined in the Canadian Institute of Chartered Accountants Handbook, has not been performed. Future-oriented financial information referred to in this Thirty-Fourth Report was prepared by the ABH Group based on Management's estimates and assumptions. Readers are cautioned that, since these projections are based upon assumptions about future events and conditions, the actual results will vary from the projections, even if the assumptions materialize, and the variations could be significant.

15. Capitalized terms not defined in this Thirty-Fourth Report are as defined in the previous reports of the Monitor and the Initial Order. All references to dollars are in U.S. currency unless otherwise noted.

16. Copies of all of the Monitor's Reports, in both English and French, including a copy of this Thirty-Fourth Report, and all motion records and Orders in the CCAA Proceedings will be available on the Monitor's website at www.ey.com/ca/abitibibowater. The Monitor has also established a bilingual toll-free telephone number that is referenced on the Monitor's website so that parties may contact the Monitor if they have questions with respect to the CCAA Proceedings.

17. Copies of all of the U.S. Bankruptcy Court's orders are posted on the website for Epiq Bankruptcy Solutions LCC (**"Epiq"**) at http://chapter11.epiqsystems.com/abitibibowater. he Monitor has included a link to Epiq's website from the Monitor's website.

PROVINCE AND BC

18. As discussed in more detail in this Thirty-Fourth Report, one point of distinction between the position of the Province and that of BC is that, as of the date of the commencement of these CCAA Proceedings, certain of the Petitioners were, and remain today, in ownership and occupation of the relevant properties in BC whereas only a portion of the relevant properties in Newfoundland remained in the Petitioners' possession, occupation or control as at such date.

19. In addition, the order of magnitude of the potential remediation claims for the properties in Newfoundland are better understood than the potential remediation claims for the properties in BC.

20. In this Thirty-Fourth Report the Monitor will discuss first the position of the Province and the properties in Newfoundland and thereafter discuss the properties in BC.

NEWFOUNDLAND - THE ABITIBI ACT

21. On December 4, 2008, ABH announced the closure of the Petitioners' last remaining operating mill in the Province effective March, 2009, prior to the Petitioners filing for protection in these proceedings.

22. On December 16, 2008, the Province introduced and passed the *Abitibi-Consolidated Rights and Assets Act*, S.N.L. 2008, c. A-1.01 (the "**Abitibi Act**").

23. The Petitioners are of the view that, in effect, the Abitibi Act confiscated most of the assets of the Petitioners located in the Province, cancelled all water and hydro electric agreements between the Province and the Petitioners, cancelled legal proceedings instituted by the Petitioners against the Province and deprived the Petitioners of access to the Province's Courts for redress in respect of the foregoing. The assets allegedly confiscated by the Abitibi Act are described in greater detail in the Contestation.

24. The Petitioners have advised the Monitor that, in April 2009, ABH filed a *Notice of Intent to Submit a Claim to Arbitration* under Chapter 11 of the *North American Free Trade Agreement* ("**NAFTA**") in respect of losses (in excess of $300 million) arising out of the allegedly wrongful confiscation effected by the Province. The Petitioners have also advised the Monitor that, although they remain in negotiations with the Canadian Government regarding its claim under NAFTA, should the negotiations fail to result in an acceptable amount of compensation, the Petitioners will file a *Notice of Arbitration* under Chapter 11 of NAFTA.

THE EPA ORDERS AND THE SITES

25. On November 12, 2009, the Province, acting through the Minister of Environment and Conservation, issued five Ministerial Orders pursuant to Section 99 of the EPA (the "**EPA Orders**") against the Petitioners.[1] On that same date, the Province served the Motion seeking a declaration regarding the EPA Orders from this Honourable Court.

26. In its Motion, the Province is seeking a declaration that, among other things, the Order issued by this Honourable Court on August 26, 2009 (the "**Claims Procedure Order**") shall not bar, extinguish or otherwise affect the enforceability of the EPA Orders made against the Petitioners.

27. The EPA Orders require that the Petitioners submit a detailed Remediation Action Plan for all of the Sites (as defined below), complete approved site remediation actions and close all landfills and lagoons/impoundments associated with such Sites, all within certain specified timelines.

28. The EPA Orders relate to several locations in the Province (collectively, the "**Sites**"), all of which were either no longer owned by the Petitioners or no longer used by the Petitioners in their business as follows:

   (a) mining and processing of minerals at the Buchans mine (the "**Buchans Site**" or "**Buchans**");

   (b) pulp and paper operations at the Grand Falls-Windsor mill (the "**Grand Falls Mill**" or "**Grand-Falls**");

   (c) pulp and paper operations at the Stephenville mill (the "**Stephenville Mill**" or "**Stephenville**");

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[1] The Monitor notes that the Petitioners issued Notices of Appeal with respect to the EPA Orders on January 11, 2010 pursuant to s. 107 of the EPA. Such appeals were dismissed on February 8, 2010.

(d) shipping and storing operations at the Botwood site (the "**Botwood Site**" or "**Botwood**"); and

(e) logging camps at approximately fifty different locations across the Province (the "**Logging Camps**").

29. The Monitor has been advised by the Petitioners that, of the above noted Sites, Buchans, Grand Falls and the Logging Camps were expropriated by the Province under the Abitibi Act and are no longer owned by the Petitioners.

30. The Petitioners have also advised the Monitor that certain assets owned by the Petitioners when the Abitibi Act was passed into law were not expropriated by the Province. These include (i) the Stephenville Mill, which consists of vacant land (the mill itself has been demolished) with small buildings located thereon, and (ii) the Botwood Site, which consists of unused storage facilities and a shipping terminal. The Petitioners have referred to such assets as the "**Remaining Assets**" in their Contestation. The Monitor has been advised by the Petitioners and understands that the Remaining Assets are no longer used by the Petitioners in their business and have little or no net value to the Petitioners and their stakeholders.

31. The Province contends that the Petitioners' industrial activities resulted in the release of substances into the environment in amounts, concentrations and at rates that have caused and will, in the future, continue to cause, an adverse effect both on and adjacent to the Sites.

32. In its Motion, the Province acknowledges that over the years the Petitioners have performed and completed some environmental assessment and remediation work at some of the Sites. However, the Province also contends that, by the spring of 2009, the Petitioners had not fulfilled all of their obligations under the EPA with respect to the Sites.

The Buchans Site

33. The Buchans Site was part of the original lands granted in 1905 under what is known as a "Charter Lease" to the Anglo-Newfoundland Development Company, a company which merged with a predecessor of one of the Petitioners in 1961. Mining operations were developed on certain lands at the Buchans Site in the 1920s as part of a joint venture with a predecessor of ASARCO, a corporation unrelated to the Petitioners or their predecessors.

34. The Petitioners have advised the Monitor that the land beneath the Town of Buchans was surrendered to the Province by grants in 1978 and 1979. In 1994, most of the remaining interests of the Petitioners in the area surrounding the Buchans Site were surrendered to the Province.

35. The Petitioners have advised the Monitor that between 1999 and 2008, the mining rights in relation to tailings disposal ponds associated with ASARCO's mining operations were transferred by the Province to Atlantic Barite Limited, a subsidiary of Pennecon Limited, an entity unrelated to the Petitioners. The Monitor also understands that, in addition, the Province issued mining rights to Buchans River Limited, another entity unrelated to the Petitioners, over much of the former Buchans Site.

36. The Petitioners have also advised the Monitor that, until the passage of the Abitibi Act in 2008, the Petitioners retained certain residual surface and timber rights in the area as well as a small 2 MW hydroelectric power station near the Town of Buchans.

37. In its Motion, the Province acknowledges that it retained the services of Conestoga-Rovers and Associates ("**CRA**"), environmental consultants, to undertake environmental site assessments at the Sites on the basis that the Province could not be certain when, if at all, the Petitioners would fulfill their obligations to provide the assessment reports requested or whether the Petitioners

would fulfill their obligations to remediate the contamination identified by the Province.

38. CRA prepared an environmental site assessment report for the Province with respect to the Buchans Site in November 2009 (the "**Buchans Report**"). The Buchans Report outlines thirty-three potential areas of concern[2] at the Buchans Site.

39. The potential cost of remediation as estimated by CRA, and a competing estimate of such cost prepared by the environmental consultants to the Petitioners, have not been disclosed by the Province or the Petitioners in this proceeding and are the subject of confidentiality restrictions. The estimated potential costs are addressed later in this Thirty-Fourth Report.

<u>The Grand Falls Mill</u>

40. The Grand Falls Mill was built in 1909 and was purchased by the Petitioners in 1969. At that time, the Petitioners also acquired land tenure that included freehold and leasehold lands. The primary industrial activity at the Grand Falls Mill was newsprint manufacturing.

41. The Petitioners have advised the Monitor that, in their view, the Province effectively expropriated the land upon which the Grand Falls Mill was built when it passed the Abitibi Act and, accordingly, the Province is the owner of the Grand Falls Mill.

42. CRA prepared an environmental site assessment report for the Province with respect to the Grand Falls Mill in November 2009 (the "**Grand Falls Report**"). The Grand Falls Report identified sixteen broad areas of concern at the Grand Falls Mill.

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[2] A "potential area of concern" is defined by CRA as a past release into the environment that resulted in property damage and may have impacted media at concentrations that could trigger environmental remediation.

The Stephenville Mill

43. The Petitioners have advised the Monitor that operations at the Stephenville Mill were shut down in December 2005. Between approximately 2006 and 2008, the Petitioners completed a decommissioning and demolition program that included the demolition of the majority of the main mill buildings and related infrastructure. The Petitioners have advised the Monitor that since the closure of the Stephenville Mill, they have expended approximately $2 million in environmental assessments and site clean-up.

44. The Petitioners also advised the Monitor that substantial portions of the Stephenville Mill served as the Harmonville Base of the United States Air Force ("**USAF**") between 1941 and 1966. During that time, several fuel storage and dump sites for by-products of the air force base were established.

45. In addition, the Petitioners advised the Monitor that in the late 1960's, the Province passed legislation which allowed for the construction of a kraft linerboard mill in Stephenville which was taken over and operated by a Crown corporation, Labrador Linerboard Limited ("**Linerboard**") from 1972 to 1977. The Stephenville Mill was ultimately closed in 1979 when it was purchased by the Petitioners and converted to a pulp and paper production mill which remained until its closure in 2005.

46. CRA prepared an environmental site assessment report for the Province in respect of the Stephenville Mill in November 2009 (the "**Stephenville Report**"). The Stephenville Report outlines twenty-one potential areas of concern with respect to the Stephenville Mill.

The Botwood Site

47. The Botwood Site refers to an area around the town of Botwood where the Petitioners formerly had a storage and shipping operation relating to its Grand Falls Mill. The Botwood Site also served as a transportation hub for mining operations by ASARCO in Buchans.

48. CRA prepared an environmental site assessment report for the Province in respect of the Botwood Site in November 2009 (the "**Botwood Report**"). The Botwood Report outlines ten potential areas of concern with respect to the Botwood Site.

The Logging Camps

49. CRA was retained by counsel to the Province to conduct Phase 1 environmental site assessments of former logging camps operated by the Petitioners and located on Crown Lands throughout the Province. In total, CRA identified approximately forty-eight (48) Logging Camps.

50. Development and use of the Logging Camps began in the 1940s and continued until recently. The Petitioners have advised the Monitor that they only have active records for twenty (20) Logging Camps which have been closed since 1965 and that the remaining twenty-eight (28) Logging Camps were either not owned by the Petitioners or date back to a time when few, if any, refuelling sites were likely to have existed.

51. CRA prepared an environmental site assessment for the Province with respect to the Logging Camps in November 2009 (the "**Logging Camps Report**"). The Logging Camps Report identified potential areas of concern for the Logging Camps.

ORDERS ISSUED IN THESE CCAA PROCEEDINGS AND THE POSITIONS OF THE PARTIES

Paragraph 10 of the Initial Order

52. Paragraph 10 of the Initial Order, as amended, provides that until and including March 15, 2010, or such later date as the Court may order, no right may be exercised and no proceeding may be commenced or proceeded with by anyone, including any government, administration or entity exercising executive, legislative, judicial, regulatory or administrative functions against or in respect of

the Petitioners or any of the present or future property, assets, rights and undertakings of the Petitioners.

53. It is the position of the Petitioners that the EPA Orders fall within Paragraph 10 of the Initial Order and are therefore stayed.

Paragraph 10.1 of the First Stay Extension Order

54. The Petitioners are of the view that the EPA Orders are in substance financial or monetary in nature and were issued in violation of the Initial Order. As a result, the EPA Orders are not exempted from the stay of proceedings issued by this Honourable Court and there is no basis, in fact or in law, to grant the conclusions of the Motion which would have the effect of granting the Province a preference over other creditors.

55. On May 14, 2009, this Honourable Court granted the First Stay Extension Order which included the following amendment to the Initial Order:

> 10.1 **ORDERS** that the aforementioned stay cannot be interpreted as to restrict or prevent Her Majesty the Queen or her agents from exercising powers, rights or duties in relation to matters involving public health, safety, security, public order or the environment against the Petitioners, the Partnerships, the Property, the Directors or others, providing that any financial or monetary fines or orders shall be stayed.

56. It is the position of the Province that the EPA Orders fall within Paragraph 10.1 of the First Stay Extension Order and are not stayed. The Province has asserted that the EPA Orders are in relation to the environment and are not financial or monetary fines or orders in that they simply require the Petitioners to take certain steps in order to comply with their statutory obligations for the protection of the environment in the Province.

57. In addition, the Province asserts that orders issued by the Province in relation to matters involving the environment that do not require payments to be made to the Province are not "claims" as that term is defined in the CCAA and that the

issuance of the EPA Orders does not render the Province a "creditor". The net effect of the position of the Province would be to render the obligations of the Petitioners to remediate the Sites as obligations not subject to compromise under the CCAA.

EFFECT OF THE EPA ORDERS

Financial Effect of the EPA Orders

58. The Monitor has not performed any independent assessment of the potential remediation costs that might be applicable in respect of Sites. The Monitor is aware, however, that both the Province and the Petitioners have engaged environmental experts to investigate and assess the potential remediation required and, as a result of such work, both experts have formed preliminary estimates of the potential costs involved. The Monitor has been advised by the Petitioners that these estimates are subject to confidentiality restrictions. Neither the Province nor the Petitioners have included in their materials filed in respect of this Motion estimates of the potential remediation costs.

59. The Monitor believes, however, that it is both appropriate and necessary to provide some financial context regarding this dispute to properly inform this Honourable Court and the Petitioners' stakeholders regarding the effect that a decision in this Motion may have on the overall restructuring.

60. As a preliminary matter, the Monitor notes that there are many issues involved in attempting to quantify potential environmental remediation costs at this stage. A number of factors, some of which may not yet be fully identified or understood, can have a material effect upon the outcome. In the Monitor's experience, generally speaking, providing a reliable estimate of such remediation costs is very difficult and reasonable experts can have widely divergent views.

61. At this time it was not possible to give an accurate assessment of the potential remediation costs for the Sites at issue. However, the Monitor and its counsel have had discussions with the Petitioners and its environmental consultant, Amec

Earth Environmental Inc. ("**Amec**"), and with counsel for the Province in an effort to find an appropriate description of the estimated range of potential remediation costs for the Sites for the benefit of the Court and other stakeholders.

62. Based on the Monitor's discussions with Amec and the Petitioners, and subject to the qualifications expressed above, the Monitor advises that the Petitioners are of the view that a "base case" remediation plan could cost the Petitioners in a range of value from the mid-to-high eight figures. In the Petitioners' view, a "worst case" to "extreme case" scenario could be several times the cost of the base case scenario.

63. As such, and subject to all of the difficulties and qualifications noted above with respect to estimating these potential remediation costs at this stage, the Monitor is of the view that amounts at issue in this Motion between the Province and the Petitioners are likely to be material to the estates of the Petitioners and on the Petitioners' ability to effect a viable plan of arrangement among their stakeholders.

<u>The Effect of the EPA Orders on the Petitioners' Restructuring</u>

64. The EPA Orders are in respect of liabilities or obligations that existed as of the date of commencement of this CCAA Proceeding. One issue that arises is whether this Honourable Court intended to grant super-priority status to regulatory bodies for pre-filing claims when it granted Paragraph 10.1 of the First Stay Extension Order or whether Paragraph 10.1 is intended to permit regulatory bodies to continue to regulate the Petitioners in respect of their conduct after the commencement of the CCAA Proceedings.

65. If the Petitioners are successful and the monetary consequences of the EPA Orders are treated as claims in the CCAA Proceedings, such claims will be compromised and the Province, if it is allowed to file a late proof of claim form (as it did not file a proof of claim by the Claims Bar Date), will be entitled to

participate in the negotiation of, and to receive its pro-rata distribution under, any plan of compromise or arrangement in the CCAA Proceedings.

66. If the Province is successful and the EPA Orders are not treated as claims, but rather as obligations or liabilities that either must be satisfied in priority to obligations to other creditors or that survive the restructuring proceedings, the Petitioners may find that this will negatively affect their efforts to obtain exit financing, which may in turn challenge the ability of the Petitioners to successfully emerge from these CCAA Proceedings.

67. The Monitor is of the view that the EPA Orders have the effect of compelling the Petitioners to expend material sums of money to remediate property that is either no longer owned by the Petitioners or no longer used by the Petitioners in their business and which have little or no net value to the Petitioners and their stakeholders. It is the Monitor's view that sources of potential exit financing will have concerns with respect to funding an enterprise carrying such a potentially burdensome obligation without any corresponding benefit for the business.

68. Alternatively, the Petitioners may be forced to transfer their remaining operating assets to a new entity to enable the restructured going concern business of the Petitioners to avoid the remediation obligation arising from the former ownership or occupation of the Sites. The Monitor does not know if this is a viable option for the Petitioners in view of the considerable cost and tax and other consequences that would flow from such a restructuring.

69. The Monitor also notes that the decision in this Motion will have consequences for other stakeholders of the Petitioners. If the Petitioners are successful and the remediation obligations are treated as claims in the CCAA Proceedings, the Province's claims may be significant in the estate. However, provided it is allowed to file a claim, the Province will only receive its *pro rata* share of whatever consideration is to be offered under the plan to all creditors in the Province's class, as such may be determined under any plan to be proposed by the Petitioners.

70. On the other hand, if the Province is successful in its Motion, the remediation obligation will become, in effect, a priority or unaffected obligation to be satisfied in full by the Petitioners before the remaining value of the Petitioners' enterprise is allocated among the other creditors and claimants. The net effect of such a determination would be the reallocation of value away from the creditors generally in favour of the Province and the size of such reallocation could be material.

71. It is the Petitioners' view that, if the Province is successful and effect is given to the EPA Orders, the resulting reallocation of value would not be consistent with the scheme of priorities under federal insolvency legislation.

72. It is the Monitor's view that, if the Province is successful in this Motion, the net result will be that the ability of the Petitioners to successfully restructure will be challenged on a number of levels, including the consequences of the reallocation of enterprise value among stakeholders and the likely adverse effect on the Petitioners' ability to secure exit financing. In addition, the restructuring process will likely become more complicated, including further delays and costs, all of which will be borne by the Petitioners and their estates.

BC - MACKENZIE PROPERTIES

73. The Petitioners' own a pulp and paper mill (the **"BC Mill"**) and a sawmill (**"Site 1"**) and they operate a second sawmill (**"Site 2"**) on land leased from BC Rail, all located in MacKenzie, British Columbia (collectively, the **"MacKenzie Properties"**). The BC Mill has been operated as a pulp mill since 1971 and a pulp and paper mill since 1989. Site 1 and Site 2 have been operated as sawmills since 1968 and circa 1971 respectively.

74. The Petitioners' actively operated the BC Mill and the two sawmills since about January 2002 to on or about January 2008. The BC Mill was idled in November 2007 and its permanent closure was announced in November 2008. The sawmills

were idled at the same time but restarted on or about October 18, 2009 on a limited basis.

75. The Petitioners are in advanced discussions with a prospective buyer for the sale of the two sawmills and possibly the BC Mill.

76. The Petitioners have received draft Stage 1 Preliminary Site Investigation reports prepared by their environmental consultants and the reports are being internally reviewed by the Petitioners. The Monitor has been advised by the Petitioners that the Petitioners have not commenced Stage 2 studies at this time and, as a result, are not in a position to estimate costs of possible remediation.

EFFECT OF THE MACKENZIE PROPERTIES

77. The Monitor has not performed any independent assessment with respect to any potential remediation costs associated with the MacKenzie Properties. Likewise, as stated above, the Petitioners have not been able to advise the Monitor as to an estimate of any such costs.

78. In addition, neither the Monitor nor, to the Monitor's knowledge, the Petitioners, have attempted to analyze the potential remediation obligations in terms of obligations that existed as of the commencement of this CCAA proceeding as opposed to those that arose or continue thereafter.

79. Accordingly, the Monitor is not able, at this time, to provide this Honourable Court or any of the other stakeholders with an assessment of the financial effect of the potential remediation costs upon the Petitioners or their estates nor can it assess the potential effect upon the ability of the Petitioners to achieve a successful restructuring.

CLAIMS BAR DATE

80. The Province did not file a Proof of Claim in the CCAA Proceedings in accordance with Claims Procedure Order and, as a result, the Petitioners are of the

view that all claims by the Province are now barred in accordance with paragraph 15 of the Claims Procedure Order.

81. The Monitor takes no position with respect to whether the Province should be granted an extension of the Claims Bar Date with respect to filing its claim against the Petitioners.

CONCLUSIONS AND RECOMMENDATIONS

82. The Monitor notes that the outcome of this Motion could have far reaching consequences both in this restructuring and in other large, heavy industry restructurings where potential environmental obligations are of concern.

83. The Monitor recognizes the need in all Court supervised CCAA restructurings to strike a balance between various stakeholders affected by particular decisions, all operating within the established federal and provincial legislative schemes.

84. The Monitor notes, as a practical and factual matter, that if the Province is successful, then the provincial environmental regulatory scheme will be respected and, in fact, will escape the restructuring process unscathed, whereas the costs of such remediation will be visited upon the Petitioners, their estates and, ultimately, all other stakeholders, without, at least in the case of the Province where the Petitioners no longer own or use the Sites, any corresponding benefit accruing to the Petitioners, their estates or the other stakeholders.

85. Furthermore, if the Province is successful in its Motion, it is the view of the Monitor that the ability of the Petitioners to affect a successful restructuring will be negatively affected, including by a reallocation of value in favour of the Province, by increased difficulty in securing exit financing and by additional delays, potential complications and increased costs.

86. On the other hand, if the pre-filing obligations of the Petitioners in respect of the potential remediation costs, especially, in the case of the Province, for properties the Petitioners no longer own or use, are found to be compromisable obligations,

if a claim is filed on a timely basis or if allowed as a late claim, then the Province would share on a *pro rata* basis with a class of similar creditors as determined in accordance with a plan of arrangement yet to be filed and the Province would be entitled to participate in the formulation, negotiation and implementation of any such plan.

All of which is respectfully submitted.

ERNST & YOUNG INC.
in its capacity as the Court Appointed Monitor
of the Petitioners

Per:

Alex Morrison, CA, CIRP
Senior Vice President

Greg Adams, CA, CIRP
Senior Vice President

APPENDIX "A"

ABITIBI PETITIONERS

1. Abitibi-Consolidated Company of Canada
2. Abitibi-Consolidated Inc.
3. 3224112 Nova Scotia Limited
4. Marketing Donohue Inc.
5. Abitibi-Consolidated Canadian Office Products Holding Inc.
6. 3834328 Canada Inc.
7. 6169678 Canada Inc.
8. 4042140 Canada Inc.
9. Donohue Recycling Inc.
10. 1508756 Ontario Inc.
11. 3217925 Nova Scotia Company
12. La Tuque Forest Products Inc.
13. Abitibi-Consolidated Nova Scotia Incorporated
14. Saguenay Forest Products Inc.
15. Terra Nova Explorations Ltd.
16. The Jonquière Pulp Company
17. The International Bridge and Terminal Company
18. Scramble Mining Ltd.
19. 9150-3383 Quebec Inc.
20. Abitibi-Consolidated (U.K.) Inc.

APPENDIX "B"

BOWATER PETITIONERS

1. Bowater Canada Finance Corporation
2. Bowater Canadian Limited
3. Bowater Canadian Holdings. Inc.
4. 3231378 Nova Scotia Company
5. AbitibiBowater Canada Inc.
6. Bowater Canada Treasury Corporation
7. Bowater Canadian Forest Products Inc.
8. Bowater Shelburne Corporation
9. Bowater LaHave Corporation
10. St-Maurice River Drive Company Limited
11. Bowater Treated Wood Inc.
12. Canexel Hardboard Inc.
13. 9068-9050 Quebec Inc.
14. Alliance Forest Products Inc. (2001)
15. Bowater Belledune Sawmill Inc.
16. Bowater Maritimes Inc.
17. Bowater Mitis Inc.
18. Bowater Guérette Inc.
19. Bowater Couturier Inc.

APPENDIX "C"
18.6 PETITIONERS

1. AbitibiBowater US Holding 1 Corp.
2. AbitibiBowater Inc.
3. Bowater Ventures Inc.
4. Bowater Incorporated
5. Bowater Nuway Inc.
6. Bowater Nuway Mid-States Inc.
7. Catawba Property Holdings LLC
8. Bowater Finance Company Inc.
9. Bowater South American Holdings Incorporated
10. Bowater America Inc.
11. Lake Superior Forest Products Inc.
12. Bowater Newsprint South LLC
13. Bowater Newsprint South Operations LLC
14. Bowater Finance II, LLC
15. Bowater Alabama LLC
16. Coosa Pines Golf Club Holdings, LLC

APPENDIX "D"

PARTNERSHIPS

1. Bowater Canada Finance Limited Partnership

2. Bowater Pulp and Paper Canada Holdings Limited Partnership

3. Abitibi-Consolidated Finance LP

TAB 2

1999 CarswellAlta 809

Blue Range Resource Corp., Re

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as amended and In the Matter of a Plan of Compromise or Arrangement of Blue Range Resource Corporation

Duke Energy Marketing Limited Partnership, Appellant and Blue Range Resource Corporation and Humble Petroleum Marketing Ltd., Respondents

Engage Energy Canada, L.P., Appellant (Applicant) and Blue Range Resource Corporation, Respondent

Enron Capital & Trade Resources Canada Corp., Appellant (Applicant) and Blue Range Resource Corporation, Humble Petroleum Marketing Ltd., Pricewaterhousecoopers Inc., in its capacity as Monitor, Royal Bank of Canada, National Bank of Canada and First National Bank of Chicago, Respondents (Respondents)

Engage Energy Canada, L.P., Appellant (Applicant) and Blue Range Resource Corporation and Humble Petroleum Marketing Ltd., Pricewaterhousecoopers Inc., in its capacity as Monitor, Royal Bank of Canada, National Bank of Canada and First National Bank of Chicago, Respondents

Big Bear Exploration Ltd., Appellant (Respondent) and Enron Capital & Trade Resources Canada Corp., Respondent (Applicant)

Alberta Court of Appeal

Fruman J.A.

Heard: August 18, 1999
Judgment: August 24, 1999
Docket: Calgary Appeal 99-18395, 99-18397, 99-18410, 99-18411, 99-18418, 99-18424 C

Proceedings: allowing leave to appeal (June 18, 1999), Doc. Calgary 9901-04070 (Alta. Q.B.); allowing leave to appeal (June 30, 1999), Doc. Calgary 9901-04070

Counsel: *L.B. Robinson* , for Engage Energy Canada, L.P.

J.L. Ircandia and *M. Marion* , for Blue Range Resource Corporation et al.

A.R. Anderson and *B. Urrell* , for Enron Capital Trade Resources Canada Corp.

H.A. Gorman , for Duke Energy Marketing Limited Partnership.

R.J. Wilkins, for Big Bear Exploration Ltd.

Subject: Corporate and Commercial; Insolvency

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.1.

Contracts --- Construction and interpretation — General principles

Issue raised had no precedential value and did not raise serious and arguable grounds.

The company produced natural gas and held leases for natural gas producing properties. The company had entered into long term natural gas supply agreements with gas marketing companies, including the applicants. The company was granted an order staying proceedings against it pursuant to s. 11 of the *Companies' Creditors Arrangement Act*. The company terminated its natural gas supply contracts with the applicants as permitted by the order. The applicants would suffer substantial losses as a result of the termination of the contracts. The applicants brought an application for a declaration that the termination of the contracts was ineffective, or for variation of the stay order such that the company would be able to terminate contracts only if the company was incapable of performing them or their termination was essential to the success of the restructuring. Two of the applicants also sought an order permitting them to set-off damages they anticipated suffering against payments due to the company for deliveries of natural gas. The applications were dismissed. The chambers judge held that the dedication of natural gas reserves contained in pre-existing natural gas supply contracts did not in the circumstances constitute an interest running with the land giving rise to encumbrance on the leases. The chambers judge held that the applicants failed to satisfy the court that a variation of the order was appropriate, particularly given that termination did not affect the applicants' rights to claim for damages. The chambers judge held that the applicants were not entitled to set-off their anticipated damages against payments they owed for natural gas deliveries. The chambers judge held that future damages were sufficiently independent from the obligation to pay for gas already delivered that equitable set-off was not appropriate. The applicants brought an application for leave to appeal.

The applicants entered into several contracts with the company. The company obtained an order staying proceedings against it under s. 11.1 of the *Companies' Creditors Arrangement Act*. The order permitted eligible financial contracts to be terminated, but contracts which were not eligible financial contracts were caught by the stay. The applicants applied for a declaration that certain contracts entered into with the company were eligible financial contracts within the meaning of the Act. The application was dismissed. The chambers judge held that the applicants' contracts were physical delivery contracts, because the primary purpose was the actual exchange of a commodity. No exchange of commodity is actually contemplated in the case of financial contracts. The chambers judge held that finding that the contracts were eligible financial contracts would defeat the object of a stay under the Act, which is to protect only contracts of a financial nature and not physical contracts. The applicants brought an application for leave to appeal.

B Ltd. acquired control of the company. The companies were kept separate, with B Ltd. assuming the company's management obligations under a written agreement. B Ltd. also paid liabilities to third parties in respect of the company's assets and operations. A loan agreement was executed by the companies, with advances by B Ltd. being secured under a general security agreement. The applicants brought an application for an order that amounts owed to B

Ltd. for management fees and third party liabilities were not secured under the terms of the general security agreement. The application was granted. The chambers judge held that the general security agreement had to be read with the loan agreement, whose terms were not broad enough to cover the management fees. B Ltd. brought an application for leave to appeal.

Held: The applicants' applications were granted in part and B Ltd.'s application was dismissed.

The appeal would not unduly hinder the progress of restructuring the company's affairs as a plan of arrangement was already in place. No legal principles were in issue concerning the application to vary the order. The chambers judge was aware of the circumstances, understood the competing issues, and attempted to balance the interests of all the parties. The applicants failed to show any serious and arguable grounds concerning the dismissal of the application to vary the order. The law of set-off applies to all claims made against a debtor company. The issue of set-off had significance to the parties, as well as to the practice. The issue raised serious and arguable grounds.

The effect of the decision of the chambers judge was to restrict the term "forward commodity contract" in s. 11.1(1)(h) of the *Companies' Creditors Arrangement Act* to derivative contracts. The chambers judge's decision was the first to deal with the interpretation of "eligible financial contract" in s. 11.1(1) of the Act, and the first to consider financing vehicles that provide for delivery of product. The meaning of the term had real and significant interest to the parties as well as a significant impact on the industry generally. The issue raised serious and arguable grounds.

The application raised an issue of priority among creditors resulting from the interpretation of a particular and unique financial instrument. The issue raised had no precedential value and did not raise serious and arguable grounds.

Cases considered by *Fruman J.A.* :

Med Finance Co. S.A. v. Bank of Montreal (1993), 24 B.C.A.C. 318, 40 W.A.C. 318, 22 C.B.R. (3d) 279 (B.C. C.A.) — considered

Multitech Warehouse Direct Inc., Re (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) — applied

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) — applied

Smoky River Coal Ltd., Re (1999), (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 237 A.R. 83, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 197 W.A.C. 83 (Alta. C.A.) — applied

Statutes considered:

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

Generally — referred to

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

s. 11 [rep. & sub. 1997, c. 12, s. 124] — referred to

s. 11.1 [en. 1997, c. 12, s. 124] — referred to

s. 11.1(1) "eligible financial contract" [en. 1997, c. 12, s. 124] — considered

s. 11.1(1) "eligible financial contract" (h) [en. 1997, c. 12, s. 124] — referred to

s. 13 — considered

s. 18.1 [en. 1997, c. 12, s. 125] — considered

APPLICATIONS by applicants and B Ltd. for leave to appeal from judgment reported at (1999), 245 A.R. 154 (Q.B.) and from judgment reported at 12 C.B.R. (4th) 173, 72 Alta. L.R. (3d) 196, [1999] 12 W.W.R. 616, 245 A.R. 172 (Q.B.).

Fruman J.A. **:**

1 Blue Range Resource Corporation, a company which produces and sells natural gas, experienced serious financial problems. On March 2, 1999, it successfully petitioned the court for an order staying proceedings against it under s. 11 of *The Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended. A series of further applications were heard, resulting in numerous orders adversely affecting companies which had contractual arrangements with Blue Range, and its subsidiary, Humble Petroleum Marketing Ltd. Six of those orders are the subject of applications for leave to appeal under s. 13 of the CCAA.

Leave Under the CCAA

2 Section 13 provides that any person dissatisfied with an order or decision made under the CCAA may appeal from it, with leave from either the judge appealed from, or the Court of Appeal. The section does not clarify the grounds upon which leave may be granted. The test that has been adopted in Alberta requires the applicant to show "serious and arguable grounds that are of real and significant interest to the parties": *Re Multitech Warehouse Direct Inc.* (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) at 63; *Re Smoky River Coal Ltd.* (1999), 237 A.R. 83 (Alta. C.A.) at para. 22.

3 An appellate court should exercise its power sparingly, when asked to intervene in issues which arise in CCAA proceedings. A judge exercising a supervisory function under the CCAA has an ongoing management process, much like a trial judge making orders in the course of a trial: *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) at 272.

4 In *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279 (B.C. C.A.) at 282, Hinds J. summarized the matters to be considered in granting leave to appeal an issue under the *Bankruptcy Act*:

(a) whether the point on appeal is of significance to the practice;

(b) whether the point raised is of significance to the action itself;

(c) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and

(d) whether the appeal will unduly hinder the progress of the action.

5 The parties agree, as do I, that these four elements are subsumed in the more general wording of the *Multitech Warehouse Direct Inc.* test. In particular, the importance to the practice or to the industry should be considered. While many matters involving competing claims on money will be significant to the parties, they may have little precedential value. This element is entirely consistent with the requirement that an appellate court exercise its powers sparingly.

6 In this case, unlike *Multitech Warehouse Direct Inc.* and *Smoky River Coal Ltd.* , a plan of arrangement is already in place and an appeal would not unduly hinder the progress of restructuring Blue Range's affairs. It is therefore unnecessary to consider any potential delay caused by granting leave.

7 The leave applications relate to orders granted by LoVecchio J. on June 18 and June 30, 1999, and by Wilkins J. on July 16, 1999.

June 18, 1999 Order - CA Appeal Nos. 18395 and 18397

Variation Order

8 The original CCAA stay order permitted termination of various contracts. Engage Energy Canada, L.P. and Duke Energy Marketing Limited Partnership applied for a variation of the initial stay order to provide that Blue Range should only be permitted to terminate its gas marketing contracts with them if Blue Range was incapable of performing them, or termination was essential to the success of the restructuring. LoVecchio J. dismissed the application. Although he recognized that the applicants would potentially suffer substantial losses as a result of the termination of the contracts, he found that an order authorizing the termination was appropriate in the circumstances, especially since it did not affect the creditors' rights to claim for damages.

9 Engage and Duke seek leave to appeal. No legal principles are in issue, nor is there any suggestion that the chambers judge lacked jurisdiction to make the initial order or to refuse a variation. A chambers judge has a broad discretion under the CCAA. It is clear from his reasons that LoVecchio J. was aware of the circumstances, understood the competing issues and attempted to balance the interests of all the parties. He is owed considerable deference. Engage and Duke allege no errors, other than their disagreement with the exercise of his discretion. They have not made out serious and arguable grounds, and their application for leave to appeal is denied.

Set-Off

10 At the time of the CCAA stay order, Engage and Duke had received but not yet paid for natural gas deliveries made by Blue Range in February and March of 1999. As a result of the termination of their gas purchase contracts with Blue Range, they would have to buy natural gas at higher prices, resulting in damages. Engage and Duke sought orders permitting them to set-off anticipated damages they would incur, against the payments owed by them to Blue Range for natural gas deliveries. LoVecchio J. dismissed their application, based on his finding that the future damages were sufficiently independent from the obligation to pay for gas already delivered that equitable set-off was not appropriate.

11 Engage and Duke seek leave to appeal. Section 18.1 of the CCAA provides that the law of set-off applies to all claims made against a debtor company. Although the section is a recent addition to the statute, at the hearing counsel relied upon the same authorities and did not disagree on the principles upon which determinations of set-off are made. They disagreed considerably on the application of those principles to the facts of this case, however. The point in issue has significance to the parties, as well as to the practice. It requires a determination whether amounts owing to a debtor company under a contract at the time of a CCAA stay, are sufficiently connected to damages suffered from the termination of that contract as a direct result of the CCAA proceedings, to warrant equitable set-off. The point must be considered in the context of the legislation which now specifically authorizes set-off in s. 18.1. The issue raises serious and arguable grounds. Leave to appeal is granted.

June 30, 1999 Order - CA Appeal Nos. 18410; 18411 and 18418

12 Duke, Engage and Enron Capital & Trade Resources Canada Corp. have applied for leave to appeal the June 30, 1999 decision of LoVecchio J. Although their application is unopposed, I nevertheless have an obligation to ensure

that the tests for granting leave are met.

13 The chambers judge was asked to decide whether contracts providing for delivery of natural gas were "eligible financial contracts" as defined in s. 11.1(1) of the CCAA. He received the evidence of U.S. and Canadian experts, and heard extensive argument and submissions. He concluded, based on the sources cited by counsel, that almost any contract could fit within the definition, but went on to decide that the contracts being considered were "physical" rather than "financial" contracts, and not captured by the language of the section. The effect of his decision is to restrict "forward commodity contract" in subsection 11.1(1)(h) to derivative contracts.

14 Section 11.1 of the CCAA was enacted in 1997. The June 30 decision is the first to deal with the interpretation of "eligible financial contract" and the first to consider financing vehicles that provide for delivery of product. Its meaning has a real and significant interest to the parties, as well as a significant impact upon the oil and gas industry generally, as it affects available financing instruments. The issue raises serious and arguable grounds. Leave to appeal is granted.

July 16, 1999 Order - CA Appeal No. 18424

15 Big Bear Exploration Ltd. acquired control of Blue Range on December 12, 1998. The two companies were kept separate, with Big Bear assuming Blue Range's management obligations. On March 1, 1999 a management agreement was committed to writing. Big Bear also paid liabilities to third parties in respect of Blue Range's assets and operations. Meanwhile, on January 12, 1999 the two companies executed a loan agreement. Advances made by Big Bear to Blue Range under the loan were secured under a General Security Agreement signed at the same time.

16 Enron and the Blue Range Creditors' Committee applied to the court for an order that amounts owed to Big Bear for management fees and third party liabilities, totalling more than $1.1 million, were not secured under the terms of the General Security Agreement. Wilkins J. granted the order, finding that the General Security Agreement had to be read with the Loan Agreement, whose terms were not broad enough to cover the management fees.

17 Big Bear seeks leave to appeal. There were no facts in dispute before the chambers judge. Big Bear complains about the brevity of the reasons, alleges errors in contractual interpretation and disagrees with the chamber's judges conclusion, arguing that the General Security Agreement should be interpreted without reference to the Loan Agreement. In essence, the point raises an issue of priority among creditors resulting from the interpretation of a particular and unique financial instrument. It has no possible precedential value and does not raise serious and arguable grounds. Leave to appeal is dismissed.

Summary

18 *C.A. Appeal Nos. 18395 and 18397* -- Leave to appeal the portion of the June 18, 1999 order dealing with variation of contracts is dismissed. Leave to appeal the portion dealing with set-off is granted.

19 *C.A. Appeal Nos. 18410; 18411 and 18418* -- Leave to appeal the June 30, 1999 order is granted.

20 *C.A. Appeal No. 18424* -- Leave to appeal the July 16, 1999 order is dismissed.

Order accordingly.

END OF DOCUMENT

TAB 3

1999 CarswellAlta 491, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94, [1999] A.J. No. 676

1999 CarswellAlta 491

Smoky River Coal Ltd., Re

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

In the Matter of Smoky River Coal Limited, Allstate Insurance Company, Allstate Life Insurance Company, Security Life of Denver Insurance Company, Indiana Insurance Company, Peerless Insurance Company, Pacific Life Insurance Company, AH (Michigan) Life Insurance Company, Northern Life Insurance Company, Reliastar Life Insurance Company, Modern Woodmen of America, Phoenix Home Life Mutual Insurance Company, American International Life Assurance Company of New York, and Phoenix American Life Insurance Company, Petitioners/not Parties to the Appeal;

Luscar Ltd. and Consol of Canada Inc., Appellants and Smoky River Coal Limited, Respondent/Debtor and Canadian National Railway Company, Respondent/Creditor

Alberta Court of Appeal

Picard, Hunt, McIntyre JJ.A.

Heard: April 13, 1999
Judgment: June 9, 1999[FN*]
Docket: Calgary Appeal 99-18164

Proceedings: affirming (January 27, 1999), Doc. Calgary 9801-10214 (Alta. Q.B.); refused reconsideration or re-hearing (August 16, 1999), Doc. Calgary Appeal 99-18164 (Alta. C.A.)

Counsel: *R.B. Davison, Q.C.*, and *J.H. Hockin*, for the appellants.

D.R. Haigh, Q.C., and *B.T. Beck*, for the respondent Smoky River Coal.

W.E. Cascadden, for Neptune Bulk Terminals.

T.M. Warner, for the respondent Canadian National Railway.

D.W. Mann, for the petitioners.

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

Arbitration --- Relation to other proceedings — Stay of court proceedings — Discretion of court to grant stay

Relationship among respondent corporation, appellant shareholders and other corporate shareholder was governed by shareholders' agreement, which provided that disputes would be arbitrated — Petition was filed to place corporate shareholder under protection of Companies' Creditors Arrangement Act ("CCAA") when allegations of breach of contractual obligations were brought against it by appellants — Stay of all actions ordered against corporate shareholder — Corporate shareholder brought motion to prohibit arbitration — Appellants brought cross-motion for stay of corporate shareholder's motion pursuant to s. 15 of Commercial Arbitration Act ("CAA") — Chambers judge dismissed appellants' motion, finding that corporate shareholder's insolvency, appointment of monitor and role of court under CCAA made shareholders' agreement void, preventing stay under s. 15 of CAA — Appellants appealed — Appeal dismissed — Chambers judge had authority under s. 11 of CCAA to order stay of arbitration proceedings, as arbitration is "proceeding" under s. 11 — Appellants were creditors for purposes of CCAA, as it could be said they claimed right to property in corporate shareholder's possession — Even if appellants were not creditors, words of s. 11(4) of CCAA were sufficiently expansive to support discretion exercised by chambers judge — Chambers judge's reasons for stay, which included view that arbitration would compromise process under CCAA, indicated he properly exercised discretion under s. 11(4) — Even if chambers judge erred in interpreting s. 15 of CAA, outcome of case would not change since CCAA would prevail over provincial Act in case of conflict — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11(4) — Commercial Arbitration Act, R.S.B.C. 1996, c. 55, s. 15.

Cases considered by *Hunt J.A.*:

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.) — considered

Cadillac Fairview Inc., Re (1995), 30 C.B.R. (3d) 17 (Ont. Gen. Div. [Commercial List]) — considered

Cadillac Fairview Inc., Re (January 29, 1995), Doc. B348/94 (Ont. Gen. Div. [Commercial List]) — considered

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339 (Ont. Gen. Div.) — considered

Central Capital Corp., Re (1995), 29 C.B.R. (3d) 33, 22 B.L.R. (2d) 210 (Ont. Gen. Div. [Commercial List]) — considered

Central Capital Corp., Re (1996), 38 C.B.R. (3d) 1, 26 B.L.R. (2d) 88, 132 D.L.R. (4th) 223, 27 O.R. (3d) 494, (sub nom. *Royal Bank v. Central Capital Corp.)* 88 O.A.C. 161 (Ont. C.A.) — referred to

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

Farm Credit Corp. v. Holowach (Trustee of), 86 A.R. 304, 59 Alta. L.R. (2d) 279, 51 D.L.R. (4th) 501, [1988] 5 W.W.R. 87, 68 C.B.R. (N.S.) 255 (Alta. C.A.) — applied

Farm Credit Corp. v. Holowach (Trustee of), 100 A.R. 395 (note), 66 Alta. L.R. (2d) xlvii, [1989] 4 W.W.R. lxx, 73 C.B.R. (N.S.) xxvii, 60 D.L.R. (4th) vii, 102 N.R. 236 (note) (S.C.C.) — referred to

Gaz métropolitain Inc. v. Wynden Canada Inc. (1982), 44 C.B.R. (N.S.) 285 (Que. S.C.) — applied

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

Kaverit Steel & Crane Ltd. v. Kone Corp., 85 Alta. L.R. (2d) 287, 40 C.P.R. (3d) 161, 87 D.L.R. (4th) 129, 120 A.R. 346, 8 W.A.C. 346, [1992] 3 W.W.R. 716, 4 C.P.C. (3d) 99 (Alta. C.A.) — applied

1999 CarswellAlta 491, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94, [1999] A.J. No. 676

Landawn Shopping Centres Ltd. v. Harzena Holdings Ltd. (1997), 44 O.T.C. 288 (Ont. Gen. Div. [Commercial List]) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) — considered

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

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 63 Alta. L.R. (2d) 361, 92 A.R. 81, 72 C.B.R. (N.S.) 1 (Alta. Q.B.) — considered

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) — considered

Pacific National Lease Holding Corp. v. Sun Life Trust Co., 34 C.B.R. (3d) 4, 10 B.C.L.R. (3d) 62, [1995] 10 W.W.R. 714, (sub nom. *Pacific National Lease Holding Corp., Re)* 62 B.C.A.C. 151, (sub nom. *Pacific National Lease Holding Corp., Re)* 103 W.A.C. 151 (B.C. C.A.) — applied

Philip's Manufacturing Ltd., Re (1991), 9 C.B.R. (3d) 1, [1992] 1 W.W.R. 651, 60 B.C.L.R. (2d) 311 (B.C. S.C.) — considered

Prince George (City) v. McElhanney Engineering Services Ltd., 9 B.C.L.R. (3d) 368, [1995] 9 W.W.R. 503, 23 C.L.R. (2d) 253, (sub nom. *Prince George (City) v. Sims (A.L.) & Sons Ltd.))* 61 B.C.A.C. 254, (sub nom. *Prince George (City) v. Sims (A.L.) & Sons Ltd.))* 100 W.A.C. 254 (B.C. C.A.) — applied

Quebec Steel Products (Industries) Ltd. v. James United Steel Ltd., [1969] 2 O.R. 349, 5 D.L.R. (3d) 374 (Ont. H.C.) — referred to

Quintette Coal Ltd., Re (1991), (sub nom. *Quintette Coal Ltd. v. Nippon Steel Corp.)* 56 B.C.L.R. (2d) 80, 7 C.B.R. (3d) 165 (B.C. S.C.) — considered

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 51 B.C.L.R. (2d) 105, 2 C.B.R. (3d) 303 (B.C. C.A.) — considered

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

T. Eaton Co., Re (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) — considered

Statutes considered:

Bankruptcy Act, R.S.C. 1927, c. 11

s. 104 — considered

Bankruptcy Act, S.C. 1949, c. 7 (2nd Sess.)

Generally — referred to

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

Generally — considered

s. 2(1) "claim provable in bankruptcy" [renumbered 1997, c. 12, s. 1(1)] — considered

s. 2(1) "creditor" [rep. & sub. 1997, c. 12, s. 1(2)] — considered

s. 81 — considered

s. 81(1) — considered

s. 121 — considered

s. 121(1) [rep. & sub. 1992, c. 27, s. 50] — considered

s. 121(2) [rep. & sub. 1997, c. 12, s. 87] — considered

s. 121(3) — considered

Commercial Arbitration Act, R.S.B.C. 1996, c. 55

Generally — considered

s. 15 — considered

s. 15(1) — considered

s. 15(2) — considered

s. 23 — considered

Commercial Tenancy Act, R.S.B.C. 1979, c. 54

Generally — referred to

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36

Generally — referred to

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

Generally — considered

Pt. I — referred to

s. 2 — considered

s. 2 "secured creditor" — considered

s. 2 "unsecured creditor" — considered

ss. 4-8 — referred to

s. 6 — referred to

s. 11 [rep. & sub. 1997, c. 12, s. 124] — considered

s. 11(4) [rep. & sub. 1997, c. 12, s. 124] — considered

s. 11(4)(a) [rep. & sub. 1997, c. 12, s. 124] — considered

s. 11(4)(b) [rep. & sub. 1997, c. 12, s. 124] — considered

s. 11(4)(c) [rep. & sub. 1997, c. 12, s. 124] — considered

s. 12 — considered

s. 12(1) — considered

s. 12(2) [am. 1992, c. 27, s. 90(2)] — considered

s. 12(2)(a) [am. 1992, c. 27, s. 90(2)] — considered

s. 12(2)(a)(iii) [am. 1992, c. 27, s. 90(2)] — considered

s. 13 — referred to

Winding Up Act, R.S.C. 1927, c. 213

Generally — referred to

APPEAL by appellants from dismissal of motion to stay respondent's motion to prohibit arbitration of dispute arising under shareholders' agreement.

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

1 This case raises a question about the scope of the powers of a judge pursuant to the *Companies' Creditors Arrangement Act* ("*CCAA*"), R.S.C. 1985, c. C-36. Specifically, does a judge have the discretion to establish a procedure for resolving a dispute between parties who have agreed to arbitrate their disputes under a contract? In my view, the judge is granted that power by the *CCAA*, in this case his discretion was exercised properly, and the appeal must be dismissed.

Facts

2 The Appellants Luscar Ltd. and Consol of Canada Inc. ("the Appellants") and the Respondent Smoky River Coal Limited ("Smoky") are owners and operators of coal mines in Western Canada. Neptune Bulk Terminals (Canada) Ltd. ("Neptune") owns and operates a port facility in Vancouver. Smoky and the Appellants are shareholders of Neptune and ship coal for export through the port facility.

3 The relationship between Neptune and its shareholders is governed by a Shareholders' Agreement ("the Agreement"), key provisions of which are reproduced below. Briefly, the Agreement restricts the manner in which a shareholder may dispose of rights arising from the Agreement. Among the consequences of a breach specified in the Agreement are that shareholders are given a right of refusal to purchase, at book value, the Neptune shares belonging to an offending shareholder. The Agreement also provides that disputes among the parties will be arbitrated in British Columbia.

4 In April 1998, a dispute arose between the Appellants and Smoky when the Appellants alleged that Smoky had breached its obligations under the Agreement. Neptune issued a Notice of Default as required by the Agreement. Over the next several months, information was exchanged among the parties concerning the facts giving rise to the alleged breach. The Appellants say it was not until September 1998 that they received information, on a "with prejudice" basis, that confirmed their view that Smoky had breached its contractual obligations. Because until September they had been unable to use the information obtained earlier, they had taken no further steps in the interim to trigger formally the default provisions of the Agreement.

5 In the meantime, on July 30, 1998, a syndicate of Smoky's lenders had filed a petition to place Smoky under the protection of the *CCAA*. They, along with Canadian National Railway Company (a major unsecured creditor of Smoky) are also Respondents. On August 7, 1998, an order was made retroactive to July 31, 1998, staying all actions against Smoky and its assets. This order ("the Cairns order") made specific reference to rights arising under the Agreement, even though Neptune and the Appellants had been unaware of the *CCAA* filing. The Cairns order, which was of limited duration, has since been extended several times. A Monitor has been appointed to oversee Smoky's affairs, although not empowered to take possession of Smoky's assets or manage Smoky's business.

6 Upon learning of the Cairns order, the Appellants became involved in the *CCAA* proceedings, arguing that the stay should not be extended against them and asserting that their dispute with Smoky should be resolved by arbitration pursuant to the Agreement. The chambers judge suggested that the parties attempt to resolve this issue among themselves. When they were unable to do so, cross-motions resulted. In its motion, Smoky sought various declarations concerning the status of the "dispute" under the Agreement or, alternatively, an order prohibiting arbitration proceedings under the Agreement and giving directions for the determination of issues arising under the Agreement. The Appellants' motion sought a stay of Smoky's motion pursuant to s. 15 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (the "B.C. *Arbitration Act*").

Decision Appealed From

7 The learned chambers judge dismissed the Appellants' motion, concluding that the Court of Queen's Bench (which is the "court" under s. 2 of the *CCAA*) has jurisdiction "to hear and determine ... whether Smoky has been or is in default under the ... Agreement and any and all related issues arising therefrom." He ordered the parties to appear before him for further directions concerning a trial of the issues arising from the Agreement.

8 Among his undisputed findings were that:

• the law of British Columbia applies to the dispute under the Agreement

- the question of whether or not Smoky was in default under the Agreement was an issue that, pursuant to the Agreement, the parties had agreed would be decided by arbitration

- Smoky's motion was a commencement of "legal proceedings" within the meaning of s. 15 (1) of the B.C. *Arbitration Act*

- the Appellants had applied to stay Smoky's motion

9 He framed the question this way at para. 1: "Should this Court establish a procedure to resolve a dispute between [the Appellants and Smoky] as part of its supervisory role of the reorganization of Smoky under the *CCAA*, or should this Court stay the pending Notice of Motion of Smoky dated January 6, 1999 while that dispute is resolved by an arbitrator in British Columbia in accordance with the *Commercial Arbitration Act*?"

10 He concluded that s. 15 of the B.C. *Arbitration Act* obliged him to stay Smoky's motion and send the matter to British Columbia for arbitration unless, in the words of that section, the agreement to arbitrate was "void, inoperative or incapable of being performed." He suggested at para. 31 that the latter condition applied because of Smoky's insolvency, the appointment of the Monitor, and the role of the Court under the *CCAA*. He said this incapacity was beyond the parties' control.

11 He considered that the *CCAA* process would be compromised if the contractual dispute was not settled within its ambit. But he noted that, in so dealing with the matter, the resolution of the dispute would be neither precluded nor postponed. Rather, it had to be addressed expeditiously because of its likely impact on the viability of a plan of arrangement. Were it not resolved under the umbrella of the *CCAA*, moreover, the efforts of Smoky's officers could be drained through involvement in the B.C. arbitration, at a time when they should be attending to Smoky's reorganization. Additionally, other stakeholders (including the Monitor) would be excluded from an arbitration in B.C. He rejected the Appellants' argument that their rights as non-creditors could not be affected by *CCAA* orders. He concluded that the dispute should be resolved as expeditiously as possible in the Court of Queen's Bench under the *CCAA* proceedings, "so as to permit Smoky to move forward with certainty as to its status as a shareholder of Neptune" (para. 43).

12 O'Leary J.A. subsequently granted leave to appeal pursuant to s. 13 of the *CCAA*. He suggested the following as the issues for the appeal:

(1) Did the chambers judge err in finding that the arbitration agreement was "incapable of performance" because Smoky is subject to proceedings under the CCAA?

(2) If [the chambers judge] erred in finding that the arbitration agreement was incapable of performance, did he nevertheless have jurisdiction under the CCAA to override the NSA arbitration agreement with respect to the forum and procedure for resolving disputes?

(3) If the Order appealed adversely affected the substantive rights of Luscar and Consol under the *Commercial Arbitration Act* and the arbitration rules of the British Columbia International Commercial Arbitration Centre, did the chambers judge have jurisdiction under the CCAA to make the Order?

13 Because of the approach I have taken to this case, I do not find it necessary to deal with the first issue in quite the way framed by O'Leary J.A. The second and third issues are considered in the reasons that follow.

Contractual Provisions

14 A number of provisions of the Agreement are relevant to the issue under appeal.

15 Paragraph 8.01 provides:

> Except as otherwise expressly permitted by this agreement or a Terminal Contract, no Shareholder or Affiliate shall sell, transfer or otherwise dispose of or offer to sell, transfer or otherwise dispose of, any of its Interest, or any Terminal Contract or any of its rights thereunder.

16 It is alleged that Smoky breached this provision when it transported six train loads of coal through the terminal. According to the Appellants, on this occasion Smoky "subcontracted" its capacity at the terminal.

17 Paragraph 8.04 describes the sole method by which a shareholder may dispose of its contracted shipping capacity. Briefly, it must offer that capacity to the other shareholders and only if they do not take up the right may the capacity be subcontracted to a third party.

18 Paragraph 10 deals with default:

> 10.01 It is an event of default, if a Shareholder (the "Defaulting Shareholder") (the other Shareholders being the "Non-Defaulting Shareholders"):
>
> (a) fails to observe, perform or carry out any of its obligations hereunder and such failure continues for 30 days after Neptune has given notice in writing to the Defaulting Shareholder specifying the nature of the default and requiring that the default be cured within 30 days; or
>
> (b) becomes a bankrupt or commits an act of bankruptcy, or permits or authorizes the appointment of a receiver or if a receiver-manager of its assets is appointed or if the Defaulting Shareholder makes an assignment for the benefit of creditors or otherwise.

Neptune shall give a copy of any notice under this paragraph to the Non-Defaulting Shareholders.

> 10.02 Upon the expiration of the 30 day period referred to in subparagraph 10.01(a) hereof or upon Neptune becoming aware of an event described in 10.01(b) hereof, Neptune shall declare a Default and give notice thereof to the Non-Defaulting Shareholders.

19 In the event of a continuing default, paragraph 11.01 grants other shareholders the option to purchase the defaulting shareholder's shares at book value. In this case, the evidence suggests that the book value of Smoky's shares is about $880,000, while the market value of Smoky's rights in the Neptune Terminal may exceed $46,000,000. During the course of argument, the chambers judge observed that, from a practical perspective, a plan of arrangement under the *CCAA* could not go forward without a resolution of the dispute between Smoky and the Appellants. (AB 83-84)

20 The relevant paragraph dealing with dispute resolution is 12.02:

> The parties agree that all disputes or differences between or among the parties hereto, other than a dispute or difference decided by the auditors pursuant to paragraph 12.01, shall be submitted to a single arbitrator under the auspices of and pursuant to the rules of the British Columbia International Commercial Arbitration Centre and pursuant to the Commercial Arbitration Act of British Columbia whose decision shall be final and binding upon the parties to the arbitration. The arbitrator may determine all questions of procedure and after hearing any evidence and representations of the parties, the arbitrator shall make an award and reduce the same to writing together with the reasons therefor.

21 Paragraph 15.11 provides that the Agreement will be governed by and construed in accordance with the laws of British Columbia.

Statutory Provisions

22 Section 11(4) of the *CCAA* is central to this appeal.

> 11(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
>
> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceedings against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company. (Emphasis added)

23 Part I of the *CCAA* (ss. 4 to 8) provides for the making of a compromise or arrangement between the company and its creditors. If accepted by two-thirds of the creditors, the plan may be sanctioned by the court.

24 Section 2 of the *CCAA* contains the following definitions:

> **"secured creditor"**
>
> "secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds;
>
> **"unsecured creditor"**
>
> "unsecured creditor" means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issued under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.

25 Section 12 sets out the claims procedure. Section 12(1) states that a "claim" means "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the Bankruptcy and Insolvency Act." Section 12(2) mandates how the "amount" of a "claim" is to be determined. Section 12(2)(a) states:

> For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:
>
> (a) the amount of an unsecured claim shall be the amount...
>
> (iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insol-

vency Act, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor...

26 For reasons that will become apparent, the following provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") are also relevant.

Definitions - s. 2(1)

"claim provable in bankruptcy", "provable claim" or "claim provable"

"claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;

"creditor"

"creditor" means a person having a claim, unsecured, preferred by virtue of priority under section 136 or secured, provable as a claim under this Act;

.....

Persons claiming property in possession of bankrupt

81(1) Where a person claims any property, or interest therein, in the possession of a bankrupt at the time of the bankruptcy, he shall file with the trustee a proof of claim verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the property to be identified.

Claims provable

121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

Contingent and unliquidated claims

121(2) The determination of whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

Debts payable at a future time

121(3) A creditor may prove a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

27 Section 15(2) of the B.C. *Arbitration Act*, referred to by the chambers judge, provides:

In an application under subsection (1), the court <u>must</u> make an order staying the legal proceedings <u>unless</u> it determines that the arbitration agreement is void, inoperative or incapable of being performed.

(Emphasis added)

1999 CarswellAlta 491, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94, [1999] A.J. No. 676

28 Section 23 states:

> An arbitrator must adjudicate the matter before the arbitrator by reference to law unless the parties, as a term of an agreement referred to in section 35, agree that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.
>
> (Emphasis added)

29 Under ss. 8 and 9 of the *Domestic Commercial Arbitration, Rules of Procedure* of the B.C. International Commercial Arbitration Centre (as amended June 1, 1998) ("Rules"), arbitration may be commenced by a notice from one party to another and to the Centre or by the filing of a Joint Submission to Arbitrate to the Centre. The arbitration is deemed to have commenced following this filing and the payment of fees (s. 10). There is no evidence to suggest that arbitration was commenced in this case.

30 Section 33 of the Rules provides:

> An arbitration tribunal shall decide the dispute in accordance with the law unless the parties agree in writing in accordance with section 23 of the *Commercial Arbitration Act* that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.
>
> (Emphasis added)

Analysis

1. Did the Chambers Judge Have the Authority under s. 11 of the CCAA to Order a Stay of the B.C. Arbitration Proceedings?

(A) Does the term "proceedings" in s. 11 of the CCAA include the proposed arbitration in B.C.?

31 There is little doubt that the term "proceedings" in s. 11 is broad enough to encompass extra-judicial proceedings. Trial and appellate courts have treated the term expansively, relying upon jurisprudence that takes a broad, liberal approach to the interpretation of the *CCAA*. *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 11 D.L.R. (4th) 576, 53 A.R. 39 (Alta. Q.B.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.) ("*Quintette Coal*"). Such courts have observed that, were it otherwise, non-judicial proceedings could operate against the interests of creditors and render impossible the achievement of effective arrangements.

32 Thus, in *Quintette Coal*, the term "proceedings" was held to include extra-judicial conduct such as the withholding of payments to the debtor company. In *Meridian*, it was said to embrace payment pursuant to a letter of credit. Without specific discussion of the point, it seems also to have been assumed that "proceedings" includes the exercise of a contractual right to replace an operator of jointly-owned petroleum properties. *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Alta. Q.B.).

33 The above jurisprudence persuades me that "proceedings" in s. 11 includes the proposed arbitration under the B.C. *Arbitration Act*. The Appellants assert that arbitration is expeditious. That is often, but not always, the case. Arbitration awards can be appealed. Indeed, this is contemplated by s. 15(5) of the Rules. Arbitration awards, moreover, can be subject to judicial review, further lengthening and complicating the decision-making process. Thus, the efficacy of *CCAA* proceedings (many of which are time-sensitive) could be seriously undermined if a debtor company was forced to participate in an extra-*CCAA* arbitration. For these reasons, having taken into account the nature and purpose of the *CCAA*, I conclude that, in appropriate cases, arbitration is a "proceeding" that can be stayed under s. 11 of the *CCAA*.

(B) Are the Appellants creditors for the purposes of the CCAA?

34 If the Appellants can be considered creditors under the *CCAA*, there is little doubt that the chambers judge had the power to affect their rights in the way he did. It is obvious that the contractual rights of a creditor can be affected permanently under the *CCAA*. To take a simple example, a plan of arrangement or compromise that is approved by the requisite number of creditors can alter permanently the contractual rights of even those creditors that have not approved the plan (*CCAA*, s.6).

35 To explain my conclusion that the Appellants can be considered creditors under the *CCAA*, it is necessary to examine the statutory linkage between the *CCAA* and the *BIA* and the courts' view of that linkage.

36 The relevant provisions of the *CCAA* and the *BIA* have been set out above. For the purposes of the claims procedure in s. 12 of the *CCAA*, "claim" is defined as the *BIA's* meaning of "a debt provable in bankruptcy". Could the Appellants' claims in this case constitute a "debt provable in bankruptcy"?

37 The answer is not readily apparent from the *BIA*, since nowhere does it define "*debt* provable in bankruptcy". The closest definition is "*claim* provable in bankruptcy". A contingent and unliquidated claim recoverable by legal process is a "claim provable in bankruptcy" for the purposes of s. 121(1) of the *BIA*: *Farm Credit Corp. v. Holowach (Trustee of)*, [1988] 5 W.W.R. 87, at 90, 51 D.L.R. (4th) 501 (Alta. C.A.), leave to appeal to the Supreme Court of Canada dismissed at [1989] 4 W.W.R. lxx (S.C.C.). Section 81(1) of the *BIA* contemplates proof of a claim arising from "any property, or interest therein" in the possession of the bankrupt at the time of bankruptcy. Some of the Respondents argue that the Appellants' claim against Smoky under the Agreement would fall under one of these sections and is, therefore, a "claim" under the *CCAA* that would give the Appellants access to the s. 12 claims procedure, making them creditors under that statute.

38 This legal result is contingent on whether the terms "debt" and "claim" are interchangeable under the *BIA*. Both terms are used in s. 121, which is entitled "Claims Provable". There are cases which, without directly considering the point, appear to have assumed that the two terms are synonymous: *Re Central Capital Corp.* (1995), 22 B.L.R. (2d) 210 (Ont. Gen. Div. [Commercial List]); affirmed (1996), 27 O.R. (3d) 494 (Ont. C.A.).

39 There are also cases where the point has been addressed directly. In *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.), the issue was whether the holder of a loan guaranteed by the debtor company should be treated as a creditor for the purposes of the plan of arrangement filed by the debtor company, notwithstanding the fact that the loan holder had made no demand of payment under the loan agreement or the guarantee. Farley J. concluded that the loan holder was a creditor. He distinguished *Quebec Steel Products (Industries) Ltd. v. James United Steel Ltd.*, [1969] 2 O.R. 349, 5 D.L.R. (3d) 374 (Ont. H.C.) because of changes that had been made to the wording of s. 12 of the *CCAA* in the meantime. Specifically, he noted that the earlier wording had bundled together the concepts of "claim" and "amount", leading in *Quebec Steel* to the application of the common law definition of "debt" as a certain sum of money.

40 At 6-7, Farley J. said:

> It strikes me that [under the current *CCAA*] the double recitation in s. 12(1) and (2) of "[f]or the purposes of this Act" and the segregation of these subsections was intended to allow "claim" to be determined as any "indebtedness, liability or obligation of any kind" by reference to whether it "could be a debt provable in bankruptcy within the meaning of the *Bankruptcy Act*". The determination of the amount of that claim is to be determined under another provision, also "[f]or the purposes of this Act". Under the structure and context of the C.C.A.A. could there be a claim (unsecured debt provable as such under the *Bankruptcy Act*) without there being a creditor as the holder of that claim. I think not. I therefore conclude that the B. of M. is creditor of Algoma vis-à-vis the guar-

antee (see *Re Film House Ltd.* (1974), 19 C.B.R. (N.S.) 231 (Ont. S.C.), varied (1974), 19 C.B.R. (N.S.) 231 at 234 (Ont. S.C.); *Re Froment*, 5 C.B.R. 765, [1925] 2 W.W.R. 415, [1925] 3 D.L.R. 377 (Alta. T.D.), which indicate that the contingent liability of a guarantor who has not been called upon to pay or who has not in fact paid should be considered a debt provable in bankruptcy pursuant to the *Bankruptcy Act*).

41 He held to similar effect in *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 17 (Ont. Gen. Div. [Commercial List]), where the party found to be a "claimant" for the purposes of the *CCAA* had merely launched a lawsuit against the debtor company, seeking, among other things, declarations concerning the validity of certain agreements and recovery of damages for the breach of the agreements by the debtor company. See also *Re Quintette Coal Ltd.* (1991), 7 C.B.R. (3d) 165 (B.C. S.C.) at 174 where it was held that "claim" under the *CCAA* included "future prospects".

42 I find this reasoning persuasive. There is a possible explanation for the fact that the *CCAA* refers to a "debt", rather than a "claim", provable under the *BIA*. At the time the *CCAA* was passed, the *Bankruptcy Act*, R.S.C. 1927, c. 11, contained s. 104, entitled "Debts provable". That section is the forerunner of s. 121, now entitled "Claims provable". The language used in the body of s. 104 was "debts provable"; in the current s. 121, it is "claims provable". The definitions at that time also referred to "debts" rather than "claims". It may be that Parliament failed to re-align the language of the *CCAA* when the relevant language of the *Bankruptcy Act* was amended in 1949, S.C. 1949, 2nd sess., c. 7.

43 Nor am I convinced there are compelling reasons why the notion of a "debt" should be treated narrowly under the *CCAA*, rather than as broadly as a "claim" under the *BIA*. It is true that, in comparison to *CCAA* proceedings, bankruptcy proceedings are by nature more final. If it is ever to be dealt with, a claim must be resolved during the bankruptcy proceedings. In contrast, if a *CCAA* plan of arrangement is accepted, there is the future possibility of a going concern against which a claim may be asserted.

44 But there may also be situations (like the present one) where it would be difficult for a plan of arrangement to be prepared and voted upon without some resolution, in the same process, of a claim that is relatively unripe. This appears to have been the reasoning of Blair J. in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.). There, the plaintiffs had served a statement of claim (seeking damages for breach of contract against the debtor company) before an initial stay under the *CCAA* was ordered. In refusing to lift the stay and permit the action to proceed, he noted that, unless the claim was dealt with in the context of *CCAA* proceedings, the creditors would have no way to assess whether to accept or reject the debtor company's plan (notwithstanding that the plan itself had treated the plaintiffs as parties that were unaffected by it). His language at 311 suggests a tacit acceptance of the fact that the plaintiffs were not "creditors" in the same sense as other creditors. He held, nevertheless, that their "claim" should be dealt with under the *CCAA*.

45 In this case, the essence of the Appellants' claim is that Smoky has breached the Agreement. Although paragraph 11.01 of the Agreement grants an option to purchase the defaulting shareholder's shares, it is clear from paragraph 11.02 that other remedies are contemplated. Viewed this way, the Appellants' claim is not significantly different than the breach of contract claims in some of the cases just discussed. To the extent that the Appellants might exercise an option to acquire Smoky's shares, moreover, it could be said that they claim a right to "property" in Smoky's possession, a right that would be provable under s. 81 of the *BIA*.

46 For these reasons, I conclude that the Appellant's claim against Smoky can be treated under the claims process of s. 12 and that they are creditors for the purposes of the *CCAA*. In case I am wrong, I will now consider whether, if the Appellants *cannot* be considered creditors, the chambers judge nevertheless had the power to make the order.

(C) Even if the Appellants are not creditors for the purposes of the CCAA, does s. 11 authorize the order made in this case?

47 The Appellants do not dispute that the rights of non-creditor third parties can be affected by the s. 11 power to order a stay. They agree this is the clear implication of cases such as *Norcen, supra*, a decision that has been followed widely and cited with approval by many Canadian courts. But they say in no case has a court altered permanently the contractual rights of a non-creditor and doing so is beyond the scope of the *CCAA*. They assert that, if the order is upheld, they will have lost forever the opportunity to resolve the dispute pursuant to the arbitration procedure accepted by the parties to the Agreement. As discussed later, in my view the nature of the contractual right being affected is an important factor to take into account.

48 The Respondents disagree with the Appellants' assessment of the jurisprudence. They also maintain that the impugned order affects the Appellants' procedural, not substantive, rights.

49 In my opinion, the language of s. 11(4), considered in the context of the *CCAA's* purpose, authorizes the order made by the chambers judge. To recapitulate, that order declared that the Alberta Court of Queen's Bench "has jurisdiction to hear and determine the issue of whether Smoky has been or is in default under the Neptune Shareholders' Agreement and any and all related issues arising therefrom", required the parties to appear before him for further directions, and dismissed the Appellants' motion for a stay pursuant to the B.C. *Arbitration Act*. Although there are no previous decisions on all fours with the present situation, I read the existing jurisprudence as supportive of my interpretation of s. 11(4).

50 The language of s. 11(4) is very broad. It allows the court to make an order "on such terms as it may impose". Paragraphs (a), (b) and (c) empower the court order to stay "*all* proceedings taken or that might be taken" against the debtor company; restrain further proceedings "in *any* action, suit or proceeding" against the debtor company; and prohibit "the commencement of or proceeding with *any* other action, suit or proceeding" (emphasis added). These words are sufficiently expansive to support the kind of discretion exercised by the chambers judge.

51 This interpretation is supported by the legislative objectives underlying the *CCAA*. The purpose of the *CCAA* and the proper approach to its interpretation have been described as follows:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order [sic] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.

per Farley J. in *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at 31.

52 As has been noted often, the *CCAA* was enacted by Parliament in 1933 during the height of the Depression. At that time, corporate insolvency led almost inevitably to liquidation because that was the only option available under legislation such as the *Bankruptcy Act* and the *Winding-Up Act*. In the result, shareholder equity was destroyed, creditors received very little, and the social evil of unemployment was exacerbated. The *CCAA* was intended to provide a means of enabling the insolvent company to remain in business: *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.); *Quintette Coal Ltd., supra.*

53 The courts have underscored that the *CCAA* requires account to be taken of a number of diverse societal interests. Obviously, the *CCAA* is designed to "provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both": *Re Lehndorff General Partner Ltd., supra*, at 31. It is intended to "prevent any manoeuvers for positioning among creditors during the interim period which would give

the aggressive creditor an advantage to the prejudice of others who were less aggressive and would further undermine the financial position of the company making it less likely that the eventual arrangement would succeed": *Meridian, supra*, at 114. But the *CCAA* also serves the interests of a broad constituency of investors, creditors and employees: *Hongkong Bank of Canada, supra*, at 320; *Quintette Coal Ltd., supra*, at 314. These statements about the goals and operation of the *CCAA* support the view that the discretion under s. 11(4) should be interpreted widely.

54 There are a number of cases where third party rights have been affected by a stay order. *Norcen* provides a convenient starting point.

55 Under the terms of the contract pursuant to which the debtor company (Oakwood) operated jointly owned oil and gas properties, the parties were entitled to replace the operator in the event of insolvency. Norcen was a party to the operating agreement, but not a creditor of Oakwood, nor present at the initial *CCAA* application. The stay order specifically enjoined Oakwood's removal as operator under any operating agreements. Norcen applied to vary the stay order and replace Oakwood pursuant to the terms of its operating agreement.

56 In denying Norcen's application, Forsyth J. agreed that, by bringing its *CCAA* application, Oakwood had declared itself insolvent and that, normally, this would bring into play the replacement of operator provisions. He acknowledged at 11 (C.B.R.) that Norcen's rights might be affected permanently under the operating agreement were it not prevented from replacing Oakwood: if Oakwood's plan of arrangement was approved by its creditors and its insolvency thereby "cured", Norcen might lose forever its claim to replace Oakwood as operator. While not deciding the issue of whether the insolvency was capable of being "cured", he approached the case as involving more than a mere suspension of Norcen's rights. He concluded at 12, nevertheless, that the s. 11 powers were broad enough to affect the rights of non-creditors, noting that there was much room for discretion within the application of s. 11 "to refuse a stay when third party rights will be seriously prejudiced by its terms."

57 Having determined that the s. 11 powers permitted interference with Norcen's contractual rights, Forsyth J. addressed the *CCAA*'s constitutional validity, observing that it had been upheld by the Supreme Court of Canada in *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 (S.C.C.). Thus, he said, the continuance of insolvent companies must be considered a constitutionally valid statutory objective. "[I]t follows that a stay which happens to affect some non-creditors in pursuit of that end is valid" (p. 16). He concluded that continuance of a company involves more than a consideration of creditor claims, adding that s. 11 of the *CCAA* could be used to interfere with some other contractual relationships in circumstances which threaten a company's existence. In *obiter*, he expressed the view that fairness required that such interference "should be effective only for a relatively short period of time" (p. 16).

58 A related case is *Re T. Eaton Co.* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.). Dylex (not a creditor of T. Eaton but an operator of stores in malls where T. Eaton was the anchor tenant) applied to amend a *CCAA* stay order so that it could exercise rights pursuant to its leases. Those leases permitted Dylex to alter the lease terms if T. Eaton ceased to operate in the shopping centres. Houlden J.A. denied the motion, noting that, if such rights were accorded to Dylex, there might be other tenants who would make the same claim. This would likely increase the claims of landlords against T. Eaton and seriously impact its re-structuring plan. He took account of T. Eaton's position as a large employer and purchaser from suppliers. At 295-96, without extensive analysis, he opined that s. 11 and the inherent jurisdiction of the Court gave him the power to make orders against non-creditor third parties when their actions would potentially prejudice the success of the plan. I acknowledge that it is not clear that his order had the effect of altering contractual rights permanently, since, depending on the outcome of the re-organization proceedings, at a future time the tenants might still be able to exercise their rights under the leases. In this regard, the situation was akin to that in *Norcen*.

59 In *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), the debtor company was permitted to terminate its leases in shopping malls, as part of its restructuring program. Farley J. viewed s. 11 as giving the court the inherent jurisdiction, in the interim between the filing and the approval of a plan, to "fill in gaps in [the]

legislation so as to give effect to the objects of the CCAA, including the survival program of a debtor until it can present a plan" (p. 110).

60 To summarize, the language of s. 11(4) is very broad. The *CCAA* must be interpreted in a remedial fashion. Cases support the view that third-party rights may be affected by a stay order, although there are none where the third-party rights appear to have been affected in quite the same way as those of the Appellants as a result of this order. I am satisfied, nevertheless, that the *CCAA* gives the chambers judge the discretion to make the impugned order. It remains to consider whether he properly exercised that discretion.

2. Did the Chambers Judge Properly Exercise his Discretion under s. 11(4) of the CCAA?

61 The fact that an appeal lies only with leave of an appellate court (s. 13, *CCAA*) suggests that Parliament, mindful that *CCAA* cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.

62 A similar opinion was expressed by Macfarlane J.A. in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]). In considering whether to grant leave to appeal, he observed at 272:

> ...I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made....
>
> Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A.

63 The Appellants point to cases where a specific issue arising under the *CCAA* has been sent for resolution to a forum other than the *CCAA* court. In each of those cases, however, it has been determined that resolution in the other forum would promote the objectives of the *CCAA*. In each such case, moreover, the *CCAA* judge has retained control over the impact of the outside determination.

64 For example, in *Re Philip's Manufacturing Ltd.* (1991), 9 C.B.R. (3d) 1 (B.C. S.C.), the debtor company's landlord alleged that its leases were about to expire since the company had not given requisite notice. The judge noted that it was essential to the reorganization plan that the company be able to remain in the leased premises. He permitted the landlord to pursue proceedings under the *Commercial Tenancy Act*, R.S.B.C. 1979, c. 54. But that legislation contained a summary procedure for determining the issue at hand (whether the landlord was entitled to a writ of possession). The judge, moreover, maintained some control over the process by ordering that, if an order of possession was granted, it would be stayed for as long as the *CCAA* stay, "to be dealt with in the context of any reorganization plan ultimately brought before the court" (para. 44). Additionally, the summary procedure was to occur in the B.C. Supreme Court, the same court that supervised the *CCAA*.

65 Similarly, in *Re Cadillac Fairview Inc.* (January 29, 1995), Doc. B348/94 (Ont. Gen. Div. [Commercial List]), an issue arose about the quantification of a claim affecting the debtor company. Farley J. permitted this issue to be determined by a court in Chicago, because that court undertook to resolve the matter expeditiously and in coordination with the *CCAA* proceedings.

66 On the other hand, in *Landawn Shopping Centres Ltd. v. Harzena Holdings Ltd.* (1997), 44 O.T.C. 288 (Ont. Gen. Div. [Commercial List]), a plan of arrangement was already in effect when a landlord sought to proceed to arbitration with its claim against the debtor company. Instead, the court ordered that the claim be dealt with by the court under the terms of the plan of arrangement.

67 These cases compel the conclusion that a judge has the discretion under the *CCAA* to permit issues to be determined in another forum but is under no obligation to do so. The proper exercise of the discretion will be very fact-dependent.

68 As noted by Gibbs J.A. in *Quintette Coal Ltd., supra*, at 312, the judicial exercise of discretion under s. 11 should "produce a result appropriate to the circumstances." The power under s. 11 should be exercised in a manner to give effect to the purpose of the *CCAA*, and not to "seriously ... impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period."

69 In this case, the chambers judge considered a number of matters in refusing to permit the arbitration. Among these were his view that the arbitration would compromise the *CCAA* process; that the effect of his order would not be to preclude or postpone the resolution of the dispute but to expedite it; that an expedited resolution of the dispute was critical to the *CCAA* proceedings given its possible impact on a plan of arrangement; and that it was desirable for Smoky's officers to focus on the re-organization.

70 These were all legitimate matters to consider. Another factor, not mentioned by the chambers judge, is that arbitration had not been commenced in this case by the time the initial *CCAA* order was made. There may be reasons why the Appellants had not moved toward arbitration more rapidly. But the fact remains that several months had elapsed between the origin of the dispute under the Agreement and the *CCAA* petition, during which time no steps to commence arbitration were taken by the Appellants.

71 It is also important to consider the nature of and the extent to which the Appellants' contractual rights may be compromised as a result of the order under appeal. I agree there are some potential advantages to the Appellants under arbitration. Specifically, they would be able to play a role in selecting the decision-maker. If their interpretation of s. 33 of the Rules and s. 23 of the B.C. *Arbitration Act* is correct, arguably the arbitration would limit Smoky's ability to rely on certain arguments that might be available in a court proceeding (for example, equitable arguments such as relief from forfeiture).

72 But as the Appellants acknowledged during argument, no decision has yet been made about what rules will apply to the resolution of this dispute under the procedures to be determined by the chambers judge. It remains open to the Appellants to argue that Rule 33 and s. 23 of B.C. *Arbitration Act* ought to govern the resolution of their dispute in the *CCAA* proceedings. The only "rights" of the Appellants that have been affected so far are that they cannot help select the decision-maker and they must participate in proceedings in the Court of Queen's Bench of Alberta. I do not consider that the order under appeal permanently affects the substantive contractual rights of the parties. It merely affects the forum in which those contractual rights will be assessed. This is a relatively minor incursion compared to the large benefit that may result from the *CCAA* proceedings. I assume that, in settling the details of the *CCAA* procedure, the chambers judge will take account of the Appellants' arguments and ensure that their substantive contractual rights are protected.

3. What is the Relationship between the Discretion of the Chambers Judge under s. 11 of the CCAA and s. 15 of the B.C. Arbitration Act?

73 It is apparent that I have taken a different approach than the chambers judge, who focussed largely on s. 15 of the B.C. *Arbitration Act*. He was correct in his opinion that, under that legislation, a stay must be ordered unless one of the three disabling events exists. If a case is governed by that legislation, a court should honour the choice of the parties to go to arbitration and has very limited power to refuse a stay of competing proceedings. *Kaverit Steel & Crane Ltd. v. Kone Corp.* (1992), 87 D.L.R. (4th) 129 (Alta. C.A.); *Prince George (City) v. McElhanney Engineering Services Ltd.*, [1995] 9 W.W.R. 503 (B.C. C.A.).

74 He concluded that, as a result of Smoky's insolvency, the appointment of a Monitor, and the court's role under

the *CCAA*, the agreement to arbitrate was "incapable of being performed". The Appellants say this conclusion was wrong.

75 But even if the chambers judge erred in interpreting s. 15, the outcome of this case would not change. There would then be a conflict between the *CCAA* and a provincial statute. The Appellants do not contest the constitutional validity of the *CCAA*. The authorities are clear that, in the event of a conflict with a provincial law, the *CCAA* must prevail. *Gaz métropolitain Inc. v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (Que. S.C.); *Re Pacific National Lease Holding Corp., supra*; *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* (1995), 34 C.B.R. (3d) 4 (B.C. C.A.). Accordingly, it is not necessary to decide whether he misapplied s. 15.

76 For these reasons, I would dismiss the appeal.

Appeal dismissed.

FN* Reconsideration refused (1999), 12 C.B.R. (4th) 126, 71 Alta. L.R. (3d) 46, 175 D.L.R. (4th) 703 at 727, 244 A.R. 196, 209 W.A.C. 196 (C.A.).

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TAB 4

1999 CarswellAlta 539

Royal Bank v. Fracmaster Ltd.

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

In the Matter of Fracmaster Ltd.

UTI Energy Corp., Respondent (Plaintiff) and Fracmaster Ltd., Respondent (Defendant)

Royal Bank of Canada, and Royal Bank of Canada, as agent for Royal Bank of Canada, Canadian Imperial Bank of Commerce, Bank of Nova Scotia, Hong Kong Bank of Canada, Banque Nationale de Paris (Canada) and Credit Suisse First Boston Canada, Respondents (Plaintiffs) and Fracmaster Ltd., Respondent (Defendant) and UTI Energy Corp., Appellant

The Janus Corporation, Appellant (Plaintiff) and Fracmaster Ltd., Respondent (Defendant)

Royal Bank of Canada, and Royal Bank of Canada, as agent for Royal Bank of Canada, Canadian Imperial Bank of Commerce, Bank of Nova Scotia, Hong Kong Bank of Canada, Banque Nationale de Paris (Canada) and Credit Suisse First Boston Canada, Respondents (Plaintiffs) and Fracmaster Ltd., Respondent (Defendant) and UTI Energy Corp., Appellant and Calfrac Limited, Appellant

Alberta Court of Appeal

Conrad, O'Leary, Fruman JJ.A.

Heard: June 4, 1999
Judgment: June 7, 1999
Docket: Calgary Appeal 99-18326, 99-18327, 99-18331, 99-18335

Proceedings: affirming (May 17, 1999), Doc. Calgary 9901-05042 (Alta. Q.B.); and affirming (May 21, 1999), Doc. Calgary 9901-08246 (Alta. Q.B.)

Counsel: *H.A. Gorman*, for UTI Energy Corp.

V.P. Lalonde, for Janus Corporation & Alfred H. Balm.

E.W. Halt and *L. Berner*, for Calfrac Limited.

T.J. Mallett and *A.D. Little*, for BJ Services Company.

B.P. O'Leary and *A.Z.A. Campbell*, for Arthur Andersen Inc. (The Receiver).

1999 CarswellAlta 539, (sub nom. UTI Energy Corp. v. Fracmaster Ltd.) 244 A.R. 93, (sub nom. UTI Energy Corp. v. Fracmaster Ltd.) 209 W.A.C. 93, 11 C.B.R. (4th) 230, [1999] A.J. No. 675

F.R. Dearlove, for Royal Bank et al. (The Lending Syndicate).

R. Dudelzak, Q.C., for Global Securities Ltd.

W.E.B. Code, for BNPI.

G.B. Davison, for Fracmaster (For the Corporation).

S.T. Fitzgerald, for TD Asset Finance.

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

Bankruptcy --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale

Company filed petition under Companies' Creditors Arrangement Act — Company applied for approval of sale of its assets to U, and syndicate of creditors supported application — Syndicate brought application in alternative for order appointing receiver and directing receiver to approve sale to U — C brought application for court approval of its proposal to purchase company's assets — Chambers judge made order appointing receiver and ordered receiver to make recommendation to court on bids — Receiver's application for approval of sale of assets to company B was granted — Chambers judge held that receiver properly used its business experience and acumen in choosing offer ultimately recommended to court — U and C brought appeals from decision approving B's offer — Appeals dismissed — Chambers judge's conclusions on risks were not unreasonable — Chambers judge did not act unreasonably in considering commercial realities and nature of variations, and in accepting form of B's offer — Preferences of syndicate did not fetter court's discretion and were not necessarily determinative — Chambers judge did not act unreasonably by following recommendation of receiver — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

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

Company filed petition under Companies' Creditors Arrangement Act — Company conducted sale process under which several companies submitted offers or proposals, including U and J — Company applied for approval of sale of its assets to U, and syndicate of creditors supported application — Syndicate brought application in alternative for order appointing receiver and directing receiver to approve sale to U — J brought application for order appointing interim receiver and directing meeting of creditors and shareholders to consider J's plan of arrangement — Chambers judge made order appointing receiver and ordered receiver to make recommendation to court on bids — J brought appeal from chambers judge's decision declining to order meeting of creditors and shareholders to consider J's plan of arrangement — Appeal dismissed — Chambers judge held that it was pointless to order meeting as syndicate had indicated it would not support J's plan, and syndicate had valid commercial reasons for its refusal — No requirement existed under Act that all proposed plans of arrangement be put to meetings of creditors and shareholders for their consideration — Chambers judge did not err in concluding that J's plan was doomed to failure — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Company filed petition under Companies' Creditors Arrangement Act — Company conducted sale process under which several companies submitted offers or proposals — Company applied for approval of sale of its assets to U, and syndicate of creditors supported application — Chambers judge made order appointing receiver and ordered receiver to make recommendation to court on bids — U brought appeal from chambers judge's decision denying company's application for court approval of sale of its assets to U — Appeal dismissed — Chambers judge held that sale of assets to U could be accomplished in manner that did not require use of Act — Chambers judge did not err in concluding that sale of assets to U would be inappropriate use of Act — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

The company experienced financial difficulties and filed a petition under the *Companies' Creditors Arrangement Act*. The company had insufficient equity to satisfy fully the claims of all its creditors and shareholders. The company conducted a sale process under which several companies submitted offers or proposals, including U, J and C. Four applications were brought before the chambers judge. The company applied for the court's approval of the sale of its assets to U, and a syndicate of creditors supported the application. The syndicate also brought its own application in the alternative, for an order appointing a receiver and directing the receiver to approve the sale to U. J brought an application for an order appointing an interim receiver and directing a meeting of creditors and shareholders to consider J's plan of arrangement. C brought an application for approval and acceptance of its proposal to purchase the company's assets. The chambers judge made an order appointing a receiver, and ordered the receiver to make a recommendation to the court on bids, with consideration given to terms set out by the chambers judge.

With the approval of the chambers judge, the receiver issued a press release outlining the terms of sale. Three bids were received by the receiver, at which time the content of every bid was disclosed to the parties. U and C made bids, but J did not. The receiver recommended to the court company B's offer, which exceeded U's bid by approximately $20,000,000. The receiver applied for approval of the sale of the assets to B. The application was granted. The chambers judge held that the creditors' opinions were important but were not the deciding factor. The chambers judge held that the receiver properly adhered to the terms for offers set out by the court order, and acted properly throughout the bidding process. The chambers judge held that the receiver properly used its business experience and acumen in choosing the offer ultimately recommended to the court. J brought an appeal from the chambers judge's decision declining to order a meeting of the creditors and shareholders to consider J's plan of arrangement. U brought an appeal from the chambers judge's decision denying the company's application for court approval of the sale of its assets to U. U and C brought appeals from the order approving the sale of the company's assets to B, claiming that the receiver and the chambers judge failed to properly consider the closing risks associated with B's offer. C further claimed that the receiver failed to administer the sale process in strict compliance with the court ordered procedure, and U claimed that the chambers judge erred in acting upon the receiver's recommendation.

Held: The appeals were dismissed.

The chambers judge held that the plan proposed by J fit within the Act, but that the commercial reality was that there was no equity left in the company and that the syndicate had the only realistic remaining financial interest. The chambers judge held that it was pointless to order a meeting as the syndicate had indicated it would not support J's plan, and the syndicate had valid commercial reasons for its refusal. No requirement exists under the Act that all proposed plans of arrangement must be put to meetings of creditors and shareholders for their consideration. The court is to exercise its discretion by considering whether the proposed plan has a reasonable chance of success. It was clear that the syndicate did not support J's plan. The syndicate would have been entitled to vote as a class at the meeting, and would have defeated the plan. The company's situation was urgent and required rapid resolution. The delays that would have resulted if a meeting had been called would have further jeopardized the company and the value of its assets. The chambers judge did not err in concluding that J's plan was doomed to failure. Under the Act, the court has no discretion to sanction a plan unless it has been approved by a vote of a two-thirds majority in value of each class of creditors.

In deciding on the company's application for court approval of the proposed sale of assets to U under the Act, the chambers judge noted that the proposed sale did not create any monetary return for unsecured creditors or shareholders of the company, nor did it contemplate that they would receive any benefit. The sale was in effect a sale of assets for the benefit of the syndicate. The chambers judge held that the transaction could be accomplished in a manner that did not require the use of the Act. The liquidation of a company's assets may be concluded under the Act, but such a transaction must be in the best interest of the creditors generally. Liquidation transactions that do not result in an ongoing business entity that will survive the asset sale are inconsistent with the intent of the Act. The chambers judge did not err in concluding that the sale of assets to U would be an inappropriate use of the Act.

The chambers judge considered the closing risks associated with B's offer, and accepted the receiver's conclusion that the closing risks associated with B's offer were no greater than U's offer, and more than offset by the purchase price. The receiver's risk assessment was acceptable given the time constraints presented in the circumstances. The chambers judge's conclusions on the risks were not unreasonable.

The chambers judge dealt with C's complaints in her reasons, and held that the order setting out the procedure to be followed had to be read in light of the commercial realities of the business world and the bidding process. The chambers judge held that the variations were minor and that B's offer was in substantially the same form as the offer proposed by the receiver. The time constraints presented in the circumstances did not permit the creation of a distinct and final tender process. There was an attempt to build flexibility into the process. The chambers judge did not act unreasonably in considering the commercial realities and the nature of the variations, and in accepting the form of B's offer.

The receiver was required to make a recommendation to the court, bearing in mind the interests of all claimants, including the secured creditors. The receiver concluded that B's offer was the best, despite the fact that the syndicate supported U's offer. The chambers judge followed the receiver's recommendation after being satisfied that the receiver acted properly and providently. As none of the bids exceeded the secured debt of the syndicate, only the syndicate had a financial interest in the proceeds of the sale of the assets. However, the preferences of the syndicate did not fetter the court's discretion and were not necessarily determinative. The chambers judge did not act unreasonably by following the recommendation of the receiver, because of the unique facts and manner in which events unfolded. Once the sale process was engaged, it had to be fundamentally fair, with a level playing field for all participants. All parties that had previously made an offer for the company's assets, including U, were contacted by the receiver and advised of the sale process. The court order did not give U a reserve bid. It would have undermined the integrity of the independent bidding process if the court had defaulted to U's bid without prior notice to the other bidders.

Cases considered by *Fruman J.A.*:

Bargain Harold's Discount Ltd. v. Paribas Bank of Canada (1992), 10 C.B.R. (3d) 23, 4 B.L.R. (2d) 306, 7 O.R. (3d) 362 (Ont. Gen. Div.) — referred to

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

Inducon Development Corp., Re (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) — applied

M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., 170 D.L.R. (4th) 577, 237 N.R. 334, 44 C.L.R. (2d) 163, 232 A.R. 360, 195 W.A.C. 360, [1999] 1 S.C.R. 619, [1999] 7 W.W.R. 681, 69 Alta. L.R. (3d) 341, 3 M.P.L.R. (3d) 165 (S.C.C.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1 (Ont. C.A.) — applied

Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473, 65 A.R. 372, 59

1999 CarswellAlta 539, (sub nom. UTI Energy Corp. v. Fracmaster Ltd.) 244 A.R. 93, (sub nom. UTI Energy Corp. v. Fracmaster Ltd.) 209 W.A.C. 93, 11 C.B.R. (4th) 230, [1999] A.J. No. 675

C.B.R. (N.S.) 242 (Alta. C.A.) — applied

Solv-Ex Corp v. Solv-Ex Canada Ltd. (November 19, 1997), Doc. Calgary 9701-10022 (Alta. Q.B.) — referred to

Statutes considered:

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

s. 4 — considered

s. 5 — considered

s. 6 — considered

s. 13 — referred to

Tariffs considered:

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

Sched. C, Tariff of Costs, column 5 [rep. & sub. Alta. Reg. 152/98] — referred to

APPEAL by U and C from decision approving sale of company's assets to B; APPEAL by J from decision dismissing J's application for order directing meeting of creditors and shareholders to consider J's plan of arrangment; APPEAL by U from decision dismissing company's application for approval of sale of company's assets to U, in judgments reported at (1999), 11 C.B.R. (4th) 204 (Alta. Q.B.) and (1999), 11 C.B.R. (4th) 217 (Alta. Q.B.).

***Conrad J.A.* (for the court):**

1 The decision of the Court is unanimous and will be delivered by Madam Justice Fruman.

***Fruman J.A.* (for the court):**

2 Fracmaster Ltd., an oil and gas services company with world-wide operations, encountered serious financial difficulties. With liabilities that greatly exceeded its assets, its inevitable insolvency gave rise to hurried attempts to restructure the company. A series of court proceedings and a court-authorized tender process, all conducted at break neck speed, resulted in a court order approving the sale of Fracmaster's assets to BJ Services Company for $80 million. That order, and the events which led up to it, are the subject of four appeals by prospective purchasers whose bids for Fracmaster were unsuccessful.

3 We make two preliminary observations. First, this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

4 Our second observation is that events unfolded rapidly, with short time periods and offers arriving, literally, at the last minute. Parties did not always have time to prepare and file affidavits. On occasion representations of fact were mixed with submissions of law made by counsel to the chambers judge. As a result, our record is not as complete as we

might have wished. We imply no criticism. We understand Fracmaster's serious financial jeopardy, the need for haste, and the accommodation by the parties and the court to conclude matters quickly. However, the frailties of the record require that we give considerable deference to fact findings made by the chambers judge and further illustrate why leave is and should be required to appeal proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (section 13). I will refer to that statute as the "CCAA".

Facts

5 Fracmaster is an Alberta company. Beginning in the fall of 1998, when its financial condition was precarious, it unsuccessfully attempted to restructure its financial affairs. With the indulgence of a lending syndicate to whom Fracmaster owed $96 million, and whose debt was registered as a first charge on its assets, it subsequently filed a petition under the CCAA. On March 18, 1999, Fracmaster was granted an order imposing a stay of proceedings and appointing Arthur Andersen Inc. as the monitor. Fracmaster then conducted another sale process, in order to restructure the company, inject equity or sell its assets. The sale process was neither supervised nor controlled by the monitor. Several companies submitted offers or proposals, including UTI Energy Corp., Calfrac Limited and The Janus Corporation together with its principal, Alfred H. Balm.

6 When the matter returned to court in May of 1999 four applications were heard:

First, Fracmaster applied for approval of the sale of its assets to UTI. The members of the lending syndicate supported that application, in accordance with a contractual commitment they had made to UTI.

Second, that same lending syndicate, as an alternative to Fracmaster's application, applied to lift the stay, appoint Arthur Andersen as receiver, direct the receiver to approve the UTI sale and permit the lending syndicate to begin to realize on its security.

Third, Balm/Janus applied to continue the stay, adjourn the other applications, appoint an interim receiver and have the court direct the calling of meetings of secured creditors, unsecured creditors and shareholders, to consider the Balm/Janus plan of arrangement.

Fourth, Calfrac applied for approval and acceptance of its proposal to purchase Fracmaster's assets.

7 In reasons dated May 17, 1999 [reported at 11 C.B.R. (4th) 204], the chambers judge dismissed the Fracmaster, Balm/Janus and Calfrac applications. She appointed Arthur Andersen as the receiver/manager on certain terms and conditions, including the power to sell the assets of Fracmaster subject to court approval. She denied the lending syndicate's application to direct the receiver to sell the assets to UTI. Alive to concerns about delay, she asked the receiver to quickly report its recommendations about a sale of assets or other immediate action that the receiver considered appropriate for the benefit of all claimants, including the secured creditors (CCAA A.B. 333). The May 17 order in the CCAA proceedings is the subject of appeals by Balm/Janus and UTI.

8 The next day, May 18, the receiver returned to court with a notice of motion seeking directions for approval of a sale process by way of sealed bids. The process was designed to respond to the principles and objectives established by the chambers judge for a sale of assets. As there had been no independent valuations, the proposed tender process would test the market to determine whether offers were available in excess of the amount of the lending syndicate's secured debt. The process was also designed to maximize the value to the creditors; respond to concerns about delay and the need for finality; provide a process for the benefit of all creditors; and be fundamentally fair by establishing a level playing field for all participants.

9 The proposal was not greeted with unanimous approval by the prospective purchasers, and its terms were the subject of heated debate in court. At the conclusion of the May 18 proceedings, the chambers judge ordered a tender

process. The order set out the terms and conditions of offers that would be considered, with final offers to be submitted by 2:00 p.m. on May 20, 1999, by way of sealed bids. The receiver would advise the interested parties of its recommendation by 8:00 p.m. on May 20, and make its recommendation to the court at 10:00 a.m. on May 21. The tender process established in the May 18 order has not been appealed.

10 Offers were submitted by UTI, Calfrac and BJ Services, a company which had previously shown interest in acquiring Fracmaster, but had not participated in the CCAA company-conducted sale process. Balm/Janus did not submit an offer. The lending syndicate continued to support the UTI offer, in accordance with a contractual commitment its members had made to UTI. The receiver recommended acceptance of the BJ Services offer, for a number of reasons, including the fact that it provided the highest cash purchase price, exceeding the Calfrac offer by $13 million and the UTI offer by $19.3 million. The chambers judge, in reasons dated May 21, 1999 [reported at 11 C.B.R. (4th) 217], approved the BJ Services offer recommended by the receiver. UTI and Calfrac appeal that decision.

The CCAA Appeals

11 Balm/Janus appeal the chambers judge's decision in the CCAA proceedings, declining to order a meeting of creditors and shareholders of Fracmaster to consider and implement Balm/Janus' proposed plan of arrangement. The appeal is supported by certain shareholders of Fracmaster and by Banque Nationale de Paris, a subordinated lender.

12 The chambers judge acknowledged that the restructuring proposed by Balm/Janus was a true plan which fit within the CCAA, leaving an after-life for Fracmaster and its shareholders. However, she noted the commercial reality that there was no equity left in Fracmaster, and that the lending syndicate had the only realistic remaining financial interest (CCAA A.B. 329-330). Under the terms of the CCAA and the Balm/Janus proposal, the plan would require the approval of the lending syndicate, which had indicated that it would not support the proposal. The chambers judge found as a fact that the lending syndicate had valid commercial reasons for its refusal (CCAA A.B. 331). She decided that it would be pointless to order meetings of creditors and shareholders and dismissed the Balm/Janus application.

13 There is no requirement under the CCAA that all proposed plans of arrangement be put to meetings of creditors and shareholders for their consideration. Sections 4 and 5 specifically employ the word "may", giving the court discretion. In exercising its discretion, the court must consider whether the proposed plan of arrangement has a reasonable chance of success: *Bargain Harold's Discount Ltd. v. Paribas Bank of Canada* (1992), 10 C.B.R. (3d) 23 (Ont. Gen. Div.), or instead, is doomed to failure: *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.). Here it was clear that the lending syndicate did not support the plan. They would be entitled to vote as a class at the meeting and defeat the plan. It was also clear that the Fracmaster situation was urgent, requiring rapid resolution, and that the delays that would be occasioned by calling the meetings would further jeopardize Fracmaster's financial condition and the value of its assets. The chambers judge did not err in concluding that the Balm/Janus plan was doomed to failure. We grant leave to appeal to Balm/Janus, but dismiss their appeal.

14 We wish to make a further observation. Under the CCAA the court has no discretion to sanction a plan unless it has been approved by a vote of a 2/3 majority in value of each class of creditors (section 6). To that extent, each class of creditors has a veto. This procedure is quite different from a court-appointed receivership. In a receivership the desires of the creditors are a significant factor, but the approval by a specific majority of creditors is not a pre-condition to court sanction, and creditors do not have an absolute veto. The difference in the procedures gives rise to different tests and considerations to be applied in each type of proceeding. While in this case the lending syndicate's desires in the CCAA and receivership proceedings were consistent, the chambers judge was not required to give the same weight to their wishes in each proceeding.

15 UTI also appeals the May 17, 1999 order denying Fracmaster's application to approve the sale of its assets to UTI under the CCAA. The chambers judge noted that the proposed sale of assets to UTI did not create any monetary return for the unsecured creditors or shareholders of Fracmaster, nor did it contemplate that they would receive any

benefit. The transaction was effectively a sale of assets for the benefit of the lending syndicate, a transaction which she concluded could be accomplished in a manner that did not require the use of the CCAA (CCAA A.B. 331-332). Without deciding whether the UTI offer was commercially provident, she concluded that the sale should not be approved under the CCAA, and dismissed Fracmaster's application.

16 Although there are infrequent situations in which a liquidation of a company's assets has been concluded under the CCAA, the proposed transaction must be in the best interest of the creditors generally: *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at 31. There must be an ongoing business entity that will survive the asset sale. See, for example, *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]); *Solv-Ex Corp v. Solv-Ex Canada Ltd.* (November 19, 1997), Doc. Calgary 9701-10022 (Alta. Q.B.). A sale of all or substantially all the assets of a company to an entirely different entity, with no continued involvement by former creditors and shareholders, does not meet this requirement. While we do not intend to limit the flexibility of the CCAA, we are concerned about its use to liquidate assets of insolvent companies which are not part of a plan or compromise among creditors and shareholders, resulting in some continuation of a company as a going concern. Generally, such liquidations are inconsistent with the intent of the CCAA and should not be carried out under its protective umbrella. The chambers judge did not err in concluding that the sale of assets to UTI would be an inappropriate use of the CCAA. We grant leave to appeal to UTI, but dismiss its appeal.

Receivership Appeals

17 Calfrac appeals the May 21 order which approved the sale of Fracmaster's assets to BJ Services. Its primary complaint is that the receiver failed to administer the sale process in strict compliance with the May 18 court ordered procedure. Calfrac's complaints about the process were considered by the chambers judge, and dealt with in her May 21 reasons (Receivership A.B. 119 to 122). She concluded that the terms of the May 18 order had to be read in light of the commercial realities of the business world and the bidding process. She viewed the variations as minor and not problematic and decided that the BJ Services offer was in substantially the same form as the offer proposed by the receiver.

18 A review of Calfrac's offer indicates that it too was not in strict complaince with the terms of the May 18 order. This is not entirely unexpected as the order, tender process and submission of offers came about quickly, without time to contemplate all the intricacies of fine legal drafting. Amendments to the form of agreement were contemplated in paragraph 4. c of the May 18 order. The other paragraphs of section 4, setting out other terms and conditions, did not specifically mention amendments.

19 The tender process in this case was not a distinct and final process designed to provide a complete set of bid documents to the bidders, with no possibility of negotiation or variation, as might be the case in a construction bid. See, for example, *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 (S.C.C.). Time did not permit the creation of such definitive conditions. Instead the process was designed to be court supervised. The amendment provisions contained in paragraph 4. c illustrate the intent to build flexibility into the process, rather than requiring strict compliance with the order. All parties were entitled to be present and make representations at the court proceedings to approve an offer, with the court to have ultimate discretion to determine whether the principles and objectives of the sale process had been met. The chambers judge did not act unreasonably in considering the commercial realities and the nature of the variations, and in accepting the form of BJ Services offer. This ground of appeal fails.

20 A second ground of appeal advanced by both Calfrac and UTI, is that the receiver and the chambers judge failed to properly consider the closing risks associated with the BJ Services offer. The chambers judge considered the closing risks in her reasons (Receivership A.B. 112 to 113) and accepted the receiver's conclusion that the closing risks associated with the BJ Services offer were more than the Calfrac offer, no greater than the UTI offer, and more than offset by the BJ Services purchase price.

21 Calfrac is critical of the summary manner in which the receiver communicated its risk assessment, and the lack of detail to back up its analysis. The receiver had 6 hours in which to analyze the offers and indicate its recommendation to the parties. The expedited procedure was set out in the May 18 order which has not been appealed. With the benefit of more time, the receiver undoubtedly would have proffered a more detailed analysis. But one cannot be overly critical of the receiver's work product, given the time constraints.

22 Both UTI and Calfrac contend that the chambers judge erred in her assessment of the closing risks. UTI suggests that she erred in concluding that the closing risks of the BJ Services offer were no greater than the UTI offer. Even if that were so, the chambers judge also concluded that the BJ Services closing risks were more than offset by the greater purchase price. If that was the case for the Calfrac offer, which involved fewer closing risks and a higher purchase price than the UTI offer, it would certainly be the case for the UTI offer, which involved greater closing risks and the lowest purchase price. We are not satisfied that the chambers judge's conclusions on risks were unreasonable. We defer to her findings and dismiss this ground of appeal.

The Lending Syndicate's Wishes

23 UTI's principal ground of appeal is that the chambers judge erred in acting upon the receiver's recommendation and approving the sale of Fracmaster's assets to BJ Services. UTI submits that the prevailing consideration for the receiver should have been the wishes and business decision of the lending syndicate, which supported the UTI offer. UTI's appeal is supported by the lending syndicate and, if the Balm/Janus appeal does not succeed, by Banque Nationale de Paris, the subordinated lender.

24 The facts in this case are unique. After the preliminary stay and CCAA order, Fracmaster conducted a company supervised sale process, which resulted in offers or proposals from several companies, including Balm/Janus, Calfrac and UTI. The lending syndicate considered the proposals, preferred the UTI offer and contractually agreed to support it. An acknowledgment to the April 26 UTI offer, signed by the lending syndicate, stated: "The above Offer is hereby acknowledged by each of the undersigned and each of them agree to support the Offer at the CCAA Proceedings."

25 On April 27, 1999 the lending syndicate signed a side letter which contemplated that the sale of assets might not be completed under the CCAA, but under an alternate transaction, such as the appointment of a receiver and conveyance of assets by the receiver to UTI. The letter stated: "It is agreed that the Term Lenders and the Operating Lender will use their reasonable best efforts to conclude any such alternate transaction so long as they receive the same consideration as they would have received under the Offer."

26 Fracmaster applied for an order approving the sale of its assets to UTI under the provisions of the CCAA. Although the lending syndicate supported that application, in the same proceeding the lending syndicate applied for an alternate order appointing a receiver and directing the receiver to sell the assets to UTI. The chambers judge dismissed Fracmaster's application under the CCAA. She appointed a receiver but refused to direct the receiver to transfer the assets to UTI, concluding that this would fetter the receiver's discretion and largely defeat the purposes of its appointment (CCAA A.B. 333). Although the chambers judge noted that the receiver could have recommended a sale to UTI if it felt comfortable doing so, the receiver instead recommended a new sale process, involving sealed tenders. Both UTI and Calfrac participated in the sealed tender process, repeating their earlier offers. BJ Services, which had not made an offer in the CCAA proceedings, put in a new bid. It offered cash consideration to the lending syndicate of $80 million for Fracmaster's assets, compared to $60.7 million plus warrants offered by UTI and $66 million plus warrants offered by Calfrac. The lending syndicate, which had agreed to support the UTI offer before the BJ Services offer was made, stuck by their commitment and continued to support the UTI offer.

27 In accordance with the May 18 order, the receiver was required to make a recommendation to the court, bearing in mind the interests of all claimants, including the secured creditors. The bid process confirmed that the

lending syndicate had the only remaining financial stake in the company. The amount of its secured debt was $96 million, which exceeded the bids. The receiver was aware that the lending syndicate supported UTI's offer, and was also aware of the letter agreement. Nevertheless, the receiver concluded that the BJ Services offer was the best offer, and recommended its acceptance.

28 The chambers judge followed that recommendation and approved the BJ Services offer. There is no suggestion that the BJ Services offer was prejudicial to the lending syndicate. The chambers judge considered the case law and concluded that although the creditors' interests were an important consideration, they were not the only consideration (Receivership A.B. 117). Accepting the principle that the creditors' views should be very seriously considered, she indicated that if she were satisfied that the receiver acted properly and providently, she would be reluctant to withhold approval of a transaction recommended by the receiver. (Receivership A.B. 118)

29 UTI concedes that had the bid process resulted in a bid which exceeded the lending syndicate's secured claim of $96 million, parties other than the lending syndicate would have had a financial interest in the outcome, and different considerations would apply. Because none of the bids exceeded $96 million, only the lending syndicate had a financial interest in the proceeds of sale of assets. UTI submits that the lending syndicate made a bargain with UTI, and that bargain should be the paramount consideration. The thrust of UTI's argument is that its offer should be accepted so long as no one else offered more than $96 million. In effect, it would have a reserve bid.

30 The narrow issue raised in the appeal is the weight to be given to the lending syndicate's wishes to accept the UTI offer. But this appeal raises a competing issue, the integrity of the bid process.

31 Lenders have the ability to appoint private receivers and deal with assets without court approval. In the circumstances of this case, where Fracmaster has many offshore assets, we are told that a private receivership without court involvement would not be expedient. Once a creditor embarks upon a court appointed receivership, the creditor loses an element of control, including the power to dictate the terms of the disposition of assets. Although the lending syndicate's preferences are an important factor to be considered by the court, its preferences do not fetter the court's discretion and are not necessarily determinative.

32 The receiver's role in a liquidation of assets is clear and well defined. Its obligation is to make a sufficient effort to obtain the highest possible sale price for the assets: *Salima Investments Ltd. v. Bank of Montreal* (1985), 21 D.L.R. (4th) 473 (Alta. C.A.), at 476. In *Royal Bank v. Soundair Corp.* (1991), 83 D.L.R. (4th) 76 (Ont. C.A.), at 93, Galligan J.A. set out the principles which govern the function of the court and the exercise of its discretion when considering an application by a receiver for court approval of a sale:

> 1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. It should consider the interests of all parties.
>
> 3. It should consider the efficacy and integrity of the process by which offers have been obtained.
>
> 4. It should consider whether there has been unfairness in the working out of the process.

The chambers judge considered each of these principles in turn, then accepted the receiver's recommendation.

33 Only in rare cases will the receiver's recommendation diverge from the wishes of the only stakeholder, and those cases must be carefully scrutinized by a judge who is asked to approve that recommendation. But we cannot say that the chambers judge acted unreasonably by following the recommendation of the receiver in this case, because of the unique facts and manner in which events unfolded.

34 After the court learned of the existence of the lending syndicate's contractual commitment to support the UTI offer in a receivership, it nevertheless ordered a sealed tender process. The receiver asked for the sale process in order to determine whether offers might be made which would exceed the amount of the lending syndicate's debt. The receiver also submitted that only a sale process would satisfy the court that it had fulfilled its mandate to maximize recovery and "give everyone a fair and reasonable attempt at bidding on the assets of the company" (Receivership A.B. 56). Once the sale process was engaged, it had to be fundamentally fair, with a level playing field for all participants.

35 The receiver contacted all parties who had previously made an offer for Fracmaster's assets or expressed an interest in making an offer. The receiver also issued a press release outlining the terms of the sale. It was therefore clearly contemplated that the bidding process would not be confined to previous bidders.

36 Some reference to a reserve bid could have been incorporated into the May 18 order indicating, for example, that UTI's offer was to be accepted unless a bid exceeded $96 million. The order was silent. Under the order, UTI was not required to repeat its earlier offer and could have changed the consideration. In fact, it could have made no offer at all. Anyone entering the bidding process might well know, as BJ Services did, that the lending syndicate supported UTI's offer and that this could create some impediments. But they could not know that UTI's offer would have the effect of a reserve bid up to $96 million. To default to the UTI bid without prior notice to the other bidders would undermine the integrity of the independent bidding process.

37 UTI chose to resubmit its earlier offer, but must have been mindful of the risks. Clause 6. (b) of UTI's offer specifically stated that the offer was conditional on court approval.

38 While neither the receiver nor the court had an obligation to sweeten the lending syndicate's negotiated deal, the fact that the effect of the recommended bid was to increase the lending syndicate's cash consideration was not itself a reason to dismiss the receiver's recommendation. Once the court embarked upon a sealed tender process other interests were engaged. The chambers judge considered the interests and desires of the lending syndicate. She also considered the other factors set out in *Soundair*, including fairness and the efficacy and integrity of the process. She balanced the competing interests, as she was required to do, and we cannot say that her conclusion was unreasonable or that she erred in principle. This ground of appeal fails.

Summary

39 We grant leave to appeal the CCAA orders to Balm/Janus and UTI. The Balm/Janus appeal, Calfrac appeal and two appeals by UTI are dismissed.

(DISCUSSION AS TO COSTS)

***Conrad J.A.* (for the court):**

40 We have concluded that there is no reason to depart from the normal rule that costs follow the success of the appeal. Accordingly, we will order one set of costs to BJ Services to be payable in equal amounts by UTI, Calfrac and Balm/Janus. The costs are to be assessed on Column 5.

Appeals dismissed.

END OF DOCUMENT

TAB 5

Société québécoise d'information juridique
SOQUIJ
AZ-50522640

Parc industriel Laprade inc. c. Conporec inc. 2008 QCCA 2222

COUR D'APPEL

CANADA
PROVINCE DE QUÉBEC
GREFFE DE QUÉBEC

N° : 200-09-006507-088
(200-11-017221-089)

DATE : 21 novembre 2008

SOUS LA PRÉSIDENCE DE L'HONORABLE FRANCE THIBAULT, J.C.A.

PARC INDUSTRIEL LAPRADE INC.
REQUÉRANTE - Requérante
c.

CONPOREC INC.
INTIMÉE - Débitrice
et
ERNST & YOUNG INC.
MISE EN CAUSE - Contrôleure

JUGEMENT

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[1] Je suis saisie, à titre de juge unique, d'une requête pour permission d'appeler d'un jugement de la Cour supérieure (honorable Étienne Parent), rendu le 20 octobre 2008, qui a rejeté, avec dépens, la *Requête visant à faire modifier les termes de l'ordonnance initiale telle que déjà modifiée par l'ordonnance du 5 septembre 2008* présentée par Parc industriel Laprade inc. (ci-après Laprade), aux termes de l'article 11(1) de la *Loi sur les arrangements avec les créanciers des compagnies*[1] et de la clause de retour contenue à l'Ordonnance initiale :

> [53] **DÉCLARE** que toute Personne intéressée peut présenter une demande au tribunal afin de faire modifier ou annuler l'Ordonnance ou d'obtenir un autre redressement moyennant un préavis de sept jours à la Requérante et au Contrôleur aux adresses ci-dessous indiquées ainsi qu'à toute autre partie susceptible d'être touchée par l'ordonnance demandée ou moyennant tout autre préavis, s'il en est, que le tribunal pourra ordonner:

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1 L.R.C., (1985), ch. C-36.

[2] Je brosse à grands traits les faits saillants. Le 8 août 2008, le juge Marc Lesage accueille, en partie une *Requête pour obtenir une ordonnance initiale en vertu des articles 4, 5 et 11 de la Loi sur les arrangements avec les créanciers des compagnies* et il rend une Ordonnance initiale dans laquelle fixe à 250 000 $ la charge d'administration, à 500 000 $ la charge A & D et accorde au prêteur intérimaire une charge prioritaire prenant rang après ces deux charges au montant de 1 500 000 $, plus une hypothèque additionnelle de 20% grevant l'immeuble de Sorel-Tracy et les meubles rattachés à cet immeuble.

[3] Le 5 septembre 2008, la juge Rita Bédard accueille, en partie une *Requête amendée en prolongation de délai et en modification de l'ordonnance initiale* et modifie le paragraphe [34] de l'Ordonnance initiale afin qu'il se lise dorénavant ainsi :

> «DÉCLARE que le remboursement de toutes les sommes dues en vertu du Financement intérimaire est garanti par une hypothèque grevant l'universalité des biens meubles et immeubles, corporels et incorporels, présents et à venir de la Requérante jusqu'à concurrence d'un montant en capital de 1 500 000 $CA plus l'hypothèque additionnelle de 20% prenant rang avant toute hypothèque conventionnelle ou légale, priorité ou autre charge sans qu'il soit nécessaire de publier cette hypothèque (l'«Hypothèque intérimaire»), sauf la Charge A&D et la Charge d'administration;»

[4] Cette sûreté universelle prioritaire grève un immeuble qui n'était pas visé dans l'Ordonnance initiale et sur lequel Laprade détient une hypothèque de premier rang de 1 200 000 $, laquelle perd cette priorité en raison de l'Ordonnance modifiée.

[5] Le 24 septembre 2008, Laprade demande à la Cour de réviser le jugement du 5 septembre 2008. Au soutien de sa requête, elle invoque que la requête en modification de l'Ordonnance initiale ne lui a pas été signifiée, qu'aucune explication n'a été donnée pour motiver les exigences nouvelles du prêteur intérimaire à l'égard de l'immeuble rajouté à titre de sûreté et qu'elle n'a jamais donné son consentement à cette sûreté prioritaire à la sienne.

[6] Le juge Étienne Parent a rejeté la requête en révision de Laprade. Il a conclu à l'irrecevabilité de la demande et décidé que le recours approprié, en l'espèce, aurait été l'appel. Malgré cette détermination, le juge Parent a tout de même examiné les arguments soumis par Laprade au soutien de sa requête en révision et ils les a rejetés.

[7] Laprade demande la permission d'appeler de ce jugement. Elle invoque qu'il est entaché d'une erreur de droit. À son avis, l'appel n'était pas possible, car l'Ordonnance initiale modifiée ayant été rendue *ex parte*, le fondement factuel nécessaire à la contestation n'aurait pas pu être présenté à la Cour d'appel. Laprade invoque que, en pareille matière, la clause de retour lui permettait de s'adresser au juge et de faire réviser l'Ordonnance initiale modifiée. Elle appuie sa proposition sur deux autorités, une doctrinale et l'autre jurisprudentielle. Dans l'affaire *Re Muscleeich Research & Development Inc.*[2], le juge Farley écrit :

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2 (2006), 19 C.B.R. (5th) 54, paragr. 5 (Ont. Sup.Ct.J.).

> As this order today is being requested without notice to persons who may be affected, I would stress that these persons are completely at liberty and encouraged to use the comeback clause found at paragraph 59 of the Initial Order. In this respect, notwithstanding any order having previously been giver, the onus rests with the applicants (and the applicants alone) to justify *ab initio* the relief requested and previously granted.

[8] L'auteure Janis P. Sarra[3] écrit, à ce sujet :

> As noted above, where a stay or other order is made without notice to parties, the courts frequently add a "come-back" clause, whereby parties can return to court at a later date to seek to set aside some or all of the order. The come-back order is viewed by the courts as the counterbalance to any prejudice suffered by creditors as a result of failing to receive notice.

Et elle ajoute, un peu plus loin :

> While there is a "come-back" clause in initial CCAA orders that allows parties that did not receive notice or received inadequate notice of motions regarding DIP financing to come before the court and object to the terms, this has not, to date, frequently been used. In part, this may be due to confusion as to the appropriate onus on come-back clauses. Arguably, the onus should continue to rest with the debtor, as applicant of the initial stay, particularly where the order has been granted *ex parte*.[4]

[9] Avant d'étudier la requête pour permission d'appeler de Laprade, je me permets deux commentaires à l'endroit des parties, qui se veulent plus des suggestions que des critiques.

[10] D'abord, il m'apparaît que les règles élémentaires de transparence, qui favorisent la confiance des justiciables dans le système judiciaire, militaient ici en faveur de la signification de la requête pour modifier l'Ordonnance initiale à Laprade, un créancier garanti. Si la procédure suivie n'est pas illégale, elle est, pour le moins, inélégante. D'ailleurs, la loi 47[5] prévoit expressément la signification de telles requêtes.

[11] Ensuite, je m'en voudrais de ne pas souligner un certain laxisme de Laprade. Si elle avait produit une comparution au dossier comme l'Ordonnance initiale le prévoyait à son paragraphe [51], il y aurait eu économie des ressources judiciaires. Elle aurait alors pu faire valoir ses motifs d'opposition à la modification de l'Ordonnance initiale, en temps utile.

[12] Sur la requête pour permission d'appeler, je rappelle que la décision de l'accorder ou de la refuser dépend de la démonstration des critères élaborés par la

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3 Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, Thomson Carswell, 2007, p. 55.

4 *Ibid.*, p. 100.

5 *Loi édictant la Loi sur le programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, c. 47, sanctionnée le 25 novembre 2005, modifiée par L.C. 2007, c. 36. Les dispositions pertinentes ne sont pas encore entrées en vigueur.

jurisprudence, que ma collègue la juge Bich a reproduits dans l'affaire de *Papier Gaspésia inc.*[6] :

> [4] La permission d'appeler est en l'espèce régie par les articles 13 et 14 L.A.C.C. De façon constante, la jurisprudence enseigne que la décision d'accorder ou de refuser la permission d'appeler en pareil cas dépend des critères suivants :
>
> > 19 As set out in Resurgence Asset Management LLC v. Canadian Airlines Corporation, 2000 ABCA 149 (Alta. C.A. [In Chambers]) ("*Resurgence No. 1*"), a decision on a leave application sought earlier in this action, and as conceded by all the parties to this application, the criterion to be applied in an application for leave to appeal is that there must be <u>serious and arguable grounds that are of real and significant interest</u> to the parties. This criterion subsumes four factors to be considered by the court:
> >
> > (1) whether the point on appeal is of significance to the practice;
> >
> > (2) whether the point raised is of significance to the action itself;
> >
> > (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
> >
> > (4) whether the appeal will unduly hinder the progress of the action.
> >
> > (Je souligne)
>
> [5] C'est à celui qui sollicite la permission d'appeler de démontrer que sa demande répond à ces critères, qui sont bien sûr cumulatifs. On doit également tenir compte de ce qu'une grande réserve doit être exercée par les cours d'appel à l'endroit des décisions de première instance rendues selon la L.A.C.C. Les permissions d'appeler ne doivent être accordées que de manière parcimonieuse («sparingly», dit la Cour d'appel de l'Ontario dans *Re Air Canada*) vu la très grande latitude laissée aux tribunaux de première instance dans l'application de la L.A.C.C. et l'élaboration des mesures destinées à en assurer l'accomplissement. La Cour d'appel de l'Alberta résume ainsi l'état du droit en la matière :
>
> > The standard of review that would govern the appeal is to be considered : *Resurgence # 2* at para. 42 ; *Resurgence # 1* at para. 28-29. Ancillary to these considerations are indications that a supervisory chamber judge under the CCAA should be accorded considerable deference. Their decisions will be interfered only in the event of unreasonable acts, errors in principle or manifest errors : *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) at para. 3. <u>It has also been stated that an appellate court scrutinizing leave applications under the CCAA should exercise its powers sparingly, that a supervising CCAA judge has an ongoing</u>

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6 *Papiers Gaspésia inc. (Arrangement relatif à)*, J.E. 2005-75, paragr. 4 et 5 (C.A.).

> management process similar to that of a judge making orders during a trial :*Blue Range Resource Corp., Re,* 1999 ABCA 255 (Alta C.A.) at para. 3 : *Smoky River Coal Ltd., Re* at para. 62.

[13] En l'espèce, je suis d'avis que la requête de Laprade ne satisfait pas ces quatre critères cumulatifs. Je m'en tiens à l'examen de deux critères, l'existence d'un motif d'appel valable *prima facie* et son effet sur le déroulement du processus.

[14] Je suis loin d'être convaincue que la requête en révision de Laprade était irrecevable, comme l'a décidé le juge de première instance. À cet égard, je suis plutôt d'accord avec l'énoncé suivant du juge Normand Gosselin dans l'affaire *Groupe de scieries GDS inc. (Arrangement relatif au)*[7] :

> [33] Cette conclusion permet aux intéressés qui n'ont pas pu se faire entendre sur la requête pour ordonnance initiale, d'adresser au Tribunal une demande de révision en vue de faire annuler ou modifier cette ordonnance initiale. Cette révision fait alors l'objet d'une audition *«de novo»* et le fardeau de la preuve repose toujours sur les débitrices qui doivent, à ce stade, démontrer que l'ordonnance initiale était justifiée et cela, non plus seulement sur la base des faits et des arguments présentés au premier juge, mais aussi en tenant compte de la preuve et des moyens soumis par la partie qui s'oppose à l'ordonnance.

[15] En principe, Laprade avait le droit de faire réviser l'Ordonnance initiale modifiée en tenant pour acquis que le fardeau de la preuve appartenait à la débitrice. En pratique, il appert cependant que si la révision avait été jugée recevable, l'Ordonnance initiale modifiée serait demeurée inchangée.

[16] En effet, le juge de première instance a étudié la requête de Laprade à son mérite. Il appert de son jugement qu'aucun des arguments soumis par cette dernière n'aurait pu permettre de réviser l'Ordonnance initiale modifiée et Laprade ne m'a pas convaincue d'une erreur. Je rappelle que l'argument fondamental de Laprade est à l'effet que son consentement était requis pour que sa sûreté soit décalée par la « super priorité » accordée par l'Ordonnance initiale modifiée. Cette position est sans mérite comme l'a décidé le juge de première instance et la Cour d'appel de la Colombie-Britannique dans les termes suivants :

> Dickson J.A. pointed out in Braid Builders, supra, that receivers will not accept an appointment without reasonable assurance that they will be paid. That is equally true for monitors. When, as here, the cash flow from operations is insufficient to assure payment and asset values exceeding secured charges are in doubt, granting a super-priority is the only practical means of securing payment. In such circumstances, <u>if a super-priority cannot be granted without the consent of secured creditors, then those creditors would have an effective veto over CCAA relief. I do not think that Parliament intended that the objects of the Act could be indirectly frustrated by secured creditors.</u>[8]

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[7] J.E. 2007-299, paragr. 33 (C.S.).

[8] *United Used Auto & Truck Parts Ltd. (Re)* (2000), 73 B.C.L.R. (3d) 236, paragr. 29 (B.C.C.A.).

[17] En l'absence de quelque allégation pouvant affecter le bien-fondé de l'Ordonnance initiale modifiée, permettre l'appel aurait comme effet de mettre en péril le processus de redressement entrepris, à l'aveuglette, et en faveur d'une partie qui n'a pas agi avec diligence en négligeant de produire une comparution. En effet, en pareille matière, la confiance du prêteur est essentielle et il n'est pas souhaitable de remettre les jugements en cause sans raison valable.

[18] En terminant, je note que le dossier est maintenant géré par le même juge, ce qui sert au mieux les intérêts de la justice dans le cas de dossiers de ce type qui nécessitent un suivi régulier et rigoureux ainsi que des décisions rapides.

POUR CES MOTIFS :

[19] **REJETTE** la requête pour permission d'appeler, avec dépens.

FRANCE THIBAULT, J.C.A.

Me Martin P. Jutras
Kaufman, Laramée
Pour la requérante

Me Guy De Blois
Langlois, Kronström, Desjardins
Pour l'intimée

Me Claude Marchand
Ogilvy, Renault
Pour la mis en cause

Date d'audience : 19 novembre 2008

TAB 6

COUR D'APPEL

CANADA
PROVINCE DE QUÉBEC
GREFFE DE QUÉBEC

N° : 200-09-007014-100
(200-11-019131-104)

DATE : 23 avril 2010

SOUS LA PRÉSIDENCE DE L'HONORABLE FRANCE THIBAULT, J.C.A.

BANQUE DE MONTRÉAL
REQUÉRANTE – Opposante
c.

GYRO-TRAC (USA) INC.
GYRO-TRAC INC.
GYRO-TRAC CÔTE OUEST INC.
INTIMÉES – Requérantes - Débitrices
et
RAYMOND CHABOT INC.
PERSONNE DÉSIGNÉE – INTIMÉE

JUGEMENT

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[1] La requérante sollicite la permission de faire appel d'un jugement rendu le 1er avril 2010 par la Cour supérieure du district de Québec (honorable Jean-François Émond), qui a accueilli la requête des intimées en reconnaissance d'instances étrangères en application de la *Loi sur les arrangements avec les créanciers des compagnies*[1] (LACC), et qui a rendu diverses ordonnances dont une visant la suspension de toute procédure intentée en vertu de la *Loi sur la faillite et l'insolvabilité* (LFI)[2] ou de la *Loi sur les liquidations et les restructurations*[3].

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[1] L.R.C. (1985), ch. C-36.
[2] L.R.C. (1985), ch. B-3.
[3] L.R.C. (1985), ch. W-11.

[2] Les intimées sont des sociétés commerciales liées. L'intimée Gyro-Trac Inc. est la « compagnie mère », elle contrôle les deux autres. Depuis plusieurs mois, les intimées éprouvent de sérieuses difficultés financières. Elles ont tenté, en vain, d'obtenir un financement pour redresser leur situation. C'est dans ce contexte que la requérante a « rappelé » les prêts – d'une valeur de plus de 4 millions de dollars – qu'elle avait consentis aux intimées, le 5 novembre 2009. Les intimées ont fait défaut d'exécuter leurs obligations, ce qui a entraîné le dépôt par la requérante de deux requêtes en faillite, selon l'article 43 LFI, contre Gyro-Trac Inc. et Gyro-Trac Côte Ouest Inc., le 10 mars 2010. Ces requêtes devaient être présentées à la Cour supérieure, le 24 mars 2010.

[3] Dans l'intervalle, soit le 19 mars 2010, les intimées se sont prévalues d'une loi américaine, le *Bankruptcy Code*[4] et ont déposé chacune une « Voluntary Petition ». Le même jour, elles ont demandé et obtenu d'un juge de la Cour de faillite américaine, le juge David R. Duncan, l'autorisation d'agir devant les juridictions étrangères. Fortes de cette autorisation, les intimées ont présenté, devant la Cour supérieure du district de Québec, une requête en reconnaissance d'instances étrangères. Cette requête vise à faire reconnaître que les procédures intentées aux États-Unis constituent des « instances étrangères principales » au sens de l'article 45 LACC. L'audition de la requête des intimées a eu lieu le 24 mars 2010. Devant la Cour supérieure, la requérante a reconnu que les procédures américaines constituaient des instances étrangères, mais elle a soutenu qu'elles constituaient des instances étrangères « secondaires ». De façon subsidiaire, elle a plaidé que les procédures américaines visaient à court-circuiter les requêtes en faillite déposées devant la Cour supérieure, et cela, dans le contexte où aucun plan de redressement viable de la situation des intimées n'a été présenté.

[4] Selon la LACC, une démarche en deux étapes permet de déterminer si l'instance concernée se qualifie au titre d'une instance étrangère principale. La première exige la preuve d'une participation à une procédure judiciaire régie par une loi étrangère relative à la faillite et à l'insolvabilité (art. 46 LACC). Lorsque cette exigence est satisfaite, le juge reconnaît l'« instance étrangère ». La seconde étape nécessite la qualification de l'instance comme étant une instance étrangère « principale ou secondaire » (art. 45 et 47 LACC). Le juge de première instance a conclu que les procédures intentées par les intimées devant les instances américaines se qualifiaient comme des instances étrangères principales. Cette détermination repose sur son appréciation de la preuve suivant laquelle le lieu où les intimées ont leurs principales affaires se situe aux États-Unis, même si le siège social de Giro-Trac Inc. et de Gyro-Trac Côte Ouest Inc. est établi au Québec.

[5] Au soutien de sa requête pour permission de faire appel, la requérante fait valoir que le juge de première instance a commis deux erreurs. La première consiste à avoir appliqué la LACC au lieu de la LFI. La seconde erreur serait d'avoir créé une instance

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[4] *United States Code*, titre 11.

de groupe en recourant à la détermination du lieu de la principale place d'affaires du groupe formé par les trois intimées alors que le concept de « groupe » est étranger à la LACC, sauf aux fins de détermination des dettes d'une débitrice, et qu'un processus individualisé est requis. Voici comment la requérante articule sa position :

55. Le jugement a erronément étendu le concept de groupe à la LACC et l'a interprété hors de son contexte, soit aux seules fins de déterminer les dettes d'une débitrice;

56. En reconnaissant un concept de groupe en regard du recours à la LFI ou à la LACC, le jugement déresponsabilise les débitrices individuellement, procède à l'inverse de la levée du voile corporatif, et ce au détriment des créanciers dont les attentes légitimes en regard de leurs débiteurs sont ainsi écartées;

57. Le jugement introduit erronément une notion de lieu principal des affaires en tenant compte d'un groupe et non pas en tenant compte de la situation individualisée d'une débitrice;

58. Le jugement détermine que le lieu principal des activités pour Gyro-Trac Inc. est celui de sa filiale sans tenir compte des attentes légitimes de ses créanciers et cocontractants qui ont conclu leurs affaires en s'attendant légitimement à ce que la juridiction applicable soit celle du lieu des affaires de Gyro-Trac Inc., avant sa cessation d'activité et avant son déguerpissement;

59. Le jugement détermine que le lieu principal des activités pour Gyro-Trac Côte Ouest Inc. est celui de sa corporation sœur sans tenir compte des attentes légitimes de ses créanciers et cocontractants qui ont conclu leurs affaires en s'attendant légitimement à ce que la juridiction applicable soit celle du lieu des affaires de Gyro-Trac Côte Ouest Inc. alors que leurs activités étaient toutes québécoises et canadiennes;

60. Le jugement impose erronément un lieu principal de litige et l'arbitrage de tribunaux étrangers à la place des tribunaux du lieu des conventions de financement et autres ainsi que des lieux des sûretés consenties par Gyro-Trac Inc. et Gyro-Trac Côte Ouest Inc. alors que leurs activités étaient toutes québécoises et canadiennes;

[6] Avant de me pencher sur les deux moyens de la requérante, j'estime utile de rappeler les critères qui président à l'octroi d'une permission d'appeler en vertu de l'article 13 LACC. Ils ont été décrits par le juge Gendreau dans *9145-7978 Québec inc. (Arrangement relatif à)*[5] et ils ont été rappelés régulièrement[6] :

> [13] La permission d'appeler d'une ordonnance en application de la Loi est régie par des critères sévères. Le juge Wittman, de la Cour d'appel de l'Alberta, les reprend dans *Ressurgence Asset Management LLC c. Canadian Airlines Corp.* :
>
>> As set out in *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149 (Online : Alberta Courts) ("Resurgence No. 1"), a decision on a leave application sought earlier in this action, and as conceded by all the parties to this application, the criterion to be applied in an application for leave to appeal is that there must be serious and arguable grounds that are of real and significant interest to the parties. This criterion subsumes four factors to be considered by the court
>>
>> (1) whether the point on appeal is of significance to the practice;
>>
>> (2) whether the point raised is of significance to the action itself;
>>
>> (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
>>
>> (4) whether the appeal will unduly hinder the progress of the action.
>
> [14] Une autorisation de pourvoi ne sera accueillie qu'avec prudence surtout lorsque la gestion d'un arrangement est confiée à un seul juge qui a eu l'opportunité de présider à toutes les étapes de l'affaire :
>
>> An appellate court should exercise its power sparingly, when asked to intervene in issues which arise in CCAA proceedings. A judge exercising a supervisory function under the CCAA has an ongoing management process, much like a trial judge making

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5 [2007] QCCA 618.

6 Dans le même sens, voir : *3915611 Canada Inc. c. Eicon Networks Corporation*, [2002] J.Q. n° 9989 (C.A.) (QL); *Highland Capital Management, L.P. (Arrangement relatif à)*, J.E. 2003-5, paragr. 10 et 11 (C.A.); *Uniforêt Inc. (Arragement relatif à)*, J.E. 2003-1595, paragr. 12 et 13 (C.A.), autorisation de pourvoi à la C.S.C. refusée, 19 février 2004, 29969; *Re Liberty Oil & Gas Ltd* (2003), 122 A.C.W.S. (3d) 976 (Alta. C.A.), 2003 ABCA 158, paragr. 15 et 16; *Dans l'affaire du plan d'arrangement de Papiers Gaspésia inc. et Ernst & Young inc.*, [2004] J.Q. n° 17464 (C.A.) (QL); *Papiers Gaspésia inc. (Arrangement relatif à)*, J.E. 2005-75, paragr. 4 et 5 (C.A.); *9145-7978 Québec inc. (Arrangement relatif à)*, B.E. 2007BE-716 (C.A.), 2007 QCCA 769, paragr. 2; *Parc industriel Laprade inc. c. Conporec inc.*, [2008] R.J.Q. 2590 (C.A.), 2008 QCCA 2222, paragr. 12 et 13; *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, J.E. 2010-568 (C.A.), 2010 QCCA 403.

orders in the course of a trial : *Re Pacific National Lease Holding Corp. (1992)*, 15 C.B.R. (3d) 265 at 272 (B.C.C.A.).

[15] Cela découle de l'objectif de la Loi. Houlden & Morawetz écrivent :

The CCAA has a broad remedial purpose giving a debtor an opportunity to find a way out of financial difficulties short of bankruptcy, foreclosure or the seizure of assets through receivership proceedings. It allows the debtor to find a plan that will enable it to meet the demands of its creditors through refinancing with new lending, equity financing or the sale of the business as a going concern. This alternative may give the creditors of all classes a larger return and protect the jobs of the company's employees.

[7] Je suis d'avis que la requête ne satisfait pas les conditions requises par la jurisprudence pour que la permission sollicitée soit accordée. L'appel est voué à l'échec.

[8] La requérante plaide que le juge de première instance a commis une erreur en appliquant la LACC au lieu de la LFI. L'argument qu'elle fait valoir pour soutenir cette affirmation n'est pas convaincant. Le fait qu'elle ait déposé des requêtes en faillite avant la requête des intimées en vertu de la LACC ne justifie pas sa position. Pour s'en convaincre, on peut lire l'article 48 (1) a) LACC, qui prévoit que l'effet de la reconnaissance d'une instance étrangère principale est justement de suspendre les procédures qui sont ou qui pourraient être intentées en vertu de la LFI.

[9] Je suis d'accord avec l'affirmation du juge de première instance selon laquelle un débiteur qui satisfait aux conditions prescrites par la LFI et la LACC peut choisir de déposer son recours en vertu de l'une ou l'autre de ces lois :

<u>A company qualifying for protection and restructuring under the CCAA has the option of either making an application under the CCAA or utilizing the provisions of Part III of he BIA by filing a Division I proposal</u>. The BIA is a defined code that goes into extensive detail. This should be contrasted with the CCAA, which is a very short and general statute that has been utilized to give flexibility to meet what might be described as the peculiar and unusual situation or circumstances. A general categorization (which, of course, is never completely accurate) is that the BIA may be seen as useful for more run-of-the-mill cases, whereas the CCAA may be seen as facilitating more unique or complicated cases. Certainly the CCAA provides the flexibility to deal with the thornier questions.[7]

[Je souligne].

[7] David E. Baird, *Baird's pratical guide to the companies' creditors arrangement act*, Carswell, p. 9.

[10] En l'espèce, il est acquis au débat que la LACC pouvait être appliquée puisque l'endettement total des intimées dépasse largement le seuil des 5 millions de dollars qui y est prévu. En conséquence le premier moyen de la requérante est mal fondé.

[11] Le juge de première instance a-t-il procédé à la détermination du lieu où le groupe formé des trois intimées a ses principales affaires ou, au contraire, a-t-il fait un exercice individualisé? Voici ce que le juge de première instance a écrit sur cette question :

> [105] S'il est vrai que le siège social de Gyro-Trac inc. et Gyro-Trac Côte Ouest inc. se situe au Québec, il est également vrai que leurs principaux intérêts, pour ne pas dire leurs seuls intérêts, se situent à Summerville, en Caroline du Sud.
>
> [106] Pour en arriver à cette conclusion, le Tribunal tient compte des éléments suivants :
>
> ⇒ Que Gyro-Trac inc. n'exerce aucune activité commerciale au Canada si ce n'est celle de détenir les actions de ses filiales Gyro-Trac (USA) inc. et Gyro-Trac Côte Ouest inc.[21];
>
> ⇒ Que Gyro-Trac Côte Ouest inc. n'exerce actuellement aucune activité, que ce soit au Canada ou ailleurs;
>
> ⇒ Que pour l'instant, les activités commerciales du Groupe Gyro-Trac s'exercent exclusivement dans la filiale Gyro-Trac (USA) inc.;
>
> ⇒ Que les activités du Groupe Gyro-Trac inc. sont gérées sur une base régulière, à partir de Summerville en Caroline du Sud;
>
> ⇒ Que la quasi-totalité des actifs grevés de sûretés en faveur de BMO sont situés à Summerville en Caroline du Sud;
>
> ⇒ Qu'à l'exception de BMO, tous les créanciers détenant des sûretés sont des entreprises américaines;
>
> ⇒ Que les seuls employés du Groupe Gyro-Trac sont à l'emploi de la filiale Gyro-Trac (USA) inc. à Summerville en Caroline du Sud;
>
> ⇒ Que le seul administrateur de Gyro-Trac inc. et Gyro-Trac Côte Ouest inc. réside à Summerville en Caroline du Sud;
>
> ⇒ Que le principal actionnaire de Gyro-Trac inc. (M. Daniel Gaudreault) réside dans l'État de la Caroline du Sud

[12] À mon avis, le grief fait par la requérante quant à l'absence d'un exercice individualisé de détermination du lieu où chaque intimée a ses principales affaires est mal fondé. Tel qu'il appert des extraits cités ci-devant, le juge de première instance a

fait un exercice individualisé pour chacune des intimées visées. Il a conclu que ce lieu était situé aux Etats-Unis. Cette détermination constitue une question de fait et la requérante n'a pas établi l'existence d'une erreur manifeste et dominante susceptible de donner ouverture à l'appel. Le juge de première instance a énuméré plusieurs éléments qui montrent que les activités principales de Giro-Trac Inc. et de Gyro-Trac Côte Ouest Inc. tant du point de vue « économique » que du point de vue du « contrôle » se situent aux État-Unis. Le fait que ces deux entités aient des activités réduites en raison de leur situation financière ne change pas le fait que celles qui subsistent se situent aux États-Unis.

[13] Il va sans dire que les droits de la requérante seront pris en compte aux États-Unis comme ils l'auraient été ici. D'ailleurs, dans le « Order authorizing use of cash collateral » prononcé par la Bankruptcy Court District of South Carolina, le 7 avril 2010, le juge s'est assuré de la protection des droits de la requérante :

> As a means to adequately protect the interests of BOM, the Debtor proposes to a payment for each machine sold, monthly interest payments, and replacement liens. Since the filing of the Debtor's case, Debtor has received cash in the amount of $64,027.29 from the post-petition sale of parts and $59,165 from pre-petition receivables. Debtor proposes to use this cash to replenish the inventory which can be sold at a 30 percent mark up. The Debtor indicates it will give replacement liens on newly acquired parts inventory to the extent cash collateral is used. Debtor also proposes direct payments to BOM in the amount of $25,000 upon the sale of new GT-25XPs. Upon the sale of GT-13XPs the Debtor proposes to pay BOM $10,000. On collateral not subject to the lien of BB&T that is sold post-petition, the Debtor will pay fifty (50%) percent of the net receipts of such sales to BOM. Finally, the Debtor proposes to pay monthly payments of $4,000 to BOM until the Debtor's Plan of Reorganization is approved.
>
> According to the terms detailed above the interests in cash collateral of both BB&T and BOM are adequately protected.[8]

[14] Le juge de première instance a rappelé, à bon droit, l'objectif recherché par le législateur dans la partie IV de la LACC :

> [110] Bref, une telle démarche aurait été contraire à l'objectif recherché par le législateur pour qui la reconnaissance des instances étrangères vise à administrer équitablement et efficacement les affaires d'insolvabilité en contexte international, à protéger les intérêts des créanciers, ceux des compagnies en difficulté ainsi qu'à faciliter le redressement de ces entreprises de manière à protéger les investissements et préserver les emplois.

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[8] *Order authorizing use of cash collateral rendu par United States bankruptcy* Court district of South Carolina le 7 avril 2010, pièce I-1.

POUR CES MOTIFS :

[15] **REJETTE** la requête pour permission de faire appel, avec dépens.

FRANCE THIBAULT, J.C.A.

Me Daniel O'Brien
O'Brien, avocats
Pour la requérante

Me Suzanne Gagné et Me Mihnea Bantoiu
Létourneau & Gagné
Pour les intimées Gyro-trac USA Inc., Gyro-Trac Inc., Gyro-Trac Côte Ouest Inc.

M. André Champagne (absent)
Pour Raymond Chabot Inc.

Date d'audience : 22 avril 2010

TAB 7

COUR D'APPEL

Canada
PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

N° : 500-09-015099-047
(500-11-022333-047)

DATE : LE 10 DÉCEMBRE 2004

SOUS LA PRÉSIDENCE DE L'HONORABLE MARIE-FRANCE BICH J.C.A.

DANS L'AFFAIRE DU PLAN D'ARRANGEMENT DE :

PAPIERS GASPÉSIA INC.
INTIMÉE - Requérante
et
ERNST & YOUNG INC., ès qualités de contrôleur des affaires et des finances de Papiers Gaspésia inc.
INTIMÉE - Contrôleur
et
FJORD-TECH INDUSTRIES INC.
LES STRUCTURES G.B. LTÉE
REQUÉRANTES
et
A. BROUSSEAU ET FILS LTÉE
et
A.M.I. MÉCANIQUE INC.
et
AREL MECOBA
et
ARNO ÉLECTRIQUE LTÉE
et
BEACON ROOFING SUPPLY CANADA COMPAGNY
et
CEGERCO INC.
et
FABRICATION DELTA INC.
et
LES ENTREPRISES DESCIMCO INC.

et
DOUGLAS BARWICK INC.
et
CONSTRUCTION E.D.B. INC.
et
LES ENTREPRISES MICHEL TREMBLAY
et
L'ÉLECTRICITÉ DU SAINT-LAURENT LTÉE
et
GANOTEC INC.
et
GASTIER INC.
et
GROUPE-CONSEIL GEMAXEL INC.
et
LES GRUES P.G. INC.
et
CONSTRUCTION M.F.T. INC.
et
MBI COREXCEL INC.
et
MÉCANIQUE CNC (2002) INC.
et
MARIO LÉVESQUE CONSULTANT INC.
et
NADEAU MATÉRIAUX DE CONSTRUCTION INC.
et
O.L. ÉLECTRIQUE
et
PLOMBERIE PABOK
et
9030-3652 QUÉBEC INC., faisant affaires sous les nom et raison sociale POMPAGE DE BÉTON ST-LAURENT
et
POMPES SULZER (CANADA) INC.
et
CONSTRUCTION RÉGIS TREMBLAY INC.
et
LES REVÊTEMENTS VAUDRY INC.
et
LES ENTREPRISES D'ÉLECTRICITÉ RIAL INC.
et
SCIAGE ET POMPAGE DE BÉTON PELLETIER
et

TECHNISOL
et
LES TOITURES GAUTHIER INC.
INTERVENANTES
et
METSO PAPER LTD.
INTERVENANTE

JUGEMENT

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[1] Les requérantes, auxquelles se joignent les intervenantes[1] (à l'exception de Metso Paper Ltd.), demandent la permission d'appeler d'un jugement rendu le 15 novembre 2004 par la Cour supérieure, district de Montréal (honorable Paul Chaput). Ce jugement décide d'un certain nombre de demandes formulées par Papiers Gaspésia Inc. dans le cadre de la *Loi sur les arrangements avec les créanciers des compagnies*[2] («L.A.C.C.»). Les conclusions du jugement de première instance se lisent comme suit :

> 95 POUR CES MOTIFS, le tribunal :
>
> 96 ACCUEILLE en partie la septième requête en prorogation;
>
> 97 DÉCLARE cette requête valablement signifiée;
>
> 98 ORDONNE que la présentation de toute nouvelle requête de la Requérante ou du Contrôleur soit précédé d'un avis d'au moins un jour franc, les jours non juridiques n'étant pas comptés;
>
> 99 ORDONNE que la Date de cessation de la suspension, fixée par l'ordonnance initiale du 30 janvier 2004, et rectifiée par jugement le 3 février 2004, soit prorogée au 28 janvier 2005;
>
> 100 AUTORISE Ernst & Young Inc., en sa qualité de Contrôleur de Papiers Gaspésia Inc. à déposer dans les quinze (15) jours du présent jugement un ou des appels d'offres quant aux actifs de la société en commandite selon des termes et conditions à être déterminés par le Contrôleur, lesquels incluront :
>
> 4.1 la description des lots d'actifs à être vendus et qui seront établis par le Contrôleur et les Débitrices;

---

1 Les requérantes et les intervenantes seront collectivement désignées par le terme «les requérantes».
2 L.R.C., c. C-36.

4.2 que les actifs seront vendus tels quels, sans garantie de quelque nature que ce soit et sujet à l'approbation de la Cour, libres de toute hypothèque, priorité ou autre charge;

4.3 que toute vente à être conclue suite à l'appel d'offres soit approuvée par la Cour;

4.4 que toute vente respecte, lorsqu'applicable, la clause de non-concurrence souscrite en faveur d'Abitibi-Consolidated Inc. lors de l'achat de l'usine; et

4.5 que l'ouverture des soumissions aura lieu au plus tard le 14 janvier 2005;

101 ORDONNE que les termes et conditions de l'appel d'offres, les recommandations du Contrôleur d'acceptation ou de refus des soumissions reçues et le mode de distribution du prix de vente passe l'objet d'un amendement au plan déjà déposé dans le présent dossier;

102 AUTORISE le Contrôleur, agissant pour Papiers Gaspésia Inc., à vendre, à un prix commercialement raisonnable dans les circonstances, les actifs décrits à l'annexe du présent jugement, à condition d'obtenir le consentement d'Hydro-Québec relativement aux immeubles sur lesquels Hydro-Québec requiert une servitude.

103 DÉCLARE que cette vente par le Contrôleur est une vente forcée au sens de l'article 3069 C.c.Q.;

104 ORDONNE que le produit de la vente de ces ventes soit utilisé pour financer les dépenses prévues au budget du contrôleur établi à son sixième rapport ou pour rembourser les avances intérimaires supplémentaires de 1 300 000 $ dans la mesure où, au moment d'une telle vente, elles ont déjà été avancées;

105 PERMET à la Requérante d'emprunter des Prêteurs Intérimaires les avances intérimaires supplémentaires de 1 300 000 $;

106 DÉCLARE que le remboursement des Avances Intérimaires Supplémentaires de 1 300 000 $ est garanti par une hypothèque en faveur des Prêteurs Intérimaires au montant de 1 300 000 $ grevant tous les Biens (tels que définis à l'ordonnance Initiale, sauf le dépôt à terme d'un an auprès de la Banque Laurentienne du Canada au montant de 2 300 000 $ en capital, cette exception n'étant applicable que jusqu'à concurrence d'une somme équivalente que la Banque Laurentienne du Canada serait appelée à verser aux termes de la lettre de crédit de soutien irrévocable portant le numéro 964 LBI 4629 et venant à

échéance le 26 mars 2005, ou tout renouvellement au remplacement de celle-ci), cette hypothèque prenant rang avant l'Hypothèque de Temrex et l'Hypothèque Intérimaire (telle que définie à l'ordonnance initiale), avant toute hypothèque conventionnelle ou légale, toute priorité ou autre charge, sauf la Charge administrative (telle que définie à l'ordonnance initiale), et la Charge des administrateurs (telle que définie à l'ordonnance initiale).

107 DÉCLARE que le Contrôleur a, à compter du présent jugement, tous les pouvoirs nécessaires afin que le Contrôleur puisse mener à terme l'appel d'offres d'achat quant aux actifs de Papiers Gaspésia Inc. et Papiers Gaspésia, société en commandite et prendre les décisions de gestion aux lieu et place du conseil d'administration;

108 ORDONNE que l'Ordonnance Initiale, l'ordonnance rendue par l'honorable juge Jean Guilbault le 27 février 2004, les ordonnances rendues par l'honorable juge Paul Chaput le 3 juin 2004, le 2 septembre 2004, le 22 octobre 2004 et le 5 novembre 2004 demeurent autrement inchangées et en vigueur selon leurs termes;

109 ORDONNE l'exécution provisoire de l'ordonnance à être rendue sur la présente Requête, nonobstant appel et sans qu'il soit nécessaire de fournir un cautionnement;

110 LE TOUT sans frais.

[2] Accessoirement à leur demande de permission d'appeler, les requérantes souhaitent également que soit suspendue l'ordonnance d'exécution provisoire énoncée au paragraphe 109 ci-dessus. À l'audition du 1er décembre 2004, les avocats des requérantes ont toutefois précisé qu'ils ne sollicitaient cette suspension qu'à l'égard des conclusions relatives aux offres et appels d'offres (paragraphes 100 et 101) et des conclusions relatives à la vente des actifs décrits dans l'annexe du jugement de première instance (paragraphes 102, 103 et 104). En outre, sans opposition des intimées, les requérantes ont modifié leur requête de façon à y ajouter les conclusions subsidiaires suivantes :

ET SUBSIDIAIREMENT au cas où le Tribunal refuserait d'ordonner la suspension de l'exécution provisoire en ce qui concerne la vente des actifs excédentaires et le processus d'appel d'offres :

DIRE ET DÉCLARER que les droits des créanciers détenteurs d'hypothèques légales de construction devront, à l'égard du produit de la vente des actifs excédentaires, être considérés comme si lesdits actifs excédentaires n'avaient pas été vendus et comme si les hypothèques légales de construction étaient toujours publiées ;

ORDONNER au contrôleur de conserver le produit de la vente des actifs excédentaires dans un compte distinct séparé jusqu'à adjudication finale du tribunal sur les droits des parties advenant le cas où le plan d'arrangement amendé ne serait pas accepté par la catégorie de créanciers dont feront partie les détenteurs d'hypothèques légales de construction ou jusqu'à ratification du plan d'arrangement amendé accepté par la catégorie de créanciers dont feront partie les détenteurs d'hypothèques légales de construction.

[3] Les intimées Papiers Gaspésia Inc. et Ernst & Young Inc. de même que l'intervenante Metso Paper Ltd. s'opposent à toutes les demandes des requérantes.

[4] La permission d'appeler est en l'espèce régie par les articles 13 et 14 L.A.C.C. De façon constante, la jurisprudence enseigne que la décision d'accorder ou de refuser la permission d'appeler en pareil cas dépend des critères suivants :

> 19 As set out in Resurgence Asset Management LLC v. Canadian Airlines Corporation, 2000 ABCA 149 (Alta. C.A. [In Chambers]) ("*Resurgence No. 1*"), a decision on a leave application sought earlier in this action, and as conceded by all the parties to this application, the criterion to be applied in an application for leave to appeal is that there must be <u>serious and arguable grounds that are of real and significant interest</u> to the parties. This criterion subsumes four factors to be considered by the court:
>
> (1) whether the point on appeal is of significance to the practice;
>
> (2) whether the point raised is of significance to the action itself;
>
> (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> (4) whether the appeal will unduly hinder the progress of the action.[3]
>
> (Je souligne)

[5] C'est à celui qui sollicite la permission d'appeler de démontrer que sa demande répond à ces critères, qui sont bien sûr cumulatifs. On doit également tenir compte de ce qu'une grande réserve doit être exercée par les cours d'appel à l'endroit des décisions de première instance rendues selon la L.A.C.C. Les permissions d'appeler ne doivent être accordées que de manière parcimonieuse («sparingly», dit la Cour d'appel

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[3] *Re Canadian Airlines Corp.*, (2000) 20 C.B.R. (4th) 46, à la p. 51, par. 19. Au même effet, voir : *3915611 Canada Inc.* c. *Eicon Networks Corporation*, C.A.M., 500-09-012346-029, 11 juin 2002 (C.A.) ; *Highland Capital Management* c. *Uniforêt Inc.*, J.E. 2003-1595 (C.A.), par. 12 et 13 ; *Highland Capital Management, L.P. (Arrangement relatif à)*, J.E. 2003-5 (C.A.), par. 10 et 11 ; *Re Liberty Oil & Gas Ltd.*, 2003 Carswell Alta 684 (Alb. C.A.), par. 15 et 16 ; *Arrangement relatif à Papiers Gaspésia Inc.*, C.A.M. 500-09-015065-048, 25 novembre 2004 (honorable L. Mailhot).

de l'Ontario dans *Re Air Canada*[4]), vu la très grande latitude laissée aux tribunaux de première instance dans l'application de la L.A.C.C. et l'élaboration des mesures destinées à en assurer l'accomplissement[5]. La Cour d'appel de l'Alberta résume ainsi l'état du droit en la matière :

> The standard of review that would govern the appeal is to be considered : *Resurgence # 2* at para. 42 ; *Resurgence # 1* at para. 28-29. Ancillary to these considerations are indications that a supervisory chamber judge under the CCAA should be accorded considerable deference. Their decisions will be interfered only in the event of unreasonable acts, errors in principle or manifest errors : *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) at para. 3. It has also been stated that an appellate court scrutinizing leave applications under the CCAA should exercise its powers sparingly, that a supervising CCAA judge has an ongoing management process similar to that of a judge making orders during a trial :*Blue Range Resource Corp., Re,* 1999 ABCA 255 (Alta C.A.) at para. 3 : *Smoky River Coal Ltd., Re* at para. 62.[6]
>
> (Je souligne)

[6] En l'espèce, après mûre considération, compte tenu des représentations des parties et de la jurisprudence et de la doctrine qu'elles ont citées, je suis d'avis que la permission d'appeler du jugement de première instance doit être refusée, la demande ne répondant pas aux critères applicables.

[7] Les requérantes, qui sont toutes titulaires d'une hypothèque légale aux termes du paragraphe 2724(2) C.c.Q., font valoir que leurs droits et l'exercice de leurs droits sont gravement compromis par le jugement de première instance.

[8] Au regard du premier critère («whether the point on appeal is of significance to the practice»), les requérantes soulèvent deux questions de droit qui ne sont pas sans intérêt : un tribunal peut-il, en vertu de la L.A.C.C., envisager, amorcer, compléter, permettre ou ordonner la liquidation ou le démantèlement de l'entreprise et des actifs d'une débitrice alors que cette loi a pour objectif premier la relance de l'entreprise? La L.A.C.C. autorise-t-elle le juge à ordonner ou permettre la vente de certains actifs en donnant à celle-ci les effets d'une vente forcée (notamment au chapitre de la radiation des droits réels)[7]? Autrement dit, un tribunal peut-il, en vertu de la L.A.C.C., ordonner que certains actifs soient vendus libres de tous les droits qui les grèvent?

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4 QuickLaw [2003] O.J. no. 5244 (Ont. C.A.), par. 2. Voir aussi *Houweling Nurseries Ltd.* v. *Amethyst Greenhouses Ltd.*, QuickLaw [2003] B.C.J. No. 1322 (B.C. C.A.), par. 12 .

5 *Highland Capital Management* c. *Uniforêt Inc.*, précité, note 3, par. 12.

6 *Re Liberty Oil & Gas Ltd.*, précité, note 3, au par. 20.

7 Vente qui, de surcroît, se fera sans les garanties offertes ou la procédure requise pour les ventes forcées régies, par exemple, par le *Code civil du Québec* ou le *Code de procédure civile* ou la *Loi sur la faillite et l'insolvabilité*, L.R.C., c. B-3.

[9] Notre Cour ne s'est jamais prononcée de façon directe et substantielle sur l'une ou l'autre de ces questions. La première d'entre elles fait toutefois l'objet d'une jurisprudence abondante dans les autres provinces canadiennes, jurisprudence partagée, semble-t-il. En effet, vu l'objectif sous-jacent à la L.A.C.C., certains tribunaux sont d'avis qu'un plan d'arrangement ne peut pourvoir à la liquidation d'une entreprise que dans des circonstances exceptionnelles ; d'autres ouvrent plus largement la porte à la possibilité de la liquidation, lorsque la chose paraît appropriée. En l'espèce, le juge de première instance (qui est saisi du dossier de Papiers Gaspésia Inc. depuis plusieurs mois et qui connaît donc bien la situation de l'entreprise et de ses créanciers) a estimé que l'affaire présentait justement le caractère tout à la fois exceptionnel et approprié propice à une liquidation éventuelle.

[10] La seconde question fait l'objet de quelques décisions de la Cour supérieure du Québec[8], décisions qui vont toutes dans le même sens en autorisant la vente d'actifs libres de tous droits. La pratique qui consiste à autoriser de telles ventes est également courante dans les autres provinces canadiennes[9]. Le jugement de première instance est dans le droit fil de cette jurisprudence et quoiqu'il n'utilise pas le langage qu'on retrouve habituellement dans ces affaires, il a le même effet.

[11] Il serait sans doute intéressant que notre Cour ait l'occasion d'exprimer son avis sur les questions en litige (encore qu'il soit loin d'être sûr qu'elle déciderait autrement que ne l'a fait le premier juge), mais les circonstances très particulières de l'espèce font qu'il n'est pas utile ou opportun que la Cour s'en saisisse. Le débat, en effet, serait purement théorique puisque les mesures ordonnées ou permises par le jugement de première instance ne causent pas de préjudice réel ou probable aux requérantes et ne compromettent pas véritablement leurs droits, à ce stade des procédures.

[12] Tout d'abord, il n'y a pas lieu de retenir les prétentions des requérantes au sujet de la tardiveté de la signification de la requête qui a mené au jugement de première instance : les requérantes n'ont pas réussi à démontrer *prima facie* que le premier juge a commis une erreur déterminante en décidant que cette tardiveté ne leur a causé aucun préjudice. Là-dessus, les arguments des requérantes sont voués à l'échec.

[13] Ensuite, il est vrai que la prorogation de l'ordonnance de suspension des procédures empêche les requérantes d'exercer les recours que pourraient leur conférer la *Loi sur la faillite et l'insolvabilité* (par ex. : demande de séquestre intérimaire, requête

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8 Voir par exemple : *Logipal Inc. et Richter et Associés Inc.*, C.S.M. 500-11-018710-026, 23 janvier 2003 ; *Pangeo Pharma Inc. et Ernst & Young Inc.*, C.S.M. 500-11-012037-037, 14 août 2003 ; *Pangeo Pharma Inc. et Ernst & Young Inc.*, C.S.M. 500-11-021037-037, 5 novembre 2003 ; *Cavaliers Specialty Yarn Inc. et Richter & Associés Inc.*, C.S.M. 500-11-021490-038, 23 janvier 2004 ; *Cavaliers Specialty Yarn Inc. et Richter & Associés Inc.*, C.S.M. 500-11-021490-038, 28 mai 2004 ; *Qbiogène Inc. et RSM Richter Inc.*, C.S.M. 500-11-022623-041, 5 juillet 2004.

9 Voir par exemple : *Harris Trust & Savings Bank* c. *Anicom Multimedia Wiring System*, Ont. S.C. Toronto, 00-CL-3989, 6 mars 2001 ; *Re Psinet Limited*, Ont. S.C. Toronto, 01-CL-4155, 26 septembre 2001 ; *Re Stelco Inc.*, Ont. S.C. Toronto, 04-CL-5306, 24 septembre 2004. Voir aussi : *Re Loewen Group Inc.*, QuickLaw [2001] O.J. no. 5640 (Ont. C.A.).

en faillite) ou le *Code civil du Québec* (recours hypothécaire) mais cela est précisément voulu par l'article 11 L.A.C.C. et on peut difficilement y voir un préjudice. Le juge de première instance a cru opportun, après avoir entendu toutes les parties, de proroger la suspension ordonnée en vertu de cette disposition. Les requérantes n'ont pas montré en quoi cette conclusion était entachée d'une erreur *prima facie*. Là-dessus également les arguments des requérantes sont voués à l'échec.

[14] Par ailleurs, l'appel d'offres permis à certaines conditions par le jugement de première instance n'équivaut pas à liquidation pure et simple, malgré qu'on puisse le considérer comme l'amorce d'un éventuel processus de liquidation[10], qui pourrait cependant ne pas avoir lieu si un acheteur se manifestait et se montrait intéressé à la relance de l'entreprise (quoique cela paraisse peu probable). En outre, afin d'assurer la protection de l'intérêt des créanciers (dont les requérantes), le premier juge ordonne que leur soient soumis les termes et conditions de cet appel d'offres, les recommandations d'acceptation ou de refus des soumissions reçues et le mode de distribution du prix de vente, le tout par le biais d'un amendement au plan d'arrangement déjà proposé (voir par. 101 du jugement de première instance). Non seulement ce plan d'arrangement doit-il être présenté aux créanciers mais il doit en outre être homologué par la Cour supérieure. S'il y a lieu, les requérantes pourront s'assurer alors que leurs droits soient convenablement protégés (notamment en réclamant la constitution d'une classe particulière de créanciers) et elles pourront s'adresser au tribunal dans ce but. Les requérantes pourront aussi, ce qu'elles n'ont d'ailleurs pas manqué de faire valoir à plusieurs reprises lors de l'audition, voter contre le plan d'arrangement, s'il ne leur convient pas, ou en déférer au tribunal si elles estiment que leurs droits ne sont pas pris en considération ou sont bafoués.

[15] De plus, les requérantes n'ont pas montré en quoi les autres hypothèses qu'elles favorisent (nomination d'un séquestre intérimaire, requête en faillite, recours hypothécaire) seraient plus avantageuses pour elles dans les circonstances de l'espèce. En fait, il ressort plutôt que ces autres recours déboucheront au bout du compte tous sur la liquidation des actifs de l'entreprise, liquidation qui se fera *grosso modo* de la même façon dans tous les cas et qui impliquera, dans tous les cas également, des frais de conservation importants dont le paiement, d'ailleurs, n'est pas assuré dans le cadre des hypothèses évoquées par les requérantes. L'on n'a pas montré non plus en quoi ces autres recours seraient plus expéditifs ou efficaces et permettraient aux requérantes d'obtenir plus rapidement satisfaction de leurs créances respectives. En fait, soit dit avec égards, les avantages évoqués par les requérantes relèvent davantage de la spéculation que de la réalité ou de la probabilité.

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[10] Voir d'ailleurs les paragraphes 64 et 65 du jugement de première instance, où l'on écrit que :
«64. Dans le contexte, il ne paraît pas y avoir d'autre avenue que continuer le processus engagé sous la LACC en vue de la liquidation et, à cette fin, de proroger la suspension des recours.
65. Par contre, il ne faut pas perdre de vue qu'une telle liquidation doit être faite dans l'intérêt des créanciers dans le cadre d'un plan qui doit leur être soumis pour approbation.»

[16] Les requérantes s'en prennent aussi au fait que le premier juge a permis la vente immédiate de certains actifs bien précis, décrits dans l'annexe du jugement et visés par les paragraphes 102, 103 et 104 du jugement (les «actifs excédentaires»). Pour l'essentiel, cette vente a été autorisée par le premier juge (avec tous les effets d'une vente forcée) en vue d'assurer le paiement des dépenses prévues au budget du contrôleur et le remboursement d'avances intérimaires faites par certains prêteurs afin d'assurer la conservation des actifs, avances garanties par une hypothèque de premier rang (pour une valeur maximum de 1 300 000 $). Même en supposant que les requérantes aient raison de prétendre que le premier juge ne pouvait donner à la vente les effets d'une vente forcée et ordonner la radiation de leurs droits, y a-t-il eu préjudice? Compte tenu de la faible valeur des actifs en question, il est peu probable (pour dire le moins) que les requérantes puissent espérer quelque paiement que ce soit de leur vente. De même, le fait que ces actifs demeurent dans le patrimoine de la débitrice n'en augmente pas la valeur globale et risque de mettre en péril la conservation des autres actifs de la débitrice. Les prétentions des requérantes sur ce point sont d'ailleurs assez paradoxales puisqu'elles ne s'opposent pas à l'injection des avances intérimaires ni à la constitution de l'hypothèque de premier rang aux prêteurs qui consentent ces avances (et qui vont vraisemblablement cesser de le faire si les actifs excédentaires ne sont pas vendus). En fait, tout tend à démontrer que, même si leurs droits n'étaient pas radiés, les requérantes ne tireraient rien des actifs excédentaires, qui sont du reste grevés de charges prioritaires aux leurs.

[17] Bref, et pour en revenir aux critères applicables à la permission d'appeler d'un jugement rendu sous l'empire de la L.A.C.C., il appert que si les deux questions de droit soulevées par les requérantes ne sont pas en soi dépourvues d'intérêt ou de mérite (premier et troisième critères), le second critère («the point raised is of significance to the action itself») milite en faveur du rejet de la demande, vu l'absence de préjudice réel ou probable aux droits des requérantes, dont la démarche, si elle aboutissait, aurait surtout l'effet de retarder indûment le processus engagé en vertu de la L.A.C.C. (quatrième critère). Dans l'ensemble, il n'y a donc pas d'intérêt réel et significatif à accorder la permission d'appeler du jugement de première instance.

[18] POUR CES MOTIFS :

[19] **REJETTE** la requête pour permission d'appeler et aux fins d'obtenir la suspension de l'ordonnance d'exécution provisoire, avec dépens.

MARIE-FRANCE BICH J.C.A.

Me Yves Poirier
Me Alain Robichaud
DeGRANPRÉ CHAIT
Avocats de Fjord-Tech Industries Inc., Les Structures G.B. ltée et des intervenantes

Me Sylvain A. Vauclair
Me Mélanie Béland
McCARTHY TÉTRAULT
Avocats de Papiers Gaspésia inc.

Me Jean Fontaine
STIKEMAN ELLIOTT
Avocat de Ernst & Young Inc.

Me Marc-André Boutin
DAVIES WARD PHILLIPS VINEBERG
Avocat de l'intervenante Metso Paper Ltd.

Me Robert Tessier
POULIOT MERCURE
Avocat de Investissements Québec

Me Catherine Delisle
DELISLE DELISLE
Avocate de Ville de Chandler

Date d'audience : 1er décembre 2004

TAB 8

1992 CarswellBC 524

Pacific National Lease Holding Corp., Re

Re PACIFIC NATIONAL LEASE HOLDING CORPORATION, PACIFIC NATIONAL FINANCIAL CORPORATION, PACIFIC NATIONAL LEASING CORPORATION, PACIFIC NATIONAL VEHICLE LEASING CORPORATION, SOUTHBOROUGH HOLDINGS INC. and PAC NAT EQUITIES CORPORATION

British Columbia Court of Appeal

Macfarlane J.A. [in Chambers]

Heard: October 22, 1992
Judgment: October 28, 1992
Docket: Doc. Vancouver CA016047

Counsel: *H.C. Ritchie Clark* and *D.D. Nugent*, for petitioners (appellants).

W.E.J. Skelly, for Sun Life Trust Company.

M.P. Carroll, for Mutual Life Assurance Company of Canada.

W.C. Kaplan, for Commcorp Financial Services Inc. and National Trust.

H.W. Veenstra, for National Bank of Canada.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Application of Act.

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Court refusing to authorize company to set aside funds to fulfil its obligations under Employment Standards Act — Company applying for leave to appeal from order — Leave being denied as appeal likely to delay or frustrate re-organization efforts — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-46 — Employment Standards Act, R.S.B.C. 1979, c. 10.

The petitioners made an application under the *Companies' Creditors Arrangement Act* ("CCAA") for a stay of all proceedings so that they might attempt a re-organization of their affairs. The stay was granted, but the petitioners subsequently applied to set aside over $1 million in a trust fund to meet their obligations under the *Employment Standards Act* (B.C.). The petitioners' application was dismissed because to allow the petitioners' application would be an unacceptable alteration of the status quo in effect when the order was granted. The petitioners sought leave to appeal.

Held:

The application was dismissed.

In supervising a proceeding under the CCAA, orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems. In that context, appellate proceedings may well upset the balance and delay or frustrate the process under the CCAA. Accordingly, it was not appropriate to grant leave to appeal.

Cases considered:

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

Westar Mining Ltd., Re (1992), 14 C.B.R. (3d) 95 (B.C. S.C.) — *referred to*

Statutes considered:

Bank Act, R.S.C. 1985, c. B-1.

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

Employment Standards Act, R.S.B.C. 1979, c. 10.

Application for leave to appeal from order made under Companies' Creditors Arrangement Act.

***Macfarlane J.A.*:**

1 This is an application for leave to appeal an order of Mr. Justice Brenner pronounced August 17, 1992 pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "C.C.A.A.").

2 The petitioners had become insolvent prior to July 22, 1992 when they made an application under the C.C.A.A. for a stay of all proceedings so that they might attempt a reorganization of their affairs as contemplated by the C.C.A.A.

3 Mr. Justice Brenner made an ex parte order on July 23, 1992. The effect of the order was to stay all proceedings against the petitioners.

4 The order permitted the petitioners to maintain in trust a sum not exceeding $1,500,000, to satisfy the potential liabilities of directors and officers of the petitioner companies with respect to the payment of wages under provincial legislation and remittances in connection therewith pursuant to federal legislation. The petitioners had previously established that fund to protect its directors and officers from potential personal liability under the *Employment Standards Act*, R.S.B.C. 1979, c. 10, for failing to make the payments mandated by that statute.

5 On July 31, 1992 Mr. Justice Brenner heard a number of applications brought by various interested parties seeking to set aside the ex parte stay order or, if the stay order was not set aside, to vary its terms. Mr. Justice Brenner amended and replaced the stay order with an order on terms proposed by the parties. That order has not yet been

entered and has gone through a number of amendments. The order provided that on an interim basis, pending the hearing and determination of an application on the merits of the issues, the petitioners should not, without further order of the court, make any payment to any employee or employees of the petitioners in respect of unpaid wages, severance, termination, lay-off, vacation pay or other benefits arising or otherwise payable as a result of the termination of an employee or employees.

6 The merits were argued in August, and on August 17 Mr. Justice Brenner delivered the reasons for judgment and made the order which is the subject of this application.

7 The operative portions of the order read as follows:

> THIS COURT ORDERS that the application by the Petitioners to make statutory severance payments or to maintain a trust fund to indemnify its directors and officers with respect to statutory severance payments is dismissed;
>
> THIS COURT FURTHER ORDERS that any proceedings that may be brought by employees of the Petitioners to compel payment of statutory severance payments are stayed.

8 The appeal concerns the order made under para. 1 of the order, not against the stay granted in para. 2.

9 The reasons for judgment of Mr. Justice Brenner are careful and detailed and are contained in 17 pages. The reasons contain a review of the essential facts, including the circumstances which gave rise to the financial difficulties of the petitioners, the competing arguments with respect to the need and the ability to make severance payments to employees whose services had been terminated, a consideration of the purposes of the C.C.A.A., the principle derived from the judgment of Mr. Justice Macdonald in *Re Westar Mining Ltd.*, unreported reasons for judgment, August 11, 1992 [now reported at 14 C.B.R. (3d) 95 (B.C. S.C.)] (which dealt with a similar issue), and the application of that principle to the facts of this case.

10 The essential facts are that the petitioners are a group of interrelated companies that have carried on a leasing business for some years. Just prior to the commencement of the C.C.A.A. proceedings the petitioners had over $246,000,000 in lease portfolios under administration. They had a workforce of approximately 230 which, by the time Mr. Justice Brenner gave his reasons on August 17, 1992, had been reduced to 60. The provisions of the *Employment Standards Act* had not, by August 17, 1992, given rise to any actual liability with respect to the severance of the employees who had left the company. The potential liability was not known but the company said that it could be as much as $1,500,000.

11 Mr. Skelly informed me, upon the hearing of the application, that the latest information indicated a liability for severance pay in an amount of approximately $850,000 and for vacation pay in an amount of approximately $150,000 for a total potential liability of $1,000,000. I understand from counsel that once the funders are repaid there may be as much as $61,000,000 available to meet other liabilities.

12 Mr. Clark, for the petitioners, was not prepared to concede that the potential liability had been reduced, and submits that a trust fund of about $1,300,000 is required.

13 The petitioners were in the business of purchasing equipment or vehicles and entering into leases with third parties. The initial purchases were financed with security on such leases granted in favour of National Bank of Canada and by way of a trust deed in favour of Canada Trust Company and Royal Trust Company. Additional financial advances were obtained from the other respondents, who are 27 other financial institutions, referred to in the material as the "funders." The funders advanced moneys and took security, in part by way of assignment of the lease revenue stream. The moneys advanced by the funders exceeded the amount which the petitioners had paid for the equipment or vehicles. The difference, together with other revenue, was the petitioners' profit.

14 The arrangements with the funders provided that the petitioners would continue the ongoing administration of the leases, including collection of the monthly lease payments, which would be forwarded to the funders.

15 The petitioners got into financial difficulties, which they revealed to the funders. The funders and the petitioners were not able to agree to a plan to deal with this crisis. As a result the petitioners sought protection under the C.C.A.A.

16 The appellants seek an order of this court setting aside the order made August 17, 1992, and authorizing the petitioners to comply with the statutes governing their operations (and in particular the *Employment Standards Act*) and permitting them to continue to maintain the trust funds with respect to possible claims against directors and officers arising out of the various federal and provincial statutes.

17 The petitioners assert that Mr. Justice Brenner erred:

18 1. In ordering the appellants not to abide by the relevant mandatory statutory provisions including those under the *Employment Standards Act*, requiring the appellants to pay all the statutory payments in full, and thereby ordering the appellants to breach a mandatory statute regarding statutory payments.

19 2. In ruling that he had the inherent jurisdiction under the *Companies' Creditors Arrangement Act* or otherwise to order the appellants to breach the *Employment Standards Act* regarding statutory payments and thereby order the petitioners to commit offences under such statute.

20 3. In failing to properly apply the relevant legal principles applicable to a decision regarding the payment of statutory payments including such payments to former employees.

21 4. In ruling that the payment of unpaid wages and holiday and vacation pay accruing to the appellants' employees was to be treated in the same manner as severance pay.

22 5. In suspending the provisions of the July 23, 1992 order authorizing the trust fund.

23 6. In failing to provide any protection to the directors and officers of the appellants by way of the trust fund when ordering the petitioners to breach the *Employment Standards Act*, thereby exposing the directors and officers of the petitioners to liabilities under that statute and to prosecution for offences thereunder.

24 I understand the submission of the respondents to be that the real issue is whether a judge, acting pursuant to the powers given by the C.C.A.A., may make an order the purpose of which is to hold all creditors at bay pending an attempted reorganization of the affairs of a company, and which is intended to prevent a creditor obtaining a preference which it would not have if the attempted reorganization fails and bankruptcy occurs.

25 I think that the answer is given in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84 (C.A.). In that case Mr. Justice Gibbs, at pp. 88-89 [B.C.L.R.], said:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the

attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

26 In the same case, at p. 92, Mr. Justice Gibbs considered whether security given under the *Bank Act* [R.S.C. 1985, c. B-1] gave preference to the bank over other creditors, despite the provisions of the C.C.A.A. He said:

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

27 Mr. Justice Brenner, after reviewing that and other authorities, said:

(1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the court.

(2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.

(3) During the stay period the Act is intended to prevent manoeuvers for positioning amongst the creditors of the company.

(4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

(5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

(6) The court has a broad discretion to apply these principles to the facts of a particular case.

Counsel do not suggest that statement of principles is incorrect.

28 Mr. Justice Brenner then referred to the judgment of Mr. Justice Macdonald in *Westar*, supra, and concluded:

In my view, to allow the petitioners to make statutory severance payments or to authorize a fund out of the company's operating revenues for that purpose would be an unacceptable alteration of the status quo in effect when the order was granted.

29 He said earlier that he did not understand Mr. Justice Macdonald to be saying in *Westar* that in no case should

a court ever authorize severance payments when a company is operating under the C.C.A.A.

30 He held, in effect, that it was a proper exercise of the discretion given to a judge under the C.C.A.A. to order that no preference be given to any creditor while a reorganization was being attempted under the C.C.A.A.

31 It appears to me that an order which treats creditors alike is in accord with the purpose of the C.C.A.A. Without the provisions of that statute the petitioner companies might soon be in bankruptcy, and the priority which the employees now have would be lost. The process provided by the C.C.A.A. is an interim one. Generally, it suspends but does not determine the ultimate rights of any creditor. In the end it may result in the rights of employees being protected, but in the meantime it preserves the status quo and protects all creditors while a reorganization is being attempted.

32 So far as the directors and officers are concerned, they were personally liable for potential claims under the *Employment Standards Act* before July 22. Nothing has changed. No authority has been cited to show that the directors and officers have a preferred right over other potential creditors.

33 This case is not so much about the rights of employees as creditors, but the right of the court under the C.C.A.A. to serve not the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods Ltd.*, supra. Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the C.C.A.A. must be served.

34 In this case Mr. Justice Brenner reviewed the evidence and made certain findings of fact. He concluded that it would be an unacceptable alteration of the status quo for the petitioners to make statutory severance payments or to authorize a fund out of the companies' operating revenues for that purpose. He also found that there was no evidence before him that the petitioners' operation will be impaired if terminated employees do not receive severance pay and instead become creditors of the company. He said that there was no evidence that the directors and officers will resign and be unavailable to assist the company in its organization plans.

35 Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this court on discreet questions of law. But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.

36 A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.

37 Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

38 In all the circumstances I would refuse leave to appeal.

Application dismissed.

END OF DOCUMENT

TAB 9

Société québécoise d'information juridique
SOQUIJ

AZ-50614111

Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à) **2010 QCCA 403**

COUR D'APPEL

CANADA
PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

N° : 500-09-020313-102
(460-11-001833-097)

DATE : 4 MARS 2010

SOUS LA PRÉSIDENCE DE L'HONORABLE MARIE-FRANCE BICH, J.C.A.

DANS L'AFFAIRE DU PLAN D'ARRANGEMENT DE SOCIÉTÉ INDUSTRIELLE DE DÉCOLLETAGE ET D'OUTILLAGE (S.I.D.O.) LTÉE :

DAVID BOUCHARD
REQUÉRANT / Intervenant

et
SOCIÉTÉ INDUSTRIELLE DE DÉCOLLETAGE ET D'OUTILLAGE (S.I.D.O.) LTÉE
INTIMÉE / Débitrice / Requérante

et
RAYMOND CHABOT INC.
Contrôleur

JUGEMENT

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[1] Le requérant demande la permission d'appeler du jugement par lequel la Cour supérieure, district de Bedford (l'honorable Gaétan Dumas), le 17 décembre 2009 (motifs transcrits le 23 décembre 2009), a homologué, séance tenante, le plan d'arrangement soumis par l'intimée aux termes de la *Loi sur les arrangements avec les créanciers des compagnies*[1] (« *L.a.c.c.* »).

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1 L.R.C.(1985), ch. C-36.

[2] Essentiellement, le requérant, actionnaire minoritaire de l'intimée et ancien P.D.G. de celle-ci, soutient que l'arrangement homologué par le juge de première instance est en réalité une façon de le priver du recours en oppression et en dommages-intérêts (notamment pour délai de congé) qu'il a intenté à ses coactionnaires, à l'intimée ainsi qu'à trois administrateurs de cette dernière, certaines manœuvres contestables ayant par ailleurs été employées en vue d'obtenir l'aval de la majorité des créanciers. Autrement dit, le plan d'arrangement aurait pour objectif de contrer son action. C'est là sa thèse générale, qu'il a du reste présentée à la Cour supérieure.

[3] Reprenant les moyens qu'il a présentés au juge de première instance et que celui-ci a rejetés, le requérant allègue ainsi que — et je résume très succinctement :

- le plan d'arrangement conférerait indûment aux salariés de l'entreprise une priorité indue, inspirée de l'alinéa 136(1)*d)* de la *Loi sur la faillite et l'insolvabilité*[2] (« *L.f.i.* »), disposition inapplicable en l'espèce;

- les employés, en raison de leur priorité, les détenteurs de débentures, en raison de leur droit de conversion, et les fournisseurs ne pouvaient, faute d'intérêts véritablement communs, être regroupés dans la même catégorie de créanciers aux fins du vote d'approbation de l'arrangement proposé;

- l'arrangement n'est pas raisonnable car il a pour objectif de forcer un créancier minoritaire à accepter des conditions exorbitantes, notamment au chapitre des quittances, et une réorganisation corporative sans lien avec l'entreprise et sa restructuration;

- les quittances à certains tiers, telles que prévues en particulier par la clause 7.2.3 de l'arrangement proposé, sont abusives et inopportunes, étant sans lien avec les affaires de l'entreprise.

[4] Selon le requérant, les questions ainsi soulevées portent sur des principes dont l'application gagnerait à être balisée par la Cour d'appel et qui sont importants pour la pratique, particulièrement en ce qui concerne la constitution des classes de créanciers et les quittances en faveur de tiers lorsque ces quittances sont sans lien avec les affaires de l'entreprise. Il s'agirait là par ailleurs de questions cruciales aux fins de la réorganisation proposée des affaires de l'intimée.

[5] À ces moyens, l'intimée oppose que la permission d'appeler ne devrait pas être accordée, la demande du requérant ne remplissant pas les conditions prévues en pareil cas par la jurisprudence. L'intimée fait ainsi valoir les arguments suivants, brièvement résumés.

[6] L'appel soulèverait des questions rattachées au seul intérêt du requérant, sans importance ou utilité aucune pour la pratique. Tout d'abord, la question de la priorité conférée aux employés serait d'autant moins intéressante que la *L.a.c.c.* a été modifiée

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2 L.R.C. (1985), ch. B-3.

pour inclure d'autorité une telle priorité (voir l'article 6, paragr. (5), *L.a.c.c.*, entré en vigueur le 18 septembre 2009). Ensuite, la question de la coercition du créancier minoritaire, coercition souvent inhérente au processus établi par la *L.a.c.c.*, est liée strictement aux intérêts personnels du requérant et n'a aucune portée générale. Enfin, la question de la quittance à des tiers a été réglée entièrement par la jurisprudence, particulièrement dans le cas où son bénéficiaire, comme c'est ici le cas de l'un d'entre eux au moins, est la personne qui injectera des fonds substantiels dans l'entreprise débitrice aux termes de l'arrangement. L'intimée note de plus que le requérant n'a pas plaidé en première instance celui de ses moyens se rattachant à l'absence de communauté d'intérêts entre les employés, les fournisseurs et les détenteurs de débentures. Il aurait plutôt contesté le fait d'avoir été placé, aux fins du vote, dans la même catégorie que la créancière la plus importante, détentrice de débentures (Capital Régional et Coopératif Desjardins).

[7] L'intimée prétend également qu'aucune des questions soulevées par le requérant n'est d'intérêt pour la réorganisation en cours. En outre, un appel ne ferait que mettre en péril cette réorganisation, la faillite étant la seule autre voie envisageable.

[8] Finalement, l'intimée est d'avis que les chances de succès de l'appel sont fort minces, *prima facie*, la preuve faite devant le juge de première instance démontrant qu'en réalité le requérant ne recherche pas la réorganisation de la société débitrice, mais bien sa faillite.

* *

[9] L'article 13 *L.a.c.c.*, qui régit la requête, prévoit que tout droit d'appel s'exerce sur permission. À la différence, par exemple, de la *Loi sur la faillite et l'insolvabilité*, dont l'article 193 permet des appels de plein droit, il n'y a ici pas d'appel sans autorisation judiciaire préalable. Cela est révélateur de l'intention du législateur, qui a clairement voulu limiter les pourvois. Une interprétation restrictive de la disposition est donc de mise, et c'est bien ainsi que l'entend la jurisprudence. Ainsi, dans *9145-7978 Québec inc. (Arrangement relatif à)*[3], rappelant les critères qui président à l'octroi d'une permission d'appeler en vertu de l'article 13 *L.a.c.c.*, le juge Gendreau écrit que :

> [13] La permission d'appeler d'une ordonnance en application de la *Loi* est régie par des critères sévères. Le juge Wittman, de la Cour d'appel de l'Alberta, les reprend dans *Resurgence Asset Management LLC c. Canadian Airlines Corp.* [renvoi omis] :
>
> > As set out in *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149 (Online: Alberta Courts) ("Resurgence No. 1"), a decision on a leave application sought earlier in this action, and as conceded by all the parties to this application, the criterion to be applied in an application for leave to appeal is that there must be serious and arguable grounds that are of real and significant interest to the parties. This criterion subsumes four factors to be considered by the court
> >
> > (1) whether the point on appeal is of significance to the practice;

3 2007 QCCA 618, J.E. 2007-975.

> (2) whether the point raised is of significance to the action itself;
>
> (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
>
> (4) whether the appeal will unduly hinder the progress of the action.
>
> [14] Une autorisation de pourvoi ne sera accueillie qu'avec prudence surtout lorsque la gestion d'un arrangement est confiée à un seul juge qui a eu l'opportunité de présider à toutes les étapes de l'affaire [renvoi omis] :
>
> > An appellate court should exercise its power sparingly, when asked to intervene in issues which arise in *CCAA* proceedings. A judge exercising a supervisory function under the CCAA has an ongoing management process, much like a trial judge making orders in the course of a trial: *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 at 272 (B.C.C.A.).
>
> [15] Cela découle de l'objectif de la *Loi*. Houlden & Morawetz [renvoi omis] écrivent :
>
> > The *CCAA* has a broad remedial purpose giving a debtor an opportunity to find a way out of financial difficulties short of bankruptcy, foreclosure or the seizure of assets through receivership proceedings. It allows the debtor to find a plan that will enable it to meet the demands of its creditors through refinancing with new lending, equity financing or the sale of the business as a going concern. This alternative may give the creditors of all classes a larger return and protect the jobs of the company's employees.

[10] Il convient de citer également la juge Rayle qui, renvoyant elle aussi à l'arrêt *In Re: Canadian Airlines Corp.*[4], écrit ce qui suit dans *Syndicat des employées et employés de CFAP-TV (TQS-Québec), section locale 3946 du Syndicat canadien de la fonction publique c. TQS inc.*[5] :

> [21] Compte tenu du vaste pouvoir discrétionnaire que la *LACC* confère au juge de la Cour supérieure, l'appel n'est possible que sur permission et permission ne sera accordée que si l'appel soulève une question sérieuse et d'intérêt général. [...]

[11] Dans le même sens, voir : *3915611 Canada Inc. c. Eicon Networks Corporation*[6]; *Highland Capital Management, L.P. (Arrangement relatif à)*[7], paragr. 10 et 11; *Highland Capital Management c. Uniforêt Inc.*[8], paragr. 12 et 13; *Re Liberty Oil & Gas Ltd.*[9], paragr. 15 et 16 ; *Arrangement relatif à Papiers Gaspésia inc.*[10]; *Papiers Gaspésia inc.*

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4 (2000), 19 C.B.R. (4th) 33 (Alb. C.A.).
5 2008 QCCA 1429, J.E. 2008-1578 (requête pour autorisation de pourvoi à la Cour suprême rejetée, 12 février 2009, 32836).
6 C.A.M. 500-09-012346-029, 11 juin 2002 (C.A.).
7 J.E. 2003-5 (C.A.).
8 J.E. 2003-1595 (C.A., requête pour autorisation de pourvoi à la Cour suprême du Canada rejetée, 19 février 2004, 29969).
9 2003 ABCA 158, 2003 Carswell Alta 684 (Alb. C.A.).
10 C.A.M. 500-09-015065-048, 25 novembre 2004.

(Arrangement relatif à)[11], paragr. 4 et 5; *9145-7978 Québec inc. (Arrangement relatif à)*[12], paragr. 2; *Parc industriel Laprade inc. c. Conporec inc.*[13], paragr. 12 et 13.

* *

[12] J'estime que la demande de permission d'appeler du requérant ne remplit pas les conditions énoncées par la jurisprudence.

* *

[13] Le juge de première instance est familier avec le dossier du plan d'arrangement soumis par l'intimée : c'est lui qui a accordé l'ordonnance initiale et qui, depuis, s'occupe de l'affaire et en assure le suivi.

[14] Son jugement du 17 décembre a été rendu après que la preuve eût été présentée par les parties. Le requérant figure au nombre des témoins entendus. Le juge a également, ainsi qu'il le note au paragraphe 7 de son jugement, pris connaissance du recours en oppression et en dommages-intérêts intenté par le requérant. Or, tout cela ayant été considéré, le juge conclut ce qui suit au paragraphe 18 de son jugement :

> [18] Pour des motifs évidents, l'intervenant préférerait sûrement que la compagnie fasse faillite, cela lui permettrait de continuer ses recours civils contre des tiers. Donner raison à l'intervenant lui donnerait un droit de veto et plongerait la débitrice en faillite de façon inévitable.

[15] Cette lecture des intentions du requérant est confirmée par sa requête pour permission d'appeler : l'objectif principal qui en ressort est celui de la préservation du recours qu'il a institué contre l'intimée, ses coactionnaires et les administrateurs de l'intimée. Sa thèse générale, comme on l'a vu au paragraphe [2], *supra*, est la suivante : le plan d'arrangement proposé par l'intimée n'obéit pas à des objectifs légitimes, mais serait une façon de faire obstacle au recours en oppression et dommages-intérêts qu'il a intenté.

[16] Or, à première vue, rien de ce qu'a soumis le requérant au soutien de sa requête n'appuie cette prétention que le juge de première instance n'a pas retenue. La requête pour permission d'appeler ignore par ailleurs largement et ne conteste pas véritablement certaines déterminations factuelles du juge de première instance, qui sont pourtant cruciales à l'issue du débat. Ainsi, en va-t-il des constats suivants du juge, au sujet du risque de faillite imminente qui guette l'intimée (risque rappelé par ailleurs au paragraphe 18 du jugement, précité) :

> [9] <u>La compagnie débitrice est insolvable. Dans l'état actuel du dossier le capital-actions de celle-ci ne vaut rien. Le tribunal est convaincu qu'en cas de faillite, les créanciers ordinaires ne recevraient absolument rien</u>. Le tribunal est préoccupé par les 60 employés qui risquent de perdre leurs emplois si le plan d'arrangement n'est pas approuvé. Les employés ont accepté de faire des concessions importantes pour sauver la compagnie. Nous sommes en crise

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[11] J.E. 2005-75 (C.A.).
[12] 2007 QCCA 769, B.E. 2007BE-716.
[13] [2008] R.J.Q. 2590 (C.A.).

économique. Cette crise touche particulièrement le domaine de l'aéronautique. Le temps des Fêtes n'est sûrement pas le moment idéal pour tenter de se retrouver un emploi.

[10] Le tribunal croit que la débitrice est vouée à une mort certaine si le plan n'est pas approuvé avant le 31 décembre. Pratt & Whitney, qui est presque l'unique cliente de la débitrice, risque de s'approvisionner ailleurs si le plan ne passe pas. D'autre part, elle s'est engagée à continuer à faire affaire avec la débitrice ce qui pourrait assurer la survie de celle-ci, du moins à court terme.

[Soulignements ajoutés.]

[17] Il appert de tout ce qui précède que le requérant ne poursuit par son appel que des intérêts personnels, sans portée générale, qui ne sont susceptibles d'avantager ni les créanciers (qui perdront tout en cas de faillite, selon le juge de première instance) ni, il va sans dire, l'intimée. Il paraît en outre peu probable que la faillite avantage même le requérant, si ce n'est que son recours en oppression (dont les chances de succès sont impossibles à établir) pourra subsister contre ceux qu'il a poursuivis en même temps que l'intimée. En ce sens, l'appel ne répond pas au second des critères à considérer aux fins d'une permission d'appeler (« the point raised is of significance to the action itself »). Plutôt, l'appel « will unduly hinder the progress of the action » et il fera en sorte que se matérialise le péril dans lequel se trouvent l'intimée et ses autres créanciers.

[18] On ne peut bien sûr pas reprocher au requérant de chercher à protéger ses intérêts, mais il ne paraît pas opportun de lui accorder la permission d'appeler dans ces circonstances et cela seulement justifierait de rejeter sa requête.

[19] Il convient néanmoins de se pencher sur les moyens particuliers qu'invoque le requérant.

[20] **La « priorité » accordée aux employés.** Le requérant plaide ici l'illégalité des dispositions du plan d'arrangement qui confèrent aux employés un avantage analogue à celui qu'édicte l'alinéa 136(1)*d) L.f.i.* Voici les dispositions pertinentes du plan d'arrangement :

Article 1.1 Définitions

[...]

« Réclamation Privilégiée » : désigne les réclamations des employés actuels et anciens de la Débitrice pour des sommes égales à celles qu'il seraient en droit de recevoir en application de l'alinéa 136(1)*d)* de la LFI si la Débitrice avait fait faillite à la date à laquelle l'Ordonnance Initiale fut rendue et, d'autre part, pour le montant des gages, salaires, commission ou autre rémunération pour services fournis entre cette date et celle où l'Ordonnance sera rendue;

[...]

Article 3.2 Distribution du Montant à Distribuer

Aux termes du présent Plan, il sera pourvu aux Réclamations Admissibles aux Distributions des Créanciers en la manière et selon l'ordre de priorité suivant :

3.2.1 Une première Distribution sera effectuée, à même le Montant à Distribuer, à la Date de distribution, afin d'acquitter :

a) Les Réclamations Privilégiées jusqu'à concurrence de deux mille dollars (2 000 $) par Créancier; puis

b) Les Réclamations Fiscales relativement aux montants qui étaient impayés au moment de la demande d'émission de l'Ordonnance initiale et qui sont de nature à faire l'objet d'une Réclamation aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*;

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe; puis

c) les Réclamations Admissibles aux Distributions jusqu'à concurrence de deux mille cinq cents dollars (2 500 $) par Créancier;

3.2.2 À l'occasion de cette première Distribution, le solde du Montant à Distribuer à la suite du versement des sommes mentionnées au paragraphe 3.2.1 des présentes sera distribué aux Créanciers afin d'acquitter le paiement au prorata de la portion des Réclamations Admissibles aux Distributions supérieure à deux mille cinq cents dollars (2 500 $) par Créancier;

3.2.3 Une seconde Distribution sera effectuée si dans les six (6) mois de la Date de prise d'effet, DCR signe avec un tiers une entente visant la vente de toute ou partie des actions du capital de la Débitrice émises aux termes des Clauses de réorganisation pour un montant supérieur à 850 000 $;

> 3.2.4 La seconde Distribution sera d'un montant égal à 75 % du prix de vente des actions mentionnées au paragraphe 3.2.3 des présentes auquel prix de vente sera déduit un montant de 850 000 $ et sera effectuée dans les trois mois suivant toutes telles transactions afin d'acquitter le paiement au prorata de la portion des Réclamations Admissibles aux Distributions qui n'a pas été acquittée lors de la première Distribution;

[21] S'il est exact que la *L.a.c.c.*, telle qu'en vigueur à l'époque pertinente, c'est-à-dire avant le 18 septembre 2009, ne prévoit pas qu'un tel avantage soit reconnu par le plan d'arrangement, elle n'interdit pas qu'il le soit. Ainsi que le rappelle le juge Farley dans *Re Air Canada* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J.) :

> 6 The Trade creditors also submit that as among the unsecured debt, as the unsecured SP Debt is subordinated to Senior Indebtedness (also unsecured), then the doctrine of subordination requires that the SP Debt be subordinated to all unsecured debt — (that is, not only the Senior Indebtedness but also all unsecured debt). They rely upon what they say is a "fundamental principle of Canadian insolvency law that, excepting only specifically enumerated preferred creditors, all unsecured creditors are entitled to pro rata distribution" and that this principle is reflected in s. 141 of the Bankruptcy and Insolvency Act ("BIA") :
>
> > S. 141 Subject to this Act, all claims proved in a bankruptcy shall be paid rateably.
>
> However, this is a CCAA insolvency proceeding not a BIA one. <u>The jurisprudence in CCAA proceedings is that any plans of arrangement are treated as contracts amongst the parties (including the minority voting against</u>) and that the court in a sanction hearing will review the creditor approved plan to see if it is fair, reasonable and equitable, <u>wherein equitable does not necessarily mean equal</u>. See *Alternative Fuel Systems inc. v. Remington Development Corp.*, [2004] A.J. No. 60, 2004 ABCA 31; *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.).

[22] Le contexte de cette affaire était autre, s'agissant d'un accord de subordination, mais le propos est transposable à l'espèce. Or, le juge de première instance a considéré ici que le plan et l'avantage (limité) conféré aux employés étaient justes, raisonnables et équitables, et ce, en raison des sacrifices importants consentis par ces employés :

> [15] Le tribunal ne croit pas que c'est ce que la débitrice a fait. Elle a fait une offre qui avantage les employés certes, mais cela ne crée pas une priorité en tant que telle. Les arrangements que peuvent convenir les créanciers s'arrêtent là où l'imagination peut aller. Il n'y a rien qui interdit ce qui est offert aux employés. D'ailleurs, il faut noter que ceux-ci ont fait des concessions énormes pour sauver l'entreprise.

[23] Le requérant ne fait pas voir ce en quoi cette détermination serait erronée au point de justifier une éventuelle intervention de la Cour.

[24] On pourrait ajouter qu'il ne paraît pas *a priori* déraisonnable qu'un plan d'arrangement prévoit ce genre d'avantage au bénéfice des employés dans la mesure

où ce même avantage leur reviendra automatiquement, de par la *L.f.i.*, en cas de faillite. Ce n'est évidemment pas dire qu'il faut importer dans la *L.a.c.c.* toutes les mesures propres à la *L.f.i.*, mais un plan régi par la première peut, dans le respect de l'économie générale de la loi, s'inspirer de la seconde ou y emprunter, si les circonstances s'y prêtent.

[25] Dans un autre ordre d'idées, il faut constater que la question de savoir si ce genre d'avantage est légal ou approprié dans le cadre d'un plan d'arrangement est devenue largement caduque puisque, depuis le 18 septembre 2009, la *L.a.c.c.* prévoit ce qui suit en son paragraphe 6(5) :

> **6.** [...]
>
> (5) Le tribunal ne peut homologuer la transaction ou l'arrangement que si, à la fois :
>
> *a)* la transaction ou l'arrangement prévoit le paiement aux employés actuels et anciens de la compagnie, dès son homologation, de sommes égales ou supérieures, d'une part, à celles qu'ils seraient en droit de recevoir en application de l'alinéa 136(1)*d)* de la *Loi sur la faillite et l'insolvabilité* si la compagnie avait fait faillite à la date à laquelle des procédures ont été introduites sous le régime de la présente loi à son égard et, d'autre part, au montant des gages, salaires, commissions ou autre rémunération pour services fournis entre la date de l'introduction des procédures et celle de l'homologation, y compris les sommes que le voyageur de commerce a régulièrement déboursées dans le cadre de l'exploitation de la compagnie entre ces dates;
>
> *b)* il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements prévus à l'alinéa *a)*.

[26] Cela étant, il ne paraît pas opportun de soumettre à la Cour une question que le législateur a désormais résolue.

[27] **La classification des créanciers.** Si l'on comprend bien le jugement de première instance, le requérant a d'abord plaidé que Capital Régional et Coopératif Desjardins, créancière chirographaire, aurait dû, aux fins du vote des créanciers, être placée dans une catégorie à part, en tant que titulaire de débentures susceptibles d'être converties en actions. Le juge n'a pas retenu cette prétention, estimant que :

> [14] Le tribunal croit que la classification a valablement été faite. Le souhait de l'intervenant que Desjardins soit mis dans une classe à part n'a pas de mérite. Tous les créanciers ordinaires ont voté ensemble. Bien que certains puissent avoir plus d'intérêts à l'approbation de la proposition cela ne justifie pas de créer des classes distinctes.

[28] En appel, le requérant voudrait maintenant faire valoir que les employés, d'une part, en raison de l'avantage que leur confère le plan, les fournisseurs, d'autre part, et, enfin, Capital Régional et Coopératif Desjardins ainsi que Desjardins Capital de Développement Estrie inc. auraient dû former trois groupes distincts et qu'il était inapproprié de les faire voter tous ensemble : ce sont peut-être tous des créanciers ordinaires, mais cela ne leur confère pas une communauté d'intérêts telle qu'on puisse

les regrouper dans la même catégorie. Au contraire, « [l]es employés, les fournisseurs et les détenteurs de débentures n'ont pas les mêmes intérêts légaux » (paragr. 103 de la requête pour permission d'appeler), « [l]es discussions quant à l'approbation du plan ne pouvaient donc se tenir convenablement entre les employés, les fournisseurs et les détenteurs de débentures, l'intérêt et le statut légal de chacun étant beaucoup trop différents » (paragr. 111) et « même en présence d'intérêts légaux similaires, il aurait été nécessaire de les séparer considérant que le plan les traite différemment » (paragr. 112).

[29] Sans égard au changement d'orientation de l'argument du requérant, je ne crois pas que la question ainsi soulevée mérite d'être soumise à la Cour et présente un intérêt pour la pratique : les critères relatifs à la classification des créanciers aux fins du vote sont connus et bien établis[14], une jurisprudence abondante existe sur le sujet et la seule tâche dont la Cour serait en réalité saisie consisterait à vérifier si le juge de première instance a appliqué correctement ces règles aux faits particuliers de l'espèce. En l'absence de toute question de portée générale ou de principe, ce moyen d'appel ne peut justifier que la permission soit ici accordée.

[30] Le requérant, il est vrai, affirme qu'« [i]l est évident de la preuve administrée que le regroupement des différents créanciers en une seule catégorie ne visait qu'à noyer le vote de l'Appelant et offrir un veto à CRCD » (paragr. 120 de la requête pour permission d'appeler). Cette affirmation participe de la thèse générale du requérant, exposée plus haut, thèse que le juge de première instance, preuve ouïe, n'a pas retenue. Il s'agit, là encore, d'une question de fait et le requérant, sauf à l'alléguer, ne fait pas voir ce en quoi la conclusion du juge à cet égard serait potentiellement entachée d'une erreur manifeste et dominante qui appellerait l'intervention de la Cour.

[31] **Le caractère déraisonnable et inéquitable du plan et la coercition indue d'un créancier minoritaire.** Je n'insisterai pas sur ce moyen, qui se situe dans le droit fil de la même thèse générale du requérant et ne justifie pas que la permission d'appeler soit accordée. Encore une fois, il s'agit d'une question de fait (ou, au mieux, de fait et de droit), que le juge a considérée, concluant que le requérant n'était pas victime d'une manœuvre illégale ou inéquitable orchestrée par les principaux défendeurs à l'action en oppression, mais qu'il cherchait plutôt à provoquer la faillite de l'intimée, et ce, afin de conserver son recours (au moins pour partie, contre certains des défendeurs). Les arguments énoncés dans la requête pour permission d'appeler ne soulèvent pas véritablement d'erreur manifeste et dominante à cet égard et le requérant invite plutôt la Cour à reprendre *de novo* le débat de première instance. Ceci ne saurait justifier que la permission d'appeler soit accordée[15].

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[14] Voir par exemple la synthèse qu'en font les ouvrages suivants : Janis SARRA, *Rescue! The Companies' Creditors Arrangemenet Act*, Toronto, Thomson Carswell, 2007, p. 233-239; E. Patrick SHEA, *BIA, CCAA & WEPPA. A Guide to the New Bankruptcy & Insolvency Regime*, Markham, Ont., LexisNexis Canada Inc., 2009, p. 60-63; Lloyd W. HOULDEN, Geoffrey B. MORAWETZ & Janis P. SARRA, *The 2010 Annotated Bankruptcy and Insolvency Act*, Toronto, Carswell, 2010, N§149 et N§150.

[15] Par analogie, voir : *Highland Capital Management c. Uniforêt Inc.*, voir *supra*, note 8, paragr. 18.

[32] **Les quittances.** L'article 7.2 du plan d'arrangement approuvé par le juge de première instance comporte les dispositions suivantes :

> **Article 7.2 Quittances**
>
> À la Date de prise d'effet, la Débitrice et/ou les autres Personnes nommées ci-dessous bénéficieront des quittances et des renonciations suivantes, lesquelles prendront effet à l'Heure de prise d'effet :
>
> 7.2.1 Une quittance complète, finale et définitive des Créanciers quant à toute Réclamation contre la Débitrice et une renonciation des Créanciers à exercer tout droit personnel ou réel à l'égard des Réclamations;
>
> 7.2.2 Une quittance complète, finale et définitive des Créanciers quant à toute réclamation, autre qu'une réclamation visée au paragraphe 5.1(2) LACC, qu'ils ont ou pourraient avoir, directement ou indirectement, contre les administrateurs, dirigeants, employés ou autres représentants ou mandataires de la Débitrice en raison ou à l'égard d'une Réclamation Visée et une renonciation des Créanciers à exercer tout droit personnel ou réel à l'égard de toute telle réclamation;
>
> 7.2.3 Une quittance complète, finale et définitive des Créanciers quant à toute réclamation qu'ils ont ou pourraient avoir, directement ou indirectement, contre DCR et Fortin, de même que leurs dirigeants, administrateurs, directeurs, employés, conseillers financiers, conseillers juridiques, banquiers d'affaires, consultants, mandataires et comptables actuels et passés respectifs à l'égard de l'ensemble des demandes, réclamations, actions, causes d'action, demandes reconventionnelles, poursuites, dettes, sommes d'argent, comptes, engagements, dommages-intérêts, décisions, jugements, dépenses, saisies, charges et autres recouvrements au titre d'une créance, d'une obligation, d'une demande ou d'une cause d'action de quelque nature que ce soit qu'un Créancier pourrait avoir le droit de faire valoir à l'encontre de DCR ou Fortin;
>
> 7.2.4 Une quittance complète, finale et définitive des Créanciers quant à toute réclamation qu'ils ont ou pourraient avoir, directement ou indirectement, contre la Débitrice ou le Contrôleur ou leurs administrateurs, dirigeants, employés ou autres représentants ou mandataires ainsi que leurs conseillers juridiques à l'égard de toute mesure prise ou omission faite de bonne foi dans le cadre des Procédures ou de la préparation et la mise en œuvre du Plan ou de tout contrat, effet, quittance ou autre convention ou document créé ou conclu, ou de toute autre mesure prise ou omise relativement aux Procédures ou au Plan, étant entendu qu'aucune disposition du présent paragraphe ne limite la responsabilité d'une Personne à l'égard d'une faute relativement à une obligation expressément formulée qu'elle a aux termes du Plan ou aux termes de toute convention ou autre document conclu par cette Personne après la Date de détermination ou conformément aux modalités du Plan, ni à l'égard du manquement à un devoir de prudence envers quelque autre Personne et survenant après la Date de prise d'effet. À tous égards, la Débitrice et le Contrôleur et leurs employés, dirigeants, administrateurs,

mandataires et conseillers respectifs ont le droit de s'en remettre à l'avis de conseillers juridiques relativement à leurs obligations et responsabilités aux termes du Plan; et

7.2.5 Une quittance complète, finale et définitive de la Débitrice quant à toute réclamation qu'elle a ou pourrait avoir, directement ou indirectement, contre ses administrateurs, dirigeants et employés.

[33] Les quittances prévues aux clauses 7.2.1 et 7.2.4 sont standard et le requérant, qui ne s'en prend pas à la clause 7.2.5, vise surtout la quittance prévue par la clause 7.2.3, qui libère DCR (acronyme désignant Capital Régional et Coopératif Desjardins et Desjardins Capital de Développement Estrie inc.) et Denis Fortin de toute réclamation qu'un créancier de l'intimée pourrait faire valoir contre eux pour quelque cause que ce soit. La requête pour permission d'appeler, à ce sujet, expose notamment que :

145. Le litige entre CRCD et l'Appelant quant au rachat de ses actions en date du 28 février 2006 ne peut être éliminé du simple fait que CRDC contribue au plan d'arrangement de l'Intimée;

146. Une quittance générale et finale au bénéfice de Fortin n'a également rien à voir avec les activités de l'Intimée.

147. D'ailleurs, Fortin agissait comme administrateur de l'entreprise et il est notamment poursuivi pour oppression par l'Appelant.

148. Or, la Loi sur les arrangements avec les créanciers des compagnies limite les quittances et ne permet pas de couvrir une telle réclamation par quittance.[16]

[34] L'article 5.1 *L.a.c.c* prévoit que :

5.1 (1) La transaction ou l'arrangement visant une compagnie débitrice peut comporter, au profit de ses créanciers, des dispositions relativement à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.	**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.
(2) <u>La transaction ne peut toutefois viser des réclamations portant sur</u> des droits contractuels d'un ou de plusieurs créanciers ou fondées sur la fausse représentation ou <u>la conduite injustifiée ou abusive des administrateurs</u>.	(2) <u>A provision for the compromise of claims against directors may not include claims that</u> (a) relate to contractual rights of one or more creditors; or (b) <u>are based on allegations</u> of misrepresentations made by directors to creditors or <u>of wrongful or oppressive</u>
(3) Le tribunal peut déclarer qu'une réclamation contre les administrateurs ne peut faire l'objet d'une transaction s'il est	

16 Voir aussi les paragr. 142, 143 et 152 de la requête pour permission d'appeler.

convaincu qu'elle ne serait ni juste ni équitable dans les circonstances.

(4) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie débitrice est réputé un administrateur pour l'application du présent article.

conduct by directors.

(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.

(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.

[Soulignements ajoutés.]

[35] Dans la mesure où la clause 7.2.3 du plan d'arrangement doit être lue en conjonction avec la clause 7.2.2, qui comporte justement une réserve conforme en tous points au paragr. 5.1(2) *L.a.c.c.*[17], la contestation du requérant paraît à première vue sans objet quant aux administrateurs de l'intimée, dont Denis Fortin, un des administrateurs et des défendeurs à l'action en oppression.

[36] Voici par ailleurs ce qu'écrit le juge de première instance à propos des quittances :

> [16] Pour ce qui est de l'argument concernant la réorganisation du capital-actions ainsi que la possibilité d'accorder des quittances en faveur des tiers, le tribunal fait sien le plan d'argumentation présenté par la débitrice.
>
> [Soulignement ajouté.]

[37] Or, devant la Cour supérieure, se basant principalement sur l'arrêt de la Cour d'appel de l'Ontario dans *A.T.B. Financial v. Metcalfe & Mansfield Alternative Invesments II Corp.*[18], l'intimée faisait à cet égard valoir que la quittance en faveur de DCR était légale et appropriée en l'espèce, considérant que cette quittance a un lien raisonnable avec la réorganisation proposée[19]. Dans l'argumentaire écrit remis au juge de première instance, l'intimée citait les passages suivants de l'arrêt *Metcalfe*[20] :

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17 Ce n'était pas le cas dans l'affaire *Papiers Gaspésia inc. (Arrangement relatif à)*, B.E. 2005BE-85 (C.S.), paragr. 35 à 48, et le juge Chaput, tout en reconnaissant la possibilité d'inclure au plan d'arrangement des quittances envers les tiers, exclut une quittance non conforme à l'article 5.1 *L.a.c.c.* Sur l'impossibilité de consentir une quittance contraire à l'article 5.1, paragr. (2), *L.a.c.c.*, voir aussi : *Royal Penfield inc. (Syndic de)*, [2003] R.J.Q. 2157 (C.S.), paragr. 44 à 48.

18 (2008), 92 O.R. (3d) 513, requête pour autorisation de pourvoi à la Cour suprême rejetée, 19 septembre 2008, 32765.

19 Voir la p. 26, paragr. 112, du plan d'argumentation déposé par l'intimée devant la Cour supérieure. Voir aussi p. 31, paragr. 127 à 130.

20 *Ibid.*, p. 27, paragr. 113.

> [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 analysis 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..

[38] Manifestement, le juge de première instance a estimé que la quittance dont DCR est bénéficiaire selon la clause 7.2.3 du plan d'arrangement répondait à ces exigences.

[39] Le plan d'argumentation produit par l'intimée devant la Cour supérieure et, de même, le plan d'argumentation déposé aux fins du présent débat citent aussi, entre autres, l'affaire *Muscletech Research and Development Inc.*[21], où l'on reconnaît la possibilité, dans le cadre d'un arrangement régi par la *L.a.c.c* de stipuler une quittance en faveur du tiers qui finance la restructuration de l'entreprise débitrice[22]. Or, c'est précisément, en l'espèce, le cas de DCR, qui versera une somme considérable afin de soutenir la réorganisation des affaires de l'intimée dans le cadre du plan d'arrangement.

[40] Il n'est pas inutile de reproduire ici quelques-uns des passages de l'affaire *Muscletech* :

> [7] With respect to the relief sought relating to Claims against Third Parties, the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. <u>In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties</u> arising out of "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other products by

21 (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.).
22 Voir p. 30, paragr. 123, du plan d'argumentation de l'intimée devant la Cour supérieure, voir p. 40, paragr. 183 du plan d'argumentation de l'intimée en opposition à la requête pour permission d'appeler.

the Applicants or any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:

> the Product Liability system vis-à-vis the Non-Applicants appears to be in essence derivative of claims against the Applicants and it would neither be logical nor practical/functional to have that Product Liability litigation not be dealt with on an all encompassing basis.

[8] Moreover, 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. In addition, the Claims Resolution Order, which was not appealed, clearly defines Product Liability Claims to include claims against Third Parties and all of the Objecting Claimants did file Proofs Of Claim settling out in detail their claims against numerous Third Parties.

[9] It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by the ultimate Plan to be put forward to this court. That alone, in my view, would be a sufficient basis to include in the Plan, the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties. In *Canadian Airlines Corp., Re* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.), Paperney J. stated at p. 92:

> While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release.

[Soulignements ajoutés.]

[41] Ultérieurement, la Cour supérieure de justice de l'Ontario, dans une décision rendue dans le même dossier en 2007, écrira que :

> [20] A unique feature of this Plan is the Releases provided under the Plan to Third Parties in respect of claims against them in any way related to "the research, development, manufacture, marketing, sale, distribution, application, advertising, supply, production, use or ingestion of products sold, developed or distributed by or on behalf of" the Applicants (see Article 9.1 of the Plan). It is self-evident, and the Subject Parties have confirmed before this court, that the Contributed Funds would not be established unless such Third Party Releases are provided and accordingly, in my view it is fair and reasonable to provide such Third Party releases in order to establish a fund to provide for distributions to creditors of the Applicants. With respect to support of the Plan, in addition to unanimous approval of the Plan by the creditors represented at meetings of creditors, several other stakeholder groups support the sanctioning of the Plan, including Iovate Health Sciences Inc. and its subsidiaries (excluding the Applicants) (collectively, the "Iovate Companies"), the Ad Hoc Committee of MuscleTech Tort Claimants, GN Oldco, Inc. f/k/a General Nutrition Corporation, Zurich American Insurance Company, Zurich Insurance Company, HVL, Inc. and

> XL Insurance America Inc. It is particularly significant that the Monitor supports the sanctioning of the Plan.
>
> [21] With respect to balancing prejudices, if the Plan is not sanctioned, in addition to the obvious prejudice to the creditors who would receive nothing by way of distribution in respect of their claims, other stakeholders and Third Parties would continue to be mired in extensive, expensive and in some cases conflicting litigation in the United States with no predictable outcome.
>
> [...]
>
> [23] The representative Plaintiffs opposing the sanction of the Plan do not appear to be rearguing the basis on which the class claims were disallowed. <u>Their position on this motion appears to be that the Plan is not fair and reasonable in that, as a result of the sanction of the Plan, the members of their classes of creditors will be precluded as a result of the Third Party Releases from taking any action not only against MuscleTech but against the Third Parties who are defendants in a number of the class actions. I have some difficulty with this submission. As stated above, in my view, it must be found to be fair and reasonable to provide Third Party Releases to persons who are contributing to the Contributed Funds to provide funding for the distributions to creditors pursuant to the Plan. Not only is it fair and reasonable; it is absolutely essential. There will be no funding and no Plan if the Third Party Releases are not provided</u>. The representative Plaintiffs and all the members of their classes had ample opportunity to submit individual proofs of claim and have chosen not to do so, except for two or three of the representative Plaintiffs who did file individual proofs of claim but withdrew them when asked to submit proof of purchase of the subject products. Not only are the claims of the representative Plaintiffs and the members of their classes now barred as a result of the Claims Bar Order, they cannot in my view take the position that the Plan is not fair and reasonable because they are not participating in the benefits of the Plan but are precluded from continuing their actions against MuscleTech and the Third Parties under the terms of the Plan. They had ample opportunity to participate in the Plan and in the benefits of the Plan, which in many cases would presumably have resulted in full reimbursement for the cost of the product and, for whatever reason, chose not to do so.
>
> [...][23]
>
> [Soulignements ajoutés.]

[42] Dans le même sens, on pourra consulter la décision de la Cour supérieure dans *Charles-Auguste Fortier inc. (Arrangement relatif à)*[24], qui fait une étude approfondie de la question et conclut à l'opportunité d'une quittance en faveur de la caution de la société débitrice, caution qui joue un rôle central dans la réorganisation des affaires de celle-ci et sans le concours de laquelle le plan échouera.

[43] La situation de l'espèce est analogue : DCR injectera des sommes substantielles dans la réorganisation de l'intimée en vertu du plan d'arrangement, ce qu'elle ne fera

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23 *Muscletech Research & Development Inc., Re* (2007) 30 C.B.R. (5th) 59 (Ont. S.C.J.).
24 2008 QCCS 5388, J.E. 2009-9.

pas si elle ne peut bénéficier de la quittance prévue par la clause 7.2.3. La requête pour permission d'appeler et les observations présentées à l'audience ne permettent pas de conclure que le requérant conteste ce fait ou conteste l'absence d'une autre source de financement, son argument étant plutôt que cette quittance est sans lien avec les activités de l'entreprise. Avec égards, cet argument ne peut être retenu et, à mon avis, il n'a pas de chance raisonnable de succès devant cette Cour. La permission d'appeler ne saurait donc, sur le fondement de ce moyen, être accordée.

* *

[44] **POUR CES MOTIFS,**

[45] La requête pour permission d'appeler est **REJETÉE**, avec dépens.

MARIE-FRANCE BICH, J.C.A.

M^e Sylvain Racette
Bélanger Sauvé
Pour le requérant

M^e Alain Tardif
M^e Isabelle Vendette
McCarthy Tétreault
Pour l'intimée

Date d'audience : le 2 février 2010

TAB 10

2000 CarswellAlta 1145

Blue Range Resource Corp., Re

In the matter of the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as amended; and in the matter of Blue Range Resources Corporation; Enron Canada Corp., and the Creditor's Committee (Appellants/Appellants) and National Oil-well Canada Ltd. et al. (Respondents/Respondents)

Alberta Court of Appeal

Russell, Sulatycky, Wittmann JJ.A.

Heard: June 15, 2000
Judgment: October 24, 2000
Docket: Calgary Appeal 99-18564, 99-18565, 99-18566, 99-18567, 99-18568, 99-18569, 99-18570, 99-18571, 99-18802

Proceedings: affirmed *Blue Range Resource Corp., Re* (1999), 1999 CarswellAlta 1053, 251 A.R. 1 (Alta. Q.B.)

Counsel: *A. Robert Anderson* and *Scott J. Burrell*, for Enron Canada Corp. and Creditors' Committee.

S. Collins, for TransAlta Utilities Corporation.

D.W. Dear, for Rigel Oil & Gas Ltd.

D. Mann, for Barrington Petroleum Ltd. and PetroCanada Oil & Gas.

K.E. Staroszik, for Founders Energy Ltd.

J.N. Thom, for National-Oilwell Canada Ltd. and Campbell's Industrial Supply Ltd.

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

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Monitor appointed by court obtained order establishing procedure to determine claims of creditors of corporation — Claims bar date was set during which creditors could prove claims — Notices of claim filed after claims bar date by certain creditors were disallowed by monitor — Partial distribution was made by court — Late-filing creditors applied to court for permission to file or amend claims after expiry of claims bar date — Applications were allowed on basis that same test should apply to late-filing creditors under Companies' Creditors Arrangement Act (CCAA) as under Bankruptcy and Insolvency Act (BIA) — Creditor EC Corp. and creditors committee appealed — Appeal dismissed

— Claims bar orders setting out claims procedure ought not to purport to extinguish debt, but simply set deadline for obtaining remedy — Inadvertence alone can be basis for permitting late filing, provided claimant can show it acted in good faith and not in effort to manipulate its position — Any prejudicial effect of permitting claim is relevant factor, as is availability of means to alleviate prejudice — All creditors had acted in good faith and existing creditors suffered no prejudice as result of late filings or amendments — Existing creditors were aware of potential for further claims and that these might be permitted by court — No evidence existed to suggest that existing creditors would have voted differently on plan of arrangement had late-filing creditors filed in time — Value of claims of late-filing creditors was less than one per cent of total of claims filed in time — Fact that existing creditors might receive less money if late claims allowed did not constitute prejudice, since policy of CCAA depends on all legitimate creditors being able to participate in available proceeds — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by Court — Miscellaneous issues

Monitor appointed by court obtained order establishing procedure to determine claims of creditors of corporation — Claims bar date was set during which creditors could prove claims — Notices of claim filed after claims bar date by certain creditors were disallowed by monitor — Partial distribution was made by court — Late-filing creditors applied to court for permission to file or amend claims after expiry of claims bar date — Applications were allowed on basis that same test should apply to late-filing creditors under Companies' Creditors Arrangement Act (CCAA) as under Bankruptcy and Insolvency Act (BIA) — Creditor EC Corp. and creditors committee appealed — Appeal dismissed — Claims bar orders setting out claims procedure ought not to purport to extinguish debt, but simply set deadline for obtaining remedy — Inadvertence alone can be basis for permitting late filing, provided claimant can show it acted in good faith and not in effort to manipulate its position — Any prejudicial effect of permitting claim is relevant factor, as is availability of means to alleviate prejudice — All creditors had acted in good faith and existing creditors suffered no prejudice as result of late filings or amendments — Existing creditors were aware of potential for further claims and that these might be permitted by court — No evidence existed to suggest that existing creditors would have voted differently on plan of arrangement had late-filing creditors filed in time — Value of claims of late-filing creditors was less than one per cent of total of claims filed in time — Fact that existing creditors might receive less money if late claims allowed did not constitute prejudice, since policy of CCAA depends on all legitimate creditors being able to participate in available proceeds — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by *Wittmann J.A.*:

Allen v. Sir Alfred McAlpine & Sons Ltd., [1968] 2 Q.B. 229, [1968] 1 All E.R. 543 (Eng. C.A.) — applied

Cohen, Re (1956), 19 W.W.R. 14, 3 D.L.R. (2d) 528, 36 C.B.R. 21 (Alta. C.A.) — considered

Hogan v. Kolisnyk, [1983] 3 W.W.R. 481, 25 Alta. L.R. (2d) 17, 43 A.R. 17 (Alta. Q.B.) — considered

Kuziw v. Kucheran Estate, 2000 ABCA 226 (Alta. C.A.) — considered

Lethbridge Motors Co. v. American Motors (Can.) Ltd. (1987), 53 Alta. L.R. (2d) 326, 20 C.P.C. (2d) 11, 79 A.R. 321, 40 D.L.R. (4th) 544 (Alta. C.A.) — considered

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

Mount James Mines (Que.) Ltd., Re (1980), 28 O.R. (2d) 271, 33 C.B.R. (N.S.) 227, 110 D.L.R. (3d) 80 (Ont.

2000 CarswellAlta 1145, 2000 ABCA 285, 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352, [2000] A.J. No. 1232

Bktcy.) — considered

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) — considered

Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership (1993), 507 U.S. 380, 113 S. Ct. 1489 (U.S. Tenn.) — considered

Smoky River Coal Ltd., Re, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94 (Alta. C.A.) — considered

Specialty Equipment Cos. Inc., Re (1993), 159 B.R. 236 (U.S. Bankr. N.D. Ill.) — considered

W. Schoeler Trucking Ltd. v. Markel Insurance Co. of Canada (1979), 9 Alta. L.R. (2d) 232, 19 A.R. 196, [1980] I.L.R. 1-1210 (Alta. Dist. Ct.) — considered

312630 British Columbia Ltd. v. Alta Surety Co., 30 C.C.L.I. (2d) 165, 10 B.C.L.R. (3d) 84, [1995] 10 W.W.R. 100, 23 C.L.R. (2d) 273, 61 B.C.A.C. 208, 100 W.A.C. 208 (B.C. C.A.) — applied

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 11 — referred to

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

Generally — considered

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

Generally — considered

s. 6 — considered

s. 12(2)(a)(iii) — referred to

Insurance Act, R.S.A. 1980, c. I-5

s. 205 — referred to

s. 211 — referred to

s. 385 — referred to

Rules considered:

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

Generally — considered

R. 244(4) [en. Alta. Reg. 234/94] — considered

Federal Rules of Bankruptcy Procedure (U.S.)

Generally — referred to

R. 9006(b)(1) — considered

APPEAL by creditor EC Corp. and creditors committee from judgment reported at (1999), 251 A.R. 1 (Alta. Q.B.), permitting creditors to file notices of claim, or amended claims, after expiry of claims bar date.

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

Introduction

1 The *Companies' Creditors Arrangement Act*, R.S.A. 1985, c. C-36, as amended ("*CCAA*"), permits the compromise and resolution of claims of creditors against an insolvent corporation. In this appeal, as part of the ongoing resolution of the insolvency of Blue Range Resources Corporation ("Blue Range"), this Court has been asked to state the applicable criteria in considering whether to allow late claimants to file claims after a stipulated date in an order ("claims bar order").

2 In his decision below, the chambers judge determined that in the circumstances of this case it was appropriate to allow the respondents ("late claimants") to file their claims thus entitling them to participate in the *CCAA* distribution.

Facts

3 Blue Range sought and received court protection from its creditors under the *CCAA* on March 2, 1999. The claims procedure established by PriceWaterhouse Coopers Inc. ("the Monitor"), and approved by the court in a claims bar order, fixed a date of May 7, 1999 at 5:00 p.m. by which all claims were to be filed. Due to difficulties in obtaining the appropriate records, the date was extended in a second order to June 15, 1999 at 5:00 p.m., for the joint venture partners. The relevant orders stated that claims not proven in accordance with the set procedures "shall be deemed forever barred" (A.B.P.01, A.B.P.06). Under this procedure $270,000,000 in claims were filed.

4 The respondent creditors in this appeal fall into two categories: first, those who did not file their Notices of Claim before the relevant dates in the claims bar orders, and second, those who filed their initial claims in time but sought to amend their claims after the relevant dates. All of these creditors applied to the chambers judge for relief from the restriction of the date in the claims bar orders and to have their late or amended claims accepted for consideration by the Monitor.

5 The chambers judge allowed the late and amended claims to be filed. The appellants, Enron Capital Corp. ("Enron") and the Creditor's Committee, seek to have that decision overturned. I granted leave to appeal on January 14, 2000 on the following question:

> What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and

applying the criteria to each case, what is the result? (A.B.928).

Judgment Below

6 The chambers judge found that the applicable section of the *CCAA*, s. 12(2)(iii) did not mandate a claims procedure. He stated that preserving certainty in the *CCAA* process was not a sufficient reason to deny the late claimants a second chance. In his view, taking a strict reading of the claims bar orders would have the effect of denying creditors, who have a logical explanation for their non- compliance with the order, any recovery. While the chambers judge noted that compromise is required by creditors in a *CCAA* proceeding, he did not think it fair that these late claimants be required to compromise 100 per cent of their legitimate claims. In addition, the chambers judge was of the view that process required flexibility and should avoid pitting creditors against one another.

7 Having decided that flexibility in the process was required, the chambers judge then considered an appropriate test for allowing the filing of late claims. Although encouraged by the appellants to adopt an approach similar to that contained in the *United States Bankruptcy Code, Federal Rules of Bankruptcy Procedure*, for Chapter 11 Reorganization Cases, ("*U.S. Bankruptcy Rules*") the chambers judge chose to incorporate the test in place under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Specifically, he found that because the situation of Blue Range was essentially a liquidation, the approach used in the *BIA* was appropriate. Under the *BIA*, late claims are permitted under almost any circumstance provided no injustice is done to other creditors. A late filing creditor under the *BIA* may only share in undistributed assets. Therefore, the chambers judge found that the creditors should be allowed to file late claims, or to amend existing claims late.

Standard of Review

8 It has been recently held by this court that decisions of a *CCAA* supervising judge should only be interfered with in clear cases. Deference to a *CCAA* supervising judge is generally appropriate where the questions before the court deal with management issues and are of necessity matters which must be decided quickly. This issue was addressed by Macfarlane, J.A. in *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) (cited with approval by Hunt, J.A. in *Smoky River Coal Ltd., Re* (1999), 237 A.R. 326 (Alta. C.A.)) as follows at 272:

> ...I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the CCAA. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made...
>
> ...
>
> Orders depend on a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the CCAA.

The chambers judge was exercising his discretion under the *CCAA* in granting an extension of the claims bar dates. However, the criteria upon which that discretion is to be exercised is a matter of legal principle, and therefore on that issue, the standard of review is correctness.

Analysis

9 As a preliminary matter I wish to comment on the nature of the order granted and the notices sent out to the individual creditors. The order dated April 6, 1999 stated in paragraph 2:

> Claims not proven in accordance with the procedures set out in Schedules "A" and "B" shall be deemed forever

barred and may not thereafter be advanced as against Blue Range in Canada or elsewhere. (A.B.P.01)

The first page of Schedule "A" stated in part:

> A Claims' Bar Date of 5:00 p.m. Calgary time on May 7, 1999 has been set by the Alberta Court of Queen's Bench. All claims received by the monitor or postmarked after the Claims' Bar Date will be <u>forever extinguished, barred and will not participate in any voting or distributions in the CCAA proceedings.</u>
>
> [Emphasis added] (A.B.P.03).

The language used in Schedule "A" goes beyond the text of the order. Although it may not be of practical significance, barring the right of a claimant to a remedy is fundamentally different from erasing the debt. The court under the *CCAA* has powers to compromise and determine, but only in accordance with the process prescribed in the statute.

10 It was urged before the court in oral argument by counsel for the appellants that the purpose of the wording of the claims bar orders was to "smoke out" the creditors. I am dubious that the severe wording of the claims bar orders is effective to "smoke out" the creditor who may otherwise lie dormant. The objective of making certain that all legitimate creditors come forward on a timely basis has to be balanced against the integrity and respect for the court process and its orders. Courts should not make orders that are not intended to be enforced in accordance with their terms. All counsel conceded that the court had authority to allow late filing of claims, and that it was merely a matter of what criteria the court should use in exercising that power. It necessarily follows that a claims bar order and its schedule should not purport to "forever bar" a claim without a saving provision. That saving provision could be simply worded with a proviso such as "without leave of the court", which appears to be not only what was contemplated, but what in fact occurred here.

The Appropriate Criteria

11 The appellants advocated the adoption of the criteria under the *U.S. Bankruptcy Rules*, Chapter 11, while the respondents favoured either the application of the tests under the *BIA* or some blending of the two standards.

12 Rule 9006 of the *U.S. Bankruptcy Rules* deals with the extension of time in these circumstances. The relevant portion of the Rule states:

> 9006 (b)(1) ... when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

The key phrase in this section is "excusable neglect". In *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489 (U.S. Tenn. 1993) the U.S. Supreme Court dealt with the interpretation of this phrase. In *Pioneer*, the creditor's attorney, due to disruptions in his legal practice and confusion over the form of notice, failed to file a Notice of Claim in time. The U.S. Supreme Court noted that excusable neglect may extend to "inadvertent delays" (at pg 391) and went on to identify the relevant considerations when determining whether or not a delay is excusable. The Court said at 395:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable", we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

The American authorities also seem to reflect that the burden of meeting all of these elements, including showing the absence of prejudice, lies with the party seeking to file the late claim: e.g. *Specialty Equipment Cos. Inc., Re*, 159 B.R. 236 (U.S. Bankr. N.D. Ill. 1993).

13 The Canadian approach under the *BIA* has been somewhat different. Canadian courts have been willing to allow the filing of late or amended claims under the *BIA* when the claims are delayed due to inadvertence, (which would include negligence or neglect), or incomplete information being available to the creditors, see: *Mount James Mines (Que.) Ltd., Re* (1980), 110 D.L.R. (3d) 80 (Ont. Bktcy.). The Canadian standard under the *BIA* is, therefore, less arduous than that applied under the *U.S. Bankruptcy Rules*.

14 I accept that some guidance can be gained from the *BIA* approach to these types of cases but I find that some concerns remain. An inadvertence standard by itself might imply that there need be almost no explanation whatever for the failure to file a claim in time. In my view inadvertence could be an appropriate element of the standard if parties are able to show, in addition, that they acted in good faith and were not simply trying to delay or avoid participation in *CCAA* proceedings. But I also take some guidance from the *U.S. Bankruptcy Rules* standard because I agree that the length of delay and the potential prejudice to other parties must be considered. To this extent, I accept a blended approach, taking into consideration both the *BIA* and *U.S. Bankruptcy Rules* approaches, bolstered by the application of some of the concepts included in other areas, such as late reporting in insurance claims, and delay in the prosecution of a civil action.

15 In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.), the applicant was an unsecured creditor of Alberta Pacific Terminals Ltd. ("APCL"). Transtec Canada Ltd. was indebted to the applicant and APCL had guaranteed the obligation. APCL sought protection under the *CCAA*. Through oversight, the applicant Lindsay was not sent the relevant *CCAA* materials by APCL and was not included in the *CCAA* proceedings. He did not, therefore, have the opportunity to vote on the plan of arrangement. It is clear, however, that Lindsay at some point during the *CCAA* proceedings became aware of them, and at various stages had his lawyers contact APCL's lawyers to inquire about the process. Despite this knowledge he did not pursue the matter. Lindsay then came to the court seeking permission to sue APCL as a guarantor, potentially recovering considerably more than those creditors who participated in the *CCAA* process.

16 After reviewing all of the facts, Huddart, J. found that "Lindsay (or solicitors on his behalf) made considered, deliberate, decisions not to notify Alberta-Pacific of his claim until after the approval order and then not until after the closing of the share purchase agreement" (para 19). She then went on to conclude that Lindsay preferred not to participate in the *CCAA* process and chose to take his chances later on.

17 In deciding how to exercise her discretion, Huddart, J. applied the following factors: "the extent of the creditor's actual knowledge and understanding of the proceedings; the economic effect on the creditor and debtor company; fairness to other creditors; the scheme and purpose of the *CCAA* and the terms of the plan" (para 56). On these criteria, Huddart, J. found that it would not be equitable to allow Lindsay to pursue a claim as he was well aware of what was going on in the *CCAA* proceedings, chose not to participate, and his late action would cause serious prejudice both to the debtor company and to the other creditors.

18 While *Lindsay* is clearly distinguishable on its facts from the within appeal, the case does highlight the issues of the conduct of the late claimants and the potential prejudice to other creditors and the debtor. Lindsay was the classic creditor "lying in the weeds", waiting for the appropriate moment to pounce. He did not act in good faith and his conduct was potentially prejudicial to other creditors and the debtor company. By avoiding the *CCAA* proceedings, Lindsay was attempting to gain an advantage not available to other creditors.

19 There is further support for a blended approach in several other areas of the law where courts have had to deal with the impact of delays and late filings. In particular, I have considered the courts' treatment of delays in the pros-

ecution of actions and the late filing of notices of claim to insurers.

20 In *Lethbridge Motors Co. v. American Motors (Can.) Ltd.* (1987), 53 Alta. L.R. (2d) 326 (Alta. C.A.) the court had to decide whether or not to allow an action to continue where no steps had been taken by the plaintiff for five years. In deciding that the action could continue, Laycraft, C.J.A. relied on the following test from the English Court of Appeal in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543 (Eng. C.A.) where Salmon L.J. said at 561:

> In order for the application to succeed the defendant must show:
>
> (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.
>
> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
>
> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

Relying on this test, as well as additional refinements, the Court found that the fundamental rule was that it was "necessary for a defendant to show serious prejudice before the court will exercise its jurisdiction to strike out an action for want of prosecution" (at pg. 331). The onus of showing serious prejudice has now been substantially altered as the result of amendments to the *Alberta Rules of Court* in 1994. Rule 244(4) now states that proof of inordinate and inexcusable delay constitutes *prima facie* evidence of serious prejudice: *Kuziw v. Kucheran Estate*, 2000 ABCA 226 (Alta. C.A.).

21 Similar questions can arise in an insurance context where an insured is required to file a proof of loss or other notice of claim within a certain time period under a contract of insurance. For example, s. 205 of the *Insurance Act*, R.S.A. 1980, c. I-5 states:

> 205 [w]here there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to by done or omitted by the insured with respect to the loss and the consequent forfeiture or avoidance of the insurance in whole or in part and the Court considers it inequitable that the insurance should be forfeited or avoided on that ground, the Court may relieve against forfeiture or avoidance on such terms as it considers just.

22 Similar wording is also found in ss. 211 and 385 of the *Insurance Act* and similar legislation exists throughout the common law provinces.

23 When deciding whether to grant relief from forfeiture in an insurance context the Alberta courts have generally adopted a two part test, see: *Hogan v. Kolisnyk* (1983), 25 Alta. L.R. (2d) 17 (Alta. Q.B.). In *Hogan* the court found it appropriate to look first at the conduct of the insured to determine whether the insured is guilty of fraud or wilful misconduct. Second, the court considered whether the insurer had been seriously prejudiced by the imperfect compliance with the statutory provision (at 35). The "noncomplying" party can show that there was no prejudice by showing that the innocent party had actual knowledge of the events in question and was thereby able to investigate the situation.

24 Considering whether the insurer has suffered any prejudice, the court in *Hogan* quoted from a decision of Stevenson, D.C.J. in *W. Schoeler Trucking Ltd. v. Markel Insurance Co. of Canada* (1979), 9 Alta. L.R. (2d) 232

(Alta. Dist. Ct.) at 237 where Stevenson, D.C.J. said "[t]he root of the question is whether or not it (the insurer) would have acted any differently if it had been given notice of the loss when it should have been given notice". In *312630 British Columbia Ltd. v. Alta Surety Co.* (1995), 10 B.C.L.R. (3d) 84 (B.C. C.A.) the B.C. Court of Appeal set out a more recent formulation of the test, namely whether the insurer by reason of the late notice had lost a realistic opportunity to do anything that it might otherwise have done.

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

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

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

27 In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.

National-Oilwell Canada Ltd. ("National")

28 National, and National as the successor in interest to Dosco Supply, a division of Westburne Industrial Enterprises Ltd. ("Dosco") indicate that their claims were filed late due to the unexpected illness and resulting lengthy absence of their credit manager who was in charge of the Blue Range accounts receivable. National submitted the National and Dosco notices of claims on June 7, 1999 (AB V, pgs 538 and 542). National's claim is $58,211.00 and Dosco's claim is $390,369.13. National and Dosco clearly acted in good faith and provided the Notices of Claim as soon as the relevant personnel became aware of the situation.

Campbell's Industrial Supply Ltd. ("Campbell's")

29 Campbell's initial claim in the amount of $14,595.22 was filed prior to the date in the relevant claims bar order. Campbell's then amended its claim on June 25, 1999 and again on July 8, 1999 to $23,318.88. The claim was amended after the relevant date as a result of a representative from Blue Range informing Campbell's that its claim should include invoices sent to Trans Canada Midstream, Berkley Petroleum, Big Bear Exploration and Blue Range Resources Corporation (A.B. 495-496). In addition, there appears to have been some delay due to the Notices of Claim not being sent to the correct Campbell's office. Campbell's acted in good faith throughout and it is in fact arguable that any delay in the proper filing of its claims was actually due to errors on the part of Blue Range rather than its own doing.

TransAlta Utilities Corporation ("TransAlta")

30 TransAlta did not comply with the dates in the claims bar orders. It contends that it did not receive the claims package prior to the relevant dates. It is apparent from the evidence that the claims package was sent to TransAlta at its accounts receivable office, rather than the registered office for service (A.B.432-434). TransAlta was permitted to file its total claim of $120,731.00 by order of the chambers judge dated September 7, 1999. There is no evidence that TransAlta was attempting to circumvent the *CCAA* process. On the contrary, as soon as the appropriate personnel became aware of the situation, TransAlta took the necessary steps to have its Notice of Claim filed.

Petro-Canada Oil and Gas ("PCOG")

31 PCOG filed extensive claims material with the Monitor prior to the relevant dates showing several unsecured claims. The Monitor's draft third interim report indicated that four of PCOG's claims should properly have been classified as secured. The mistake by PCOG was the result of a misapprehension of how operator's liens functioned under the CAPL Operating Procedures incorporated into the contracts giving rise to the claims. PCOG then sought to amend its claims and have them changed from unsecured to secured status (A.B. 554), on July 7, 1999. The change in status would result in claims of $137,981.30 being amended from unsecured to secured. There was no lack of good faith.

Barrington Petroleum Ltd. ("Barrington")

32 Barrington was acquired by Sunoma Energy Corp ("Sunoma") in about September, 1998. An affidavit filed by Sunoma's controller indicates that the financial records of Barrington were found to have been in complete disarray. Barrington's initial Notice of Claim in the amount of $223,940.06 was submitted prior to the relevant date. Barrington received a Notice of Dispute of Claim which approved the claim to the extent of $57,809.37, but disputed the remainder. On reviewing the issue, Barrington's controller determined that Blue Range was correct, but at the same time she identified additional invoices of which she had been unaware (A.B.549-551). On discovering the additional invoices, Barrington then submitted an amended Notice of Claim on July 22, 1999 and an objection to the Notice of Dispute of Claim. Barrington acted in good faith.

Rigel Oil & Gas Ltd. ("Rigel")

33 The full amount of Rigel's Notice of Claim was $146,429.68. This Claim was filed prior to the relevant date and the amount was approved by Blue Range. After the relevant date, on August 12, 1999, Rigel moved to amend and to allege that, despite Blue Range's claims to the contrary, its claim was secured, rather than unsecured. The only issue for Rigel on appeal is if their claim is properly secured can it be accepted because it was not claimed as secured until August 12, 1999.

Halliburton Group Canada Inc. ("Haliburton")

34 Halliburton was in the process of attempting to collect on accounts receivable owed by Big Bear Exploration Ltd. through May and June, 1999. They subsequently became aware, after the relevant date, that a claim in the amount of $11,309.90 was in fact against Blue Range, and should properly have been filed as a Notice of Claim in the *CCAA* proceedings (A.B. 497-499). On making this discovery, Halliburton wrote to the Monitor on July 14, and July 26, 1999 requesting that its claim be included in the *CCAA* proceeding. The Monitor disputed this claim as having been filed too late (A.B. 498). It appears that Halliburton acted in good faith.

Founders Energy Ltd. ("Founders")

35 Founders filed its claim prior to the relevant date, but, due to an oversight, claimed as an unsecured rather than a secured creditor. After filing its initial Notice of Claim, Founders received a Notice of Dispute from Blue Range. Within the 15 day appeal period, but outside the claims bar date, Founders then filed an amended Notice of Claim

claiming a secured interest in the sum of $365,472.39, on July 26, 1999.

Prejudice

36 The timing of these proceedings is a key element in determining whether any prejudice will be suffered by either the debtor corporation or other creditors if the late and late amended claims are allowed. The total of all late and amended claims of the late claimants, secured and unsecured, is approximately $1,175,000. As set out above, in the initial claims bar order, the relevant date was 5:00 p.m. May 7, 1999. This date was extended for joint venture partners to 5:00 p.m. on June 15, 1999. The Plan of Arrangement, sponsored by Canadian Natural Resources Ltd. ("CNRL"), was voted on and passed on July 23, 1999. Status as a creditor, the classification as secured or unsecured, and the amount of a creditor's claim, are relevant to voting: s.6 *CCAA*.

37 Enron and the Creditor's Committee claim that they would be prejudiced if the late claims were allowed because, had they known late claims might be permitted without rigorous criteria for allowance, they might have voted differently on the Plan of Arrangement. Enron in particular submits that it would have voted against the CNRL Plan of Arrangement, thus effectively vetoing the plan, if it had known that late claims would be allowed. This bald assertion after the fact was not sufficient to compel the chambers judge to find this would in fact have been Enron's response. Nowhere else in the evidence is there any indication that late claimants being allowed would have impacted the voting on the different proposed Plans of Arrangement. In addition, materiality is relevant to the issue of prejudice. The relationship of $1,175,000 (which is the total of late claims) to $270,000,000 (which is the total of claims filed within time) is .435 per cent.

38 Also, the contrary is indicated in the Third Interim Report of the Monitor where it is shown in Schedule D-1 (A.B.269) that $2 million was held as an estimate of unsecured disputed claims. Therefore, when considering which Plan of Arrangement to vote for, Enron, and all of the creditors, would have been aware that $2 million could still be legitimately allowed as unsecured claims, and would have been able to assess that potential effect on the amount available for distribution.

39 Further, the late claimants were well known to the Monitor and all of the other creditors. The evidence discloses that officials at Enron received an e-mail from the Monitor on May 18, 1999 indicating that there were several creditors who had filed late, after the first deadline of May 7, and the Monitor thought that even though they were late the court would likely allow them (A.B.1040). Finally, all of the late claimants were on the distribution list as having potential claims. (A.B. 9-148). It cannot be said that these late claimants were lying in the weeds waiting to pounce. On the contrary, all parties were fully aware of who had potential claims, especially Enron and the Creditors Committee.

40 In a *CCAA* context, as in a *BIA* context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the *CCAA* involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: *Cohen, Re* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in *312630 British Columbia Ltd.* It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

Summary of Criteria

41 In considering claims filed or amended after a claims bar date in a claims bar order, a *CCAA* supervising judge should proceed as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

Conclusion

42 Applying the criteria established, I find that the conclusion reached by the chambers judge ought not to be disturbed, and the late claims filed by the respondents should be permitted under the *CCAA* proceedings. The appeal is dismissed.

Appeal dismissed.

END OF DOCUMENT

TAB 11

2000 CarswellAlta 503

Canadian Airlines Corp., Re

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

In the Matter of the Business Corporations Act (Alberta) S.A. 1981, c.B-15., as amended, Section 185

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

Resurgence Asset Management LLC, Applicant and Canadian Airlines Corporation and Canadian Airlines International Ltd., Respondents

Alberta Court of Appeal [In Chambers]

Wittmann J.A.

Heard: May 18, 2000
Judgment: May 29, 2000
Docket: Calgary Appeal 00-18816

Proceedings: (May 12, 2000), Doc. Calgary 0001-05071 [Alta. Q.B.]

Counsel: *D. Haigh, Q.C.*, and *D. Nishimura*, for Applicant.

A.L. Friend, Q.C., and *H.M. Kay, Q.C.*, for Respondents.

S. Dunphy, for Air Canada.

A.J. McConnell, for Bank of Nova Scotia Trust Company of New York and Montreal Trust Co. of Canada.

P.T. McCarthy, Q.C., for Price Waterhouse Coopers.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Applicant was unsecured creditor of C Corp. — Board appointed by A Corp. caused C Corp. to commence proceedings under CCAA under which A Corp. stood to gain substantial benefits — Proposed plan of compromise and arrangement filed under Act — Order made that classification of creditors not be fragmented to exclude A Corp. as separate class from applicant in terms of unsecured creditors, that A Corp. be entitled to vote on plan pursuant to s. 6 of

Act, that there be no separation of unsecured creditors of two divisions of C Corp. for voting purposes, and that votes in respect of claims assigned to A Corp. be recorded and tabulated separately for purpose of consideration in application for court approval of plan — Applicant brought application for leave to appeal that order — Application dismissed — Decisions of supervising judge under Act entitled to considerable deference — Person seeking leave to appeal required to show error in principle of law or palpable and overriding error of fact — Exercise of discretion by reviewing judge not subject to review so long as discretion exercised judicially — Reviewing judge made no error of law — Applicant failed to make out prima facie meritorious case — Granting of leave would likely unduly hinder progress of action — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 6.

Cases considered by *Wittmann J.A.*:

Blue Range Resource Corp., Re (1999), 244 A.R. 103, 209 W.A.C. 103, 12 C.B.R. (4th) 186 (Alta. C.A.) — referred to

Blue Range Resource Corp., Re, (sub nom. *Blue Range Resources Corp., Re)* 250 A.R. 172, (sub nom. *Blue Range Resources Corp., Re)* 213 W.A.C. 172, 15 C.B.R. (4th) 160, 2000 ABCA 3 (Alta. C.A. [In Chambers]) — referred to

Blue Range Resource Corp., Re (2000), (sub nom. *Blue Range Resources Corp., Re)* 250 A.R. 239, (sub nom. *Blue Range Resources Corp., Re)* 213 W.A.C. 239, 15 C.B.R. (4th) 192 (Alta. C.A. [In Chambers]) — referred to

Fairview Industries Ltd., Re (1991), 11 C.B.R. (3d) 71, (sub nom. *Fairview Industries Ltd., Re (No. 3))* 109 N.S.R. (2d) 32, (sub nom. *Fairview Industries Ltd., Re (No. 3))* 297 A.P.R. 32 (N.S. T.D.) — referred to

Med Finance Co. S.A. v. Bank of Montreal (1993), 24 B.C.A.C. 318, 40 W.A.C. 318, 22 C.B.R. (3d) 279 (B.C. C.A.) — referred to

Multitech Warehouse Direct Inc., Re (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) — referred to

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

Northland Properties Ltd., Re (1988), 31 B.C.L.R. (2d) 35, 73 C.B.R. (N.S.) 166 (B.C. S.C.) — referred to

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

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

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) — considered

Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp. (1988), 19 C.P.C. (3d) 396 (B.C. C.A.) — referred to

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

Savage v. Amoco Acquisition Co. (1988), 59 Alta. L.R. (2d) 260, 68 C.B.R. (N.S.) 154, 40 B.L.R. 188, (sub nom. *Amoco Acquisition Co. v. Savage)* 87 A.R. 321 (Alta. C.A.) — referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — referred to

Smoky River Coal Ltd., Re, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 237 A.R. 83, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 197 W.A.C. 83, 1999 ABCA 62 (Alta. C.A.) — referred to

Smoky River Coal Ltd., Re, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94 (Alta. C.A.) — considered

Sovereign Life Assurance Co. v. Dodd (1891), [1891-4] All E.R. Rep. 246, [1892] 2 Q.B. 573 (Eng. C.A.) — referred to

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

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

Statutes considered:

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

s. 2 "secured creditor" — considered

s. 2 "unsecured creditor" — considered

s. 4 — considered

s. 5 — considered

s. 6 — considered

s. 6(a) — considered

s. 6(b) — considered

s. 13 — considered

APPLICATION for leave to appeal from judgment reported at (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.).

Memorandum of decision. ***Wittmann J.A.*****:**

Introduction

1 This is an application for leave to appeal the decision of Paperny, J. made on May 12, 2000, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (*CCAA*). The applicant, Resurgence Asset Management LLC (Resurgence), is an unsecured creditor by virtue of its holding 58.2 per cent of U.S.

2000 CarswellAlta 503, 2000 ABCA 149, 80 Alta. L.R. (3d) 213, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120, [2000] A.J. No. 610

$100,000,000.00 unsecured notes issued by Canadian Airlines Corporation (CAC)

2 CAC and Canadian Airlines International Ltd. (CAIL) (collectively Canadian) commenced proceedings under the *CCAA* on March 24, 2000.

3 A proposed Plan of Compromise and Arrangement (the Plan) has been filed in this matter regarding CAC and CAIL, pursuant to the CCAA.

4 The decision of Paperny, J. May 12, 2000 (the Decision) ordered, among other things, that the classification of creditors not be fragmented to exclude Air Canada as a separate class from Resurgence in terms of the unsecured creditors; that Air Canada should be entitled to vote on the Plan pursuant to s. 6 of the *CCAA* at the creditors' meeting to be held May 26, 2000; that there be no separation of unsecured creditors of CAC from unsecured creditors of CAIL for voting purposes; and that votes in respect of claims assigned to Air Canada, be recorded and tabulated separately, for the purpose of consideration in the application for court approval of the Plan (the Fairness Hearing).

Leave to Appeal Under the CCAA

5 The section of the *CCAA* governing appeals to this Court is as follows:

> 13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

6 The criterion to be applied in an application for leave to appeal pursuant to the *CCAA* is not in dispute. The general criterion is embodied in the concept that there must be serious and arguable grounds that are of real and significant interest to the parties: *Re Multitech Warehouse Direct Inc.* (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) at 63; *Re Smoky River Coal Ltd.* (1999), 237 A.R. 83 (Alta. C.A.); *Re Blue Range Resource Corp.* (1999), 244 A.R. 103 (Alta. C.A.); *Re Blue Range Resource Corp.* (2000), 15 C.B.R. (4th) 160 (Alta. C.A. [In Chambers]); *Re Blue Range Resource Corp.* (2000), 15 C.B.R. (4th) 192 (Alta. C.A. [In Chambers]).

7 Subsumed in the general criterion are four applicable elements which originated in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C. C.A.), and were adopted in *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279 (B.C. C.A.). McLachlin, J.A. (as she then was) set forth the elements in *Power Consolidated* as follows at p.397:

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

These elements have been considered and applied by this Court, and were not in dispute before me as proper elements of the applicable criterion.

Facts

8 On or about October 19, 1999, Air Canada announced its intention to make a bid for CAC and to proceed to complete a merger subject to a restructuring of Canadian's debt. On or about November 5, 1999, following a ruling by

the Quebec Superior Court, a competing offer by Airline Industry Revitalization Co. Inc. was withdrawn and Air Canada indicated that it would proceed with its offer for CAC.

9 On or about November 11, 1999, Air Canada caused the incorporation of 853350 Alberta Ltd. (853350), for the sole purpose of acquiring the majority of the shares of CAC. At the time of incorporation, Air Canada held 10 per cent of the shares of 853350. Paul Farrar, among others, holds the remaining 90 per cent of the shares of 853350.

10 On or about November 11, 1999, Air Canada, through 853350, offered to purchase the outstanding shares of CAC at a price of $2.00 per share for a total of $92,000,000.00 for all of the issued and outstanding voting and non-voting shares of CAC.

11 On or about January 4, 2000, Air Canada and 853350 acquired 82 per cent of CAC's outstanding common shares for approximately $75,000,000.00 plus the preferred shares of CAIL for a purchase price of $59,000,000.00. Air Canada then replaced the Board of Directors of CAC with its own nominees.

12 Substantially all of the aircraft making up the fleet of Canadian are held by Air Canada through lease arrangements with various lessors or other aircraft financial agencies. These arrangements were the result of negotiations with lessors, jointly conducted by Air Canada and Canadian.

13 In general, these arrangements include the following:

(i) the leases have been renegotiated to reflect contemporary fair market value (or below) based on two independent desk top valuations; and

(ii) the present value of the difference between the financial terms under the previous lease arrangements and the renegotiated fair market value terms was characterized as "unsecured deficiency," reflected in a Promissory Note payable to the lessor from Canadian and assigned by the lessor to Air Canada.

14 In the result, Air Canada has acquired or is in the process of acquiring all but eight of the deficiency claims of aircraft lessors or financiers listed in Schedule "B" to the Plan in the total amount of $253,506.944.00. Air Canada intends to vote those claims as an unsecured creditor under the Plan.

15 The executory contracts claims listed in Schedule "B" to the Plan total $110,677,000.00, of which $108,907,000.00 is the claim of Loyalty Management Group Canada Inc. (Loyalty), an entity with a long term contract with Canadian to purchase air miles. The claim is subject to an agreement of settlement between Loyalty, Canadian and Air Canada. Air Canada was assigned the Loyalty unsecured claim.

16 In the Plan, all unsecured creditors of both CAC and CAI are grouped in the same class for voting purposes.

17 Pursuant to the Plan, unsecured creditors will receive a payment of $0.12 on the dollar for each $1.00 of their claim unless the total amount of unsecured claims exceeds $800 million, in which case, they will receive less. Air Canada will fund this Pro Rata Cash Amount. As a result of the assignments of the deficiency amounts in favour of Air Canada, if the Plan is approved, Air Canada will notionally be paying a substantial proportion of the Pro Rata Cash Amount to itself.

18 The Plan further contemplates Air Canada becoming the 100 per cent owner of Canadian through 853350.

19 On April 7, 2000, an Order was granted by Paperny, J., directing that the Plan be filed by the Petitioners; establishing a claims dispute process; authorizing the calling of meetings for affected creditors to vote on the Plan to

be held on May 26, 2000; authorizing the Petitioners to make application for an Order sanctioning the Plan on June 5, 2000; and providing other directions.

20 The April 7, 2000 Order established three classes of creditors: (a) the holders of Canadian Airlines Corporation 10 per cent Senior Secured Notes due 2005 (the Secured Noteholders); (b) the secured creditors of the Petitioners affected by the Plan (the Affected Secured Creditors); and (c) the unsecured creditors affected by the Plan (the Affected Unsecured Creditors).

21 On April 25, 2000, the Petitioners filed and served the Plan, in accordance with the Order of April 7, 2000. By Notice of Motion dated April 27, 2000, Resurgence brought an application, among other things, seeking "directions as to the classification and voting rights of the creditors ... (and) the quantum of the 'deficiency claims' assigned to Air Canada." Resurgence sought to have Air Canada excluded from voting as an unsecured creditor unless segregated into a separate class. Resurgence also sought to have the holders of the unsecured notes vote as a separate class.

22 The result of the April 27, 2000 motion by Resurgence is the Decision.

The Decision

23 In the Decision, the supervising chambers judge referred to her order of April 14, 2000, wherein she approved transactions involving the re-negotiation of the aircraft leases. She referred to "about $200,000,000.00 worth of concessions for CAIL" as "concessions or deficiency claims" which were quantified and reflected in promissory notes which were assigned to Air Canada in exchange for its guarantee of the aircraft leases. The monitor approved of the method of quantifying the claims and Paperny, J. approved the transactions, reserving the issue of classification and voting to her May 12 Decision.

24 The Plan provides for one class of unsecured creditor. The unsecured class is composed of a number of types of unsecured claims including executory contracts (e.g. Air Canada from Loyalty) unsecured notes (e.g. Resurgence), aircraft leases (e.g. Air Canada from lessors), litigation claims, real estate leases and the deficiencies, if any, of the senior secured noteholders.

25 In seeking to have Air Canada vote the promissory notes in a separate class Resurgence argued several factors before Paperny, J., as set out at pp. 4-5 of the Decision as follows:

> 1. The Air Canada appointed board caused Canadian to enter into these *CCAA* proceedings under which Air Canada stands to gain substantial benefits in its own operations and in the merged operations and ownership contemplated after the compromise of debts under the plan.
>
> 2. Air Canada is providing the fund of money to be distributed to the Affected Unsecured Creditors and will, therefore, end up paying itself a portion of that money if it is included in the Affected Unsecured Creditors' class and permitted to vote.
>
> 3. Air Canada gave no real consideration in acquiring the deficiency claims and manufactured them only to secure a 'yes' vote.

26 She then recited the argument made by Air Canada and Canadian to the effect that the legal rights associated with Air Canada's unsecured claims are the same as those associated with the other affected unsecured claimants, and that the matters raised by Resurgence relating to classification are really matters of fairness more appropriately dealt with in a Fairness Hearing scheduled to be held June 5, 2000.

27 After observing that the *CCAA* offers no guidance with respect to the classification of claims, beyond identifying secured and unsecured categories and the possibility of classes within each category, and that the process has

developed in case law, Paperny, J. embarked on a detailed analysis and consideration of the case law in this area including *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.); *Sovereign Life Assurance Co. v. Dodd* (1891), [1892] 2 Q.B. 573 (Eng. C.A.); *Re Fairview Industries Ltd.* (1991), 11 C.B.R. (3d) 71 (N.S. T.D.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.); *Re Woodward's Ltd.* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.); *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.) at 626; *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.); *Re Wellington Building Corp.*, [1934] O.R. 653, 16 C.B.R. 48 (Ont. S.C.). Paperny, J. also referred to an oft-cited article "Reorganization under the Companies Creditors Arrangement Act" by S. E. Edwards (1947), 25 Can. Bar Rev. 587. She concluded her legal analysis at pp.12-13 by setting forth the principles she found to be applicable in assessing commonality of interest as an appropriate test for the classification of creditors:

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

The Standard of Review and Leave Applications

28 The elements of the general criterion cannot be properly considered in a leave application without regard to the standard of review that this Court applies to appeals under the *CCAA*. If leave to appeal were to be granted, the applicable standard of review is succinctly set forth by Fruman, J.A. in *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) where she stated for the Court at p.95:

> .... this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the Chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

In another recent *CCAA* case from this Court, *Re Smoky River Coal Ltd.* (1999), 237 A.R. 326 (Alta. C.A.), Hunt, J.A., speaking for the unanimous Court, extensively reviewed the history and purpose of the *CCAA*, and observed at p.341:

> The fact that an appeal lies only with leave of an appellate court (s. 13 *CCAA*) suggests that Parliament, mindful that *CCAA* cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.

29 The standard of review of this Court, in reviewing the *CCAA* decision of the supervising judge, is therefore one of correctness if there is an error of law. Otherwise, for an appellate court to interfere with the decision of the supervising judge, there must be a palpable and overriding error in the exercise of discretion or in findings of fact.

Statutory Provisions

30 The *CCAA* includes provisions defining secured creditor, unsecured creditor, refers to classes of them, and provides for court approval of a plan of compromise or arrangement in the following sections:

2. Interpretation

.....

"secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds;

.....

"Unsecured creditor" means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issue under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.

Compromises and Arrangements

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 a manner as the court directs.

5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor 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 courts 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 receiving 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.

Classes of Creditors

31 It is apparent from a review of the foregoing sections that division into classes of creditors within the unsecured and secured categories may, in any given case, materially affect the outcome of the vote referenced in section 6. Compliance with section 6 triggers the ability of the court to approve or sanction the Plan and to bind the parties referenced in s. 6(a) and 6(b) of the *CCAA*. In argument before me, it was conceded by the applicant that Resurgence would not have the ability to ensure approval of the Plan by casting its vote if Air Canada were to be excised from the unsecured creditor category into a separate class. Conversely, counsel for Resurgence candidly admitted that Resurgence would effectively have a veto of the Plan if Air Canada were segregated into a separate class of unsecured creditor.

Application of the Criteria for Leave to Appeal

32 The four elements of the general criterion are set out in paragraph [7]. The first and second elements are satisfied in this case. The points raised on appeal are of significance to the action. If Resurgence succeeds, it obtains a veto. If it does not succeed, and it votes as a member of the unsecured creditors class with Air Canada, Air Canada can control the vote of the unsecured creditors.

33 In terms of the points on appeal being of significance to the practice, it may be that an appellate court's views in this province on the classification of unsecured creditors issue is desirable, there being no appellate authority from this Court on this issue. Although I have doubt as to the significance of this element of the general criterion in the context of the facts of this case, I am prepared for the purposes of this application to treat this element as having being satisfied.

34 The third element is whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous. In my view, the proper interpretation of this element is not a mutually exclusive application of an appeal being either meritorious or frivolous. Rather, the appeal must be *prima facie* meritorious; if it is not *prima facie* meritorious, this element is not satisfied.

35 I find that the appeal on the points raised from the Decision is not *prima facie* meritorious. In the plain ordinary meaning of the words of this element, on first impression, there must appear to be an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way. It is precisely this kind of a factor which breathes life into the modifier "*prima facie*" meritorious.

36 I have carefully reviewed all of the cases referred to by the supervising chambers judge and the principles she derived from them. In my view, she made no error in law.

37 In the exercise of her discretion, she decided neither to allow the applicant's motion to excise Air Canada from the unsecured creditors class nor to prohibit Air Canada from voting. She also declined, on the facts established before her, to separate creditors of CAC from creditors of CAIL for voting purposes. She did, however, order that Air Canada's vote be recorded and tabulated and indicated that this will be considered at the Fairness Hearing.

38 It was strenuously argued before me by the applicant, that deferring classification and voting issues to the

Fairness Hearing was an error of law or principle in and of itself.

39 The argument was put in terms that if, on a proper classification of unsecured creditors, Air Canada was removed from the unsecured class, and Resurgence vetoed the Plan, the matter of a Fairness Hearing would never arise. While that may be true, it does not follow that there is any error in law in what the supervising judge did. She concluded that the separate tabulation of the votes will allow the voice of the unsecured creditors to be heard, while, at the same time, permit, rather than rule out the possibility, that the Plan might proceed. This approach is consistent with the purpose of the *CCAA* as articulated in many of the authorities in this country.

40 The supervising chambers judge also refused to exclude Air Canada from voting on the basis that the legal rights attached to the notes held by Air Canada were valid. Resurgence argued that because Air Canada had other interests in the outcome of the Plan, it should be excluded from voting as an unsegregated secured creditor. Paperny, J. held that this was an issue of fairness, as was the fact that Air Canada was really voting on its own reorganization. She did not err in principle. She expressly acknowledged the authorities that, on different facts, either allowed different classes or excluded a vote. See, for example, *Re Woodward's Ltd.* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.); *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 166 (B.C. S.C.); *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.).

41 The fourth element of the general criterion is whether the appeal will unduly hinder the progress of the action. In other words, will the delay involved in prosecuting, hearing and deciding the appeal be of such length so as to unduly impede the ultimate resolution of the matter by a vote or court sanction? The approach of the supervising judge to the issues raised by the applicant is that its concerns will be seriously addressed at the Fairness Hearing scheduled for June 5, 2000, pursuant to s.6 of the *CCAA*, provided the creditors vote to adopt the Plan.

42 This element has at its root the purpose of the *CCAA*; the role of the supervising judge; the need for a timely and orderly resolution of the matter; and the effect on the interests of all parties pending a decision on appeal. The comments of McFarlane, J.A. in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) are particularly apt where he stated as follows at p.272:

> Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this Court on discreet questions of law. But I am of the view that this Court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial Court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.
>
> A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory or proceedings for which he has no further responsibility.
>
> Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

43 In that case, it appears that McFarlane, J.A. was satisfied that the first three elements of the criteria had been met, i.e. that there "may be an arguable case for the petitioners to present to a panel of this court on discrete [sic] questions of law".

44 It was argued before me that an appeal would give rise to an uncertainly of process and a lack of confidence in it; that the creditors, or some of them, may be inclined to withdraw support for the Plan that would otherwise be forthcoming, but for the delay. None of the parties tendered affidavit evidence on this issue.

45 Nowhere in any of the authorities has the issue of onus in meeting the elements the general criterion been prominent. I am of the view that the onus is on the applicant. That onus would include the applicant producing at least some evidence on the fourth element to shift the onus to the respondents, even though it involves proving a negative, i.e. that there will not be any material adverse impact as the result of the delay occasioned by an appeal. That evidence is lacking in this case. It is lacking on both sides but the respondents do not have an initial onus in this regard. Therefore, I find that the fourth element has not been established by the applicant.

46 The last step in a proper analysis in the context of a leave application is to ascribe appropriate weight to each of the elements of the general criterion and decide over all whether the test has been met. In most cases, the last two elements will be more important, and ought to be ascribed more weight than the first two elements. The last two elements here have not been met while the first two arguably have. In the result, I am satisfied that the applicant has not met the threshold for leave to appeal on the basis of the authorities, and I am therefore denying the application.

Conclusion

47 The application for leave to appeal the Decision is dismissed on the basis that there is no *prima facie* meritorious case and that the granting of leave would likely unduly hinder the progress of the action.

Application dismissed.

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