Court File No. CV-13-10274-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 8440522 CANADA INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS INC., AND DATA & AUDIO-VISUAL ENTERPRISES HOLDINGS INC.

Applicants

BOOK OF AUTHORITIES
(Motion of Amdocs Canadian Managed Services, Inc. and Amdocs Software Systems Limited, Returnable October 2, 2014)

September 23, 2014

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TAB 1

2009 ONCA 833
Ontario Court of Appeal

Nortel Networks Corp., Re

2009 CarswellOnt 7383, 2009 ONCA 833, [2009] O.J. No. 4967, 184 A.C.W.S. (3d) 300, 2010 C.L.L.C. 210-005, 256 O.A.C. 131, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, 99 O.R. (3d) 708

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

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Donald Sproule, David D. Archibald and Michael Campbell on their own behalf and on behalf of Former Employees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (Appellants) and Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor (Respondents)

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905 and/or 1915, George Borosh and other retirees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (Appellants) and Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor (Respondents)

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

Heard: October 1, 2009
Judgment: November 26, 2009*
Docket: CA C50986, C50988

Proceedings: affirming *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3583, 55 C.B.R. (5th) 68, 75 C.C.P.B. 233 (Ont. S.C.J. [Commercial List])

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Lyndon A.J. Barnes, Adam Hirsh for Respondents, Board of Directors of Nortel Networks Corporation, Nortel Networks Limited
Benjamin Zarnett for Monitor, Ernst & Young Inc.
Gavin H. Finlayson for Informal Nortel Noteholder Group
Thomas McRae for Nortel Canadian Continuing Employees
Massimo Starnino for Superintendent of Financial Services

Alex MacFarlane, Jane Dietrich for Official Committee of Unsecured Creditors

Subject: Insolvency; Constitutional; Employment; Public; Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

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

Telecommunications company entered protection under Companies' Creditors Arrangement Act — Company ceased making secured payments — Motion by former employees and union for continued benefits as well as severance and termination pay was dismissed — Trial judge found poor financial performance of company, which was insolvent, was important consideration — Trial judge found proceedings were at early stage and no classification of creditors had occurred — Trial judge found company had breached terms of collective agreement with union, and to former employees not covered by agreement — Trial judge found claims were unsecured — Trial judge found s. 11.3 of Act could not operate to force payment of claim, as underlying services were provided before initial order — Trial judge found s. 11.3 should be construed narrowly — Union and former employees made separate appeals, which were heard together — Appeals dismissed — Trial judge was correct that stay was necessary — Stay provisions are important part of restructuring process under Act — Periodic payments were not for services rendered, and were not excluded by s. 11.3(a) of Act — Fact that rights to payment were vested and could be enforced under earlier collective agreements indicated they were not for current services — Fact that at time of hearing business was likely to be sold rather than restructured did not affect order.

Constitutional law --- Distribution of legislative powers — Relation between federal and provincial powers — Paramountcy of federal legislation — Statutes governing labour and employment — Miscellaneous

Telecommunications company entered protection under Companies' Creditors Arrangement Act — Company ceased making secured payments — Motion by former employees and union for continued benefits as well as severance and termination pay was dismissed — Trial judge found poor financial performance of company, which was insolvent, was important consideration — Trial judge found proceedings were at early stage and no classification of creditors had occurred — Trial judge found company had breached terms of collective agreement with union, and to former employees not covered by agreement — Trial judge found claims were unsecured — Trial judge found s. 11.3 of Act could not operate to force payment of claim, as underlying services were provided before initial order — Trial judge found key factor was not payment obligation arose but rather when services performed — Trial judge found s. 11.3 should be construed narrowly — Union and former employees made separate appeals, which were heard together — Appeals dismissed — Trial judge was correct that stay was necessary — CCAA overrides provincial Employment Standards Act which requires immediate payment of termination and severance obligations — Paramountcy doctrine dictated that intent of parliament to freeze debt obligations through Act would be frustrated if stay order did not apply to statutory termination and severance payments regarding past services.

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Metropolitan Toronto Police Services Board v. Ontario (Municipal Employees Retirement Board) (1999), 178 D.L.R. (4th) 440, 45 O.R. (3d) 622, 22 C.C.P.B. 1, 123 O.A.C. 384, 1999 CarswellOnt 2669 (Ont. C.A.) — considered

Mirant Canada Energy Marketing Ltd., Re (2004), 1 C.B.R. (5th) 252, 2004 CarswellAlta 352, 2004 ABQB 218, 36 Alta. L.R. (4th) 87 (Alta. Q.B.) — referred to

Multiple Access Ltd. v. McCutcheon (1982), 1982 CarswellOnt 128, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, 44 N.R. 181, 18 B.L.R. 138, 1982 CarswellOnt 738 (S.C.C.) — considered

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — considered

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s. 11 — referred to

s. 11(3) — considered

s. 11(4) — referred to

s. 11(5) — referred to

s. 11.01(a) [en. 2005, c. 47, s. 128] — referred to

s. 11.3(a) [en. 1997, c. 12, s. 124] — considered

Employment Standards Act, 2000, S.O. 2000, c. 41
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APPEALS by union and former employees from judgment reported at *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3583, 55 C.B.R. (5th) 68, 75 C.C.P.B. 233 (Ont. S.C.J. [Commercial List]), dismissing motion for continued payments under collective agreement.

***S.T. Goudge, K.N. Feldman JJ.A.*:**

1 On January 14, 2009, the Nortel group of companies (referred to in these reasons as “Nortel”) applied for and was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, (”*CCAA*”).

2 In order to provide Nortel with breathing space to permit it to file a plan of compromise or arrangement with the court, that order provided, *inter alia*, a stay of all proceedings against Nortel, a suspension of all rights and remedies against Nortel, and an order that during the stay period, no person shall discontinue, repudiate, or cease to perform any contract or agreement with Nortel.

3 The CAW-Canada (”Union”) represents employees of Nortel at two sites in Ontario. The Union and Nortel are parties to a collective agreement covering both sites. On April 21, 2009, the Union and a group of former employees of Nortel (”Former Employees”) each brought a motion for directions seeking certain relief from the order granted to Nortel on January 14, 2009. On June 18, 2009, Morawetz J. denied both motions.

4 The Union and the Former Employees both appealed from that decision. Their appeals were heard one after the other on October 1, 2009. The appeal of the Former Employees was supported by a group of Canadian non-unionized employees, whose employment with Nortel continues. Nortel was supported in opposing the appeals by the board of directors of two of the Nortel companies, an informal Nortel noteholders group, and the Official Committee of Unsecured Creditors of Nortel.

5 We will address each of the two appeals in turn.

The Union Appeal

Background

6 The collective agreement between the Union and Nortel sets out the terms and conditions of employment of the 45 employees that have continued to work for Nortel since January 14, 2009. The collective agreement also obliges Nortel to make certain periodic payments to unionized former employees who have retired or been terminated from Nortel. The three kinds of periodic payments at issue in this proceeding are monthly payments under the Retirement Allowance Plan (”RAP”), payments under the Voluntary Retirement Option (”VRO”), and termination and severance payments to unionized employees who have been terminated or who have severed their employment at Nortel.

7 Since the January 14, 2009 order, Nortel has continued to pay the continuing employees their compensation and benefits

as required by the collective agreement. However, as of that date, it ceased to make the periodic payments at issue in this case.

8 The Union's motion requested an order directing Nortel to resume those periodic payments as required by the collective agreement. The Union's argument hinges on s. 11.3(a) of the *CCAA*. At the time this appeal was argued, it read as follows:[1]

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

9 The Union's argument before the motion judge was that the collective agreement is a bargain between it and Nortel that ought not to be divided into separate obligations and therefore the "compensation" for services performed under it must include all of Nortel's monetary obligations, not just those owed specifically to those who remain actively employed. The Union argued that the contested periodic payments to Former Employees must be considered part of the compensation for services provided after January 14, 2009, and therefore exempted from the order of that date by s. 11.3(a) of the *CCAA*.

10 The motion judge dismissed this argument. The essence of his reasons is as follows at para. 67:

> The flaw in the argument of the Union is that it equates the crystallization of a payment obligation under the Collective Agreement to a provision of a service within the meaning of s. 11.3. The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view, some current activity by a service provider post-filing that gives rise to a payment obligation post-filing. The distinction being that the claims of the Union for termination and severance pay are based, for the most part, on services that were provided pre-filing. Likewise, obligations for benefits arising from RAP and VRO are again based, for the most part, on services provided pre-filing. The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

11 The Union challenges this conclusion.

12 In this court, neither the Union nor any other party argues that Nortel's obligation to make the contested periodic payments should be decided by arbitration under the collective agreement rather than by the court.

13 Nor does the Union argue that any of the unionized former employees, who would receive these periodic payments, have themselves provided services to Nortel since the January 14, 2009 order.

14 Rather, the Union reiterates the argument it made at first instance, namely that these periodic payments are protected by s. 11.3(a) of the *CCAA* as payment for service provided after the January 14, 2009 order was made by the Union members who have continued as employees of Nortel.

15 In our opinion, this argument must fail.

Analysis

16 Two preliminary points should be made. First, as the motion judge wrote at para. 47 of his reasons, the acknowledged purpose of the *CCAA* 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. The primary instrument provided by the *CCAA* to achieve its purpose is the power of the court to issue a broad stay of proceedings under s. 11. That power includes the power to stay the debt obligations of the company. The order of January 14, 2009 is an exercise of that power, and must be read in the context of the purpose of the legislation. Nonetheless, it is important to underline that, while that order stays those obligations, it does not eliminate them.

17 Second, we also agree with the motion judge when he stated at para. 66:

> In my view, section 11.3 is an exception to the general stay provision authorized by section 11 provided for in the Initial Order. As such, it seems to me that section 11.3 should be narrowly construed.

18 Because of s. 11.3(a) of the *CCAA*, the January 14, 2009 order cannot stay Nortel's obligation to make immediate payment for the services provided to it after the date of the order.

19 What then does the collective agreement require of Nortel as payment for the work done by its continuing employees? The straightforward answer is that the collective agreement sets out in detail the compensation that Nortel must pay and the benefits it must provide to its employees in return for their services. That bargain is at the heart of the collective agreement. Indeed, as counsel for the Union candidly acknowledged, the typical grievance, if services of employees went unremunerated, would be to seek as a remedy not what might be owed to former employees but only the payment of compensation and benefits owed under the collective agreement to those employees who provided the services. Indeed, that package of compensation and benefits represents the commercially reasonable contractual obligation resting on Nortel for the supply of services by those continuing employees. It is that which is protected by s. 11.3(a) from the reach of the January 14, 2009 order: see *Mirant Canada Energy Marketing Ltd., Re* (2004), 36 Alta. L.R. (4th) 87 (Alta. Q.B.).

20 Can it be said that the payment required for the services provided by the continuing employees of Nortel also extends to encompass the periodic payments to the former employees in question in this case? In our opinion, for the following reasons the answer is clearly no.

21 The periodic payments to former employees are payments under various retirement programs, and termination and severance payments. All are products of the ongoing collective bargaining process and the collective agreements it has produced over time. As Krever J.A. wrote regarding analogous benefits in *Metropolitan Toronto Police Services Board v. Ontario (Municipal Employees Retirement Board)* (1999), 45 O.R. (3d) 622 (Ont. C.A.), at 629, it can be assumed that the cost of these benefits was considered in the overall compensation package negotiated when they were created by predecessor collective agreements. These benefits may therefore reasonably be thought of as deferred compensation under those predecessor agreements. In other words, they are compensation deferred from past agreements but provided currently as periodic payments owing to former employees for prior services. The services for which these payments constitute

"payment" under the *CCAA* were those provided under predecessor agreements, not the services currently being performed for Nortel.

22 Moreover, the rights of former employees to these periodic payments remain currently enforceable even though those rights were created under predecessor collective agreements. They become a form of "vested" right, although they may only be enforceable by the Union on behalf of the former employees: see *Dayco (Canada) Ltd. v. C.A.W.*, [1993] 2 S.C.R. 230 (S.C.C.), at 274. That is entirely inconsistent with the periodic payments constituting payment for current services. If current service was the source of the obligation to make these periodic payments then, if there were no current services being performed, the obligation would evaporate and the right of the former employees to receive the periodic payments would disappear. It would in no sense be a "vested" right.

23 In summary, we can find no basis upon which the Union's position can be sustained. The periodic payments in issue cannot be characterized as part of the payment required of Nortel for the services provided to it by its continuing employees after January 14, 2009. Section 11.3(a) of the *CCAA* does not exclude these payments from the effect of the order of that date.

24 The Union's appeal must be dismissed.

The Former Employees' Appeal

Background

25 The Former Employees' motion was brought by three men as representatives of former employees including pensioners and their survivors. On the motion their claim was for an order varying the Initial Order to require Nortel to pay termination pay, severance pay, vacation pay, an amount for continuation of the Nortel benefit plans during the notice period in accordance with the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (”*ESA*”) and any other provincial employment legislation. The representatives also sought an order varying the Initial Order to require Nortel to pay the Transitional Retirement Allowance (”TRA”) and certain pension benefit payments to affected former employees. The motion judge described the motion by the former employees as "not dissimilar to the CAW motion, such that the motion of the former employees can almost be described as a "Me too motion."

26 After he dismissed the union motion, the motion judge turned to the "me too" motion of the former employees. The former employees wanted to achieve the same result as the unionized employees. The motion judge described their argument as based on the position that Nortel could not contract out of the *ESA* of Ontario or another province. However, as he noted, rather than trying to contract out, it was acknowledged that the *ESA* applied, except that immediate payment of amounts owing as required by the *ESA* were stayed during the stay period under the Initial Order, so that the former employees could not enforce the acknowledged payment obligation during that time. The motion judge concluded that on the same basis as the union motion, the former employees' motion was also dismissed.

27 For the purposes of the appeal, the former employees narrowed their claim only to statutory termination and severance claims under the *ESA* that were not being paid by Nortel pursuant to the Initial Order, and served a Notice of Constitutional Question. The appellant asks this court to find that judges cannot use their discretion to order a stay under the *CCAA* that has the effect of overriding valid provincial minimum standards legislation where there is no conflict between the statutes and the

doctrine of paramountcy has not been triggered.

28 Neither the provincial nor the federal governments responded to the notice on this appeal.

29 Paragraphs 6 and 11 of the Initial Order (as amended) provide as follows:

> 6. THIS COURT ORDERS that each of the Applicants, either on its own or on behalf of another Applicant, *shall be entitled but not required to pay* the following expenses whether incurred prior to, on or after the date of this Order:
>
> > (a) all outstanding and future wages, salaries and employee benefits (including but not limited to, employee medical and similar benefit plans, relocation and tax equalization programs, the Incentive Plan (as defined in the Doolittle affidavit) and employee assistance programs), current service, special and similar pension benefit payments, vacation pay, commissions and employee and director expenses, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;
>
> 11. THIS COURT ORDERS that each of the Applicants shall have the right to:
>
> . . .
>
> > (b) terminate the employment of such of its employees or temporarily lay off such employees as it deems appropriate *and to deal with the consequences thereof in the Plan or on further order of the Court*.
>
> . . .
>
> all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business.
>
> [Emphasis added.]

30 Pursuant to these paragraphs, from the date of the Initial Order, Nortel stopped making payments to former employees as well as employees terminated following the Initial Order for certain retirement and pension allowances as well as for statutory severance and termination payments. The *ESA* sets out obligations to provide notice of termination of employment or payment in lieu of notice and severance pay in defined circumstances. By virtue of s. 11(5), those payments must be made on the later of seven days after the date employment ends or the employee's next pay date.

31 As the motion judge stated, it is acknowledged by all parties on this motion that the *ESA* continues to apply while a company is subject to a *CCAA* restructuring. The issue is whether the company's provincial statutory obligations for virtually immediate payment of termination and severance can be stayed by an order made under the *CCAA*.

32 Sections 11(3), dealing with the initial application, and (4), dealing with subsequent applications under the *CCAA* are the stay provisions of the Act. Section 11(3) provides:

> 11. (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

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

Analysis

33 As earlier noted, the stay provisions of the *CCAA* are well recognized as the key to the successful operation of the *CCAA* restructuring process. As this court stated in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 36:

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

34 Parliament has carved out defined exceptions to the court's ability to impose a stay. For example, s. 11.3(a) prohibits a stay of payments for goods and services provided after the initial order, so that while the company is given the opportunity and privilege to carry on during the *CCAA* restructuring process without paying its existing creditors, it is on a pay-as-you-go basis only. In contrast, there is no exception for statutory termination and severance pay.[2] Furthermore, as the respondent Boards of Directors point out, the recent amendments to the *CCAA* that came into force on September 18, 2009 do not address this issue, although they do deal in other respects with employee-related matters.

35 As there is no specific protection from the general stay provision for *ESA* termination and severance payments, the question to be determined is whether the court is entitled to extend the effect of its stay order to such payments based on the constitutional doctrine of paramountcy: *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60 (S.C.C.) at para. 43.

36 The scope, intent and effect of the operation of the doctrine of paramountcy was recently reviewed and summarized by Binnie and Lebel JJ. in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 (S.C.C.) at paras. 69-75. They reaffirmed the "conflict" test stated by Dickson J. in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.):

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [p. 191]

37 However, they also explained an important proviso or gloss on the strict conflict rule that has developed in the case law since *Multiple Access*:

> Nevertheless, there will be cases in which imposing an obligation to comply with provincial legislation would in effect

> frustrate the purpose of a federal law even though it did not entail a direct violation of the federal law's provisions. The Court recognized this in Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, in noting that Parliament's "intent" must also be taken into account in the analysis of incompatibility. The Court thus acknowledged that the impossibility of complying with two enactments is not the sole sign of incompatibility. The fact that a provincial law is incompatible with the purpose of a federal law will also be sufficient to trigger the application of the doctrine of federal paramountcy. This point was recently reaffirmed in Mangat and in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13. (para. 73)

38 Therefore, the doctrine of paramountcy will apply either where a provincial and a federal statutory provision are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. Binnie and Lebel JJ. concluded by summarizing the operation of the doctrine in the following way:

> To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law. (para. 75)

39 The *CCAA* stay provision is a clear example of a case where the intent of Parliament, to allow the court to freeze the debt obligations owing to all creditors for past services (and goods) in order to permit a company to restructure for the benefit of all stakeholders, would be frustrated if the court's stay order could not apply to statutory termination and severance payments owed to terminated employees in respect of past services.

40 The record before the court indicates that the motion judge made the initial order and the amended order in the context of the insolvency of a complex, multinational conglomerate as part of co-ordinated proceedings in a number of countries including the U.S. In June 2009, an Interim Funding and Settlement Agreement was negotiated which, together with the proceeds of certain ongoing asset sales, is providing funds necessary in the view of the court appointed Monitor, for the ongoing operations of Nortel during the next few months of the *CCAA* oversight operation. This funding was achieved on the basis that the stay applied to the severance and termination payments. The Monitor advises that if these payments were not subject to the stay and had to be funded, further financing would have to be found to do that and also maintain operations.

41 In that context, the motion judge exercised his discretion to impose a stay that could extend to the severance and termination payments. He considered the financial position of Nortel, that it was not carrying "business as usual" and that it was under financial pressure. He also considered that the *CCAA* proceeding is at an early stage, before the claims of creditor groups, including former employees and others have been considered or classified for ultimate treatment under a plan of arrangement. He noted that employees have no statutory priority and their claims are not secured claims.

42 While reference was made to the paramountcy doctrine by the motion judge, it was not the main focus of the argument before him. Nevertheless, he effectively concluded that it would thwart the intent of Parliament for the successful conduct of the *CCAA* restructuring if the initial order and the amended order could not include a stay provision that allowed Nortel to suspend the payment of statutory obligations for termination and severance under the *ESA*.

43 The respondents also argued that if the stay did not apply to statutory termination and severance obligations, then the employees who received these payments would in effect be receiving a "super-priority" over other unsecured or possibly

even secured creditors on the assumption that in the end there will not be enough money to pay everyone in full. We agree that this may be the effect if the stay does not apply to these payments. However, that could also be the effect if Nortel chose to make such payments, as it is entitled to do under paragraph 6 (a) of the amended initial order. Of course, in that case, any such payments would be made in consultation with appropriate parties including the Monitor, resulting in the effective grant of a consensual rather than a mandatory priority. Even in this case, the motion judge provided a “hardship” alleviation program funded up to $750,000, to allow payments to former employees in clear need. This will have the effect of granting the “super-priority” to some. This is an acceptable result in appropriate circumstances.

44 However, this result does not in any way undermine the paramountcy analysis. That analysis is driven by the need to preserve the ability of the *CCAA* court to ensure, through the scope of the stay order, that Parliament’s intent for the operation of the *CCAA* regime is not thwarted by the operation of provincial legislation. The court issuing the stay order considers all of the circumstances and can impose an order that has the effect of overriding a provincial enactment where it is necessary to do so.

45 Morawetz J. was satisfied that such a stay was necessary in the circumstances of this case. We see no error in that conclusion on the record before him and before this court.

46 Another issue was raised based on the facts of this restructuring as it has developed. It appears that the company will not be restructured, but instead its assets will be sold. It is necessary to continue operations in order to maintain maximum value for this process to achieve the highest prices and therefore the best outcome for all stakeholders. It is true that the basis for the very broad stay power has traditionally been expressed as a necessary aspect of the restructuring process, leading to a plan of arrangement for the newly restructured entity. However, we see no reason in the present circumstances why the same analysis cannot apply during a sale process that requires the business to be carried on as a going concern. No party has taken the position that the *CCAA* process is no longer available because it is not proceeding as a restructuring, nor has any party taken steps to turn the proceeding into one under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

47 The former employee appellants have raised the constitutional question whether the doctrine of paramountcy applies to give to the *CCAA* judge the authority, under s. 11 of the Act, to order a stay of proceedings that has the effect of overriding s. 11(5) of the *ESA*, which requires almost immediate payment of termination and severance obligations. The answer to this question is yes.

48 We note again that the question before this court was limited to the effect of the stay on the timing of required statutory payments under the *ESA* and does not deal with the inter-relation of the *ESA* and the *CCAA* for the purposes of the plan of arrangement and the ultimate payment of these statutory obligations.

49 The appeal by the former employees is also dismissed.

R.A. Blair J.A.:

I agree.

Appeals dismissed.

Footnotes

[*] A corrigendum issued by the court on December 8, 2009 has been incorporated herein.

[1] The analogous section to the former s. 11.3(a) is now found in s. 11.01(a) of the recently amended *CCAA*.

[2] The issue of post-initial order employee terminations, and specifically whether any portion of the termination or severance that may be owed is attributable to post-initial order services, was not at issue in this motion. In *Windsor Machine & Stamping Ltd., Re*, [2009] O.J. No. 3195 (Ont. S.C.J. [Commercial List]), decided one month after this motion, the issue was discussed more fully and Morawetz J. determined that it could be decided as part of a post-filing claim. Leave to appeal has been filed.

End of Document

TAB 2

2007 SKCA 72
Saskatchewan Court of Appeal

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.

2007 CarswellSask 324, 2007 SKCA 72, [2007] 9 W.W.R. 79, [2007] S.J. No. 313, 299 Sask. R. 194, 33 C.B.R. (5th) 50, 408 W.A.C. 194

ICR Commercial Real Estate (Regina) Ltd. (Appellant) and Bricore Land Group Ltd., Bricore Investment Group Ltd., 624796 Saskatchewan Ltd. 603767 Saskatchewan Ltd.,(Respondents)

Klebuc C.J.S., Jackson, Smith JJ.A.

Heard: June 7, 2007
Judgment: June 13, 2007
Docket: 1443, 1452

Proceedings: affirming *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 121, 2007 CarswellSask 157 (Sask. Q.B.); additional reasons at *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 144, 2007 CarswellSask 264 (Sask. Q.B.); and reversing *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 144, 2007 CarswellSask 264 (Sask. Q.B.)

Counsel: Fred C. Zinkhan for Appellant
Jeffrey M. Lee for Respondents
Kim Anderson for Monitor, Ernst & Young

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

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

Application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") and stay of proceedings was imposed — Supervising judge appointed exclusive selling officer for B Ltd. properties, and appointed chief restructuring officer ("CRO") to assist with sale — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO submitted report to supervising judge recommending sale of building and advising that offer represented greatest value obtainable — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. was dismissed — Supervising judge held that realtor failed to establish “prima facie case” — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — “Sound reasons” test was better than “prima facie case” test in deciding whether to lift stay under CCAA — Nonetheless, realtor did not reach necessary threshold — Relevant facts included that building was subject to exclusive selling officer agreement; that two days before disputed agreement, supervising judge received CRO report recommending sale of building; that disputed agreement stated that properties were under contract to sell; and that there was no sale from B Ltd. to city — Language in disputed agreement supported CRO’s position that purpose of agreement was to provide for eventuality of failed sale — Further, supervising judge issued at least five orders dealing substantively with sale of building to purchaser — B Ltd.’s argument, that it was not subject to stay order, was rejected — Application to lift stay must be made to commence action against debtor subject to CCAA order, regardless of whether claim arises before or after initial order — Section 11.3 of CCAA does not grant post-filing creditor right to sue without obtaining leave.

Bankruptcy and insolvency --- Proposal — Companies’ Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors’ Arrangement Act (”CCAA”) and stay of proceedings was imposed — Supervising judge appointed exclusive selling officer for B Ltd. properties, and appointed chief restructuring officer (”CRO”) to assist with sale — CRO accepted purchaser’s offer on B Ltd. properties (”offer”) — CRO submitted report to supervising judge recommending sale of building and advising that offer represented greatest value obtainable — CRO signed agreement with realtor (”disputed agreement”) — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina (”city”) — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor’s application for leave to commence action against B Ltd. was dismissed — Supervising judge held that realtor failed to establish “prima facie case” — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — “Sound reasons” test was better than “prima facie case” test in deciding whether to lift stay under CCAA — Nonetheless, realtor did not reach necessary threshold — Relevant facts included that building was subject to exclusive selling officer agreement; that two days before disputed agreement, supervising judge received CRO report recommending sale of building; that disputed agreement stated that properties were under contract to sell; and that there was no sale from B Ltd. to city — Language in disputed agreement supported CRO’s position that purpose of agreement was to provide for eventuality of failed sale — Further, supervising judge issued at least five orders dealing substantively with sale of building to purchaser — B Ltd.’s argument, that it was not subject to stay order, was rejected — Application to lift stay must be made to commence action against debtor subject to CCAA order, regardless of whether claim arises before or after initial order — Section 11.3 of CCAA does not grant post-filing creditor right to sue without obtaining leave.

Debtors and creditors --- Receivers — Actions by and against receiver — Actions against receiver

Against chief restructuring officer — Application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors’ Arrangement Act (”CCAA”) — Supervising judge stayed proceedings and appointed chief restructuring officer (”CRO”) — Order appointing CRO stated that he could not be sued personally except for acts of fraud, gross negligence or wilful misconduct, but order was ambiguous about acts of bad faith — CRO accepted purchaser’s offer on B Ltd. properties (”offer”) — CRO submitted report to supervising judge recommending sale of building and advising that offer represented greatest value obtainable — CRO signed agreement with realtor (”disputed agreement”) — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina (”city”) — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor’s application for leave to commence action against CRO personally based on bad faith was dismissed — Supervising judge held that realtor was required to allege fraud, gross negligence or wilful misconduct, and failed to do so — Supervising judge accepted CRO’s explanation that he was not aware that purchaser was going to resell building — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — Supervising judge did not err in refusing to lift stay to permit action against CRO personally — Supervising judge considered status of CRO as officer of court, noted ambiguity in order, and weighed evidence to certain extent.

Debtors and creditors --- Receivers — Actions by and against receiver — Practice and procedure — Costs

On application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") — Supervising judge stayed proceedings and appointed chief restructuring officer ("CRO") — Order appointing CRO stated that he could not be sued personally except for bad faith or other acts of misconduct — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. and against CRO personally was dismissed — Supervising judge held that realtor did not have tenable cause of action against B Ltd. or CRO — Supervising judge accepted CRO's explanation that he was not aware that purchaser was going to resell building — Supervising judge awarded substantial indemnity costs to B Ltd. and CRO, on ground that realtor had alleged bad faith by CRO — Supervising judge declined to award solicitor-and-client costs on ground that there was no inappropriate conduct giving rise to litigation — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — Supervising judge erred in awarding substantial indemnity costs — There was no basis on which to order substantial indemnity costs with respect to stay in relation to B Ltd. — Bad faith was not alleged on part of B Ltd. — With respect to allegation of bad faith against CRO, realtor could not be faulted for making very allegation that it was required to make to bring application — Award of substantial indemnity costs is punitive and must meet same test used for solicitor-and-client costs.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Unfounded allegations

Against chief restructuring officer — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") — Supervising judge stayed proceedings and appointed chief restructuring officer ("CRO") — Order appointing CRO stated that he could not be sued personally except for bad faith or other acts of misconduct — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. and against CRO personally was dismissed — Supervising judge held that realtor did not have tenable cause of action against B Ltd. or CRO — Supervising judge accepted CRO's explanation that he was not aware that purchaser was going to resell building — Supervising judge awarded substantial indemnity costs to B Ltd. and CRO, on ground that realtor had alleged bad faith by CRO — Supervising judge declined to award solicitor-and-client costs on ground that there was no inappropriate conduct giving rise to litigation — Realtor appealed — Appeal allowed in part — Appeal was allowed with respect to costs only — Supervising judge erred in awarding substantial indemnity costs — There was no basis on which to order substantial indemnity costs with respect to stay in relation to B Ltd. — Bad faith was not alleged on part of B Ltd. — With respect to allegation of bad faith against CRO, realtor could not be faulted for making very allegation that it was required to make to bring application — Award of substantial indemnity costs is punitive and must meet same test used for solicitor-and-client costs.

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s. 11(3) — considered

s. 11(4) — considered

s. 11(4)(c) — considered

s. 11(6) — considered

s. 11(6) [en. 1997, c. 12, s. 124] — considered

s. 11.1(2) [en. 1997, c. 12, s. 124] — considered

s. 11.11 [en. 2001, c. 9, s. 577] — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.3 [en. 1997, c. 12, s. 124] — considered

s. 12(1) "claim" — considered

s. 13 — referred to

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R. 173 — referred to

Words and phrases considered:

Substantial indemnity costs

[Jackson J.A. (Klebuc C.J.S. and Smith J.A. concurring):] . . . while [the judge, in awarding substantial indemnity costs,] indicated he was not awarding solicitor-and-client costs, there is not a sufficient distinction between substantial indemnity costs and solicitor-and-client costs. An award approaching solicitor-and-client costs is still a punitive order and, as there is no authority for the awarding of substantial indemnity costs, relies upon the same jurisprudential base as solicitor-and-client costs.

APPEAL by creditor from judgment reported at *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 121, 2007 CarswellSask 157, 33 C.B.R. (5th) 39 (Sask. Q.B.) dismissing application to lift stay against debtor under Companies Creditors' Arrangement Act, and from judgment reported at *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 144, 2007 CarswellSask 264, 33 C.B.R. (5th) 46 (Sask. Q.B.) ordering costs against creditor.

***Jackson J.A.*:**

I. Introduction

1 This appeal concerns a claim arising on a "post-filing" basis after a restructuring order had been made under the *Companies' Creditors Arrangement Act*[1] (the "*CCAA*"). The restructuring failed. The principal assets of the companies have been sold and the net proceeds are being held for distribution. The post-filing claim is asserted against: (i) the companies, which are subject to the *CCAA* order; and (ii) against the companies' Chief Restructuring Officer.

2 The post-filing claimant is ICR Commercial Real Estate (Regina) Ltd. ("ICR"). ICR claims a real estate commission with respect to the sale of a building belonging to Bricore Land Group Ltd. Bricore Land and four related companies (collectively "Bricore") are all subject to an initial order ("Initial Order") granted by Koch J. on January 4, 2006 pursuant to s. 11(3) of the *CCAA*. The Chief Restructuring Officer, Maurice Duval (the "CRO"), was appointed by Koch J. on May 23, 2006 (the "CRO Order"). Koch J. has been the supervising *CCAA* judge since the Initial Order.

3 The Initial Order and the CRO Order impose the usual stay of proceedings against Bricore and prohibit the commencement of new actions against Bricore and the CRO, without leave of the Court.

4 ICR applied to Koch J. for directions and, in the alternative, for leave to commence actions against Bricore and the CRO. By fiats dated April 9, 2007 and April 25, 2007, Koch J. held that the Initial Order and the CRO Order prohibiting the commencement of actions apply to ICR and that leave of the Court is required. He refused leave and also awarded substantial indemnity costs against ICR.

5 On May 23, 2007, ICR applied in Court of Appeal chambers for leave to appeal, pursuant to s. 13 of the *CCAA*, and received leave to appeal the same day. The appeal was heard on June 7, 2007 and dismissed in relation to the lifting of the stay application and allowed in relation to the costs order on June 13, 2007, with reasons to follow. These are those reasons.

II. Issues

6 The issues are:

1. Does the stay of proceedings imposed by the supervising *CCAA* judge J. under the Initial Order apply to an action commenced by ICR, a post-filing claimant, such that leave to commence an action against Bricore is required?

2. Does s. 11.3 of the *CCAA* mean that a post-filing claimant cannot be subject to the stay of proceedings imposed by the Initial Order?

3. If leave is required, did the supervising *CCAA* judge commit a reviewable error in refusing ICR leave to commence an action against Bricore?

4. Did the supervising *CCAA* judge make a reviewable error in refusing leave to commence an action against the CRO?

5. Did the supervising *CCAA* judge err in awarding costs on a substantial indemnity basis?

III. Background

7 ICR's claim to a real estate commission arises as a result of these brief facts. Bricore owned four commercial real estate properties in Saskatoon and three such properties in Regina (the "Bricore Properties"). ICR argued that it had marketed one of the Regina properties, known as the Department of Education Building (the "Building"), to the City of Regina.

8 Bricore sold the Building, at a purchase price of $700,000,[2] to a proposed purchaser, which assigned its interest to 101086849 Saskatchewan Ltd. 101086849 Saskatchewan in its turn sold the Building to the City of Regina for a price of $1,075,000.[3] The certificate of title to the Building issued in early January, 2007 to 101086849 Saskatchewan, and the certificate of title issued to the City of Regina in late January, 2007. The Building came to be sold pursuant to a series of Court Orders made by Koch J., which I will now summarize.

9 As I have indicated, the Initial Order was made on January 4, 2006. On February 13, 2006 Koch J. appointed CMN Calgary Inc. as an Officer of the Court to pursue opportunities and to solicit offers for the sale or refinancing of the Bricore Properties. He also authorized Bricore to enter into an agreement with CMN Calgary dated as of January 30, 2006 entitled "Exclusive Authority To Solicit Offers To Purchase."

10 In May 2006, it was determined that Bricore could not be reorganized and, therefore, all the Bricore Properties should be sold. On May 23, 2006, Koch J. appointed Maurice Duval, C.A., of Saskatoon, Saskatchewan as an officer of the Court to act as CRO, and to assist with the sale of the assets.

11 The CRO Order confers these powers on the CRO pertaining to the proposed sale of the Bricore Properties:

7 ...

(e) subject to the stay of proceedings in effect in these proceedings, the power to take steps for the preservation and protection of the Bricore Properties, including, without restricting the generality of the foregoing, (i) the right to make payments to persons, if any, having charges or encumbrances on the Bricore Properties or any part or parts thereof on or after the date of this Order, which payments shall include payments in respect of realty taxes owing in respect of any of the Bricore Properties, (ii) the right to make repairs and improvements to the Bricore Properties or any parts thereof and (iii) the right to make payments for ongoing services in respect of the Bricore Properties;

. . . . .

(g) subject to paragraphs 7C, 7D and 7E hereof, **the power to work with, consult with and assist the court-appointed selling officer (CMN Calgary Inc.) to negotiate with parties who make offers to purchase** the Bricore Properties in a manner substantially in accordance with the process and proposed timeline for solicitation of such offers to purchase the Bricore Properties recommended by the Monitor in the Monitor's Third Report. ...[4] [Emphasis added.]

12 On June 19, 2006, Koch J. authorized the CRO to accept an offer to purchase the Bricore Properties, including the Building, made by an undisclosed purchaser (the "Proposed Purchaser"), which offer to purchase was filed with the Court and temporarily sealed. The order directed that any further negotiations between the CRO and the Proposed Purchaser were to be completed by August 1, 2006.

13 Negotiations were protracted resulting in a further series of orders:

(a) August 1, 2006: Koch J. extended the timeframe for due diligence and further negotiations to be completed by August 15, 2006;[5]

(b) August 18, 2006: Koch J. authorized the CRO to accept an Amended Offer to Purchase made the 15th day of August, 2006. The Amended Offer to Purchase contemplated the sale by Bricore to the Proposed Purchaser of six of the seven Bricore Properties including the Building;[6]

(c) September 25, 2006: The closing date for the proposed sale by Bricore to the Proposed Purchaser of the six properties was extended from October 15, 2006 to November 15, 2006;[7]

(d) October 10, 2006: Koch J. approved the sale of the six properties to their respective purchasers; in the case of the Building, it was sold to 101086849 Saskatchewan Ltd.[8]

Koch J. ultimately approved the sale of the Building to 101086849 Saskatchewan Ltd. as of November 30, 2006.

14 ICR said it had introduced the City of Regina to the opportunity to purchase the Building and it was therefore entitled to a real estate commission based on the sale price to the City of Regina. Once its claim was denied by the Monitor, ICR applied to Koch J. on March 22, 2007 contending that (a) "prior Orders of this Court requiring leave to commence action" against Bricore and the CRO "do not apply in the circumstances"; and (b) in the alternative, "it is entitled to an order granting leave to commence the proposed proceedings." In support of its notice of motion, ICR filed a draft statement of claim and a supporting affidavit with exhibits.

15 This is the substance of ICR's draft statement of claim against Bricore and the CRO:

4. At all material times Duval's actions in relation to the matters in issue in the within proceedings were carried out in

his capacity as chief restructuring officer for the Bricore Group.

. . . . .

7. Duval, pursuant to Order of the Court under the *Companies' Creditors Arrangement Act*, was authorized in accordance in such order to market various assets of the Bricore Group, including the [Building]. [sic]

8. In the course of his efforts to market the [Building], Duval enlisted the aid of the plaintiff and its commercial realtors, licensed as brokers under *The Real Estate Act*.

9. The plaintiff, in its efforts to market the properties of the Bricore Group under the direction of Duval, including the [Building], introduced a prospective purchaser to Duval, namely the City of Regina.

10. By agreement dated September 27, 2006 made between the Plaintiff, the Bricore Group and Duval, it was agreed that the Plaintiff would be protected as the agent of record to a commission for the sale of any of the Bricore Group Properties for which the Plaintiff had located a purchaser.

11. The Plaintiff says that at the time of execution of the said Agreement by Duval on September 28, 2006, the City of Regina was in the process of doing its "due diligence" on the [Building] and it was expected that a sale of the [Building] to the City of Regina would be completed in the near future.

12. The Plaintiff says that, contrary to the Agreement entered into between the Plaintiff and the Defendants, Duval, **without the Plaintiff's knowledge and in bad faith**, proceeded to arrange to sell the [Building] to a third party, namely 101086849 Saskatchewan ltd., which became the owner of the [Building] on or about January 3, 2007.[9] [Emphasis added.]

16 While the words "bad faith" are not repeated in the affidavit evidence, Paul Mehlsen, the principal of ICR, swore an affidavit in support of the application for leave, stating that he had examined the statement of claim and that to the best of his knowledge the allegations contained therein are true. His affidavit also states:

13. Insofar as the attached letter states that "ICR is protected as agent of record", this is commonly understood in the industry as meaning that in the event a sale of the property took place in the protected period to a purchaser introduced by the agent of record, then they would receive the usual commission for such sale, which in this case would be 5%.

14. It would appear from the attached exhibit "A" that Larry Ruf arranged to have the Respondent, Maurice Duval, agree to the arrangement, as well as adding that the protection would extend to the closing of any sale or December 31, 2006, whichever was the earlier.

15. Attached hereto and marked as exhibit "B" to this my Affidavit is a true copy of an email dated October 31, 2006 from Larry Ruf to Evan Hubick, Jim Kambeitz and Jim Thompson of the proposed plaintiff, ICR. Such email states in part:

> I can confirm, on behalf of the CRO, that protection for the potential deals referenced in your letter of September 27, 2006 will be honoured to November 30, 2006.[10]

17 Exhibit "A" is a letter dated September 27, 2006 from Mr. Jim Thompson of ICR to Mr. Larry Ruf of Horizon West Management Inc. It reads, in material part, as follows:

Please be advised that we have had ongoing discussions with potential buyers and tenants as follows:

1. 1500 — 4th Avenue [Department of Education Building] — we have been in regular contact with the City of

Regina Real Estate Department for over a year regarding the possibility of this site being acquired by the City. In July a large contingent of City employees including a number from the Works and Engineering Department toured the building over several hours. We have had continuous follow up with a Real Estate Department official who confirmed recently that there still is an interest in the property and officials are in the due diligence stage. In addition, we have exposed the property to Alfords Furniture and Flooring who have an ongoing interest.

. . . . .

The purpose of this memo is to reinforce our ongoing efforts to market and represent the Bricore assets in Regina. We are aware that the properties are under contract to sell and request that ICR be protected in the specific situations as outlined.

In the event we are not able to carry on in a formal fashion we would ask that you sign where indicated to acknowledge that ICR is protected as the agent of record for the Tenants/Buyers noted herein for a period to extend to December 31, 2006.[11]

The words “December 31, 2006” are struck out and these words are added: “Date of closing of a sale or December 31, 2006 whichever is earlier.” Mr. Ruf’s name is crossed out and the signature of Maurice Duval, Chief Restructuring Officer is added in its place.

18 Mr. Ruf, on behalf of Bricore, refuted ICR’s claim in a sworn affidavit stating:

3. At no time did I approach ICR Regina in 2006 to initiate discussions regarding the sale or lease of the Department of Education Building.

4. I received two or three unsolicited telephone calls regarding the Department of Education Building in September of 2006 from representatives of ICR Regina (including Paul Mehlsen, Jim Kambeitz and Evan Hubick). During those calls, representatives of ICR Regina informed me that they knew of certain parties who would be interested in purchasing the Department of Education Building. In response to each of these inquiries, I informed representatives of ICR:

(a) that I had no authority to participate in communications regarding a sale of the Department of Education Building, and that all such inquiries should be directed to Maurice Duval, the court-appointed Chief Restructuring Officer of Bricore Group; and

(b) that further information on the status of the restructuring of Bricore Group could be obtained on the website of MLT.[12]

19 The CRO filed a report in response to ICR:

6. At the time of my review of the September 27, 2006 letter from ICR Regina, I was working very hard to attempt to negotiate and conclude the final closing of the sale of the Bricore Properties to the purchasers identified in the Accepted Offer to Purchase. I fully expected that sale to close (as it ultimately did effective November 30, 2006). However, I determined that, in the event that such sale failed to close, Bricore Group would need to identify other potential purchasers of the Bricore Properties very quickly. I therefore decided that it would be appropriate for Bricore Group, by the CRO, to agree to protect ICR Regina for a commission in the unlikely event that the sale contemplated by the Accepted Offer to Purchase did not close, and it subsequently became necessary for Bricore Group instead to conclude a sale of the Bricore Properties to one or more of the prospective purchasers of the three Bricore Properties located in Regina (as specifically identified in Mr. Thompson’s September 27, 2006 letter). For that reason, and that reason only, I agreed to sign the September 27, 2006 letter.

7. In signing the September 27, 2006 letter, my intention, as court-appointed CRO of Bricore Group, was to strike an agreement that, in the unlikely event that:

(a) the sale of the Bricore Properties identified in the Accepted Offer to Purchase fell apart; and

(b) it subsequently became necessary for Bricore Group to sell the Bricore Properties to one or more of the prospective purchasers identified in the September 27, 2006 letter;

then Bricore Group would agree to pay a commission to ICR Regina. In regard to the Department of Education Building located at 1500 — 4th Avenue in Regina (the “Department of Education Building”), the two prospective purchasers in respect of which ICR Regina was protected for a commission were the City of Regina and Alford’s Furniture and Flooring. The reference to closing date was to the closing of the Avenue Sale, which occurred effective November 30, 2006.

8. In January of 2007, after much effort and expenditure of resources, the sale of the Bricore Properties contemplated in the Accepted Offer to Purchase was unconditionally closed (effective November 30, 2006). The entity named as purchaser of the Department of Education Building in the final closing documents was a numbered Saskatchewan company controlled by Avenue Commercial Group of Calgary. Such entity was a nominee corporation operating entirely at arm’s length from the City of Regina and Bricore Group. At all times after June 2006, the CRO had no authority to sell the property, as it was already sold.

9. It was subsequently brought to my attention that the numbered company which purchased the Department of Education Building had promptly “flipped” such property to the City of Regina. I knew nothing of such a proposed flip prior to learning of it from ICR Regina.[13]

20 To rebut this, Mr. Mehlsen of ICR swore a further affidavit deposing:

3. As indicated in my Affidavit sworn March 22, 2007, ICR had an ongoing relationship with the Bricore Companies prior to 2006. This relationship continued after the Initial Order in January 2006 in that ICR continued to show Bricore Properties for lease or sale, including the [Building].

4. Attached hereto and marked as Exhibit E to this my Affidavit is a true copy of an e-mail from my contact at the City of Regina ... dated April 13, 2006 advising that the City was interested in purchasing the [Building].

5. I immediately passed this information along to Larry Ruf, as evidenced in the e-mail dated April 13, 2006 attached hereto and marked as Exhibit “F” to this my affidavit.

6. In reply to paras. 2 and 12 of Mr. Duval’s Report, it was not known to ICR that all of the Bricore Properties were sold as claimed; rather, it was known that some of the Bricore Properties had been sold, but not the subject property, [the Building], as it was the “ugly duckling” of the Bricore Properties and therefore had been excluded from the reported sale. ICR’s efforts were directed at the sale of [the Building] and leasing the other two Regina properties.

7. In response to para. 13 of Mr. Duval’s Report, it is true that there were no direct communications between ICR and Mr. Duval as all communications were with Larry Ruf, who indicated that he acted under the authority and with the knowledge of Mr. Duval.

8. As a result of contact in early summer with Mr. Ruf, ICR actively marketed the [Building] by placing signage on the property, developing an “information” or “fact” sheet detailing aspects of the building, and showed the property to the City of Regina and other prospective purchasers.

. . . . .

11. Because of delays on the part of the City of Regina in its due diligence and the fact that ICR has been working

without any formal agreement, I caused the letter of September 27, 2006 (exhibit "A" to my Affidavit sworn March 22, 2007) to be sent.

12. At no time did either Mr. Ruf or Mr. Duval advise that the [Building] was sold and that ICR's role was merely that of a "backup offer". The signed letter of September 27, 2006 and Mr. Ruf 's e-mail of October 31, 2006 make no mention of these events and this was never disclosed to myself or ICR.

. . . . .

14. In hindsight, it would appear that the confidential information concerning the intention of the City of Regina to purchase the [Building] that was provided by myself and representatives of ICR to Mr. Ruf and Mr. Duval was communicated to the [Proposed Purchaser], who then incorporated 101086849 Saskatchewan Ltd. to take advantage of this opportunity. Attached hereto and marked as exhibit "I" to this my Affidavit is a true copy of a Profile Report from the Corporate Registry indicating that 101086849 Saskatchewan Ltd. was incorporated by solicitors as a "shelf company" on May 31, 2006, with new Directors in the form of Garry Bobke and Steven Butt taking office on August 17, 2006.

15. My understanding is that the [Proposed Purchaser] initially excluded the [Building] from their offer to purchase the Bricore Group properties and made a separate offer through 101086849 Saskatchewan Ltd. when they were made aware of the confidential information about the City of Regina's plans to purchase the property.[14]

21 In refusing ICR leave to commence action, Koch J. wrote:

[1] On January 4, 2006, I granted an initial order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "*CCAA*") protecting the respondent corporations Bricore Land Group Ltd. et al. (collectively "Bricore"), from claims of their respective creditors. The order (paragraph 5) explicitly provides in accordance with the authority conferred upon the Court pursuant to s. 11(3) of the *CCAA* that "no Person shall commence or continue any Enforcement or Proceeding of any kind against or in respect of Bricore Group or the Property". The initial period of 30 days has been extended many times. The stay of proceedings continues in effect. Ernst & Young Inc. was appointed monitor. That appointment continues.

. . . . .

[16] Although the interpretation of s. 11.3 of the *CCAA* is not necessarily well settled in all aspects, it appears that the import of s. 11.3, which was introduced as an amendment to the Act in 1997, is this:

(a) An application to lift a stay of proceedings must be addressed in the context of the broad objectives of the *CCAA* which is to promote re-organization and restructuring of companies. If s. 11.3 is interpreted too literally, it can render the stay provisions ineffective, leaving the collective good of the restructuring process subservient to the self-interest of a single creditor. Clearly, s. 11.3 must be construed so as not to defeat the overall objectives of the Act. See *Smith Brothers Contracting Ltd. (Re)* (1998), 53 B.C.L.R. (3d) 264 (B.C.S.C.).

(b) The standard for determining whether to lift the stay of proceedings is not, as ICR contends, whether the action is frivolous, analogous to the standard which a defendant applicant under Rule 173 of *The Queen's Bench Rules* must meet to set aside a statement of claim. Rather, to obtain an order lifting the stay ad hoc to permit the suit to proceed, the proposed plaintiff must establish that the cause of action is tenable. I interpret that to mean that the proposed plaintiff has a *prima facie* case. See *Ivaco Inc. (Re)*, [2006] O.J. No. 5029 (Ont. S.C.J.).

(c) In determining whether to lift a stay, the Court must take into consideration the relative prejudice to the parties. See *Ivaco, Inc. (Re)*, *supra*, para. 20; and Richard H. McLaren & Sabrina Gherbaz, *Canadian Commercial Reorganization: Preventing Bankruptcy* (Toronto: Canada Law Book, 1995) at 3-18.1. Counsel have cited the case of *GMAC Commercial Credit Corporation — Canada v. T.C.T. Logistics Inc*., [2006] 2 S.C.R. 123, 2006 SCC 35. The circumstances in that case are somewhat analogous but it is of limited assistance because the *CCAA* does not contain a provision equivalent to s. 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, which expressly provides that no action lies against the superintendent, an official receiver, an interim receiver or a trustee in certain circumstances without leave of the Court.

[17] For reasons outlined *supra*, I do not find the cause of action ICR asserts against Bricore to be tenable, not even as against Bricore Land Group Ltd. Therefore, the application to lift the stay of proceedings to permit the proposed action against Bricore is dismissed.

[18] Neither is there any basis upon which to lift the stay with respect to the proposed action against Maurice Duval, the Chief Restructuring Officer. Considerations applicable to Bricore under s. 11.3 do not apply to a court-appointed restructuring officer. Maurice Duval, as an officer of the Court, has explained his position in a cogent way. I accept his explanation. He did not sell the Department of Education Building to the City of Regina. He was not aware at the relevant time that the purchaser was going to resell. Indeed, his efforts were directed toward closing a single transaction involving all six Bricore properties. Although the proposed pleading accuses Mr. Duval of acting in “bad faith”, it is not suggested on behalf of ICR that Mr. Duval has been guilty of fraud, gross negligence or wilful misconduct; that is, any of the limitations or exceptions expressly listed in paragraph 20(c) of the order of May 23, 2006.

[19] As stated previously, the overriding purpose of the *CCAA* must also be considered. That applies in the Duval situation too. The statute is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order.[15]

IV. Issue #1: Does the Stay of Proceedings Imposed by the Supervising CCAA Judge under the Initial Order Apply to an Action Commenced by ICR, a Post-Filing Claimant, Such That Leave to Commence an Action Against Bricore Is Required?

22 ICR argues that, as a post-filing creditor, the Initial Order does not apply to it, either as a matter of law or on the basis of a proper interpretation of the Initial Order.

23 The authority to make an order staying and prohibiting proceedings against a debtor company is contained in s. 11(3) of the *CCAA*:

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

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

24 Pursuant to s. 11(3) of the *CCAA*, Koch J. granted the Initial Order providing for a stay and prohibition of new proceedings in these terms:

> 5. During the 30-day period from and after the date of filing of this application on January 4, 2006 or during the period of any extension of such 30-day period granted by further order of the Court (the "Stay Period"), no Person shall commence or continue any Enforcement or Proceeding of any kind against or in respect of Bricore Group or the Property. Any and all Enforcement or Proceedings already commenced (as at the date of this Order) against or in respect of Bricore Group or the Property are hereby stayed and suspended.
>
> 6. During the Stay Period, no person shall assert, invoke, rely upon, exercise or attempt to assert, invoke, rely upon or exercise any rights:
>
> > a) against Bricore Group or the Property;
> >
> > b) as a result of any default or non-performance by Bricore Group, the making or filing of this proceeding or any admission or evidence in this proceeding, or
> >
> > c) in respect of any action taken by Bricore Group or in respect of any of the Property under, pursuant to or in furtherance of this Order.
>
> . . . . .
>
> 11. Notwithstanding any of the provisions of this Order:
>
> > a) no creditor of Bricore Group shall be under any obligation, by reason only of the issuance of this Order, to advance or re-advance any monies or otherwise extend any credit to Bricore Group, except as such creditor may agree; and
> >
> > b) Bricore Group may, by written consent of its counsel of record, agree to waive any of the protections that this Order provides to them, whether such waiver is given in respect of a single creditor or class of creditors or is given in respect of all creditors generally.
>
> . . . . .
>
> 13. Any act or action taken or notice given by creditors or other Persons or their agents, from and after 12:01 a.m. (local Saskatoon time) on the date of the filing of the application for this Order to the time of the granting of this Order, to commence or continue Enforcement or to take any Proceeding (including, without limitation, the application of funds in reduction of any debt, set-off or the consolidation of accounts) is, unless the Court orders otherwise, deemed not to have been taken or given.

"Proceeding" is defined in para. 22 of Schedule "A" to the Initial Order as "a lawsuit, legal action, court application, arbitration, hearing, mediation process, enforcement process, grievance, extrajudicial proceeding of any kind or other proceeding of any kind."

25 The authority to extend an initial order is contained in s. 11(4) of the *CCAA:*

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 proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Koch J., pursuant to this subsection, extended the stay many times and the stay continues in force.

26 As authority for the proposition that the Initial Order does not stay proceedings with respect to claims that arise after the Initial Order, ICR's counsel cites Professor Honsberger's *Debt Restructuring Principles & Practice*:

The scope of an order staying proceedings extends only to claims that arose prior to the order. A proceeding based on a claim that arose after an order was made staying proceedings is not affected by the stay.[16] [Footnote omitted.]

The only case footnoted is *Ramsay Plate Glass Co. v. Modern Wood Products Ltd.*[17] In my respectful view, the facts in *Ramsay Plate Glass* narrow its application.

27 In *Ramsay Plate Glass Co.*, the initial *CCAA* order, dated April 12, 1951, suspended all proceedings against Modern Wood Products Ltd. Modern Wood Products made an offer of compromise that was accepted by its existing creditors and approved by the Court on May 21, 1951. Ramsay Glass sought to enforce a claim against Modern Wood Products that arose in 1953. Modern Wood Products sought to strike Ramsay Glass's claim on the basis that its proceedings were stayed by the April 1951 order.

28 In dismissing the application to strike, Prevost J. wrote:

CONSIDERING that said claim is not provable in bankruptcy and that under *The Bankruptcy Act* an order staying proceedings would not apply to such a claim: *Richardson & Co. v. Storey*, 23 C.B.R. 145, [1942] 1 D.L.R. 182, Abr. Con. 301; *In re Bolf*, 26 C.B.R. 149, [1945] Que. S.C. 173, Abr. Con. 303;

CONSIDERING that s. 10 of *The Companies' Creditors Arrangement Act* and the judgments rendered under its authority should receive the same interpretation in this respect as s. 40 of *The Bankruptcy Act*;

CONSIDERING that the present claim is in no way affected by the judgment rendered on April 12, 1951 by Boyer J. under *The Companies' Creditors Arrangement Act*, ordering suspension of all proceedings against defendant company the present claim being posterior to said date and having not been made the subject of any compromise or arrangement homologated by this Court;

CONSIDERING that the present claim arose in 1953, two years after the judgment of Boyer J. homologating the compromise following the non-payment by defendant company of merchandise purchased by it from plaintiff company

> during said year;[18]

I do not interpret *Ramsay Plate Glass* as permitting a post-filing claimant to commence an action against a debtor company without obtaining leave while the *CCAA* stay is in effect. In my opinion, *Ramsay Plate Glass* can be read as authority for the proposition that a post-filing creditor need not apply for leave after the stay has been lifted. In that respect, it parallels *360networks Inc., Re*;[19] *Stelco Inc., Re*;[20] and *Campeau v. Olympia & York Developments Ltd.*[21]

29 In *360networks*, a creditor (Caterpillar Financial Services Limited) had both pre-filing and post-filing claims. Caterpillar applied, *inter alia*, for an order lifting the stay of proceedings. Tysoe J. wrote:

> 8 On the hearing of the applications, Caterpillar continued to take the position that all of its claims could properly be determined within the *CCAA* proceedings on the first of its two applications. I agree that the Deficiency Claim and the Secured Creditor Claim are properly determinable within the *CCAA* proceedings, but it is my view that it would not be appropriate to make determinations in respect of the Trust Claim or the Post-Filing Claim in the *CCAA* proceedings. The only remaining thing to be done in the *CCAA* proceedings is the determination of the validity of claims for the purposes of the Restructuring Plan (with Caterpillar's claims being the only unresolved ones). **Neither the Trust Claim nor the Post-Filing Claim falls into this category of claim because each of these types of claim is not affected by the Restructuring Plan.** Indeed, the Post-Filing Claim was not asserted in Caterpillar's proof of claim and surely cannot be adjudicated upon within Caterpillar's appeal of the disallowance of its proof of claim. The B.C. Court of Appeal has recently affirmed, in *United Properties Ltd. v. 642433 B.C. Ltd.*, 2003 BCCA 203 (B.C.C.A.), that it is appropriate for the court to decline jurisdiction to resolve a dispute in *CCAA* proceedings which, although it may relate to them, is not part and parcel of the proceedings. [Emphasis added.]
>
> . . . . .
>
> 11 Counsel for Caterpillar relies for the first ground on the fact that s. 12 of the *CCAA* authorizes the court to deal with secured and unsecured claims. However, s. 12 deals with the determination of claims for the purposes of the CCAA and does not authorize the court to determine claims which fall outside of *CCAA* proceedings, such as the Trust Claim and the Post-Filing Claim.[22]

In the result, Tysoe J. lifted the stay so as to permit an action to be commenced to resolve all of Caterpillar's claims. The significance of the decision for our purposes is that the Court in *360networks* considered the stay as applying to claims that arose after the initial order.

30 In *Stelco*, Farley J., relying on *360networks*, also held that the post-filing creditor's claim in that case "continues to be stayed and is to be dealt with in the ordinary course of litigation after Stelco's *CCAA* protection is terminated."[23]

31 *Campeau* does not deal with a post-filing creditor, but it does address the situation where a creditor, whose claim is not accepted as part of the plan of arrangement, wants to commence action. Blair J. (as he then was) refused an application brought by Robert Campeau and the Campeau Corporations to lift the stay of proceeding imposed by the initial order. In doing so, he wrote:

> 24. In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with — at least for the purposes of that proceeding — in the C.C.A.A. proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very effectively unless

and until Olympia & York — whose alleged misdeeds are the real focal point of the attack on both sets of defendants — is able to participate.

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

1. Counsel for the plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the C.C.A.A. proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York Plan filed under the Act.

2. In this sense, the Campeau claim — like other secured, undersecured, unsecured, and contingent claims — must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings — i.e. the action and the CCAA proceeding — the scales tip in favour of dealing with the Campeau claim in the context of the latter: see *Attorney General v. Arthur Andersen & Co.* (United Kingdom) (1988), [1989] E.C.C. 224 (C.A.), cited in *Arab Monetary Fund v. Hashim, supra.*

I am aware, when saying this, that in the initial plan of compromise and arrangement filed by the applicants with the court on August 21, 1992, the applicants have chosen to include the Campeau plaintiffs amongst those described as "Persons not Affected by the Plan". This treatment does not change the issues, in my view, as it is up to the applicants to decide how they wish to deal with that group of "creditors" in presenting their plan, and up to the other creditors to decide whether they will accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the C.C.A.A. proceedings.[24] [Emphasis added.]

Campeau is further authority for the proposition that a supervising *CCAA* judge can refuse a prospective creditor, who is not part of the plan of arrangement, leave to commence proceedings and that the creditor may commence action after the stay is lifted.

32 Each of *360networks*[25], *Stelco*[26] and *Campeau*[27] supports the proposition that while a stay of proceedings is extant, an application to lift the stay must be made to permit an action to be commenced against a debtor that is subject to a *CCAA* order, regardless of whether the claim arises before or after the initial order, or whether the prospective creditor is able to take part in the plan of arrangement.

33 Prevost J. in *Ramsay Plate Glass* points out that under the *Bankruptcy and Insolvency Act*[28] (*the* "*BIA*") the stay of proceedings does not extend to a claim not provable in bankruptcy. This is so, however, because of the definition of "claim provable in bankruptcy" and ss. 69.3(1) and s. 121. (See Houlden & Morawetz, *The 2007 Annotated Bankruptcy and Insolvency Act*.[29]) While s. 12 of the *CCAA* defines "claim" by reference to "claim provable in bankruptcy," it has not been interpreted as limiting the extent of the stay.

34 On the face of ss. 11(3) and (4) of the *CCAA*, the authority to safeguard the company is not limited to staying existing actions, but extends to "prohibiting, until otherwise ordered by the court, the commencement of ... any other action, suit or proceeding against the company." Unlike the *BIA* there are no words limiting this phrase to debts or claims in existence at the time of the initial order.

35 With respect to the wording of the Initial Order, there can be no question that it applies to post-filing creditors. The broad wording of paras. 5 and 6 of the Initial Order and the definition of "proceeding" confirm this. No distinction is made between creditors in existence at the time of the Initial Order and those who become creditors after. Paragraph 11(b) also establishes a mechanism for post-filing creditors to seek relief by obtaining an exemption from the protection afforded Bricore, which would include the prohibition of proceedings. The obvious implication is that the prohibition of proceedings applies to post-filing creditors, subject, of course, to obtaining leave of the Court to commence action.

V. Issue #2. Does s. 11.3 of the CCAA Mean That a Post-Filing Claimant Cannot Be Subject to the Stay of Proceedings Imposed by the Initial Order?

36 ICR argued that by the addition of s. 11.3 in 1997[30] to the *CCAA*, Parliament intended to grant a post-filing creditor the right to sue without obtaining leave.

37 In my respectful view, s. 11.3 cannot be interpreted in the way in which ICR contends. Indeed, a more logical and internally consistent reading of s. 11.3 and the other sections of the *CCAA* is to permit the supervising judge to determine, as a matter of discretion, whether an action commenced by a post-filing creditor should be permitted to proceed.

38 Section 11.3 forms part of a comprehensive series of sections addressing the question of stays added in 1997 and 2001:[31]

> **No stay, etc., in certain cases**
>
> 11.1 (2) No order may be made under this Act **staying or restraining** the exercise of any right to terminate, amend or claim any accelerated payment under an eligible financial contract or preventing a member of the Canadian Payments Association established by the *Canadian Payments Act* from ceasing to act as a clearing agent or group clearer for a company in accordance with that Act and the by-laws and rules of that Association. (Added by S.C.1997, c. 12, s. 124)
>
> **No stay, etc., in certain cases**
>
> 11.11 No order may be made under this Act **staying or restraining**
>
> > (a) the exercise by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*;
> >
> > (b) the exercise by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or
> >
> > (c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*. (Added by S.C. 2001, c. 9, s. 577.)
>
> **No stay, etc. in certain cases**
>
> 11.2 No order may be made under section 11 **staying or restraining any action, suit or proceeding** against a person, other than a debtor company in respect of which an application has been made under this Act, who is obligated under a letter of credit or guarantee in relation to the company. (Added by S.C.1997, c. 12, s. 124)

11.3 No order made under section 11 shall have the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit. (Added by S.C.1997, c. 12, s. 124)

[Emphasis added.]

39 In ss. 11.1(2), 11.11 and 11.2, Parliament uses the words “staying or restraining” to describe those circumstances limiting the scope of the stay power, but these words are not repeated in s. 11.3. This application of the *expressio unius* principle supports the obvious implication that s. 11.3 does not limit the authority of the court to stay all proceedings.

40 While the debates of the House of Commons in Hansard do not comment on s. 11.3, several text book authors assist with the task of interpretation. Professor Honsberger states:

A distinction is made between the compulsory supply of goods and services and the extension of credit by suppliers to a debtor company in CCAA proceedings.

Suppliers may be enjoined from cutting off services or discontinuing the supply of goods by reason of there being arrears of payment provided the debtor commences regular payments for current deliveries.

However, no order made under s. 11 of the Act has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration after the order is made.

. . . . .

... A court could make a similar order after the 1997 amendments provided it stipulated that the debtor company made immediate payment for goods, services, use of leased or licensed property or other valuable consideration after the order is made.[32]

[Footnotes omitted.]

41 Professor McLaren similarly comments in his text “Canadian Commercial Reorganization”:[33]

3.800 ... Section 11.3 acts as an exemption to the stay provisions of s. 11 of the CCAA. It appears the section is meant to balance the rights of creditors with debtors. The section addresses the concern that judges had too much discretion in issuing stays. Under s. 11.3(a), if a person supplies goods or services or if the debtor continues to occupy or use leased or licensed property, the court will not issue a stay order with respect to the payment for such goods or services or leased or licensed property. In essence, s. 11.3(a) will not permit the court to prohibit these individuals from demanding payment from the debtor for goods, services or use of leased property, after a court order is made.

42 Finally, Professor Sarra in *Rescue! The Companies’ Creditors Arrangement Act*[34] provides this insight:

While the court cannot compel a supplier to continue to extend credit to the debtor during a *CCAA* proceeding, the court can protect trade suppliers that choose to supply goods or credit during the stay period by granting them a charge on the assets of the debtor that will rank ahead of other claims. While section 11.3 of the *CCAA* states that no stay of proceedings can have the effect of prohibiting a person from requiring immediate payment for goods, services or the use of leased or licensed property, or requiring the further advance of money or credit, trade suppliers were often continuing credit only to find that they had lost further assets during the workout period because of their priority in the hierarchy of claims. Hence the practice of post-petition trade credit priority charges developed, first recognized in Alberta.[35] [Footnotes omitted.]

43 *Smith Brothers Contracting Ltd., Re*[36] also supports a narrow reading of s. 11.3. After citing *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*[37] and *Quintette Coal Ltd. v. Nippon Steel Corp.*[38] with respect to the intention of Parliament and the object and scheme of the *CCAA*, Bauman J. in *Smith Brothers* wrote:

> 45 It is interesting that Gibbs J.A. suggested that it would be unlikely that a court would exercise its s. 11 jurisdiction:
>
> > ... where the result would be to enforce the continued supply of goods and services to the debtor company without payment for current deliveries ...
>
> 46 Parliament has now precluded that by adding s. 11.3(a) to the CCAA. It is instructive to note, however, that the subsection has been added against the backdrop of jurisprudence which has underlined the very broad scope of the court's jurisdiction to stay proceedings under s. 11.
>
> 47 To repeat the relevant portion of the section:
>
> > 11.3 No order made under s. 11 shall have the effect of
> >
> > > (a) prohibiting a person from requiring immediate payment for ... use of leased or licenced property ... provided after the order is made;
>
> It is noted that the remedy which is preserved for creditors is a relatively narrow one; it is the right to require immediate payment for the use of the leased property.[39]

Thus, Bauman J. interpreted s. 11.3 in accordance with Parliament's intention and the object and scheme of the C*CAA* as creating a narrow right — the right to withhold services without immediate payment.

44 I agree with Bricore's counsel. When a supplier is requested to provide goods or services on a post-filing basis to a company operating under a stay of proceedings imposed by the *CCAA*, s. 11.3 allows the supplier the right:

> (a) to refuse to supply any such goods or services at all;
>
> (b) to supply such goods or services on a "cash on demand" basis only;
>
> (c) to negotiate with the insolvent corporation for the amendment of the *CCAA* Order to create a post-filing supplier's charge on the assets of the insolvent corporation to secure the payment by the insolvent corporation of amounts owing by it to such post-filing suppliers; or
>
> (d) to take the risk of supplying goods or services on credit.

Where the Initial Order imposes a stay of proceedings and prohibits further proceedings, s. 11.3 does not permit the supplier of goods or services to sue without obtaining leave of the court to do so.

VI. Issue #3: If Leave Is Required, Did the Supervising CCAA Judge Commit a Reviewable Error in Refusing ICR Leave to Commence an Action Against Bricore?

45 Having determined that the stay and prohibition of proceedings applies to ICR, notwithstanding its status as a post-filing creditor, the next issue is whether Koch J. erred in refusing to lift the stay on the basis that the claim was not tenable.

46 The claim against Bricore is presumably against Bricore both in its own right and pursuant to its indemnification agreement with the CRO. Paragraph 18 of the CRO Order requires Bricore to indemnify the CRO:

> 18. Bricore Group shall indemnify and hold harmless the CRO from and against all costs (including, without limitation, defence costs), claims, charges, expenses, liabilities and obligations of any nature whatsoever incurred by the CRO that may arise as a result of any matter directly or indirectly relating to or pertaining to any one or more of:
>
> > (a) the CRO's position or involvement with Bricore Group;
> >
> > (b) the CRO's administration of the management, operations and business and financial affairs of Bricore Group;
> >
> > (c) any sale of all or part of the Property pursuant to these proceedings;
> >
> > (d) any plan or plans of compromise or arrangement under the CCAA between Bricore Group and one or more classes of its creditors; and/or
> >
> > (e) any action or proceeding to which the CRO may be made a party by reason of having taken over the management of the business of Bricore Group.[40]

47 The authority to lift the stay imposed by the Initial Order against Bricore is contained in s. 11(4) of the *CCAA*:

> 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,
>
> . . . . .
>
> > (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.]

48 This is a discretionary power, which invokes the standard of appellate review stated as follows:

> [22] ... [T]he function of an appellate court is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that members of the appellate court

would have exercised the discretion differently. The function of the appellate court is one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order.[41]

It is often expressed as permitting intervention where the judge acts arbitrarily, on a wrong principle, or on an erroneous view of the facts, or when the appeal court is satisfied that there is likely to be a failure of justice as a result of the refusal. See: *Martin v. Deutch*[42]

49 With respect to discretionary decisions made under the *CCAA*, there is a particular reluctance to intervene. The reluctance is justified on the basis of the specialization of the judges who have carriage of complex proceedings that are often replete with compromised solutions.[43] This does not mean that the Court of Appeal can turn a blind eye or permit an injustice, but it does provide the backdrop against which *CCAA* discretionary decisions are reviewed.

50 Unlike the *BIA*,[44] the *CCAA* contains no specific statutory test to provide guidance on the circumstances in which a *CCAA* stay of proceedings is to be lifted. Some guidance, nonetheless, can be found in the statute and in the jurisprudence.

51 Subsection 11(6) of the *CCAA* states:

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

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

While the reference to "order" in the opening clause "[t]he court shall not make an order under s. (3) or (4)" may very well be to the Initial Order and not to the order lifting the stay, s. 11(6) and, in particular, its legislative history, are also relevant to an application to lift the stay.

52 Subsection 11(6) was brought into effect in 1997 by Bill C-5, which enacted "An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act." When Bill C-5 received third reading on October 23, 1996, s. 11(6) took this form:

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

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that:

(i) the applicant has acted, and is acting, in good faith and with due diligence,

(ii) a viable compromise or arrangement could likely be made in respect of the company, if the order being applied for were made, and

(iii) no creditor would be materially prejudiced if the order being applied for were made.

After Bill C-5 received third reading, it was referred to the Standing Senate Committee on Banking, Trade and Commerce.[45] The Committee reported:

> A number of insolvency experts were of the opinion that the proposed amendment would make it virtually impossible to obtain extensions of the initial 30-day stay under the CCAA and force companies to file plans of arrangement within 30 days after the making of the initial stay order.
>
> Others suggested that some CCAA reorganizations would have turned out differently if the amendment had been in place.
>
> . . . . .
>
> Of the submissions received about proposed subsection 11(6), all but one condemned the provision. ...
>
> The CLHIA [Canadian Life and Health Insurance Association] argued that the amendment to the bill would be a significant improvement to the CCAA for four reasons:
>
> (a) it would give direction to the courts as to the tests that must be met before the extension order was granted;
>
> (b) it would more closely align the CCAA with the BIA;
>
> (c) the tests are well-established under the BIA and have received extensive scrutiny and study; and
>
> (d) the tests would direct the courts to consider how the stay would affect creditors. [Footnote omitted.]
>
> . . . . .
>
> The Committee shares the concerns expressed about the potential impact of proposed subsection 11(6) of the CCAA, particularly the concern that the CCAA may no longer be a sufficiently flexible vehicle for large, complex corporate reorganizations.
>
> While the Committee fully supports initiatives to align the provisions of the CCAA more closely with those of the BIA, these initiatives must be the subject of thorough discussion and analysis before [making] their way into legislation. Unfortunately, such discussion did not take place prior [to] the introduction of proposed subsection 11(6).[46]

Notwithstanding the submissions of the Canadian Life and Health Insurance Association, the Standing Committee recommended that Bill C-5 be amended by striking subparagraphs 11(6)(b)(ii) and (iii).

53 The House of Commons concurred in the Amendments recommended by the Senate on April 15, 1997.[47] Bill C-5, as thus amended, received Royal Assent on April 25, 1997 and was proclaimed in its present skeletal form on September 30, 1997.[48] Neither the amending legislation[49] nor the proposed Bill presently before the Senate[50] make any change to s. 11 in this regard.

54 The Senate's and Parliament's specific rejection of a limitation on the court's discretion is a strong indication of Parliamentary intention. The fact that Parliament did not see fit to limit the discretion in any significant manner, despite

having been given the opportunity to do so, confirms the broad discretion given in ss. 11(3) and (4) to the supervising *CCAA* judge. Discretion is never completely unfettered, but an appellate court should be reluctant to impose rigid tests, standards or criteria where Parliament has declined to do so. Some guidance can be taken from the jurisprudence.

55 In *Canadian Airlines Corp., Re*[51] Paperny J. (as she then was) indicated that the obligation of the supervising *CCAA* judge is to "always have regard to the particular facts" and "to balance" the interests. As Farley J. said in *Ivaco Inc., Re*,[52] the supervising *CCAA* judge must also be concerned not to permit one creditor to mount "an indirect but devastating attack on the CCAA stay" so as to give one creditor an inappropriate advantage over other unsecured creditors as well as over secured creditors with priority.

56 In *Ivaco Inc., Re*[53] Ground J. stated this to be the criteria to determine whether a stay should be lifted:

> 20 It appears to me that the criteria which the court must consider in determining whether to lift a stay, being whether the proposed cause of action is tenable, the balancing of interests as between the parties, the relative prejudice to the parties, and whether the proposed action would be oppressive or vexatious or an abuse of the court process, would all be met with respect to a trial of issues to resolve interpretation of the APAs with respect to the calculation of the working capital adjustments.

Ground J. went on to confirm that finding a tenable or reasonable cause of action is not the only factor to be considered:

> 30 Even if the Statement of Claim did disclose a tenable or reasonable cause of action, there are a number of other factors which this court must consider which militate against the lifting of the stay in the circumstances of this case. The institution of the Proposed Action, even if a tight timetable is imposed, would inevitably result in considerable delay and complication with respect to the full distribution of the estate to the detriment of many small trade creditors and individual creditors as well as to pension claimants. In addition, it would appear from the evidence before this court that Heico has been aware of most of the matters alleged in the Statement of Claim for approximately 2 years and there does not appear to be any valid reason given for the delay in commencing the application to lift the stay.

57 Turning back to the case before us, Koch J.'s reasons for refusing to lift the stay were:

> [16] . . .
>
> > (a) An application to lift a stay of proceedings must be addressed in the context of the broad objectives of the *CCAA* which is to promote re-organization and restructuring of companies. ....
> >
> > (b) The standard for determining whether to lift the stay of proceedings is not, as ICR contends, whether the action is frivolous, analogous to the standard which a defendant applicant under Rule 173 of *The Queen's Bench Rules* must meet to set aside a statement of claim. Rather, to obtain an order lifting the stay ad hoc to permit the suit to proceed, the proposed plaintiff must establish that the cause of action is tenable. I interpret that to mean that the proposed plaintiff has a *prima facie* case. See *Ivaco Inc. (Re)*, [2006] O.J. No. 5029 (Ont. S.C.J.).
> >
> > (c) In determining whether to lift a stay, the Court must take into consideration the relative prejudice to the parties. See *Ivaco, Inc. (Re)*, *supra*, para. 20; and Richard H. McLaren & Sabrina Gherbaz, *Canadian Commercial Reorganization: Preventing Bankruptcy* (Toronto: Canada Law Book, 1995) at 3-18.1. ...[54]

He went on to find that the proposed action against Bricore was not "tenable."

58 On an application made by a post-filing creditor, a supervising *CCAA* judge can refuse to lift the stay on the basis that the creditor's claim is outside the *CCAA* process and the action can be commenced after the *CCAA* order is lifted. (See *360networks*[55] and *Stelco*[56]). Koch J. did not exercise this option. He was no doubt motivated in part by the fact that by the time ICR's claim could be tried, after the stay is no longer in effect, there may be no funds for it to claim as Bricore has now liquidated all of its assets and there remains, for all intents and purposes, a pool of funds only. The funds are subject to a plan of distribution, approved by the creditors, and will be distributed over this year.

59 Instead of simply rejecting the claim, Koch J. appears to have weighed the evidence to a certain extent as a means of deciding the next step. He concluded that the claim was not frivolous within the meaning of a Queen's Bench Rule 173 striking motion, but it was nonetheless an untenable claim. The question becomes whether a supervising *CCAA* judge can weigh a post-filing claim in this manner.

60 Professor Sarra comments on the anomalous position of liquidating *CCAA* proceedings:

> One policy issue that has not to date been fully explored is whether the *CCAA* should be used to effect an organized liquidation that should properly occur under the *BIA* or receivership proceedings. Increasingly, there are liquidating *CCAA* proceedings, whereby the debtor corporation is for all intents and purposes liquidated, but not under the supervision of a trustee in bankruptcy or in compliance with all of the requirements of the *BIA*. While creditors still must vote in support of such plans in the requisite amounts, there may be some public policy concerns regarding the use of a restructuring statute, under the broad scope of judicial discretion, to effect liquidation. ...[57]

The issue of whether the *CCAA* should be used for a liquidating, as opposed to a restructuring purpose, is not before us. In the case at bar, when the Initial Order was granted, it was thought possible that Bricore could be restructured. It was only some months after the Initial Order that it became clear that all of the assets would have to be sold. Our task at this point is to address the position of an undetermined claim arising post-filing in such a context.

61 If a claim had some reasonable prospect of success and were otherwise meritorious in the *CCAA* context, it seems inappropriate to refuse simply to lift the stay on the basis that the claim is outside the *CCAA* process knowing that, by the time the matter is heard in the ordinary course, there will be no assets remaining. On the other hand, it also seems inappropriate to delay distribution of the assets under a plan of arrangement, or make some other accommodation, for an action that is likely to fail. I should make it clear that I am not addressing the issue of whether a meritorious claimant can share in a proposed plan of distribution as a result of the liquidation of the assets. The issue before this Court is whether a post-filing creditor should be permitted to commence action, in the context of what is now a liquidating *CCAA*, and avail itself of whatever pre-judgment remedies might be available to it as a result of its claim.

62 In the face of a liquidating plan of arrangement, given the broad jurisdiction conferred by the *CCAA* on the Court, it seems appropriate that the supervising judge establish some mechanism to weigh the post-filing claim to determine the next step. The next step might entail permitting the claimant to commence action and attempt to convince a chambers judge to grant it a pre-judgment remedy in relation to the funds. It is also possible that the supervising judge may delay distribution of the funds, or some portion thereof, with or without full security for costs, or on such other terms as seems fit. Mechanisms to test the claim could include referral to a special claims officer, examination of the pertinent principal parties, or a settlement conference, or, as in this case, a preliminary examination by the supervising *CCAA* judge in chambers based on affidavit evidence.

63 In the case at bar, having determined that it was appropriate to assess ICR's claim in some way, did Koch J. err either in his statement of the appropriate test or in its application?

64 Koch J. used *prima facie* case, which he equated with tenable cause of action. "Tenable cause of action" is taken from Ground J.'s decision in *Ivaco Inc., Re*,[58] but Ground J. used "reasonable cause of action" or "tenable case," as comparable terms and as only one of four criteria to be considered. The use of "*prima facie* case" defined as "tenable cause of action" is not particularly helpful as the words have been used in different contexts with different purposes in mind. Even in the context of bankruptcy where specific guidelines are given, and the courts have had long experience with the application of the tests, the debate continues as to what is meant by *prima facie* case and whether it is too high of a standard to apply in determining whether an action may be commenced.[59]

65 Koch J. was clearly correct to hold that the threshold established by s. 173 of *The Queen's Bench Rules* is too low. On the other hand, it is also important not to decide the case. The purpose for passing on the claim is not to determine whether it will or will not succeed, but to determine whether the plan of arrangement should be delayed or further compromised to accommodate a future claim, or some other step need be taken to maintain the integrity of the *CCAA* proceeding.

66 Given the broad discretion granted to a supervisory judge under the *CCAA*, as well as the knowledge and experience he or she gains from the ongoing dealings with the parties under the proceedings, it would be contrary to the purpose of the *CCAA* for the law under it to develop in a restrictive way. Having regard for this, there ought not to be rigid requirements imposed on how a supervising *CCAA* judge must exercise his or her discretion with respect to lifting the stay.

67 Nonetheless, a broad test articulated along the lines of that in *Ma, Re*[60] may be of assistance. The test from *Ma, Re* is:

> 3 ... As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

While the *Ma, Re* test was developed for use under the *BIA*, a test based on sound reasons, consistent with the scheme of the *CCAA*, to relieve against the stay imposed by ss. 11(3) and (4) of the *CCAA*, may be a better way to express the task of the chambers judge faced with a liquidating *CCAA* than a test based simply on *prima facie* case. It must be kept firmly in mind that the Court is dealing with a claimant that did not avail itself of the remedy of withholding services under s. 11.3. It is also useful to remind oneself that, in a case such as this, the *CCAA* proceeding began as a restructuring exercise with the attendant possibility of creating s. 11.3 claimants. The threshold must be a significant one, but not insurmountable.

68 In determining what constitutes "sound reasons," much is left to the discretion of the judge. However, previous decisions on this point provide some guidance as to factors that may be considered:

(a) the balance of convenience;

(b) the relative prejudice to the parties;

(c) the merits of the proposed action, where they are relevant to the issue of whether there are "sound reasons" for lifting the stay (i.e., as was said in *Ma, Re*, if the action has little chance of success, it may be harder to establish "sound reasons" for allowing it to proceed).

The supervising *CCAA* judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6). Ultimately, it is in the discretion of the supervising *CCAA* judge as to whether the proposed action ought to be allowed to proceed in the face of the stay.

69 While Koch J. did not state the test as broadly as I have, I agree that ICR does not reach the necessary threshold. ICR did not structure its affairs or establish a claim with the specificity that justifies the development of a remedy to allow it to participate in the liquidation of the Bricore assets. There is also no aspect of the liquidation that requires the Court in this case to be concerned. In particular, the stay need not be lifted, and no other step need be taken in the context of the *CCAA* proceedings in light of these facts:

1. as of January 30, 2006, the Building was subject to an exclusive Selling Officer Agreement that provided CMN Calgary with the exclusive right to sell the property and to earn a commission of 1.25% of the purchase price,[61] which is significantly less than that being claimed by ICR at a 5% commission;

2. the sale to the Proposed Purchaser was a sale of six of the seven Bricore properties;

3. the trial judge received a report dated September 25, 2006 from the CRO recommending approval of the sale, which is two days before the alleged contract with ICR was proposed;[62]

4. in the September 25 report, the CRO advised the Court that "the total aggregate purchase price for the Bricore Properties obtained by Bricore in the Accepted Offer to Purchase represented the greatest value which it would be possible to obtain for all of the Bricore Properties;"[63]

5. the September 27, 2006 letter from ICR to Bricore, states "we are aware that the properties are under contract to sell ..."; and,

6. there was no sale from Bricore to the City of Regina.

70 While ICR denies knowledge of the sale, it is important to come back to the September 27th letter from ICR to Mr. Ruf. It states:

> **We are aware that the properties are under contract to sell** and request that ICR be protected in the specific situations as outlined.[64] [Emphasis added]

The addition by the CRO of these words, "Date of closing of *a sale* or December 31, 2006 whichever is earlier," to that letter adds further support to the veracity of the CRO's report to the effect that the CRO entered into discussions with ICR to provide for the eventuality of a failed sale to the purchaser with whom Bricore already had a contractual relationship.

71 Finally, in assessing Koch J.'s decision, and in determining the deference that is owed to it, I am not unmindful that he issued some 20 orders in 2006, pertaining to the Bricore restructuring, at least five of which dealt substantively with the

Building and its prospective sale to the Proposed Purchaser.

72 Thus, applying the standard of review previously articulated, I cannot say that Koch J. acted arbitrarily, on a wrong principle, or on an erroneous view of the facts, or that a failure of justice is likely to result from the exercise of his discretion in the manner he did.

VII. Issue #4. Did the Supervising CCAA Judge Make a Reviewable Error in Refusing Leave to Commence an Action Against the CRO?

73 In addition to the indemnification provided by para. 18 of the CRO Order quoted above, the Order goes on to indicate the only circumstances in which the CRO can be sued personally:

> 20. For greater clarity, the CRO [*sic*]:
>
> . . . . .
>
> > (c) the CRO shall incur no liability or obligation as a result of his appointment or as a result of the fulfillment of his powers and duties as CRO, except as a result of instances of fraud, gross negligence or wilful misconduct on his part; and
> >
> > (d) no Proceeding shall be commenced against the CRO as a result of or relating in any way to his appointment or to the fulfillment of his powers and duties as CRO, without prior leave of the Court on at least seven days' notice to Bricore Group, the CRO and legal counsel to Bricore Group.
>
> 21. Subject to paragraph 20 hereof, nothing in this Order shall restrict an action against the CRO for acts of gross negligence, bad faith or wilful misconduct committed by him.

Setting aside the obvious ambiguity in this Order, it can be taken that to assert a claim against the CRO personally, ICR had to claim "fraud, gross negligence, wilful misconduct or bad faith." ICR claimed "bad faith."

74 Based on para. 20(d) of the Initial Order, there is no question that ICR was required to obtain prior leave of the court. The issue thus becomes whether the supervising *CCAA* judge erred in exercising his discretion in refusing to lift the stay.

75 Koch J.'s reasons for refusing to lift the stay are these:

> [18] Neither is there any basis upon which to lift the stay with respect to the proposed action against Maurice Duval, the Chief Restructuring Officer. Considerations applicable to Bricore under s. 11.3 do not apply to a court-appointed restructuring officer. Maurice Duval, as an officer of the Court, has explained his position in a cogent way. I accept his explanation. He did not sell the Department of Education Building to the City of Regina. He was not aware at the relevant time that the purchaser was going to resell. Indeed, his efforts were directed toward closing a single transaction involving all six Bricore properties. Although the proposed pleading accuses Mr. Duval of acting in "bad faith", it is not suggested on behalf of ICR that Mr. Duval has been guilty of fraud, gross negligence or wilful misconduct; that is, any of the limitations or exceptions expressly listed in paragraph 20(c) of the order of May 23, 2006.

> [19] As stated previously, the overriding purpose of the *CCAA* must also be considered. That applies in the Duval situation too. The statute is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order.[65]

76 Again, Koch J. employed the same mechanism that he used to assess the claim against Bricore. He considered the status of the CRO as an officer of the court, noted the ambiguity in the Order and weighed the evidence to a certain extent. The question he was answering was the sufficiency of the claim to permit an action to be commenced against the Court's officer.

77 Again, applying the standard of review with respect to discretionary orders, there is no basis upon which the Court can intervene with Koch J.'s refusal to lift the stay so as to permit an action against the CRO in his personal capacity.

VIII. Issue #5. Did the Supervising CCAA Judge Err in Awarding Costs on a Substantial Indemnity Basis?

78 Koch J. awarded substantial indemnity costs for this reason:

> [6] In my view, allegations of misconduct against a court officer are rare and exceptional. Therefore costs on this motion should be imposed on a substantial indemnity scale, although not on the full solicitor and client basis sought. Bricore is entitled to costs on the motion of $2,000.00, and Maurice Duval is entitled to costs of $1,000.00, payable in each instance by the applicant, ICR Commercial Real Estate (Regina) Ltd.[66]

79 I note that Newbury J.A. in *New Skeena Forest Products Inc., Re*[67] dismissed a challenge to a costs award, holding that "these are the kinds of considerations which the [*CCAA*] Chambers judge ... was especially qualified to make." And, of course, all costs orders are discretionary orders.

80 Nonetheless in this case, it would appear that the supervising *CCAA* judge erred. There is no basis upon which to order substantial indemnity costs with respect to the application to lift the stay in relation to Bricore. Bad faith was not alleged on its part. With respect to the CRO, the only basis upon which the stay could be lifted was to make an allegation of "bad faith." In the absence of some other factor, ICR cannot be faulted for making the very allegation that it was required to make in order to bring its application within the ambit of the stay of proceedings that had been granted.

81 In addition, while Koch J. indicated he was not awarding solicitor-and-client costs, there is not a sufficient distinction between substantial indemnity costs and solicitor-and-client costs. An award approaching solicitor-and-client costs is still a punitive order and, as there is no authority for the awarding of substantial indemnity costs, relies upon the same jurisprudential base as solicitor-and-client costs. As such, the award does not seem to meet the test established in *Siemens v. Bawolin*[68] and *Hashemian v. Wilde*[69] wherein it is stated that solicitor-and-client costs are generally awarded where there has been reprehensible, scandalous or egregious conduct on the part of one of the parties in the context of the litigation.

82 If the parties are unable to agree with respect to costs in the Court of Queen's Bench and in this Court, they may speak to the Registrar to fix a time for a conference call hearing regarding costs.

Appeal allowed in part.

Footnotes

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

2 Appeal Book, pp. 17a and 22a [Affidavit of Paul Mehlsen].

3 *Ibid*. at pp. 27a and 32a.

4 Order (Appointment of Chief Restructuring Officer, Extension of Stay of Proceedings; Additional DIP Financing) made May 23, 2006.

5 Order (Extension of Stay of Proceedings) made August 1, 2006.

6 Order (Extension of Stay of Proceedings) made August 18, 2006.

7 Order (Extension of Stay of Proceedings, Extension of Appointment of CRO and Increase in Maximum CRO Remuneration; Increase to Administrative Charge) made September 25, 2006.

8 Order (Approving Sale; Extending Stay of Proceedings; Extending Appointment of CRO) made October 10, 2006.

9 Appeal Book, p. 7a-8a.

10 *Ibid*. at p. 12a.

11 *Ibid.* at pp. 14a-15a.

12 *Ibid*. at p. 46a.

13 *Ibid*. at pp. 38a-39a.

14 *Ibid*. at p. 51a-52a.

15 *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKQB 121 (Sask. Q.B.).

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44 *Supra* note 28.

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51 (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.) at para 15.

52 (2003), 1 C.B.R. (5th) 204 (Ont. S.C.J. [Commercial List]) at para 3.

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55 *360networks*, *supra* note 19.

56 *Stelco*, *supra* note 20.

57 *Rescue! The Companies' Creditors Arrangements Act*, *supra* note 34 at p. 82.

58 *Ivaco Inc., Re*, *supra* note 53.

59 *Ma*, *Re* (2001), 24 C.B.R. (4th) 68 (Ont. C.A.). See Houlden & Morawetz, *The 2007 Annotated Bankruptcy and Insolvency Act*, supra note 29 at p. 403.

60 *Ibid.*

61 Order (Extension of Stay, DIP Financing, Sale Process & Shareholder Proceedings) of Koch J. in Chambers dated February 13, 2006.

62 Order made September 25, 2006, *supra* note 7.

63 Appeal Book, p. 37a, para. 3.

64 *Supra* note 11.

65 *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, *supra* note 15.

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67 [2005] 8 W.W.R. 224 (B.C. C.A.) at para. 23.

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End of Document

TAB 3

2009 ABQB 503
Alberta Court of Queen's Bench

Allarco Entertainment Inc., Re

2009 CarswellAlta 1458, 2009 ABQB 503, [2009] A.W.L.D. 4034, [2010] 4 W.W.R. 299, 12 Alta. L.R. (5th) 341, 180 A.C.W.S. (3d) 569, 483 A.R. 53, 58 C.B.R. (5th) 140

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

And in the Matter of Allarco Entertainment Inc. and Allarco Entertainment 2008 Inc. and Alliance Films Inc.

J.B. Veit J.

Heard: September 2-3, 8-9, 2009
Judgment: September 14, 2009
Docket: Edmonton 0903-09146

Counsel: Frank R. Dearlove for Applicant, Alliance Films Inc.
Charles P. Russell, Q.C. for Allarco Entertainment Inc., Allarco Entertainment 2008 Inc.
Richard T.G. Reeson, Q.C. for Alberta Treasury Branches
Michael J. McCabe, Q.C. for Pricewaterhouse Coopers Inc.
David Ullmann for MGM Television of Canada, a division of Metro-Goldwyn-Mayer Studios, Inc.
Marc-Andre Morin for Twentieth Century Fox/Incendo Television Distribution Inc., Incendo Media Inc.
Harry Fogul for Twentieth Century Fox/Incendo Television Distribution Inc.
Eric Vallieres for TVA Films, a division of TVA Group Inc.
Patrick Roche for Maple Pictures Corp.
Roger P. Simard for National Bank of Canada
Danny M. Nunes for NBC Universal
Bertrand Langlois for Christal Films Distribution Inc.
Alan H. Brown for Starz Media LLC

Subject: Insolvency

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

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

Companies operated pay-per-view television channel — Companies had contracts with program supplier that provided for overall fee which was to be paid in instalments — Companies obtained protection from creditors pursuant to Companies' Creditors Arrangement Act — As part of initial order, companies obtained "pay-per-play" regime in relation to its obligations to program supplier — After unsuccessful negotiations, companies terminated contracts with program supplier — Program supplier brought motion for variation of initial order in relation to "pay-per-play" term and for order invalidating companies' terminations — Motion granted in part — Initial order should not have varied contracts by establishing different payment structure, but companies were entitled to terminate contracts — At stage of initial order, court does not have jurisdiction to approve unilateral contract changes — Post-protection service provider usually has right to maintain its contract prices — At stage of initial order, it would be inappropriate for court to attempt to draw up contract for parties — What parties have negotiated in contract should generally be presumed to be fair and reasonable price for services provided — Statutory right of debtor which has obtained protection from creditors to terminate contracts is subject to judicial oversight — Companies negotiated with supplier in good faith and termination of contracts was just and reasonable — During negotiations, supplier attempted to become secured creditor which would have given supplier unfair advantage over other creditors.

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s. 11(3) — considered

s. 11(4) — considered

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MOTION by supplier for variation of initial order granted under *Companies' Creditors Arrangement Act* and for order invalidating terminations of contracts.

J.B. Veit J.:

Summary

1 On June 16, 2009, the Allarco Entertainment companies, which operate Super Channel - a pay-per-view television channel - obtained protection from their creditors pursuant to the provisions of the *Companies' Creditors Arrangement Act*. As part of the initial, *ex parte*, order under the statute, Allarco Entertainment obtained a "pay-per-play" regime in relation to its obligations to Alliance Films Inc., a program supplier. Alliance Films now applies for a variation of the initial order: it argues that the court had no jurisdiction to grant what amounts to a major, unilateral, variation of its contracts with Allarco Entertainment. For an overall fee which was to be paid in instalments, the Alliance contracts allowed Allarco Entertainment

to exhibit films and television series, including the right to exhibit through subscription video on demand, for a limited number of times over a specific time period. Alliance asserts that the contract fees are paid for the ongoing right to exhibit the films or series episodes, that there is no “pay-per-play” provision in the contracts, and that the courts should not have imposed such a variation on Alliance.

2 Alternatively, Alliance argues that if the court does have jurisdiction to approve such contract variations, the court should not have exercised its discretion in favour of this variation because a “pay-per-play” regime constitutes a negative incentive on the debtor, Allarco Entertainment, to use the service provided by Alliance.

3 Alliance Films Inc. brought this motion in July, 2009. The court adjourned the motion on the condition that Allarco Entertainment negotiate in good faith with Alliance. The resulting negotiations were unsuccessful. On August 17, 2009, Allarco Entertainment terminated its contracts with Alliance Films. In its amended motion, in addition to asking for a variation in relation to the “pay-per-play” term in the initial order, Alliance also now asks the court to invalidate Allarco Entertainment’s terminations.

4

5 The CCAA states that where, under licence agreements, a contractor provides new services to a debtor who has obtained creditor protection, that service provider is entitled to “immediate payment”; this is compared to the provider who provided services prior to the granting of creditor protection, whose right to enforce payment is stayed. The CCAA does not state the basis on which compensation is to be paid for post-protection services. Allarco Entertainment argues that the basis for compensation should be “what is just and reasonable”; here, the debtor claims that a “pay-per-play” payment scheme is fair because it will get rid of instalment payments to Alliance, the payment of which will hinder Allarco Entertainment’s ability to re-organize. Alliance Films argues that, at this stage of the CCAA proceedings, the court does not have the right to make unilateral contract changes. At this stage of the proceedings, the broad wording of the CCAA, which is remedial legislation, does allow the courts to make some contracts between debtors and creditors: for example, with respect to utilities such as electricity, the court can allow the service provider to be paid not only the usual utility rate but also a security deposit: Fonderie Poitras ltée, Re. Another example is the court’s decision that some contract provisions relate to past services, and cannot therefore be enforced, and that other contract provisions relate to post-protection services for which the debtor incurs an obligation of immediate payment: Nortel. These are examples of the limited way in which the courts have jurisdiction to vary contracts in an initial order under CCAA proceedings. It is not necessary to articulate the principle which applies to the jurisdiction of the court in relation to contracts, s. 11.3(a) of the CCAA, and initial orders, but if that were required, it may be that, in the initial order courts have only a limited jurisdiction to affect contractual rights and that contractual payment terms negotiated between debtors and creditors generally represent the payments which debtors are required to make if they use the services set out in those contracts post-protection as that scale of payment best represents both a fair and reasonable price for the services and business in the ordinary course. This principle arises from the common law’s respect for contractual obligations. Generally, contracts cannot be varied by courts: contracts represent, in effect, a law which private parties have agreed applies to them. Court can interpret or rectify, but not vary, contracts. Even courts of equity generally limited themselves to deciding which contracts, or portions of contracts, would not be enforced by the justice system. Legislation could, of course, give to the courts the jurisdiction to vary or create contracts; however, given the clear state of the common law on this issue, explicit statutory provisions would be required to give courts a general jurisdiction to vary contracts. Such explicit authority is not given to courts in the CCAA at this stage of proceedings. The court’s only authority in the situation here was to distinguish between those portions of the Alliance contracts which represent services that have already been performed, the enforcement of which is stayed, and those portions which deal with the provision of ongoing services, the payment for which Allarco Entertainment was required to make according to the contract if it wished to continue using Alliance’s services.

6

7 After the issuance of the initial order, Allarco Entertainment negotiated with Alliance in good faith. The granting of protection from creditors is designed to promote such negotiations. Alliance is not required to continue to provide services to Allarco Entertainment post-protection; on the other hand, Allarco Entertainment is entitled to terminate contracts. The court does have a general oversight jurisdiction to determine if the termination of a contract by a debtor is just and reasonable. On this motion, Allarco Entertainment has satisfied that test: among other important aspects of the statutory test, the evidence establishes that, during the negotiations, Alliance Films was attempting to obtain a security status for its contracts which did not exist in its original contracts. Granting new security to Alliance post-protection would have given Alliance an advantage over other Allarco Entertainment creditors. Allarco Entertainment was in fact prevented from acceding to these attempts by Alliance Films.

Cases and authority cited

8 **By Alliance Film:** *Thomson Knitting Co., Re*, 1925 CarswellOnt 5 (Ont. C.A.) citing *William Hamilton Manufacturing Co. v. Hamilton Steel & Iron Co.* (1910), 23 O.L.R. 270 (Ont. C.A.); *Doman Industries Ltd., Re*, 2003 CarswellBC 538 (B.C. S.C. [In Chambers]); *Skeena Cellulose Inc., Re*, 2003 CarswellBC 1399 (B.C. C.A.); *Doman Industries Ltd., Re*, 2004 CarswellBC 1545 (B.C. C.A. [In Chambers]); *T. Eaton Co., Re*, 1999 CarswellOnt 3542 (Ont. S.C.J. [Commercial List]) citing *Keddy Motor Inns Ltd., Re* (1992), 13 C.B.R. (3d) 245 (N.S. C.A.); *Doman Industries Ltd., Re*, 2004 CarswellBC 1262 (B.C. S.C.); *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36, as amended, s. 11.3; *Stelco Inc., Re*, 2005 CarswellOnt 1537 (Ont. C.A.); *In Re Enron Corp.*, 279 B.R. 695 (U.S. Bankr. S.D. N.Y. 2002) (Gonzalez); *In re Kmart Corp.*, 293 B.R. 905 (U.S. Bankr. N.D. Ill. 2003); *In re Thatcher Glass Corp.*, 59 B.R. 797 (U.S. Bankr. D. Conn. 1986) at 6.

9 **By the Allarco Entertainment corporations:** *Lehndorff General Partner Ltd., Re* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]); *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.)); *Nortel Networks Corp., Re* [2009 CarswellOnt 3583 (Ont. S.C.J. [Commercial List])], 2009 WL 1763447; *In re Kmart Corp.*, 293 B.R. 905 (U.S. Bankr. N.D. Ill. 2003) (Sonderby); *In Re Enron Corp.*, 279 B.R. 695 (U.S. Bankr. S.D. N.Y. 2002) (Gonzalez); *Skeena Cellulose Inc., Re* (2003), 43 C.B.R. (4th) 187 (B.C. C.A.); *Blue Range Resource Corp., Re* (2000), 192 D.L.R. (4th) 281 (Alta. C.A.); *T. Eaton Co., Re* (1999), 14 C.B.R. (4th) 288 (Ont. S.C.J. [Commercial List]); *Doman Industries Ltd., Re* (2004), 29 B.C.L.R. (4th) 178 (B.C. S.C.); *Blue Range Resource Corp., Re* (1999), 245 A.R. 154 (Alta. Q.B.); *New Skeena Forest Products Inc., Re*, 2005 BCCA 192 (B.C. C.A.); *Woodward's Ltd., Re* (1993), 100 D.L.R. (4th) 133 (B.C. S.C.); *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.); *Air Canada, Re*, 66 O.R. (3d) 257, [2003] O.J. No. 2976 (Ont. C.A.); *SageCrest Dixon Inc., Re*, [2009] O.J. No. 1127 (Ont. S.C.J. [Commercial List]); *Air Canada, Re*, [2003] O.J. No. 6239 (Ont. S.C.J. [Commercial List]).

10 **By the court:** *Smith Brothers Contracting Ltd., Re*, [1998] B.C.J. No. 728 (B.C. S.C.); *West Bay SonShip Yachts Ltd., Re*, 2009 BCCA 31, [2009] B.C.J. No. 120 (B.C. C.A.); *Smoky River Coal Ltd., Re*, 2001 ABCA 209, [2001] A.J. No. 1006 (Alta. C.A.); *Fonderie Poitras ltée, Re*, 2009 QCCA 1416, [2009] J.Q. No. 7438 (Que. C.A.); *Boutiques San Francisco Inc., Re*, [2004] Q.J. No. 2886 (Que. S.C.).

11 Appendix A: The payment scheme in the initial order

1. Background

12 The following information is uncontested, or if contested, the court is able to come to a conclusion on the existence of a fact without ordering a trial of that issue.

a) Factual

13 The Allarco Entertainment companies operate Super Channel, an English language general interest pay television channel, one of only 3 pay-per-view television channels in Canada. The business of the companies is licensed and regulated by the Canadian Radio-Television and Telecommunications Commission, CRTC. One of the licensing requirements is the delivery of a certain proportion of Canadian content programming, which requirement ensures greater value for programming packages which satisfy that requirement.

14 The Allarco Entertainment companies rely on broadcasting distribution undertakings, BDUs, such as Rogers, Shaw and Bell TV, to sell Super Channel as a programming option. By law, the BDUs are obligated to treat all program networks equally, and not to unfairly encourage their customers to purchase the services of one program network in preference to others. Allarco Entertainment has an ongoing complaint about one of the BDUs, alleging that that distributor has not dealt fairly with Super Channel; this complaint is now the subject of a lawsuit, which is being case managed in Ontario. In a parallel mode, Allarco Entertainment has also laid its complaints against that BDU with the CRTC; there has not yet been a resolution of those complaints by the Commission.

15 When they applied for an initial order under the CCAA, the Allarco Entertainment companies had approximately 425 outstanding program license agreements, PLAs, with various entertainment program suppliers. Although the Allarco Entertainment companies had their own form of PLA which it used whenever possible, some of the more well known program licensors required the Allarco Entertainment companies to enter into the licensors' standard form of PLA. Approximately $64,000,000.00 of programming has been delivered to the Allarco Entertainment companies, for which payment had not been made when those companies applied for protection from their creditors.

16 Allarco Entertainment's PLAs with Twentieth Century Fox are the most significant component of the Super Channel programming cost.

17 Alberta Treasury Branch is the first secured creditor of the Allarco Entertainment companies; it holds general security agreements containing a charge over Allarco Entertainment's present and after acquired personal property. The ATB facility is currently fully drawn. ATB has agreed, on certain conditions, to reestablish the MasterCard facility for Allarco Entertainment. ATB has also indicated to Allarco Entertainment that it is prepared, on certain conditions, to forbear in pursuing recovery under the guarantee of the ATB facility.

18 Alliance has 5 PLAs with Allarco Entertainment. The PLAs typically give to Allarco Entertainment the right to play the programs offered in a package on an exclusive basis. Moreover, the first time an individual program is broadcast, Allarco Entertainment can advertise the play as a premiere, which has added value over and above the rights of exclusive broadcast.

19 When Alliance first brought this motion, it was concerned mainly with two of its program licence agreements with Allarco Entertainment, the January 15, 2008 PLA - Super Channel Q1 08 package - and the February 25th 2008 PLA - Super

Channel Q2 08 package. Those agreements are similarly structured. However, there are at least two important terms which are found in the latter agreement which are not found in the former.

20 The first of these terms is:

> **Security Interest**
>
> Licensee shall grant Licensor a security interest in respect of Licensee's payment obligations and Licensee shall execute and deliver documentation necessary to effect the foregoing.

Although Q2 2008 was agreed to and accepted by the parties on March 31st, 2008, by June 16, 2009, no security documents had been prepared by either Allarco Entertainment or Alliance Films. Alliance characterizes this contractual term as an equitable charge which has all the validity of a legal charge.

21 The second of the terms is:

> **Termination Rights**
>
> In the event of default by Licensee (including failure to pay amounts when due and/or if assignment for the benefit of creditors, seeks relief under any bankruptcy law or similar law for the protection of debtors, or allows a petition of bankruptcy to be filed against it, or a receiver or trustee to be appointed for substantially all of its assets that is not removed with 30 days), Licensor shall be entitled to terminate or suspend Licensee's rights with respect to programming (i) licensed hereunder; and/or (ii) licensed to Licensee by Licensor pursuant to any other agreement. In the event Licensor decides to terminate Licensee's rights to programming, all rights will automatically revert to Licensor, free and clear of any and all encumbrances and Licensor shall be entitled to immediate possession of all related materials.

In its PLAs which contained termination rights, Alliance did not terminate its contracts with Allarco Entertainment once it knew that Allarco Entertainment had obtained an initial order under the CCAA.

22 Alliance has 3 other PLAs with Allarco Entertainment. Alliance did not focus on these 3 PLAs because no payments are due at this time in relation to those agreements. Of those additional agreements: PLA 2007/2008 Allarco Package does not contain any security or termination clauses; PLA Super Channel Q4- 08 package does not contain a security clause but does contain a termination clause; and, PLA Super Channel Q3-08 Package contains both a security clause and a termination clause.

23 In their applications before the Court, Allarco Entertainment has provided the court with this broad stroke explanation of what its Plan of Arrangement might entail:

- sale to a third party investor of a portion or all of the equity in the business, having in mind the value of the existing CRTC license;
- ongoing active involvement in the business by entities related to Charles R. Allard, the sole director of Allarco Entertainment Inc.;

• significant reduction in both the cost of programming and general overhead expense would allow a viable business at a much lower level of subscriber involvement;

• success in the claim against the BDU would increase the number of subscribers;

• injection of funding into the business either by way of equity or further loans.

24 The Allarco Entertainment companies proposed, and in the initial order the court approved, PricewaterhouseCoopers Inc. as the Monitor under these proceedings. The Monitor has not, of course, taken a position on this application; however, the Monitor reports that, to date, it has not uncovered any abusive conduct by the Allarco Entertainment companies.

25 Paragraph 16 of the initial order provided that payment under the PLAs between Allarco Entertainment and various program licensors was to be made in accordance with the terms set out in para. 43 of the affidavit of the President and Chief Operating Officer of the Allarco Entertainment companies. Those terms are set out in appendix A hereto.

26 Since the granting of the initial order, Allarco Entertainment has continued to advertise access to Alliance programming, including subscription on demand, SVOD, rights.

27 The initial order has been extended by court order to September 30, 2009.

28 There is a dispute between the parties about the proportion of the contract payments which Alliance Films has received, and would receive, since the protection order. That issue will be discussed further in relation to the termination by Allarco Entertainment of the Alliance contracts.

29 There is a dispute between the parties concerning the content of the negotiations which preceded the termination by Allarco Entertainment of the Alliance contracts. This dispute will be referred to in the discussion of the termination issue hereunder.

30 As of August 17, 2009, Allarco Entertainment repudiated its contracts with Alliance and noted, “Any damages suffered by Alliance as a result of such repudiation will be dealt with in the claims process in the CCAA proceedings”.

31 Although the PLA providers set out in the Appearances section hereunder have been given notice of this application, only MGM has provided evidence and submissions on the motion, although many of the other parties attended the hearing by telephone. MGM is owed in excess of $1,400,000.00 in outstanding claims for licensing fees not paid to it prior to the date of the initial order in these proceedings. MGM would have expected payments in excess of $2,000,000.00 between the date of the initial order and February 2010 in the ordinary course. MGM will continue to provide Allarco with new films, at a discounted price, while MGM defers certain other payments for films which have already been delivered to Allarco. MGM is of the view that the continuation of the CCAA process is in the best interest of MGM and likely in the best interest of many other programming suppliers in these proceedings.

b) Legislative

32 Section 11 of the CCAA reads:

> 11.(1) Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.
>
> (2) An application made for the first time under this section in respect of a company, in this section referred to as an "initial application", shall be accompanied by a statement indicating the projected cash flow of the company and copies of all financial statements, audited or unaudited, prepared during the year prior to the application, or where no such statements were prepared in the prior year, a copy of the most recent such statement.
>
> (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
>> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>>
>> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>>
>> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.
>
> (4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
>
>> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>>
>> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>>
>> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.
>
> . . . . .
>
> (6) The court shall not make an order under subsection (3) or (4) unless
>
>> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>>
>> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

33 In 1997, the following amendment was made to s. 11 of the BCCA:

11.3 No order made under section 11 shall have the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, <u>use of</u> leased or <u>licensed</u> property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

(Emphasis added)

2. At This Stage of the CCAA Proceedings, Does the Court Have the Jurisdiction to Approve Unilateral Contract Changes Proposed by Allarco Entertainment to Alliance Film Contracts?

34 The short answer to this question is, No.

35 As a prelude to the discussion of the specific issue which is before the court, the court observes that the conclusion reached by Bauman J. in *Smith Brothers*, a leading decision on the interpretation of s. 11.3 of the CCAA, to the effect that it is the *use* (emphasis in the original at para. 19) of "leased property, not the making of the lease itself, after the stay order, which is within the purview of s. 11.3(a)" also apply here. The implications of that finding are twofold: the Alliance contracts are "true" licenses within the meaning of *Smith Brothers* - which means on the one hand that they are not security documents - and, Alliance cannot be forced to provide the portions of those contracts which relate to the provision of services post-protection without an immediate claim for those services.

36 The nature of the Alliance contracts is that they provide a service - the right to advertise and broadcast the availability of a package of programming - rather than the right to make a single broadcast. The advertising by Allarco Entertainment of the availability of the Alliance Films packages, including SVOB rights, constitutes "use" of the Alliance Films licensed property.

37 Allarco argues that s. 11.3 (a) of the CCAA which entitles a service provider to require immediate payment for services provided after the initial order does not indicate the payment basis on which those services will be provided. Allarco Entertainment suggests that this gap in the legislation is one which the court has the jurisdiction to fill and that the test for determining payment should be what is a just and equitable basis for compensation. Alliance argues that there is no gap, or that if there is a gap, the terms of the contract relating to payment should be accepted as being the proper basis for the provision of post-protection services.

38 To provide guidance in filling the gap, Allarco Entertainment proposes American jurisprudence pursuant to s. 503(b) of the *Bankruptcy Code* which allows a court to give priority treatment to "administrative expenses". However, in order to do so, the court must conclude not only that the debt arises out of a transaction with the debtor in possession, but also that the payment of the debt is beneficial to the operation of the debtor's business. Allarco notes that the concept of "beneficial" is narrowly interpreted, as is to be expected in a regime where those administrative expenses receive priority. For example, in *Kmart Corporation*, the bankruptcy court asserted that "post-petition performance alone does not automatically translate into a benefit to the estate, even if there was inducement on the part of the debtor"; the same principle was also applied in *Enron*.

39 I agree with Allarco Entertainment that there is a gap in the CCAA relating to the payment for post-protection services.

40 However, with respect, I disagree with Allarco Entertainment's proposed use of American jurisprudence. As the B.C. Court of Appeal emphasizes in *West Bay SonShip*, although similar policy objectives inform Canadian and American insolvency legislation, and while certain American decisions might even be persuasive in certain Canadian insolvency situations, in each specific potential use of American jurisprudence care must be exercised to ensure that, in the particular case, both the American legislative scheme is similar to that in Canada and, in the absence of expert evidence on the state of American law, that the American reasoning in a particular case is not conflated with the state of American jurisprudence on the issue.

41 For example, here the Alliance Films PLAs are, in Canadian or Albertan parlance, executory contracts. However, American authorities are not helpful on the treatment of "executory contracts" in the CCAA partly because the specialized interpretation of that term in American bankruptcy law is different from the interpretation of that term in Alberta and perhaps in Canada:

> 31 In "A Joint Report of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals - Joint Task Force on Business Insolvency Law Reform - March 15, 2002", the authors cited the following meanings for "executory contract":
>
> What is an executory contract? Neither the CCAA nor the BIA use the expression, but the United States Bankruptcy Code does in s. 365 ("Code, s. 365"). In general contract law, "executory contract" means a contract under which one or both parties still have obligations to perform. However, in U.S. bankruptcy law the expression is normally given a narrower meaning. According to the most widely accepted definition in the United States, an executory contract for the purposes of Code s. 365 is:
>
>> a contract under which both the obligations of the bankrupt ["A"] under the contract and the other party to the contract ["B"] are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.
>>
>> (Countryman, "Executory Contracts in Bankruptcy" (1974) 57 Minnesota Law Review 439 (Part 1), at 460).

42 More pertinently in this particular case, while there is in the American *Bankruptcy Code* a priority for administrative expenses which include "the actual, necessary costs and expenses of preserving the estate", there is no such limitation in s. 11.3 of the CCAA. Here, all post-protection service providers are entitled to claim immediate payment for their services. Therefore, the American jurisprudence is not, in this particular case, helpful.

43 In any event, however, no decision has been brought to my attention in which an American court has, other than in a utility situation which will be discussed later in the context of Canadian case law, itself calculated a price other than the contract price for the provision of post-protection services. Indeed, the weight of American jurisprudence on the issue appears to be that the contract price is assumed to be a reasonable price unless the debtor can show that the contract price is clearly unreasonable.

44 In the circumstances here, rather than to rely on American jurisprudence for guidance, it is more appropriate to rely on Canadian law and on first principles. As has been noted in much of the jurisprudence which interprets the CCAA, there is jurisdiction in the statute for a court to work out arrangements that will maximize benefits to all affected parties. As our Court

of Appeal put it in *Smoky River Coal Ltd., Re*:

> 16 CCAA orders become the roadmap for the proceedings and the litigation which may follow. Orders must therefore be drafted with clarity and precision. The purpose of the CCAA must be kept at the forefront in both drafting and interpreting a CCAA order. The CCAA is remedial legislation. As was stated in Re Lehndorff General Partner Ltd. (1992), 17 C.B.R. (3d) 24 (Ont. Gen. Div):
>
> > 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 a plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court.
> >
> > (Emphasis added)

45 The court's jurisdiction is not, however, unlimited. One limiting feature is the timing of the court's intervention. There is no doubt that, at the stage of the approval or failure of a plan, a court can impose terms on an unwilling creditor. We are not, however, at that stage.

46 At this stage, that is the stage of the initial order, whatever services are provided post-protection are offered by service providers who are entitled to be paid for those services. Generally, two payment regimes will be adopted. One is that ongoing service providers will accept, at least until the presentation of a plan, some new, negotiated, plan. Obviously if the parties to a contract agree to a variation of the terms of that contract, that variation governs. However, a service provider is not required to provide post-protection services without the right to claim immediate payment. If a service provider will not agree to modify its contractual payment terms in order to provide post-protection services, then the debtor must either terminate the contract or pay the contractual amount. In reaching this conclusion, I rely on the fact that, at the stage of the initial order, it would be inappropriate for a court to attempt to draw up a contract for the parties. What the parties have negotiated in a contract should generally be presumed to be a fair and reasonable price for the services provided. Not only are courts not business experts, but the cost of attempting to bring the court up to speed on the reasons that a creditor and a debtor each have for advancing a payment proposal would exhaust the financial capacity of an already insolvent debtor. At the stage of the presentation of a plan, the situation is, of course, different: at that stage the court has much more information on which to rely, including the business acumen of all other creditors.

47 Two exceptions to the general rule that contract terms govern have been identified in the jurisprudence. First, there are utility contracts: see *Hydro-Québec*. Even though the original contract for service did not contain any form of security payment, a court approved a security deposit as a term of post-protection provision of services. The provision of utilities is, however, a unique form of contract. On the one hand, utility contracts are contracts of adhesion whose payment terms are typically regulated by government or government-established commissions, and, on the other, the debtor does not typically have any choice in service providers. In those circumstances, it is appropriate for a court to set the terms of payment for post-protection services since a utility provider should not be required to provide post-protection services which require the advance of further credit: see s. 11.3(b). It appears that American jurisprudence takes a similar view with respect to utilities: see *Thatcher Glass*. The crucial nature of utility services requires the intervention of the court where the parties cannot agree on a fee for post-protection services; in other circumstances, a service provider can protect itself by refusing to provide services. These principles are usefully addressed by the Court of Appeal in *Fonderie Poitras ltée, Re*:

80 L'alinéa a) de l'article 11.3 de la LACC établit un principe clair : pendant la période de suspension, le fournisseur a droit d'être payé pour les services qu'il rend au fur et à mesure de leur utilisation.

81 Voici d'ailleurs les commentaires du professeur Richard H. McLaren au sujet de cet article:

> Section 11.3 acts as an exemption to the stay provisions of s. 11 of the CCAA. It appears the section is meant to balance the rights of creditors with debtors. The section addresses the concern that judges had too much discretion in issuing stays. Under s. 11.3(a), if a person supplies goods or services or if the debtor continues to occupy or use leased or licensed property, the court will not issue a stay order with respect to the payment for such goods or services or leased or licensed property. In essence, s. 11.3(a) will not permit the court to prohibit these individuals from demanding payment from the debtor for goods, services or use of leased property, after a court order is made.16

82 Ce principe connaît cependant des limites pratiques. Il arrive parfois que la réalité s'oppose à ce que le fournisseur soit payé immédiatement pour les services qu'il fournit à une compagnie débitrice. La fourniture d'électricité en est un exemple patent : il s'agit d'un service continu qu'il est impossible de facturer au fur et à mesure de la consommation.

83 En pareilles circonstances, il est juste et équitable pour le fournisseur de services de demander des garanties de paiement. Commentant la décision Re Smoky River CoalLtd17, les auteurs Houlden, Morawetz et Sarra déclarent:

> Under its inherent powers, the court can create a security for creditors who supply goods and services to the debtor after the filing of a CCAA petition and can provide for the priority and ranking of such a security interest with respect to other security holders. If the plan under the CCAA fails, the court can determine who are entitled to share in the proceeds of the security interest.18

. . . . .

87 Au sujet du droit applicable, le juge Rolland s'exprime en ces termes:

> [13] Il découle de ce qui précède qu'un fournisseur ne peut exiger d'être payé d'avance pour un service à fournir.
>
> [14] Ainsi, un créancier peut exiger d'être payé immédiatement lors de la livraison, mais pas de recevoir un paiement d'avance pour des services à fournir.
>
> [15] La situation est relativement simple lorsqu'il s'agit d'un bien individualisé, vendu et livré.
>
> [16] Cela peut être plus compliqué dans les cas d'un approvisionnement continu d'un service comme l'électricité, le téléphone ou le gaz.
>
> [17] Exiger de la débitrice qu'elle paie un mois d'avance comme le demande Gaz Métro, alors qu'elle entend fermer plus de 30 locaux au cours des prochains jours ou semaines, a pour effet de créer un fardeau trop onéreux pour la débitrice.
>
> [18] La LACC ne fait pas exception quant aux créanciers qu'il s'agisse de fournisseur d'un service continu par opposition à un fournisseur de biens.
>
> [19] Le tribunal a discrétion pour établir une procédure permettant au fournisseur de ne pas être préféré ou pénalisé par rapport aux autres créanciers.
>
> (je souligne)

48 In that particular case, the court concluded that a $42,000.00 guarantee was reasonable in the circumstances.

49 The second exception from the obligation to pay the contract price for post-protection service, an exception which constitutes a lesser intrusion on the freedom of contract than the outright establishment of new payment terms, is the selection by a court from amongst the provisions of one contract of certain services for which the debtor must pay the contract price while other provisions are identified as ones for which the debtor is not immediately required to pay: *Nortel*. In that case, the contract - a collective agreement - included both payments to persons who were no longer providing service to the debtor and payments to persons who were providing post-protection service to the debtor. The union advanced two arguments in support of its claim that all contract payments should be made post-protection. The first was that the services that had been provided in the past were part of the consideration for services that were being provided post-protection. The second was that, because of a statutory requirement, the union did not have the freedom which most service providers have, to refuse to provide ongoing service to a debtor which has received protection from its creditors. (On this latter point, there is a certain analogy between the union - which could not, for legislative reasons, withdraw its services despite the wording of s. 11.3(a) - and Alliance, which cannot withdraw the services which it provided in three contracts because those contracts grant licences to Allarco Entertainment without termination rights arising on insolvency.) The *Nortel* court rejected both arguments. Although the court decided which portions of the contract had to be paid, it did not purport to vary the contractual basis for payment; it merely decided which portions of the contract were eligible for payment post-protection.

50 It appears that a similar approach was taken in *Boutiques San Francisco Inc.*: the debtor could either decide to terminate the contract for display shelves, or pay the contract price for those units.

51 There may be other exceptions to the general rule but I have not been provided with any Canadian case law which has identified any such exceptions.

52 The two exceptions to the rule that post-protection services are to be paid according to the contract price reenforce the generality of the rule. Generally, contracts cannot be varied by courts: they can be interpreted or rectified but not varied. Even courts of equity limited themselves to remedies which recognized the basic authority of contracts: a court of equity might, for example, require a contracting party to render proper accounts even though that was not a term of the contract if the rendering of accounts was necessary to enforce the contract. Similarly, a court of equity might grant relief from the consequences of certain contracts - such as contracts that were unconscionable. In other cases, a court might decide that, for public policy reasons, certain contracts, such as gambling contracts, would not be enforced by the justice system.

53 Legislation could, of course, give to the courts a broad jurisdiction to create or vary contracts or to over-ride them. An example of the latter is the *Divorce Act* which provides that a court should taken into account any contract between the parties in relation, for example, to spousal support, but that the court is not limited in making a spousal support order by the terms of the contract between the parties.

54 Given the respect for contracts in the common law, explicit statutory provisions are required to give courts the jurisdiction to impose unilateral variations in contracts. Such explicit authority is not given to courts in the CCAA at the initial order stage.

55 Moreover, as was noted at the outset, it is important to correctly identify the nature of the Alliance PLAs: these are not

pay-per-play contracts, but rather contracts which allow Allarco Entertainment to advertise the availability of Alliance product without in fact broadcasting Alliance product. The effect of imposing a pay-per-play payment term on Alliance at this stage would be to impose upon Alliance the obligation to provide a continuing service - allowing Allarco Entertainment to continue to advertise the availability of Alliance programming -without providing payment for that service. Indeed, as Alliance has emphasized, Allarco Entertainment's web-site continued, post-protection, to advertise Alliance programming. It is not necessary on this application to determine whether forcing Alliance to continue to provide its services to Allarco Entertainment can also be characterized as requiring Alliance to make a further advance of credit to Allarco.

56 For the reasons set out above, having now heard argument from the party affected, this court varies para. 16 of its initial, *ex parte*, order by removing the reference to para. 43(b) of the Knox affidavit and replacing it with a reference to the contractual payments due to Alliance.

3. Should the court invalidate Allarco Entertainment's termination of the Alliance Films contracts?

57 The short answer to this question is, No.

58 Alliance correctly states that the statutory right of a debtor which has obtained protection from its creditors to terminate contracts is subject to judicial oversight. Alliance argues that it is not reasonable for Allarco Entertainment to terminate its contracts because:

- Allarco was able to obtain a "pay-per-play" clause and they should therefore be required to honour the contracts;
- the exchanges between Allarco and itself establish that Allarco was intent on obtaining a "pay-per-play" provision to give itself additional, inappropriate, power in its negotiations with Alliance;
- it is not appropriate for Allarco Entertainment to defend its actions by starting from the proposition that it has only so much cash available; rather, Allarco should be required to raise additional funds;
- Allarco Entertainment did not negotiate in good faith.

59 For the purpose of this application, the court sets the following test which Allarco Entertainment must meet for termination of its contracts with Alliance Films: the termination must be fair, appropriate, reasonable, and must have been issued after good faith negotiations. I have concluded that Allarco Entertainment meets that test.

60 In coming to that conclusion, the most important of the reasons considered by the court is the evidence that Alliance attempted, during the negotiations, to become a secured creditor, an effort that would have given Alliance an unfair advantage over other Allarco Entertainment creditors. The fact that Alliance was negotiating for such security benefits is acknowledged by Alliance; it takes the position, however, that this was not a "new" feature since some of its contracts contained provision for granting security. With respect, this is not defensible. Each contract must be enforced on its own; three of the Alliance contracts did not contain a security clause. With respect to those agreements, the addition of a security clause would be "new". Moreover, even with respect to those two contracts which did contain a security clause, no security documents had been executed.

61 In addition to the grave concern about Alliance attempting to improve its position relative to other debtors, there are other factors which the court weighs in Allarco Entertainment's favour in concluding that it should not invalidate Allarco's termination of Alliance contracts:

• while it is true that, during the negotiations, Allarco Entertainment was the beneficiary of a "pay-per-play" regime and had thus obtained what it wanted relative to Alliance as a creditor, Allarco Entertainment was also aware that Alliance had attacked the legitimacy of that provision. While on this motion Allarco valiantly argued in favour of the "pay-per-play" regime relative to Alliance, it is not unreasonable to assume that Allarco also came to an informed decision that it was at least vulnerable on that issue;

• there was a reasonable business basis for Allarco Entertainment's original application for a "pay-for-play" regime relative to Alliance. It appears to me that the main business argument in Allarco's failure is that substantial ongoing payments to Alliance throughout the year as opposed to what the evidence describes as the overwhelming position in other contracts which provide for payments at the beginning and at the end of the licence period, or at the beginning, after 12 months and at the end of the licence period seriously hamper Allarco's attempts to establish a plan which would allow them to go forward rather than to fall into bankruptcy;

• there is a dispute between Allarco Entertainment and Alliance about the cost to Alliance of the "pay-per-play" provision: Allarco states that it had paid more than 5 cents on the dollar of contractual obligations. Alliance states that termination of its contracts will place it in a worse position that the PLA providers with whom Allarco has been able to reach an accommodation. While it may be true that termination will be less advantageous to Alliance than going forward on some accommodation basis, part of the point of the CCAA is to allow for the termination of some contracts so long as the test for termination is met;

• similarly, it is a reasonable business concern of Allarco's to have fresh programming to offer potential subscribers and that such programming not consist solely of leftovers from other potential licensees;

• it would not make sense to impose upon an insolvent company the obligation to borrow more money in order to meet all its debts before it terminated certain of its contracts. Such an inflexible rule would make an effective reorganization impossible. On the evidence on this motion, at this stage of the CCAA proceedings, Allarco Entertainment has made reasonable arrangements with its banker and guarantor;

• there is no evidence that Allarco negotiated in bad faith. Rather, the evidence suggests that Allarco was attempting to make reasonable accommodations with Alliance. For example, it is not reasonable that Allarco should be required to take only that programming which has been refused by all other potential licensees. Nor is it the case that Alliance is irrevocably linked to Allarco: Alliance has other markets to which it can offer its programming;

• finally, the opinion of MGM - a creditor which is roughly in the same position relative to Allarco Entertainment as is Alliance - that there have been significant changes in the business of all affected companies which legitimizes the writing down of entertainment packages for the purposes of the development of a CCAA plan supports the general approach which Allarco Entertainment has taken in the negotiations.

62 Although Alliance Film's notice of motion requests an order invalidating Allarco Entertainment's termination of the Alliance Films contract, at the hearing Alliance suggested that what it really wanted was a determination of the variation agreement first. If that issue were resolved in its favour, Alliance then hoped that further negotiations with Allarco Entertainment would be possible. Alliance suggested that even if Allarco Entertainment were to maintain its termination of the contracts, then Alliance may require some additional evidence to support its position that the termination should not be approved. With respect, I cannot adopt that approach. The determination about whether a termination at this stage meets the required test should be made as close as possible to the date of termination in order to ensure that the court has the same overall perspective as did the parties as of the date of termination.

4. Costs

63 If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this decision.

Motion granted in part.

APPENDIX A

The following are the portions of para. 43 of Mr. Knox's first affidavit which are incorporated by reference in para. 16 of the initial court order:

(a) For those existing Program License Agreements in which the fee for delivery of a single broadcast, such as a prize fight, must be paid upon delivery of that Program, the cash flow contemplates such payment as each Program is delivered;

(b) In the case of those existing Program License Agreements with fixed terms and with a limited number of Exhibition Days, and where the license window is already open, the Cash Flow Projections have been prepared based upon a formula where the overall cost of the Contract is divided by the total number of Exhibition Days permitted, with that Exhibition Day rate being applied for the number of Exhibition Days the Business actually runs that program during the Cash Flow Projection period;

(c) For existing Program Licensing Agreements which provide for monthly payments, those payments falling due during the CCAA proceedings will be paid;

(d) As a license window opens during the CCAA Proceedings on a Licensing Agreement now in existence, license fees shall be paid in accordance with that Licensing Agreement; and

(e) For Programming which is obtained by the Business during the CCAA Proceedings under Licensing Agreements not now in existence, the licensing fees shall be paid in accordance with the terms of each such Program License Agreement.

(Emphasis added)

The only program licence agreements which come within the terms set out in para. (b) above are the Alliance Films Inc. PLAs.

End of Document

TAB 4

2009 QCCA 1416
Cour d'appel du Québec

Fonderie Poitras ltée, Re

2009 CarswellQue 7456, 2009 QCCA 1416, [2009] J.Q. No. 7438, 179 A.C.W.S. (3d) 1027, 56 C.B.R. (5th) 18, J.E. 2009-1444, EYB 2009-161902

Hydro-Québec (Appelante-requérante) c. Fonderie Poitras ltée (Intimée-débitrice) et Samson Bélair/Deloitte & Touche inc. (Mise en cause-contrôleur)

B. Morin, Y.-M. Morissette, L. Giroux JJ.C.A.

Heard: 10 juin 2009
Judgment: 22 juillet 2009
Docket: C.A. Qué. Québec 200-09-006637-091

Proceedings: varied *Fonderie Poitras ltée, Re* (2009), 2009 QCCS 1079 (Que. S.C.)

Counsel: Me Hubert Sibre pour l'appelante-requérante
Me Daniel Cantin pour l'intimée-débitrice

Subject: Public; Insolvency; Corporate and Commercial

Note liminaire

Droit public --- Services publics — Opération du service — Fourniture — Divers

Débitrice FPL a fait une demande pour être placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Tribunal a émis une ordonnance initiale comportant plusieurs conclusions concernant H-Q — H-Q a déposé une requête cherchant à obtenir davantage de protection en tant que fournisseur d'électricité, et sa requête a été accueillie en partie — Tribunal de première instance a conclu qu'il n'était pas approprié de condamner FPL à fournir un dépôt de garantie à H-Q, parce qu'il y avait une entente au sujet de versements hebdomadaires, parce que la Loi prévoyait qu'un créancier ne pouvait exiger la prestation de nouvelles avances de fonds ou de nouveaux crédits, et parce que le contrôleur nommé en vertu de la Loi pouvait s'assurer que les fournisseurs soient payés pour les services rendus — H-Q n'a pas été autorisée à cesser de fournir ses services sur préavis de vingt-quatre heures parce que l'interruption de fourniture en électricité serait dramatique pour FPL — H-Q n'a pas été autorisée à se servir de l'argent qu'elle avait déjà entre ses mains pour se payer elle-même, et le tribunal a confié la question au contrôleur — H-Q a interjeté appel — Appel accueilli en partie — Cour a conclu que H-Q ne pouvait interrompre la fourniture des services d'électricité tant que FPL payait le prix du service reçu sur une base hebdomadaire — Cour a conclu que H-Q ne pouvait interrompre le service après l'envoi d'un simple préavis mais devait plutôt s'adresser au tribunal au préalable afin d'obtenir l'autorisation d'interrompre la fourniture de service — Le droit d'un fournisseur de services à une garantie de paiement était clair et fondé sur une jurisprudence — Par conséquent, la cour a ordonné à FPL de verser un dépôt de garantie de 42 000 $ à H-Q, soit l'équivalent de deux semaines de consommation d'électricité.

Faillite et insolvabilité --- Proposition — Loi sur les arrangements avec les créanciers des compagnies — Questions diverses

Débitrice FPL a fait une demande pour être placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Tribunal a émis une ordonnance initiale comportant plusieurs conclusions concernant H-Q — H-Q a déposé une requête cherchant à obtenir davantage de protection en tant que fournisseur d'électricité, et sa requête a été accueillie en partie — Tribunal de première instance a conclu qu'il n'était pas approprié de condamner FPL à fournir un dépôt de garantie à H-Q, parce qu'il y avait une entente au sujet de versements hebdomadaires, parce que la Loi prévoyait qu'un créancier ne pouvait exiger la prestation de nouvelles avances de fonds ou de nouveaux crédits, et parce que le contrôleur nommé en vertu de la Loi pouvait s'assurer que les fournisseurs soient payés pour les services rendus — H-Q n'a pas été autorisée à cesser de fournir ses services sur préavis de vingt-quatre heures parce que l'interruption de fourniture en électricité serait dramatique pour FPL — H-Q n'a pas été autorisée à se servir de l'argent qu'elle avait déjà entre ses mains pour se payer elle-même, et le tribunal a confié la question au contrôleur — H-Q a interjeté appel — Appel accueilli en partie — Cour a conclu que H-Q ne pouvait interrompre la fourniture des services d'électricité tant que FPL payait le prix du service reçu sur une base hebdomadaire — Cour a conclu que H-Q ne pouvait interrompre le service après l'envoi d'un simple préavis mais devait plutôt s'adresser au tribunal au préalable afin d'obtenir l'autorisation d'interrompre la fourniture de service — Le droit d'un fournisseur de services à une garantie de paiement était clair et fondé sur une jurisprudence — Par conséquent, la cour a ordonné à FPL de verser un dépôt de garantie de 42 000 $ à H-Q, soit l'équivalent de deux semaines de consommation d'électricité.

Public law --- Public utilities — Operation of utility — Supply — Miscellaneous

Debtor FPL applied to seek protection under Companies' Creditors Arrangement Act — Court issued initial order which included several conclusions regarding H-Q — H-Q brought motion seeking more protection as electricity supplier, and its motion was granted in part — Trial judge found that it was not appropriate for FPL to pay security deposit to H-Q, because there was agreement between parties regarding weekly payments, because Act provided that creditor could not require further advance of money or credit, and because monitor appointed under Act could make sure that suppliers were being paid for services rendered — H-Q was not granted permission to terminate supply on one-day notice because termination of electricity supply would be drastic for FPL — H-Q was not allowed to pay itself with money already in its hands, and court referred matter to monitor — H-Q appealed — Appeal allowed in part — Court concluded that H-Q could not terminate supply of electricity as long as FPL was paying for service rendered on weekly basis — Court concluded that H-Q could not terminate supply simply after sending notice but rather had to seek permission from court before terminating supply — Right of supplier to payment guarantee was clear and based on jurisprudence — Therefore, court ordered FPL to pay security deposit of $42,000 to H-Q, which was equivalent of two weeks of electricity consumption.

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

Debtor FPL applied to seek protection under Companies' Creditors Arrangement Act — Court issued initial order which included several conclusions regarding H-Q — H-Q brought motion seeking more protection as electricity supplier, and its motion was granted in part — Trial judge found that it was not appropriate for FPL to pay security deposit to H-Q, because there was agreement between parties regarding weekly payments, because Act provided that creditor could not require further advance of money or credit, and because monitor appointed under Act could make sure that suppliers were being paid for services rendered — H-Q was not granted permission to terminate supply on one-day notice because termination of electricity supply would be drastic for FPL — H-Q was not allowed to pay itself with money already in its hands, and court referred matter to monitor — H-Q appealed — Appeal allowed in part — Court concluded that H-Q could not terminate supply of electricity as long as FPL was paying for service rendered on weekly basis — Court concluded that H-Q could not terminate supply simply after sending notice but rather had to seek permission from court before terminating supply — Right of supplier to payment guarantee was clear and based on jurisprudence — Therefore, court ordered FPL to pay security deposit of $42,000 to H-Q, which was equivalent of two weeks of electricity consumption.

Table des précédents

Cases considered by *B. Morin, J.C.A.*:

Meubles Dinec inc., Re (2006), 2006 CarswellQue 4986, 2006 QCCA 747, 35 C.B.R. (5th) 41 (Que. C.A.) — followed

Smoky River Coal Ltd., Re (2000), [2000] 10 W.W.R. 147, 297 A.R. 1, 83 Alta. L.R. (3d) 127, 19 C.B.R. (4th) 281, 2000 CarswellAlta 830, 2000 ABQB 621 (Alta. Q.B.) — considered

Smoky River Coal Ltd., Re (2001), 2001 ABCA 209, 2001 CarswellAlta 1035, 205 D.L.R. (4th) 94, [2001] 10 W.W.R. 204, 28 C.B.R. (4th) 127, 95 Alta. L.R. (3d) 1, 299 A.R. 125, 266 W.A.C. 125 (Alta. C.A.) — referred to

TQS inc., Re (2008), 2008 QCCA 1429, 2008 CarswellQue 7132, 45 C.B.R. (5th) 1 (Que. C.A.) — considered

Statutes considered:

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

s. 11 — considered

s. 11.3 [en. 1997, c. 12, s. 124] — considered

s. 11.3(a) [en. 1997, c. 12, s. 124] — considered

s. 11.3(b) [en. 1997, c. 12, s. 124] — considered

APPEL interjeté par le fournisseur d'électricité H-Q à l'encontre d'une décision publiée à *Fonderie Poitras ltée, Re* (2009), 2009 CarswellQue 2428, 2009 QCCS 1079 (Que. S.C.), ayant accueilli en partie la requête de H-Q visant à obtenir davantage de protection en tant que fournisseur.

***Per curiam*:**

1 Statuant sur l'appel d'un jugement rendu le 3 mars 2009 par la Cour supérieure, district de Québec (l'honorable Marc Lesage), qui a accueilli en partie la requête de l'appelante en modification d'une ordonnance initiale prononcée en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. (1985), c. C-36;

2 Après avoir étudié le dossier, entendu les parties et délibéré;

3 Pour les motifs du juge Morin, auxquels souscrivent les juges Morissette et Giroux;

4 ACCUEILLE l'appel en partie, avec dépens;

5 INFIRME le paragraphe 29 du jugement rendu le 3 mars 2009;

6 REMPLACE le paragraphe 9 du dispositif de l'ordonnance initiale prononcée le 5 février 2009 par le suivant :

[9] ORDONNE à Hydro-Québec de ne pas modifier, suspendre ou autrement entraver la fourniture des services d'électricité, tant que la Requérante paie le prix du service reçu après la date de l'Ordonnance ou les frais y afférents. Le paiement devra se faire de la façon suivante :

• La Requérante devra payer toute consommation d'électricité depuis le 5 février 2009 inclusivement dans les quarante-huit (48) heures de la réception d'un avis écrit d'Hydro-Québec expédié à ses procureurs confirmant la valeur de cette consommation;

• Par la suite, Hydro-Québec prendra, à chaque vendredi, une lecture de la consommation d'électricité et avisera par écrit la Requérante de la valeur de la consommation, laquelle devra être acquittée au plus tard le mardi suivant avant 17h00;

• Dans tous les cas, la Requérante devra, par télécopieur ou courriel, faire parvenir à Hydro-Québec et à ses procureurs une preuve de paiement avant l'écoulement des délais ci-haut mentionnés;

7 REMPLACE le paragraphe 10 du dispositif de l'ordonnance initiale par le suivant :

[10] ORDONNE à la Requérante de fournir à Hydro-Québec un dépôt de garantie au montant de 42 000 $, correspondant à deux (2) semaines de consommation moyenne, ce dépôt pouvant être fourni sous forme d'une lettre de garantie sans condition délivrée par une société bancaire, une société d'assurance ou une société de fiducie reconnue;

8 RÉSERVE les droits de l'appelante en ce qui a trait à la contestation des paragraphes 11 et 12 du dispositif de l'ordonnance initiale; et

9 DÉCLARE que l'appelante doit s'adresser au tribunal pour obtenir l'autorisation d'interrompre le service d'électricité.

***B. Morin, J.C.A*:**

10 La Cour est saisie d'un pourvoi à l'encontre d'un jugement rendu le 3 mars 2009 par le juge Marc Lesage, de la Cour supérieure, district de Québec, qui a accueilli en partie la requête de l'appelante en modification d'une ordonnance initiale prononcée en vertu de la *Loi sur les arrangements avec les créanciers des compagnies,* L.R.C. (1985), c. C-36 (ci-après « LACC »).

LES FAITS

11 L'intimée est une entreprise qui existe depuis 60 ans et qui opère dans la région de l'Islet, au Québec. Elle fabrique des

pièces de fonte destinées à différents marchés, dont celui de l'automobile.

12 Après trois années de croissance, l'intimée voit son chiffre d'affaires diminuer notablement à compter de 2006. Le ralentissement de la vie économique aux États-Unis entre autres l'affecte durement.

13 En raison de ce contexte difficile, l'intimée peine à payer ses comptes. Elle craint que ses fournisseurs ne cessent de lui livrer les biens et services dont elle a besoin pour exploiter son entreprise.

14 Dans le but d'assurer la survie de l'entreprise, l'intimée élabore un plan de redressement après des discussions avec ses prêteurs et fournisseurs.

15 Afin de réaliser ce plan, l'intimée souhaite bénéficier de la protection de la *LACC*. Le 2 février 2009, elle dépose une requête pour le prononcé d'une ordonnance initiale en vertu de l'article 11 de cette loi (ci-après « requête pour ordonnance initiale »), sans en aviser l'appelante au préalable.

Les relations entre les parties

16 L'appelante fournit de l'électricité à l'intimée, à raison d'une consommation approximative de 3 000 $ par jour. En raison des difficultés financières qu'elle connaît, l'intimée fait défaut d'acquitter certaines factures dans le cours de l'année 2008.

17 Le 4 juin 2008, l'appelante demande à l'intimée de lui verser la somme de 210 415 $ pour garantir le paiement du service d'électricité. La demande de l'appelante est fondée sur l'article 9.2 des *Conditions de service d'électricité*[1], qui permet à l'appelante d'exiger une garantie sous forme de dépôt.

18 Les parties finissent par s'entendre sur la constitution d'un dépôt et sur une méthode de paiement du service d'électricité. Le 10 juillet 2008, Me Stéphanie Assouline, représentante de l'appelante, fait parvenir un courriel aux représentants de l'intimée[2]:

> Cher confrère,
>
> Faisant suite à votre courriel, notre cliente accepte les termes suivants :
>
> Une somme de 25 000,00 $ par semaine débutant le 11 juillet prochain sera versée à notre cliente sous forme de transfert bancaire et ensuite chaque vendredi suivant, et ce, jusqu'au 29 août inclusivement. Madame Linda Dion d'Hydro-Québec devra recevoir une confirmation de chacun de ces transferts.
>
> Cette somme hebdomadaire de 25 000,00 $ servira, notamment, à couvrir le coût de la consommation d'électricité de l'entreprise de votre cliente.
>
> Toute somme perçue en surplus sera affectée à la constitution d'un dépôt de garantie, tel que déjà spécifié par notre

cliente, le tout conformément aux Conditions de service d'électricité en vigueur.

[. . .]

19 Durant les mois de juillet et d'août 2008, l'intimée ne verse que 9 268,98 $. Le 3 septembre 2008, constatant le bris de l'entente du 10 juillet, l'appelante demande à l'intimée de verser 201 146,02 $ à titre de dépôt de garantie dans un délai de huit jours suivant la réception de l'avis, sans quoi elle interrompra le service[3].

20 Entre septembre 2008 et février 2009, l'intimée acquitte ses factures de façon irrégulière. En date du 4 février 2009, 59 268,98 $ ont été versés par l'intimée et forment une partie du dépôt requis par l'appelante.

LES PROCÉDURES

21 Les 3 et 4 février 2009, une audience se tient devant le juge Marc Lesage. En présence du contrôleur de l'entreprise et des représentants de la Banque Nationale du Canada, de la Banque de développement du Canada et d'Investissement Québec, l'intimée présente sa requête pour ordonnance initiale qu'elle modifie le 4 février. Les représentants de l'appelante sont absents.

22 Le juge Lesage prononce une ordonnance initiale le 5 février 2009, valable jusqu'au 9 mars 2009.

23 Les paragraphes 9 à 12 du dispositif de l'ordonnance initiale visent particulièrement l'appelante :

> [9] ORDONNE à Hydro-Québec de ne pas modifier, suspendre ou autrement entraver la fourniture des services d'électricité, tant que la Requérante paie le prix de ces services reçus après la date de l'Ordonnance ou les frais y afférents au fur et à mesure de leur exigibilité laquelle exigibilité doit être conforme quant au paiement selon l'entente intervenue avec la Requérante, soit à la semaine selon l'évaluation de la consommation électrique mesurée par le logiciel installé sur le compteur électrique de la Requérante;
>
> [10] ORDONNE à Hydro-Québec de ne pas exiger de la Requérante un dépôt de garantie;
>
> [11] DÉCLARE que la Requérante ne sera pas en défaut, à l'égard de quelque fournisseur que ce soit et Hydro-Québec en particulier, pour tous comptes se rapportant à des services et/ou biens livrés ou rendus avant la date de l'ordonnance initiale;
>
> [12] ORDONNE que, sans restreindre ce qui précède et sous réserve de l'article 18.1 de la LACC, le cas échéant, que les espèces ou les équivalents d'espèces déposés par la Requérante auprès d'une Personne pendant la Période de suspension, que ce soit dans un compte d'exploitation ou un autre compte, pour elle-même ou une autre entité, ne puissent être affectés par cette Personne afin de réduire ou rembourser les sommes à elle dues à la date de l'Ordonnance ou exigibles à l'expiration de la Période de suspension ou auparavant ou afin de régler des intérêts ou charges y afférents. Toutefois, le présent dispositif n'empêche pas une institution financière : i) de se rembourser du montant de tout chèque tiré par la Requérante et dûment honoré par cette institution, ni ii) de retenir le montant de tout chèque ou autre effet déposé au compte de la Requérante jusqu'à ce qu'il ait été honoré par l'institution financière sur laquelle il a été tiré;

24 Le 16 février 2009, l'appelante dépose une requête en modification de l'ordonnance initiale (ci-après « requête en modification »). Une audience est tenue le 19 février. Le juge Lesage rend jugement le 3 mars 2009. Il accueille la requête de l'appelante en partie seulement.

25 Le 6 mars 2009, le juge Lesage proroge la durée de l'ordonnance initiale jusqu'au 16 avril 2009.

26 Le 23 mars 2009, l'appelante présente une requête pour permission d'appeler du jugement du 3 mars 2009. Le soussigné accueille cette requête et accorde la permission de faire appel selon la voie accélérée.

27 Le 16 avril 2009, l'ordonnance initiale est renouvelée jusqu'au 19 mai 2009. Le 14 mai, l'intimée présente une requête pour extension des délais. Le même jour, le juge Lesage accueille la requête et proroge la durée de l'ordonnance jusqu'au 25 août 2009[4].

LE JUGEMENT DE PREMIÈRE INSTANCE

28 Dans sa requête en modification, l'appelante demande de remplacer les paragraphes 9 à 12 du dispositif de l'ordonnance initiale par ces paragraphes :

> [9] ORDONNE à Hydro-Québec de ne pas modifier, suspendre ou autrement entraver la fourniture des services d'électricité, tant que la Requérante (Débitrice) paie le prix du service reçu après la date de l'Ordonnance ou les frais y afférents. Le paiement devra se faire de la façon suivante :
>
> • La Débitrice devra payer toute consommation d'électricité depuis le 5 février 2009 inclusivement dans les quarante-huit (48) heures de la réception d'un avis écrit d'Hydro-Québec expédié à ses procureurs confirmant la valeur de cette consommation;
>
> • Par la suite Hydro-Québec prendra, à chaque vendredi, une lecture de la consommation d'électricité et avisera par écrit la Débitrice de la valeur de la consommation, laquelle devra être acquittée au plus tard le lundi suivant avant 17h00;
>
> • Dans tous les cas, la Requérante devra, par télécopieur ou courriel, faire parvenir à Hydro-Québec et à ses procureurs une preuve de paiement avant l'écoulement des délais ci-haut mentionnés;
>
> [10] ORDONNE à la Débitrice de fournir à Hydro-Québec une avance au montant de 42 000 $;
>
> [11] CONFIRME le droit d'Hydro-Québec d'appliquer le dépôt obtenu avant l'émission de l'Ordonnance initiale afin de rembourser les sommes qui lui sont dues pour la consommation d'électricité avant l'émission de l'Ordonnance initiale;
>
> [12] DÉCLARE que si la Requérante est en défaut de respecter ses obligations envers Hydro-Québec, cette dernière aura le pouvoir de cesser de fournir de l'électricité dans les vingt-quatre (24) heures après l'envoi d'un avis écrit à cet effet aux procureurs de la Requérante et des créanciers garantis qui feront la demande de recevoir un tel avis;

29 Pour l'essentiel, le juge de première instance refuse de modifier l'ordonnance initiale tel que cela ressort des

paragraphes suivants.

Le paragraphe 9 du dispositif de l'ordonnance initiale

30 La modification que propose l'appelante vise à préciser la méthode de paiement du service d'électricité.

31 Le juge rappelle que le paragraphe 9, tel que libellé dans l'ordonnance initiale, prévoit le paiement hebdomadaire de la consommation électrique, selon l'entente intervenue entre les parties avant le prononcé de l'ordonnance initiale. Il n'y a donc pas lieu de modifier ce paragraphe.

32 À l'audience, l'intimée consent à effectuer un paiement de 21 000 $, chaque vendredi. À la fin de chaque mois, il y aura conciliation du coût réel de la consommation électrique effectivement utilisée. Le juge fera mention de cet engagement dans ses conclusions.

Le paragraphe 10 du dispositif de l'ordonnance initiale

33 Le paragraphe 10 du dispositif de l'ordonnance initiale empêche l'appelante d'exiger le paiement d'un dépôt de garantie. Le paragraphe 10, s'il était modifié conformément à la demande de l'appelante, permettrait le dépôt d'une telle garantie.

34 Selon le juge, il n'y a pas lieu de modifier le paragraphe 10 du dispositif de l'ordonnance initiale.

35 Il observe que la Cour d'appel, dans la décision *Meubles Dinec inc., Re*[5], n'a pas exigé d'avance ou de dépôt de garantie de la part de la compagnie débitrice. Le juge renvoie également à un extrait de la décision *J.B. Lefebvre ltée (Arrangement relatif à)*[6], dans laquelle le juge Rolland a estimé qu'un fournisseur ne peut exiger d'être payé d'avance pour un service à fournir. En fait, la Cour supérieure a discrétion pour établir une procédure permettant au créancier de ne pas être préféré ou pénalisé par rapport aux autres créanciers.

36 Le juge de première instance note qu'il existe une entente entre l'intimée et l'appelante quant au montant à payer après la réception du relevé hebdomadaire de la consommation électrique. En raison de cette entente, le juge refuse d'appliquer l'article 9.2 des *Conditions de service d'électricité* :

> 9.2 [. . .] Hydro-Québec peut aussi exiger un dépôt en argent ou une garantie de paiement d'un client qui, au cours des 24 mois qui précèdent la date de sa dernière facture, n'a pas payé à échéance au moins une facture d'électricité pour l'abonnement dont il est ou était titulaire.

37 En outre, l'article 11.3 de la *LACC* ne permet pas, selon le juge, d'exiger la prestation de nouvelles avances de fonds et de nouveaux crédits.

38 Enfin, le juge rappelle que le contrôleur a l'obligation de veiller à ce que la compagnie débitrice paie ses fournisseurs pour les services offerts; il lui reviendra de prendre les mesures immédiates requises si l'intimée ne s'acquitte pas de ses obligations.

Le paragraphe 11 du dispositif de l'ordonnance initiale

39 L'appelante demande de rayer le paragraphe 11 du dispositif de l'ordonnance initiale (qui traite de la suspension des recours des créanciers contre l'intimée) et de le remplacer par un paragraphe lui permettant d'opérer compensation des sommes qu'elle détient sur les montants dus avant l'ordonnance initiale.

40 D'emblée, le juge de première instance reconnaît que l'appelante est une créancière garantie en vertu d'une hypothèque légale qu'elle a publiée le 4 février 2008.

41 Les parties ne s'entendent pas sur l'affectation des sommes d'argent perçues en dépôt avant le prononcé de l'ordonnance initiale (59 268,98 $). Le juge de première instance suggère que le contrôleur demande au tribunal « des directives écrites sur ce point sur lesquelles tous les procureurs au dossier pourraient soumettre leur argumentation. Il pourrait y avoir une séance de la Cour uniquement sur cette question. Pour le moment, l'argent est entre les mains de Hydro-Québec qui doit le conserver en attendant la décision à venir »[7].

42 Enfin, l'appelante s'est engagée auprès du juge à n'appliquer aucun montant reçu après la date de l'ordonnance initiale à la dette constituée avant celle-ci.

Le paragraphe 12 du dispositif de l'ordonnance initiale

43 L'appelante demande de biffer le paragraphe 12 (qui traite de la compensation des sommes d'argent recueillies pendant la période de suspension sur les dettes contractées avant la prise d'effet de l'ordonnance initiale) et de le remplacer par un paragraphe dont l'objet est tout autre. Dans le paragraphe 12 proposé, l'appelante demande le droit de cesser de fournir l'électricité sur préavis de vingt-quatre heures.

44 Il est en preuve que l'interruption impromptue d'électricité aurait des conséquences matérielles graves, pouvant même causer des blessures corporelles. Le juge de première instance préfère ne pas accorder le droit à l'appelante de cesser de fournir ses services sur simple préavis et conclut qu'elle devra adresser sa demande au tribunal.

45 Le juge Lesage dispose de la requête pour modification en ces termes :

> [24] DÉCLARE que la requérante Hydro-Québec est une créancière garantie en ce qui a trait à une hypothèque

légale publiée le 4 février 2008 sous réserve du montant discuté de cette hypothèque légale;

[25] PREND acte de l'engagement de la débitrice de verser à Hydro-Québec à chaque vendredi de chaque semaine un paiement de 21 000 $ pour sa consommation d'électricité, la conciliation pour le coût mensuel de l'électricité réellement utilisée devant se faire à la fin de chaque mois;

[26] PREND acte de l'engagement de Hydro-Québec de n'appliquer aucune somme d'argent reçue après la date de l'ordonnance initiale à la dette constituée avant la date de l'ordonnance initiale;

[27] PREND acte de l'engagement de Hydro-Québec de ne prendre aucune décision ou exécution quant à la gestion du compte de la débitrice sans en référer d'abord à ses propres procureurs avec qui seront discutées et prises les décisions qui seront jugées par eux nécessaires et appropriées à cet égard;

[28] SUSPEND la demande de compensation de Hydro-Québec quant au montant entre ses mains de 59 268,98 $ pour permettre au contrôleur de demander des directives précises à ce sujet et aux différentes parties de faire valoir leur argumentation;

[29] REJETTE les autres conclusions recherchées à la requête;

LES QUESTIONS EN LITIGE

46 Selon l'appelante, le pourvoi soulève deux questions :

A) Les conclusions de l'Ordonnance initiale relatives à l'APPELANTE violent-elles les principes de l'article 11.3 L.A.C.C. ?

B) L'Honorable juge de première instance a-t-il erré lorsqu'il a nié à l'APPELANTE (1) le droit au paiement à l'avance pour l'électricité consommée après l'Ordonnance initiale et (2) la capacité d'interrompre le service en cas de défaut de paiement ?

47 L'appelante préfère néanmoins présenter simultanément les arguments en rapport avec ces deux questions. Elle articule son argumentation autour de ces quatre éléments :

a) L'impact de l'Ordonnance initiale et du Jugement du 3 mars sur l'APPELANTE

b) Paiement du service rendu

c) Nécessité d'une avance

d) Conditions relatives à la cessation de la fourniture d'électricité

48 L'intimée divise son exposé de la même façon.

LA POSITION DES PARTIES

a. L'impact de l'ordonnance initiale et du jugement du 3 mars sur l'appelante

L'appelante

49 L'ordonnance initiale fait subir à l'appelante un risque financier important. Le jugement entrepris du 3 mars 2009 ne change rien à la situation.

50 Contrairement à ce que prévoit l'article 11.3 de la *LACC*, l'ordonnance initiale empêche l'appelante d'exiger que les paiements soient effectués au fur et à mesure de la consommation d'électricité. De plus, le jugement entrepris du 3 mars empêche l'appelante d'obtenir un dépôt de garantie afin de couvrir le risque auquel l'ordonnance initiale l'a soumise.

51 Dans l'hypothèse où l'intimée fait défaut de payer sa consommation hebdomadaire d'électricité, l'appelante court un risque de perte équivalant à deux semaines de consommation d'électricité. Suivant les termes de l'ordonnance initiale :

> a. L'appelante est obligée de fournir de l'électricité avant d'avoir été payée. En effet, le paiement effectué le vendredi couvre une période de consommation déjà entamée. À cet égard, l'appelante assume un risque d'une semaine.
>
> b. Pendant le temps requis pour préparer une requête afin de recouvrer la somme impayée, l'appelante doit continuer à fournir l'électricité. Cela ajoute un risque de perte supplémentaire équivalent à une semaine.

52 Ainsi, l'appelante prétend qu'elle est susceptible de perdre 42 000 $ advenant un défaut de paiement[8].

53 L'intimée et ses prêteurs déclarent que le risque financier de l'appelante est minime. Or, l'article 11.3 de la *LACC* est clair : un fournisseur n'a pas à subir un risque financier, et ce, quel que soit l'ordre de grandeur de ce risque. C'est pour cette raison que les paiements doivent être faits sur réception du service. Cependant, en raison de la nature même du service, il est impossible pour un fournisseur d'électricité d'être payé au fur et à mesure de la consommation. En conséquence, l'appelante a le droit d'obtenir une protection, tel un paiement à l'avance.

54 L'appelante se trouve à accorder une forme de crédit à l'intimée. L'alinéa b) de l'article 11.3 de la *LACC* est pourtant limpide : l'ordonnance initiale ne peut avoir pour effet d'exiger la prestation de nouvelles avances de fonds ou de nouveaux crédits. Selon l'appelante, tous les créanciers de même rang doivent être traités équitablement.

L'intimée

55 Selon l'intimée, l'appelante chercher à particulariser sa situation. Or, en matière d'arrangements avec les créanciers, les droits collectifs doivent primer sur les droits individuels.

56 Le mécanisme de l'ordonnance initiale a pour but d'empêcher les créanciers d'une compagnie débitrice d'intenter un recours contre celle-ci pendant que la compagnie tente de réorganiser ses affaires. L'ordonnance initiale est normalement temporaire. En conséquence, le risque financier que l'appelante prétend subir est limité.

57 Ce risque est d'autant plus minime que l'appelante n'est pas démunie. L'intimée rappelle que le contrôleur surveille de façon étroite la situation financière de l'entreprise; en cas de défaut de paiement, celui-ci peut demander au tribunal de mettre fin à la protection de la *LACC*. En outre, le paiement hebdomadaire de 21 000 $ avantage l'appelante par rapport aux autres créanciers.

58 Il serait contraire aux objectifs de la *LACC* de privilégier les demandes de l'appelante en comparaison de celles des autres créanciers. En vertu de la *LACC*, un fournisseur d'un service continu ne bénéficie pas d'un statut particulier. L'intimée renvoie à un extrait de la décision du juge Rolland dans *J.B. Lefebvre ltée*[9] :

> [18] La *LACC* ne fait pas exception quant aux créanciers qu'il s'agisse de fournisseur d'un service continu par opposition à un fournisseur de biens.

59 L'intimée cite également un passage du jugement sur permission d'appel dans l'affaire *TQS inc., Re*[10]. Dans ce jugement, la juge Rayle a rejeté la prétention selon laquelle les salariés d'une compagnie ont un statut privilégié au regard de la *LACC* :

> [23] Je suis d'avis que le pourvoi envisagé ne remplit pas les critères énoncés ci-haut. Ce que recherchent les requérants, une minorité des employés syndiqués affectés, je le souligne à nouveau, c'est qu'on leur reconnaisse une priorité sur les autres créanciers ordinaires. Du fait qu'ils sont protégés par une convention collective, leur situation juridique et économique devrait demeurer intacte. Or, il n'y a, ni dans la LACC ni dans la jurisprudence, aucun fondement à cette prémisse.

b. Paiement du service rendu

L'appelante

60 L'appelante renvoie à un extrait de l'arrêt de notre cour dans l'affaire *Meubles Dinec inc.*[11] :

> [27] L'article 11.3 précité, dans son paragraphe a), énonce clairement que l'ordonnance ne peut avoir pour effet d'empêcher un créancier d'exiger les paiements immédiats pour la fourniture de biens ou de services.
>
> [28] En conséquence, il est donc possible d'exiger paiement des comptes d'électricité au fur et à mesure qu'ils sont dus.
>
> [29] Je comprends également que rien n'empêche, selon le même texte, d'exiger du débiteur qu'il fournisse des garanties de paiement par dépôt de sommes auprès d'institutions financières ou du contrôleur.
>
> [30] Le processus de facturation d'Hydro-Québec est au mois. La facture est envoyée à la fin du mois et représente la consommation effectuée pendant celui-ci. En outre, ordinairement un certain délai est accordé pour acquitter

celle-ci. Hydro-Québec contrairement, par exemple, à un fournisseur de biens ne peut donc, en réalité, exiger paiement au fur et à mesure qu'elle dispense ses services. Elle encourt donc un risque additionnel et est en droit d'obtenir certaines garanties avant de fournir l'électricité pour pallier le risque inhérent d'insolvabilité de la débitrice à l'égard de services déjà rendus. Si un paiement effectué au fur et à mesure de la fourniture de services est irréaliste, il est aussi clair qu'une facturation à la semaine est difficile, sinon impossible. C'est donc sur une facturation mensuelle qu'il y a lieu de se baser.

61 En raison du caractère continu du service que fournit l'appelante, il est impossible pour l'intimée de payer, au fur et à mesure, sa consommation d'électricité. Certes, le développement de la technologie permet aujourd'hui à l'appelante d'obtenir les relevés de consommation sur une base hebdomadaire (et non plus mensuelle, comme à l'époque de l'affaire *Meubles Dinec inc.*). Le risque financier demeure cependant le même : lorsque l'appelante fournit de l'électricité, elle ignore si elle sera payée. Même si le risque de perte n'est plus équivalent à un mois de consommation, il demeure élevé, particulièrement lorsqu'une entreprise comme l'intimée consomme d'importantes quantités d'énergie chaque semaine.

62 Selon l'appelante, la loi est claire. La *LACC* ne permet pas aux tribunaux de faire subir un risque de perte à un fournisseur de services, et ce, quelle que soit l'importance du risque. L'appelante est en droit de requérir que les services soient payés à l'avance, et que ces avances soient suffisantes pour la protéger de l'ensemble du risque relatif à sa situation particulière.

63 Par ailleurs, le juge de première instance a confondu la fréquence des paiements avec la période de consommation liée à ces paiements. Ce n'est pas parce que les paiements se font sur une base hebdomadaire que l'appelante ne court aucun risque. Pour réduire le risque de pertes, l'intimée devrait payer sa consommation d'électricité une journée avant le début de chaque période de consommation, soit le mardi.

L'intimée

64 L'intimée rappelle qu'elle s'est entendue avec l'appelante pour payer sur une base hebdomadaire l'électricité consommée.

65 L'intimée renvoie à la décision *J.B. Lefebvre ltée (Arrangement relatif à)*[12], dans laquelle il a été jugé qu'un fournisseur de services ne peut exiger d'être payé à l'avance pour un service à fournir. Or, c'est précisément ce que l'appelante recherche.

66 Selon l'intimée, le paiement différé du service n'est pas contraire aux prescriptions de l'alinéa a) de l'article 11.3 de la *LACC*. Certes, selon cet article l'ordonnance initiale ne peut empêcher un fournisseur de services d'exiger que les paiements relatifs à ses services soient effectués immédiatement. Cependant, si la technologie ne permet pas au fournisseur d'obtenir, en temps réel, la valeur du service consommé, ce n'est pas à la débitrice d'en faire les frais. La *LACC*n'autorise pas le paiement d'avance pour remédier à ce problème.

c. Nécessité d'une avance

L'appelante

67 Selon l'appelante, notre cour a établi dans l'arrêt *Meubles Dinec inc.* le principe selon lequel Hydro-Québec peut, en plus du paiement au début de la période de consommation, exiger le paiement d'une avance lorsque la société encourt un risque additionnel :

> Elle encourt donc un risque additionnel et est en droit d'obtenir certaines garanties avant de fournir l'électricité pour pallier le risque inhérent d'insolvabilité de la débitrice à l'égard de services déjà rendus.[13]

68 Dans cet arrêt, la Cour a déterminé qu'il était juste et équitable qu'Hydro-Québec puisse se protéger en obtenant le versement d'un dépôt de garantie, et ce, en raison du fait que le paiement de l'électricité consommée ne peut se faire au fur et à mesure de la consommation.

69 Le juge de première instance a erré en n'accédant pas à la demande de l'appelante.

70 Ce dépôt permet à l'appelante de couvrir le risque d'une perte financière équivalente à deux semaines de consommation d'électricité. À cette fin, l'appelante demande que notre cour ordonne à l'intimée de verser une somme de 42 000 $ à titre de dépôt de garantie[14].

L'intimée

71 Selon l'intimée, le cas sous étude doit être distingué de la situation qui prévalait dans *Meubles Dinec inc.*. Dans cette affaire, Hydro-Québec demandait au tribunal de pouvoir encaisser une lettre de crédit délivrée par la Banque CIBC et d'imputer la somme ainsi reçue sur une dette antérieure à l'ordonnance initiale. Cette demande avait été rejetée par le juge de première instance. Notre cour a accueilli l'appel, en rappelant que la somme d'argent n'avait jamais fait partie du patrimoine de Meubles Dinec.

72 Or, en l'instance, l'appelante demande le versement d'une nouvelle somme. Cette somme constituerait une avance, ce qui, selon l'intimée, contrevient aux dispositions de l'alinéa b) de l'article 11.3 de la *LACC* :

> L'ordonnance prévue à l'article 11 ne peut avoir pour effet :
>
> [. . .]
>
> b) d'exiger la prestation de nouvelles avances de fonds ou de nouveaux crédits.

73 En outre, le versement d'un dépôt de 42 000 $ fragiliserait la situation financière de l'intimée. Le juge de première instance a donc correctement exercé sa discrétion.

d. Conditions relatives à l'interruption du service d'électricité

L'appelante

74 Si notre cour ordonne à l'intimée de fournir un dépôt de garantie, l'appelante mentionne être disposée à présenter une requête à la Cour supérieure avant de cesser la fourniture du service d'électricité.

75 Dans l'hypothèse où la Cour refuse d'accéder à cette demande, l'appelante demande de lui permettre de mettre fin au service d'électricité sur préavis de trois jours francs (ou tout autre délai jugé raisonnable).

L'intimée

76 L'intimée souligne que notre cour, dans l'arrêt *Meubles Dinec inc.*, a refusé à Hydro-Québec le droit d'interrompre le service d'électricité sur préavis de trois jours. La Cour a conclu qu'Hydro-Québec devait s'adresser au tribunal pour obtenir l'autorisation d'interrompre le service[15].

77 L'intimée rappelle que l'interruption impromptue du service d'électricité aurait des conséquences matérielles et humaines graves. En outre, l'interruption entraînerait la fermeture de l'usine de l'intimée et vouerait à l'échec la tentative de redressement de l'entreprise.

ANALYSE

78 Même si le mécanisme de l'ordonnance initiale a pour but de donner un certain répit à une compagnie aux prises avec des problèmes financiers, les créanciers ne sont pas dépouillés de tous leurs droits. Entre autres dispositions, l'article 11.3 de la *LACC* protège les créances des fournisseurs de services.

79 Par souci de commodité, il convient de reproduire cet article :

> 11.3 L'ordonnance prévue à l'article 11 ne peut avoir pour effet :
>
> a) d'empêcher une personne d'exiger que soient effectués immédiatement les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie valable qui ont lieu après l'ordonnance prévue à cet article;
>
> b) d'exiger la prestation de nouvelles avances de fonds ou de nouveaux crédits.

80 L'alinéa a) de l'article 11.3 de la *LACC* établit un principe clair : pendant la période de suspension, le fournisseur a droit d'être payé pour les services qu'il rend au fur et à mesure de leur utilisation.

81 Voici d'ailleurs les commentaires du professeur Richard H. McLaren au sujet de cet article :

> Section 11.3 acts as an exemption to the stay provisions of s. 11 of the CCAA. It appears the section is meant to balance the rights of creditors with debtors. The section addresses the concern that judges had too much discretion in issuing stays. Under s. 11.3(a), if a person supplies goods or services or if the debtor continues to occupy or use leased or licensed property, the court will not issue a stay order with respect to the payment for such goods or services or leased or licensed property. In essence, s. 11.3(a) will not permit the court to prohibit these individuals from demanding payment from the debtor for goods, services or use of leased property, after a court order is made.[16]

82 Ce principe connaît cependant des limites pratiques. Il arrive parfois que la réalité s'oppose à ce que le fournisseur soit payé immédiatement pour les services qu'il fournit à une compagnie débitrice. La fourniture d'électricité en est un exemple patent : il s'agit d'un service continu qu'il est impossible de facturer au fur et à mesure de la consommation.

83 En pareilles circonstances, il est juste et équitable pour le fournisseur de services de demander des garanties de paiement. Commentant la décision *Smoky River Coal Ltd., Re*[17], les auteurs Houlden, Morawetz et Sarra déclarent :

> Under its inherent powers, the court can create a security for creditors who supply goods and services to the debtor after the filing of a *CCAA* petition and can provide for the priority and ranking of such a security interest with respect to other security holders. If the plan under the *CCAA* fails, the court can determine who are entitled to share in the proceeds of the security interest.[18]

84 Selon l'intimée, la *LACC* n'autorise ni le paiement d'avance des services ni la constitution d'un dépôt de garantie. Cette prétention doit être rejetée. À moins de vider l'alinéa a) de l'article 11.3 de la *LACC* de tout son sens, un fournisseur dont le service est continu a le droit d'obtenir une garantie de paiement raisonnable. Autrement, le droit qu'accorde cet alinéa aux fournisseurs de services est sans objet.

85 Il ne faut pas non plus interpréter l'alinéa b) de l'article 11.3 comme interdisant la constitution d'un dépôt en faveur de ces fournisseurs. En effet, une ordonnance prononcée en vertu de l'article 11 de la LACC vise à protéger une compagnie débitrice à l'égard de ses créanciers. L'alinéa b) de l'article 11.3 vient simplement préciser que cette protection ne va pas jusqu'à permettre *à cette compagnie* « d'exiger la prestation de nouvelles avances de fonds ou de nouveaux crédits ».

86 À l'appui de sa thèse, l'intimée renvoie, par ailleurs, à la décision *J.B. Lefebvre ltée*, plus particulièrement au paragraphe [13] du jugement.

87 Au sujet du droit applicable, le juge Rolland s'exprime en ces termes :

> [13] Il découle de ce qui précède qu'un fournisseur ne peut exiger d'être payé d'avance pour un service à fournir.
>
> [14] Ainsi, un créancier peut exiger d'être payé immédiatement lors de la livraison, mais pas de recevoir un paiement d'avance pour des services à fournir.
>
> [15] La situation est relativement simple lorsqu'il s'agit d'un bien individualisé, vendu et livré.

[16] Cela peut être plus compliqué dans les cas d'un approvisionnement continu d'un service comme l'électricité, le téléphone ou le gaz.

[17] Exiger de la débitrice qu'elle paie un mois d'avance comme le demande Gaz Métro, alors qu'elle entend fermer plus de 30 locaux au cours des prochains jours ou semaines, a pour effet de créer un fardeau trop onéreux pour la débitrice.

[18] La LACC ne fait pas exception quant aux créanciers qu'il s'agisse de fournisseur d'un service continu par opposition à un fournisseur de biens.

[19] Le tribunal a discrétion pour établir une procédure permettant au fournisseur de ne pas être préféré ou pénalisé par rapport aux autres créanciers.

(je souligne)

88 Je ne puis souscrire à la lecture que fait l'intimée de la décision du juge Rolland. Malgré ce qu'il laisse entendre au paragraphe [13], le juge ne nie pas qu'un tribunal a le pouvoir d'ordonner à une compagnie débitrice de garantir à son fournisseur le paiement des services, mais il conclut qu'en l'espèce la demande de paiement d'un mois d'avance était excessive compte tenu des circonstances.

89 C'est d'ailleurs cette interprétation de la décision *J.B. Lefebvre ltée* qu'a retenue le juge Baudouin dans l'arrêt *Meubles Dinec inc.*[19], lorsqu'il s'exprime comme suit :

[32] Le présent dossier diffère également de la décision de la Cour supérieure dans l'affaire *J.B. Lefebvre ltée (Re)* où la Cour supérieure a refusé d'ordonner à la cliente de *Gaz Métropolitain* de fournir une garantie de paiement d'un mois d'avance. Ce différend a été tranché en tenant compte des circonstances particulières de l'espèce.

90 Le droit d'un fournisseur de services à une garantie de paiement est donc clair et trouve assise dans la loi et la jurisprudence.

91 De fait, comme le soutient l'avocat de l'appelante, la LACC vise à établir un délicat équilibre entre deux objectifs jusqu'à un certain point contradictoires :

1. la protection d'une compagnie débitrice pendant qu'elle tente de se réorganiser à la suite de difficultés financières;

2. la protection des fournisseurs de cette compagnie qui ne peuvent être astreints à fournir leurs services à celle-ci après une ordonnance initiale, sans être payés ou, dans un cas comme le nôtre, sans garantie raisonnable d'être payés.

92 Il reste à savoir si l'ordonnance initiale et le jugement entrepris du 3 mars 2009 accordent une garantie de paiement suffisante à l'appelante. Dans la négative, il nous faudra déterminer la garantie appropriée.

L'ORDONNANCE INITIALE ET LE JUGEMENT ENTREPRIS DU 3 MARS 2009

93 Il convient de reproduire les paragraphes 9 et 10 du dispositif de l'ordonnance initiale :

> [9] ORDONNE à Hydro-Québec de ne pas modifier, suspendre ou autrement entraver la fourniture des services d'électricité, tant que la Requérante paie le prix de ces services reçus après la date de l'Ordonnance ou les frais y afférents au fur et à mesure de leur exigibilité laquelle exigibilité doit être conforme quant au paiement selon l'entente intervenue avec la Requérante, soit à la semaine selon l'évaluation de la consommation électrique mesurée par le logiciel installé sur le compteur électrique de la Requérante;
>
> [10] ORDONNE à Hydro-Québec de ne pas exiger de la Requérante un dépôt de garantie;

(je souligne)

94 Dans le jugement entrepris du 3 mars 2009, le juge apporte une modification au dernier segment du paragraphe 9 du dispositif de l'ordonnance initiale :

> [25] PREND acte de l'engagement de la débitrice de verser à Hydro-Québec à chaque vendredi de chaque semaine un paiement de 21 000 $ pour sa consommation d'électricité, la conciliation pour le coût mensuel de l'électricité réellement utilisée devant se faire à la fin de chaque mois;

95 Suivant les termes de l'ordonnance initiale, l'appelante devait effectuer, chaque vendredi, un relevé de la consommation et envoyer la facture à l'intimée. Dans son jugement du 3 mars, le juge de première instance modifie cette méthode de paiement. Désormais, l'intimée doit payer 21 000 $ à la fin de chaque semaine, nonobstant la consommation réelle, une conciliation devant être faite à la fin de chaque mois. En outre, le juge refuse à l'appelante le droit de réclamer un dépôt de garantie.

96 Dans un cas comme dans l'autre, la créance de l'appelante est à risque. En effet, l'appelante fournit un service sans avoir l'assurance d'être payée avant une semaine. Si l'intimée fait défaut de payer, l'appelante risque de perdre une somme d'argent équivalente à la valeur de l'électricité consommée pendant la semaine. À ce risque s'ajoute celui du temps nécessaire pour préparer une requête pour obtenir l'interruption du service d'électricité. L'appelante évalue qu'une semaine lui serait nécessaire pour rédiger et présenter cette requête.

97 Personne ne nie l'existence du risque de perte. Devant le juge de première instance, l'intimée l'a même admis.

98 Aux yeux de l'intimée, l'appelante doit cependant assumer ce risque. L'intimée fonde son argumentation sur une lecture quelque peu restrictive de l'arrêt *Meubles Dinec inc.*

99 Selon l'intimée, il n'existe un véritable risque que lorsque le paiement du service d'électricité est effectué sur une base mensuelle. C'est seulement dans ce cas précis qu'il est possible de constituer un dépôt. Lorsqu'il est possible d'établir une facturation hebdomadaire, le risque est diminué d'autant. L'ordonnance initiale et le jugement entrepris du 3 mars 2009 respectent donc l'esprit de l'arrêt *Meubles Dinec inc.*

100 Je ne puis partager cette interprétation de l'arrêt *Meubles Dinec inc.* Le juge Baudouin a rappelé dans des termes clairs le principe selon lequel un fournisseur a droit d'obtenir un garantie de paiement :

> [29] Je comprends également que rien n'empêche, selon le même texte [article 11.3 *LACC*], d'exiger du débiteur qu'il fournisse des garanties de paiement par dépôt de sommes auprès d'institutions financières.

101 Même s'il n'est plus mensuel, le risque de l'appelante demeure - et il est élevé. L'ordonnance initiale et le jugement entrepris du 3 mars 2009 ne permettent pas de le couvrir adéquatement. Il convient donc de corriger cette erreur.

Une garantie de paiement raisonnable

102 Quelle serait la garantie raisonnable en l'espèce ?

103 La position de l'appelante ne pèche pas par sa clarté. Dans certains actes de procédure, elle réclame une double protection, sous forme de paiement à l'avance *et* de dépôt de garantie. À d'autres occasions, ses avocats ont mentionné qu'ils se contenteraient d'un dépôt de garantie de 42 000 $.

104 Dans son mémoire d'appel, l'appelante exprime clairement le voeu d'être payée à l'avance :

> [24] [. . .] En conséquence, comme l'APPELANTE ne peut être payée de façon simultanée, elle est en droit de requérir que les services soient payés à l'avance, et que ces avances soient suffisantes pour la protéger de l'ensemble du risque relatif à sa situation particulière.
>
> [25] [. . .] Conséquemment, le paiement hebdomadaire de l'INTIMÉE pour sa consommation d'électricité devrait être fait une journée avant le début de chaque période de consommation, soit le mardi.

105 En outre, elle demande le versement d'un dépôt de garantie :

> [30] En résumé, afin d'éviter le risque qu'elle court, l'APPELANTE demande à cette Honorable Cour d'ordonner à l'INTIMÉE de fournir à l'APPELANTE une avance pour une somme de 42 000 $, représentant l'équivalent de deux (2) semaines de consommation moyenne d'électricité.

106 Les demandes de l'appelante sont semblables aux conclusions contenues à sa requête pour permission d'appeler :

> [38] La requérante Hydro-Québec demandera à la Cour d'appel de :
>
> [. . .]

d) Ordonner à la Débitrice de payer sa consommation hebdomadaire d'électricité à l'avance, le mardi de chaque semaine;

e) Ordonner à la Débitrice de fournir à Hydro-Québec un dépôt de garantie correspondant à deux (2) semaines de consommation moyenne, soit la somme de 42 000 $;

[. . .]

107 Les conclusions du mémoire d'appel sont cependant tout autres. L'appelante n'y demande pas le paiement du service à l'avance :

[4] MODIFIER la conclusion 9 de l'Ordonnance initiale pour qu'elle se lise comme suit :

[9] ORDONNE à Hydro-Québec (APPELANTE) de ne pas modifier, suspendre ou autrement entraver la fourniture des services d'électricité, tant que la Requérante (INTIMÉE) paie le prix du service reçu après la date de l'Ordonnance ou les frais y afférents. Le paiement devra se faire de la façon suivante :

• La Requérante devra payer toute consommation d'électricité depuis le 5 février 2009 inclusivement dans les quarante-huit (48) heures de la réception d'un avis écrit d'Hydro-Québec expédié à ses procureurs confirmant la valeur de cette consommation;

• <u>Par la suite, Hydro-Québec prendra, à chaque vendredi, une lecture de la consommation d'électricité et avisera par écrit la Requérante de la valeur de la consommation, laquelle devra être acquittée au plus tard le mardi suivant avant 17h00</u>;

• Dans tous les cas, Hydro-Québec devra, par télécopieur ou courriel, faire parvenir à Hydro-Québec et à ses procureurs une preuve de paiement avant l'écoulement des délais ci-haut mentionnés;

[5] BIFFER la conclusion 10 de l'Ordonnance initiale;

[6] ORDONNER à l'INTIMÉE de fournir à l'APPELANTE une avance (dépôt de garantie) au montant de 42 000 $, correspondant à deux (2) semaines de consommation moyenne;

(je souligne)

108 Devant le juge Lesage, l'avocat de l'appelante a concédé qu'un dépôt de 42 000 $ la satisferait :

Vous savez, monsieur le Juge, si vous voulez faire simple, si on ne veut pas s'enfarger dans ces calculs-là, puis que mon confrère me dit que vingt et un mille dollars (21 000$), il n'y a pas de problème, faisons un paiement à toutes les semaines, comme ils font, vingt et un mille dollars (21 000$). Mais moi, j'ai besoin d'avoir, en poche, suffisamment à l'avance.

Donc, ce qu'il me manque, c'est la semaine qui s'en vient, quand je vais recevoir le paiement, ça va simplement être ça. Plus le délai que j'ai pour tirer sur la « plug », comme on dit, si jamais j'ai besoin de le faire.

Ce qu'on vous a mis comme dépôt, quarante-deux mille dollars (42 000 $), c'est deux (2) semaines. On s'est dit, avec un dépôt de deux (2) semaines, nous étions protégés, et là, à toutes les semaines, on reçoit notre paiement. Mon confrère dit que c'est plus facile d'avoir un montant fixe, mon collègue me dit ici, Hydro-Québec autorise que ce soit fixé à vingt et un mille dollars (21 000$). <u>Mais il faut qu'on ait en poche le quarante-deux mille (42 000) pour se protéger, pour aller</u>

de l'avant.

109 Pourtant, dans les discussions qui ont suivi le jugement sur l'ordonnance initiale, l'appelante semblait réclamer à la fois un dépôt et un paiement à l'avance :

> [10] Suite à l'Ordonnance initiale, Hydro-Québec, cherchant à trouver une solution amicale, a demandé à la Débitrice de, notamment payer sa consommation d'électricité hebdomadaire à l'avance, ce qui représente un paiement hebdomadaire de 21 000 $, tel qu'il appert d'une lettre des procureurs d'Hydro-Québec du 10 février 2009, jointe à la présente comme pièce R-5;
>
> [11] Hydro-Québec a également demandé à la Débitrice de lui verser une somme à l'avance pour couvrir la consommation d'électricité entre le moment où la Débitrice ferait défaut de payer et le moment où le tribunal pourrait décider d'une interruption de service, tel qu'il appert de la pièce R-5;[20]

110 En tout état de cause, il m'apparaîtrait inéquitable d'ordonner à l'intimée, pour fins de garantie, de payer le service d'électricité une semaine à l'avance et de verser une somme de 42 000 $ à titre de dépôt. Dans son mémoire, l'appelante insiste beaucoup sur le fait qu'elle assume un risque de perte de deux semaines. Or, en lui permettant d'obtenir un paiement des services à l'avance, l'appelante se trouve à être protégée pour trois semaines.

111 Le dépôt en garantie d'une somme de 42 000 $ m'apparaît raisonnable dans les circonstances. Il me semble approprié d'autoriser l'intimée à fournir ce dépôt sous forme de lettre de garantie sans condition délivrée par une société bancaire, une société d'assurance ou une société de fiducie reconnue, si elle le désire.

112 Avant de trancher le pourvoi, une autre question doit être abordée.

L'interruption du service d'électricité

113 Dans l'arrêt *Meubles Dinec inc.*, le juge Baudouin a assujetti la demande d'interruption du service d'électricité à la discrétion judiciaire. En raison de la garantie qui lui est maintenant accordée, je suis d'avis d'ordonner à l'appelante de déposer une requête devant la Cour supérieure afin d'obtenir la permission d'interrompre le service d'électricité. Agir sur simple préavis nuirait aux intérêts des deux parties.

CONCLUSION

114 Pour les motifs qui précèdent, je suis d'avis :

> a) d'accueillir le pourvoi en partie, avec dépens;
>
> b) d'infirmer le paragraphe 29 du jugement rendu le 3 mars 2009 par le juge Marc Lesage;

c) de remplacer le paragraphe 9 du dispositif de l'ordonnance initiale prononcée le 5 février 2009 par le suivant :

> [9] ORDONNE à Hydro-Québec de ne pas modifier, suspendre ou autrement entraver la fourniture des services d'électricité, tant que la Requérante paie le prix du service reçu après la date de l'Ordonnance ou les frais y afférents. Le paiement devra se faire de la façon suivante :
>
> • La Requérante devra payer toute consommation d'électricité depuis le 5 février 2009 inclusivement dans les quarante-huit (48) heures de la réception d'un avis écrit d'Hydro-Québec expédié à ses procureurs confirmant la valeur de cette consommation;
>
> • Par la suite, Hydro-Québec prendra, à chaque vendredi, une lecture de la consommation d'électricité et avisera par écrit la Requérante de la valeur de la consommation, laquelle devra être acquittée au plus tard le mardi suivant avant 17h00;
>
> • Dans tous les cas, la Requérante devra, par télécopieur ou courriel, faire parvenir à Hydro-Québec et à ses procureurs une preuve de paiement avant l'écoulement des délais ci-haut mentionnés;

d) de remplacer le paragraphe 10 du dispositif de l'ordonnance initiale par le suivant :

> [10] ORDONNE à la Requérante de fournir à Hydro-Québec un dépôt de garantie au montant de 42 000 $, correspondant à deux (2) semaines de consommation moyenne, ce dépôt pouvant être fourni sous forme d'une lettre de garantie sans condition délivrée par une société bancaire, une société d'assurance ou une société de fiducie reconnue;

e) de réserver les droits de l'appelante en ce qui a trait à la contestation des paragraphes 11 et 12 du dispositif de l'ordonnance initiale; et

f) de déclarer que l'appelante doit s'adresser au tribunal pour obtenir l'autorisation d'interrompre le service d'électricité.

Appel accueilli en partie.

Notes de bas de page

1 Pièce RHQ-3.

2 Pièce RHQ-4.

3 Pièce RHQ-2 (Lettre de madame Linda Dion, datée du 3 septembre 2008).

4 Tel qu'il appert du plumitif.

5 *Meubles Dinec inc., Re*, 2006 QCCA 747 (Que. C.A.).

6 *J.B. Lefebvre ltée (Arrangement relatif à)*, B.E. 2004BE-519 (C.S.).

7 Jugement, paragr. 20.

8 Ce montant équivaut à deux semaines de consommation d'électricité, à raison de 3 000 $ par jour. Cette somme ne tient pas compte d'un risque additionnel : pour des raisons de sécurité, un délai supplémentaire serait nécessaire avant d'interrompre le service d'électricité.

9 *J.B. Lefebvre ltée*, *supra*, note 6.

10 *TQS inc., Re*, 2008 QCCA 1429 (Que. C.A.).

11 *Supra*, note 5.

12 *Supra*, note 6.

13 *Meubles Dinec inc.*, *supra*, note 5, paragr. 30.

14 Cette somme représente la valeur de consommation moyenne d'électricité pour deux semaines.

15 Voir *Meubles Dinec inc.*, *supra*, note 5, paragr. 34.

16 Richard H. McLaren, *Canadian Commercial Reorganisation*: Preventing Bakruptcy, Aurora, Canada Law Book, 2007, p. 3-17.

17 [2000] 10 W.W.R. 147 (Alta. Q.B.). Confirmé en appel : [2001] 10 W.W.R. 204 (Alta. C.A.).

18 Lloyd W. Houlden, Geoffrey B. Morawetz et Janis P. Sarra, *The 2009 Annotated Bankruptcy and Insolvency Act*, Toronto, Thomson Carswell, 2008, p. 1138.

19 *Supra*, note 5, paragr. 32.

20 Requête d'Hydro-Québec pour permission d'appeler.

Fin du document

TAB 5

CED Contracts IX.1

Canadian Encyclopedic Digest
Contracts
IX — Interpretation of Contract
1 — General Principles

For print citation information and the currency of the title, please click here.

IX.1

See Canadian Abridgment: CON.VII.1 Contracts — Construction and interpretation — General principles

§552 The objective of interpreting a contract is to discover and give effect to the parties' true intention as expressed in the written document as a whole at the time the contract was made.[1] In the absence of ambiguity, the plain, ordinary, popular, natural, or literal[2] meaning of the words, read in light of the entire agreement and its surrounding circumstances,[3] should be adopted,[4] except where to do so would result in a commercial absurdity or create some inconsistency with the rest of the contract.[5] Contractual interpretation is essentially a search for the objective meaning of language, absent proof that all parties mutually interpreted the contract in a way that may not have been apparent to an ordinary person.[6] Thus, while modern courts tend to interpret contractual language contextually, in accordance with the surrounding circumstances of the agreement,[7] and consistent with the reasonable understanding and expectations of the parties,[8] interpretation of a contract must be objectively based.[9] Generally, evidence of unexpressed (subjective) intention of the parties is not admissible.[10]

§553 Under the so-called modern "contextual approach" to contractual interpretation, particular provisions of an agreement are not to be read in isolation, but, rather, in harmony with the agreement as a whole[11] and any related agreements forming part of the larger transaction[12] in order to construe properly any given term in its wider context. Further, the contract as a whole may, and sometimes must,[13] be considered in light of the facts and circumstances known to and affecting both parties at the time of the making of the contract, in order to understand the object of the parties[14] and the frame of reference within which the process of interpretation should take place.[15] Such surrounding circumstances are usually referred to as the commercial setting or context[16] or the factual matrix[17] of the contract, and evidence pertaining to same is to be distinguished from other extrinsic evidence.[18] The genesis and aim of the transaction,[19] as well as its background and context, and the market in which the parties were operating,[20] may be considered as part of the context of the agreement. Business contracts are to be interpreted in accordance with commercial reality unless the language of the agreement clearly precludes this approach.[21] The scope of the surrounding circumstances to be considered will vary from case to case, but should encompass those factors which assist the court in searching for an interpretation that promotes the true intent of the parties.[22] A the same time, the words of the contract must not be overwhelmed by a contextual analysis, since the court's task is not to make a new contract for the parties.[23] The intention of the parties is determined in the objective sense of a reasonable person by reference to the surrounding circumstances at the time of the signing of the contract.[24]

§554 Surrounding circumstances which may be considered include correspondence leading up to the making of the agreement,[25] informal documents predating the final contract,[26] and earlier superseded agreements executed by the parties.[27] While recognizing the basic principle that evidence of negotiations (such as earlier drafts of the contract[28] and mere statements of intention,[29]) is not admissible,[30] especially where there is no ambiguity to be construed, some courts have considered "objective" evidence of negotiations in reference to the genesis and aim and factual matrix of the contract.[31] Evidence of the parties' conduct subsequent to the making of the agreement should generally not form part of the factual matrix.[32] Evidence as to the understanding of a party which is at variance with unambiguous terminology is not admissible.[33]

§555 Although the motives or objectives of the parties to the contract cannot dictate the interpretation to be given to the language employed in it,[34] the clear object or purpose of the contract may be used in construing its broad or general terms.[35]

§556 A court's duty is to interpret a contract in accordance with the language used by the parties, rather than to alter the wording in accordance with what the court thinks the parties may or ought really to have intended,[36] thereby effectively making a new contract for the parties.[37] This duty prevails even if the result is more onerous than the parties may have anticipated.[38] If, however, there is a clear contractual intention exhibited in the contract which conflicts with its literal wording, effect may be given to this overriding intention by departing from or qualifying particular terminology.[39]

§557 Where possible, effect must be given to all terms of the contract and none are to be rejected as surplusage or as having no meaning.[40] The absence of words may be considered.[41] Similarly, a court must strive to harmonize apparently conflicting terms by attempting to reasonably give meaning to each of the terms in question;[42] one clause or the other will be ruled ineffective only if such an interpretation cannot be found.[43] When different parts of the instrument are in conflict, effect will be given to the real intention of the parties as gathered from the instrument as a whole.[44] Apparent inconsistencies may be reconciled by construing a specific term as a qualification of a general one.[45] Conflicting provisions will not be considered meaningless and unenforceable unless they are so clearly repugnant that the effect of one clause virtually destroys that of another.[46] A situation not covered by specific provisions will by default fall within the general regime laid down by the contract.[47]

§558 The process of determining the meaning to be given to words in a document is governed by the same principles regardless of whether it occurs in a contract claim or a tort claim: namely, the court seeks the reasonable understanding of the parties, given the purpose, context and entire wording of the document.[48]

§559 The principles governing the interpretation of contracts are essentially the same as for statutory interpretation.[49]

§560 While contracts drafted by businesspersons are not to be subjected as rigorously to conventional legal canons of construction as deeds prepared by solicitors,[50] such will not be the case where business forms have been drafted with the advice or assistance of counsel, such as standard form banking documents.[51]

§561 A person dealing with disadvantaged parties has an enhanced duty to ensure clarity and completeness in contractual language.[52]

Footnotes

1 *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* (1997), 1997 CarswellNfld 207 (S.C.C.) (when determining extent to which "planned obligations" of contracting parties affecting their tort liabilities, necessary to ascertain parties' intention respecting particular issue from contract documents as whole); *Hill v. Nova Scotia (Attorney General)* (1997), 1997 CarswellNS 10 (S.C.C.) (release not affecting equitable interest in land); *Manulife Bank of Canada v. Conlin* (1996), 1996 CarswellOnt 3941 (S.C.C.) (guarantee covenant to be interpreted and considered within context of entire transaction); *BG Checo International Ltd. v. British Columbia Hydro & Power Authority* (1993), 1993 CarswellBC 1254 (S.C.C.); reconsideration refused (1993), 14 C.C.L.T. (2d) 233 (note) (S.C.C.); *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.* (1986), 1986 CarswellNS 147 (S.C.C.) (termination clause in distributorship agreement); *Two Forty Engineering Ltd. v. Platte River Resources Ltd.* (1996), 1996 CarswellAlta 296 (Alta. C.A.) (petroleum operating agreement); *Kingsway General Insurance Co. v. Lougheed Enterprises Ltd.* (2004), 2004 CarswellBC 1788 (B.C. C.A.) (definitions in insurance contract); *Gilchrist v. Western Star Trucks Inc.* (2000), 2000 CarswellBC 176 (B.C. C.A.) (option renegotiation agreement); *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League* (2003), 2003 CarswellMan 229 (Man. C.A.) (use of premises clause in lease); *A/S Nyborg Plast v. Groupe Qualité Lamèque Ltée/Lamèque Quality Group Ltd.* (2001), 2001 CarswellNB 334 (N.B. C.A.); leave to appeal refused (2002), 2002 CarswellNB 163 (S.C.C.) (same result when interpreting exclusive jurisdiction clause under either grammatical construction or textual analysis); *Imperial Oil Ltd. v. Young* (1998), 1998 CarswellNfld 224 (Nfld. C.A.); *Novopharm Ltd. v. Apotex Inc.* (1996), 1996 CarswellOnt 1903 (Ont. C.A.) (co-operation clause not qualifying indemnity provision); *Rogers & Rogers Inc. v. Pinehurst Woodworking Co.* (2005), 2005 CarswellOnt 7190 (Ont. S.C.J.) (covenant in restraint of trade); *550 Capital Corp. v. David S. Cheetham Architect Ltd.* (2009), 2009 CarswellAlta 837 (Alta. C.A.) (useful summary of principles of contractual interpretation); *Downey v. Ecore International Inc.* (2012), 2012 CarswellOnt 8459 (Ont. C.A.) (intent of parties when entering into contractual arrangements was to execute confidentiality agreement; confidentiality agreement binding); *Gwininitxw v. British Columbia (Attorney General)* (2013), 2013 CarswellBC 3309 (B.C. S.C.).

2 *Indian Molybdenum Ltd. v. R.* (1951), 1951 CarswellNat 280 (S.C.C.); *Brinkerhoff International Inc. v. Numac Energy Inc.* (1997), 1997 CarswellAlta 821 (Alta. C.A.) (plain language of contract making contractor liable; "surface equipment" including drilling rig); *Suncor Inc. v. Norcen International Ltd.* (1988), 1988 CarswellAlta 630 (Alta. Q.B.) (royalty provisions in mining sublease); *Nutreco Canada Inc. v. Agrimarine Industries Inc.* (2002), 2002 CarswellBC 2910 (B.C. C.A.) (express wording of joint venture agreement prevailing); *Gilchrist v. Western Star Trucks Inc.* (2000), 2000 CarswellBC 176 (B.C. C.A.) (words in option renegotiation agreement to be regarded in ordinary and natural sense, and not distorted beyond actual meaning); *Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 1997 CarswellBC 2836 (B.C. C.A.) (residual commissions payable despite agreement expiring; plain meaning of wording); *MacMillan Bloedel Ltd. v. British Columbia Hydro & Power Authority* (1992), 1992 CarswellBC 304 (B.C. C.A.) (ordinary and natural meaning of "strike" in force majeure clause); *Farmer Construction Ltd. v. Surrey (District)* (1997), 1997 CarswellBC 1232 (B.C. S.C.) (plain meaning of tender documents meaning tenderer clearly liable for all taxes); *Arnoldin Construction & Forms Ltd. v. Alta Surety Co.* (1995), 1995 CarswellNS 31 (N.S. C.A.); leave to appeal refused (1995), 193 N.R. 320 (note) (S.C.C.) ("pay when paid" clause in construction contract); *Buildevco Ltd. v. Monarch Construction Ltd.* (1990), 1990 CarswellOnt 757 (Ont. H.C.) (funding under joint venture agreement); *A&B Mechanical Ltd. v. Canotech Consultants Ltd.* (2013), 2013 CarswellMan 635 (Man. Q.B.); **see also** *Durnford Elk Shoes Ltd., Re* (1916), 1916 CarswellOnt 29 (Ont. Weekly Ct.); leave to appeal refused (1916), 1916 CarswellOnt 78 (Ont. H.C.) (cancellation clause in lease; when language used unambiguous, departure from natural meaning not justified by any consideration of its consequence or public policy).

3 **See** §§553, 565.

4 *Non-Marine Underwriters, Lloyd's London v. Scalera* (2000), 2000 CarswellBC 885 (S.C.C.) (insurer's duty to defend; where contract unambiguous, court should give effect to clear language, reading contract as whole); *Eli Lilly & Co. v. Novopharm Ltd.* (1998), 1998 CarswellNat 1061 (S.C.C.) (where no ambiguity, presumption that parties intending legal effect of words used); *Guaranty Properties Ltd. v. Edmonton (City)* (2000), 2000 CarswellAlta 774 (Alta. C.A.) (definition of assessable area clear and unambiguous); *Gilchrist v. Western Star Trucks Inc.* (2000), 2000 CarswellBC 176 (B.C. C.A.) (language of option renegotiation agreement unambiguous; evidence of post-contract conduct inadmissible); *Beker Developments Ltd. v. Standerwick* (1990), 1990 CarswellBC 1622 (B.C. C.A.) (mortgage payment terms); *Myran v. Long Plain Indian Band (Trustee of)* (2002), 2002 CarswellMan 96 (Man. Q.B.) (wording of trust deed); *Venture Capital USA Inc. v. Yorkton Securities Inc.* (2005), 2005 CarswellOnt 1875 (Ont. C.A.); leave to appeal refused (2005), 2005 CarswellOnt 7072 (S.C.C.) (refusal clause; where parties' intention plainly expressed in language of agreement, court should not stray beyond contract's four corners); *Holt v. Thunder Bay (City)* (2003), 2003 CarswellOnt 2284 (Ont. C.A.) (new term of renewal lease determinable by reference to previous lease); *Canadian Premier Holdings Ltd. v. Winterthur Canada Financial Corp.* (2000), 2000 CarswellOnt 1648 (Ont. C.A.); reconsideration refused (2000), 2000 CarswellOnt 3174 (Ont. C.A.) (liability of parties to share purchase contract to pay insurance industry assessments; court to interpret plainly worded document by presuming parties intended legal consequences of words); *First Windsor Shopping Centres Ltd. v. Langille* (2001), 2001 CarswellOnt 4860 (Ont. S.C.J.) ("the property" clearly defined in lease and unambiguous).

5 *Manulife Bank of Canada v. Conlin* (1996), 1996 CarswellOnt 3941 (S.C.C.) (court will deviate from plain meaning of words only if literal interpretation of contractual language leading either to absurd result or result plainly repugnant to parties' intention); *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), 1979 CarswellQue 157 (S.C.C.) (literal meaning should not be applied where bringing about unrealistic result or result not contemplated in commercial atmosphere of contract); *Freyberg v. Fletcher Challenge Oil & Gas Inc.* (2005), 2005 CarswellAlta 152 (Alta. C.A.); leave to appeal refused (2005), 2005 CarswellAlta 1695 (S.C.C.) (terms of gas contracts be given effect according to plain and ordinary meaning unless doing so resulting in absurdity); *Paddon-Hughes Development Co. v. Pancontinental Oil Ltd.* (1998), 1998 CarswellAlta 940 (Alta. C.A.); leave to appeal refused (1999), 243 N.R. 199 (note) (S.C.C.) (no ambiguity in lease; interpretation should be commercially realistic and businesslike); *Group Eight Investments Ltd. v. Taddei* (2005), 2005 CarswellBC 2328 (B.C. C.A.) (plain and ordinary meaning to be given to wording of promissory note, unless resulting in absurdity); *Kingsway General Insurance Co. v. Lougheed Enterprises Ltd.* (2004), 2004 CarswellBC 1788 (B.C. C.A.) (definitions in insurance contract; plain meaning of words to be given effect unless bringing about unrealistic or commercially unreasonable result); *Firstar Investment & Financial Co. v. Ridgewood Development Corp.* (2003), 2003 CarswellBC 3187 (B.C. C.A.) (forbearance agreement between lender and developer); *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 1998 CarswellOnt 4170 (Ont. C.A.) (approval of change of controlling shareholder of franchisee); *Kuzyk v. Fireman LoFranco* (2005), 2005 CarswellOnt 1808 (Ont. S.C.J.); affirmed (2007), 2007 CarswellOnt 353 (Ont. C.A.) (parties' intention plainly expressed in authorization to settle agreement); *Mississauga Teachers' Retirement Village Ltd. Partnership v. L.M.C. (1993) Ltd.* (2004), 2004 CarswellOnt 4496 (Ont. C.A.) (parties intending "sold" to include agreement to sell in accordance with the conditions of sale and dissolution agreement); **see also** *Eli Lilly & Co. v. Novopharm Ltd.* (1998), 1998 CarswellNat 1061 (S.C.C.) (where no ambiguity, notion that interpretation producing "fair result" or "sensible commercial result" should be adopted, not determinative; although absurd to adopt interpretation inconsistent with parties' commercial interests, presumption that parties intending legal effect of words used); *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League* (2003), 2003 CarswellMan 229 (Man. C.A.) (where no ambiguity, courts seldom called upon to consider commercial reality of transaction by determining "sensible commercial result"); *Ryan v. Sun Life Assurance Co. of Canada* (2005), 2005 CarswellNS 27 (N.S. C.A.) (court declining to decide if parties' reasonable expectations engaged when contract language not ambiguous); *SimEx Inc. v. IMAX Corp.* (2005), 2005 CarswellOnt 7297 (Ont. C.A.) (parties presumed to have intended legal effect of their words; however, court will not adopt interpretation that is "clearly" commercially absurd); *Canadian Broadcasting Corp. Pension Plan v. BF Realty Holdings Ltd.* (2002), 2002 CarswellOnt 1759 (Ont. C.A.) (while search for interpretation achieving "sensible commercial result" not governing interpretative exercise, such approach relevant where no ambiguity arising from wording of contract); *Canadian Premier Holdings Ltd. v. Winterthur Canada Financial Corp.* (2000), 2000 CarswellOnt 1648 (Ont. C.A.); reconsideration refused (2000), 2000 CarswellOnt 3174 (Ont. C.A.) (where contractual wording not ambiguous, commercial reasonableness may inform court's reading of text, but interpretation producing sensible commercial result not determinative); **see also** §553.

6 *Hendry v. Zimmerman* (1947), 1947 CarswellMan 35 (Man. K.B.); affirmed (1948), 1948 CarswellMan 7 (Man. C.A.); *Mac Mortgage Approval Corp. v. MMB Management Corp.* (2013), 2013 CarswellBC 3606 (B.C. S.C.).

7 *Dumbrell v. Regional Group of Cos.* (2007), 2007 CarswellOnt 407 (Ont. C.A.) (text of written agreement must be read as whole and in context of circumstances existing when agreement created, including facts known or reasonably capable of being known by parties at such time; consideration of contract's context being integral part of interpretative process and not to be resorted to only where words, viewed in isolation, suggesting some ambiguity); *Aquadel Golf Course Ltd. v. Lindell Beach Holiday Resort Ltd.* (2009), 2009 CarswellBC 39 (B.C. C.A.) (useful summary of settled law); **see also** §§553, 554.

8 *Miglin v. Miglin* (2003), 2003 CarswellOnt 1374 (S.C.C.) (court to change final support agreement only if circumstances at time of application representing significant departure from range of reasonable outcomes anticipated by parties at time of agreement, so that no longer reflecting parties' reasonable expectations to any appreciable extent); *Non-Marine Underwriters, Lloyd's London v. Scalera* (2000), 2000 CarswellBC 885 (S.C.C.) (insurer's duty to defend; where ambiguity existing, desirable to give effect to parties' reasonable expectations); *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.* (1993), 1993 CarswellMan 96 (S.C.C.) (unnecessary to decide whether reasonable expectations principle should apply where language not ambiguous, per McLachlin J.); *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* (1992), 1992 CarswellBC 913 (S.C.C.) (preventing third party from relying on limitation of liability clause intended to benefit him or her inconsistent with reasonable expectations of all parties to transaction); *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), 1979 CarswellQue 157 (S.C.C.) (ambiguous exclusion clauses in insurance contract; literal meaning not applying where bringing about unrealistic result or result not contemplated in commercial atmosphere in which insurance contracted); *Atco Electric Ltd. v. Alberta (Energy & Utilities Board)* (2004), 2004 CarswellAlta 949 (Alta. C.A.) (plaintiff's view of settlement inconsistent with express terms, and thus, reasonable expectations of parties; search for parties' intention conducted on basis of reasonableness); *Fleckenstein v. Deutsche Bank Securities Ltd. / Deutsche Bank Valeurs Mobilières Ltée* (2002), 2002 CarswellBC 132 (B.C. C.A.) (no reversible error in using extrinsic evidence to seek out parties' intentions to determine their reasonable expectations); *Singh v. British Columbia Hydro & Power Authority* (2001), 2001 CarswellBC 2684 (B.C. C.A.); leave to appeal refused (2002), 2002 CarswellBC 1033 (S.C.C.) (employment contract; principal function of contracts to protect reasonable expectation of parties engendered by promises; test of promise judged on objective basis); *Roy v. North American Leisure Group Inc.* (2004), 2004 CarswellOnt 4821 (Ont. C.A.) (reasonable expectation of parties not including expectation that Ontario law would apply to Caribbean cruise led by British cruise provider); *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 2003 CarswellOnt 2038 (Ont. C.A.) (franchise agreement constituting contract of adhesion; exclusion clause not representing intention or reasonable expectation of parties in circumstances); *Hamilton v. Open Window Bakery Ltd.* (2002), 2002 CarswellOnt 964 (Ont. C.A.); reversed in part on other grounds (2003), 2003 CarswellOnt 4489 (S.C.C.); additional reasons at (2003), 2003 CarswellOnt 5591 (S.C.C.) (employment contract defining parties' reasonable expectations regarding minimum defined benefits upon wrongful termination); *Naylor Group Inc. v. Ellis-Don Construction Ltd.* (1999), 1999 CarswellOnt 853 (Ont. C.A.); varied (2001), 2001 CarswellOnt 3340 (S.C.C.) (integrity of construction bidding process requiring that reasonable expectations of parties be given effect); *Leading Investments Ltd. v. New Forest Investments Ltd.* (1986), 1986 CarswellOnt 671 (S.C.C.); reconsideration refused (1986), 68 N.R. 399 (note) (S.C.C.) (commission clause; court required to consider parties' reasonable expectation provided not inconsistent with language of contract itself); **see also** *Grewal v. Royal Bank* (1998), 1998 CarswellOnt 1122 (Ont. C.A.) (overpayment by insurer; doctrine of reasonable expectations not applying as neither party could have reasonably expected unanticipated surplus); *Altagas Marketing Inc. v. R.* (2004), 2004 CarswellNat 4500 (F.C.) (enforcement should be denied where parties seeking to enforce contract having no reasonable expectation on particular benefit).

9 *Chandos Construction Ltd. v. Alberta (Minister of Infrastructure)* (2006), 2006 ABCA 41 (Alta. C.A.) (discretion clause in conditions of tender subject to objective rather than subjective analysis); *MacDonald v. University of British Columbia* (2005), 2005 CarswellBC 1616 (B.C. C.A.) (clause regarding adjustment of fees unambiguous; objective meaning must prevail); *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League* (2003), 2003 CarswellMan 229 (Man. C.A.) (use of premises clause in lease; while unnecessary to consider extrinsic evidence where contract clear and unambiguous on its face, principle not precluding court from considering surrounding circumstances or factual matrix in objective sense); *Hunt River Camps / Air Northland Ltd. v. Canamera Geological Ltd.* (1998), 1998 CarswellNfld 297 (Nfld. C.A.) (court generally taking broad view of dealings between parties to make objective determination of their reasonable common expectations; court striving to give effect to those expectations by using all reasonable means to advance commercial intent, rather than frustrating it); *Dumbrell v. Regional Group of Cos.* (2007), 2007 CarswellOnt 407 (Ont. C.A.) (interpretative process to be focused on meaning of contractual wording, in which evidence of parties' subjective intention having "no independent place"; however, text of written agreement must be read as whole and in context of circumstances existing when agreement created, including facts known or reasonably capable of being known by parties at such time); *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 1998 CarswellOnt 4170 (Ont. C.A.) (franchise licence agreement; while document to be construed in accordance with sound commercial principles and good business sense, construction must be done objectively); *Rana v. Maduck* (2000), 2000 CarswellSask 489 (Sask. Q.B.); *Barnabe Estate v. Minister of National Revenue* (1999), 1999 CarswellNat 2950 (Fed. C.A.); *Nexxtep Resources Ltd. v. Talisman Energy Inc.* (2013), 2013 CarswellAlta 147 (Alta. C.A.); **see also** §§553, 554.

10 *Eli Lilly & Co. v. Novopharm Ltd.* (1998), 1998 CarswellNat 1061 (S.C.C.) (evidence of subjective intention inadmissible per parol evidence rule); *PTI Group Inc. v. BOT Engineering & Construction Ltd.* (1995), 1995 CarswellAlta 387 (Alta. Q.B.); affirmed (1996), 1996 CarswellAlta 1058 (Alta. C.A.) (evidence of commercial setting to elucidate real intention of parties not same as inadmissible parol evidence of their intentions); *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League* (2003), 2003 CarswellMan 229 (Man. C.A.); *Saint John (City) v. A.C.L. Construction Ltd.* (2003), 2003 CarswellNB 349 (N.B. Q.B.) (subjective intent of draftsperson of addendum not to be considered); *Ryan v. Sun Life Assurance Co. of Canada* (2005), 2005 CarswellNS 27 (N.S. C.A.); *Imperial Oil Ltd. v. Young* (1998), 1998 CarswellNfld 224 (Nfld. C.A.) (direct evidence as to parties' actual or subjective intentions inadmissible, as distinct from evidence of surrounding factual background and circumstances under which

parties operated); *MacDonald Chisholm Inc. v. Chisholm* (1999), 1999 CarswellNS 329 (N.S. C.A.) (trial judge's interpretation of "escape clause" reasonable and consistent with objective intention of parties); *Ontario (Minister of Transportation) v. 407 ETR Concession Co.* (2005), 2005 CarswellOnt 36 (Ont. S.C.J.) (ambiguity meaning evidence of past conduct admissible, but evidence of subjective intention inadmissible); *Lanosh-Medad Family Trust (Trustee of) v. Versatech Industries Inc.* (1999), 1999 CarswellOnt 3147 (Ont. S.C.J. [Commercial List]) (subjective intention inadmissible); *EdperBrascan Corp. v. 177373 Canada Ltd.* (2000), 2000 CarswellOnt 4084 (Ont. S.C.J.); affirmed (2002), 2002 CarswellOnt 698 (Ont. C.A.); *Lama Lo Holdings Ltd. v. Gurnisch Development Corp.* (2013), 2013 CarswellBC 3693 (B.C. S.C.); **see also** *Mifsud v. Owens Corning Canada Inc.* (2003), 2003 CarswellOnt 3823 (Ont. S.C.J.) (only exception to inadmissibility where contract unambiguous on face, but surrounding circumstances or factual matrix establishing latent ambiguity; evidence of parties' intention as to which of two or more alternative subjects parties intended to refer to, admissible).

11 *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* (1997), 1997 CarswellNfld 207 (S.C.C.) (when determining extent to which "planned obligations" of contracting parties affecting their tort liabilities, necessary to ascertain parties' intention respecting particular issue from contract documents as whole); *Syncrude Canada Ltd. v. Hunter Engineering Co.* (1989), 1989 CarswellBC 37 (S.C.C.) (exclusion clause to be read in context of document as whole and surrounding circumstances); *Atco Electric Ltd. v. Alberta (Energy & Utilities Board)* (2004), 2004 CarswellAlta 949 (Alta. C.A.) (search for parties' intention in settlement with energy board; court not permitted to pick and choose clauses, rather than consider agreement as whole); *Brinkerhoff International Inc. v. Numac Energy Inc.* (1997), 1997 CarswellAlta 821 (Alta. C.A.) ("equipment" not used uniformly throughout contract); *MacDonald v. University of British Columbia* (2005), 2005 CarswellBC 1616 (B.C. C.A.) (term "adjustment" respecting tuition fees properly read in context of whole impugned clause and whole contract); *Group Eight Investments Ltd. v. Taddei* (2005), 2005 CarswellBC 2328 (B.C. C.A.) (promissory note referring to payment of "other permitted project costs" meaning costs in addition to financing costs); *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1998), 1998 CarswellOnt 2565 (Ont. Gen. Div. [Commercial List]); affirmed (1999), 1999 CarswellOnt 2812 (Ont. C.A.); leave to appeal refused (2000), 2000 CarswellOnt 2983 (S.C.C.) (comfort letter; document to be regarded as whole, considering each contractual term in context of entire document); *Canadian Newspapers Co. v. Kansa General Insurance Co.* (1996), 1996 CarswellOnt 3227 (Ont. C.A.); leave to appeal refused (1997), 107 O.A.C. 158 (note) (S.C.C.); *Novopharm Ltd. v. Apotex Inc.* (1996), 1996 CarswellOnt 1903 (Ont. C.A.) (co-operation clause not qualifying indemnity provision); **see also** *Miller v. Sloan* (2005), 2005 CarswellOnt 7027 (Ont. C.A.) (meaning of "non-recovered costs" in profit sharing clause to be ascertained in context of overall commercial transactions between parties); **see also** §552.

12 *Mechanical Pin Resetter Co. v. Canadian Acme Screw & Gear Ltd.* (1970), 1970 CarswellOnt 258 (S.C.C.) (four interrelated agreements read together to ascertain geographical scope of licence to manufacture set out in one of them); *3869130 Canada Inc. v. I.C.B. Distribution Inc.* (2008), 2008 CarswellOnt 2802 (Ont. C.A.) (parties entering into series of contracts in order to give effect to deal; while mutual undertaking not signed at the same time as asset purchase agreement, its commitments were contemplated in latter agreement and formed part of same global transaction; in such circumstances, court to have regard not only to language of particular contract being interpreted, taken as whole, but to surrounding contracts as well; where each agreement entered into on faith of others being executed and parties intending that each agreement form part of larger composite whole, assistance in interpretation of any particular agreement may be drawn from related agreements); **see also** *SimEx Inc. v. IMAX Corp.* (2005), 2005 CarswellOnt 7297 (Ont. C.A.) (as transfer agreement unambiguous, extrinsic evidence inadmissible; although evidence as to background leading to agreement and related contract potentially helpful in understanding context, assertions by parties as to what they intended inadmissible).

13 *Gilchrist v. Western Star Trucks Inc.* (2000), 2000 CarswellBC 176 (B.C. C.A.) (language must be read in context of surrounding circumstances prevalent at time of contracting); *Swinemar v. Hatt* (1980), 1980 CarswellNS 203 (N.S. T.D.) (ambiguity as to land description in deed; in true case of ambiguity, mandatory to consider surrounding circumstances); **see also** *Hi-Tech Group Inc. v. Sears Canada Inc.* (2001), 2001 CarswellOnt 9 (Ont. C.A.) (ambiguous termination provision; "indeed", since words take meaning from context, evidence of surrounding circumstances admissible in every case); *Dumbrell v. Regional Group of Cos.* (2007), 2007 CarswellOnt 407 (Ont. C.A.) (text of written agreement must be read as whole and in context of circumstances existing when agreement created, including facts known or reasonably capable of being known by parties at such time; consideration of such context being integral part of interpretative process and not to be resorted to only where words, viewed in isolation, suggesting some ambiguity).

14 *Métropolitaine, cie d'assurance-vie c. Frenette* (1992), 1992 CarswellQue 95 (S.C.C.) (in searching for parties' intention, court should give particular consideration to terms used by parties, context in which terms used, and purpose sought by parties in using these terms); *Prenor Trust Co. of Canada v. Kerkhoff Properties Inc.* (1994), 1994 CarswellAlta 149 (Alta. Q.B.) (evidence of commercial context surrounding making of agreement admissible only to show purpose for including various provisions); *Tsiribis v. Panopoulos* (1981), 1981 CarswellOnt 532 (Ont. H.C.) (apparent conflict between provisions of two related agreements; resolution in favour of giving effect to clear intention of parties in both agreements); *Prenn v. Simmonds* (1971), [1971] 3 All E.R. 237 (U.K. H.L.).

15 *Marshall v. Canada* (1999), 1999 CarswellNS 349 (S.C.C.) (court rejecting notion that extrinsic evidence inadmissible as aid to interpretation in absence of ambiguity; such evidence admissible to show that written treaty not containing all terms of agreement); *Métropolitaine, cie d'assurance-vie c. Frenette* (1992), 1992 CarswellQue 95 (S.C.C.) (in searching for parties' intention, court should give particular consideration to terms used by parties, context in which terms used and purpose sought by parties in using these terms); *GE Commercial Distribution Finance Canada Inc. v. Francks* (2003), 2003 CarswellBC 2644 (B.C. C.A.) (when interpreting guarantee, court may look outside contractual wording where interests of justice require it); *Fleckenstein v. Deutsche Bank Securities Ltd. / Deutsche Bank Valeurs Mobilières Ltée* (2002), 2002 CarswellBC 132 (B.C. C.A.) (issue whether words in agreement, on their face and in context of entire agreement and surrounding circumstances, bear only one reasonable meaning or more than one); *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League* (2003), 2003 CarswellMan 229 (Man. C.A.) (while unnecessary to consider extrinsic evidence where contract clear and unambiguous on its face, principle not precluding consideration of surrounding circumstances or factual matrix in objective sense); *Hi-Tech Group Inc. v. Sears Canada Inc.* (2001), 2001 CarswellOnt 9 (Ont. C.A.) (surrounding circumstances constituting contract's commercial purpose, in turn presupposing knowledge of genesis, background, and context of transaction, and market in which parties operating); *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1998), 1998 CarswellOnt 2565 (Ont. Gen. Div. [Commercial List]); affirmed on other grounds (1999), 1999 CarswellOnt 2812 (Ont. C.A.); leave to appeal refused (2000), 2000 CarswellOnt 2983 (S.C.C.) (comfort letter not binding since guarantee refused); *Armadillo Productions Inc. v. Hip Hype Inc.* (2001), 2001 CarswellOnt 1917 (Ont. S.C.J.) (context of unpaid invoice relevant); **see also** *Reardon Smith Line v. Hansen-Tangen* (1976), [1976] 3 All E.R. 570 (U.K. H.L.); *Eli Lilly & Co. v. Novopharm Ltd.* (1998), 1998 CarswellNat 1061 (S.C.C.) (parties' contractual intent to be determined by reference to written words, possibly read in light of surrounding circumstances prevalent at time; unnecessary to consider any extrinsic evidence at all when document clear on face); *Norsyd Investments Inc. (Receiver of) v. Sobeys Group Inc.* (2003), 2003 CarswellNS 99 (N.S. S.C.); affirmed (2003), 2003 CarswellNS 319 (N.S. C.A.) (evidence of surrounding circumstances only helpful where terms unclear or ambiguous); G.R. Hall, "A Curious Incident in the Law of Contract: The Impact of 22 Words from the House of Lords" (2004), 40 Can. Bus. L.J. 20.

16 *Hill v. Nova Scotia (Attorney General)* (1997), 1997 CarswellNS 10 (S.C.C.) (release considered in context of expropriation proceedings); *White v. Central Trust Co.* (1984), 1984 CarswellNB 38 (N.B. C.A.) (specific context in which release executed assisting in understanding words used); *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1998), 1998 CarswellOnt 2565 (Ont. Gen. Div. [Commercial List]); affirmed on other grounds (1999), 1999 CarswellOnt 2812 (Ont. C.A.); leave to appeal refused (2000), 2000 CarswellOnt 2983 (S.C.C.) (internal documents reflecting bank's state of mind regarding comfort letters).

17 *Guaranty Properties Ltd. v. Edmonton (City)* (2000), 2000 CarswellAlta 774 (Alta. C.A.) (extrinsic evidence admissible to demonstrate factual matrix respecting lands included in development agreement); *Water Street Pictures Ltd. v. Forefront Releasing Inc.* (2006), 2006 CarswellBC 2476 (B.C. C.A.) (factual matrix generally restricted to circumstances known to both parties illuminating meaning that reasonable person would give to words employed); *Fraser v. Houston* (2005), 2005 CarswellBC 1141 (B.C. S.C.); reversed in part on other grounds (2006), 2006 CarswellBC 552 (B.C. C.A.); leave to appeal refused (2006), 2006 CarswellBC 2228 (S.C.C.) (factual matrix evidence should be restricted to factual background known to parties at or before date of contract, including evidence of genesis and objective "aim" of transaction); *McCarvill v. Parker Cove Properties Ltd. Partnership* (2004), 2004 CarswellBC 3008 (B.C. C.A.) (as tenancy contract ambiguous, interpreted in factual matrix); *Dinney v. Great-West Life Assurance Co.* (2005), 2005 CarswellMan 78 (Man. C.A.) (corporate documents not normally considered to have legal effect may nonetheless form part of legal matrix for determining rights under pension plan, depending on wording, circumstances in which produced, and effect on employees; citing *Schmidt v. Air Products of Canada Ltd.*); *Schmidt v. Air Products of Canada Ltd.* (1994), 1994 CarswellAlta 138 (S.C.C.) (brochure regarding pension plan); *Metropolitan Toronto Police Widows & Orphans Fund v. Telus Communications Inc.* (2005), 2005 CarswellOnt 2297 (Ont. C.A.); leave to appeal refused (2006), 2006 CarswellOnt 435 (S.C.C.) (contract of sale, rather than loan; court examining factual matrix at time contract entered into, and conduct of parties, when determining real nature of transaction); *Dumbrell v. Regional Group of Cos.* (2007), 2007 CarswellOnt 407 (Ont. C.A.) (text of written agreement must be read as whole and in context of circumstances existing when agreement created, including facts known or reasonably capable of being known by parties at such time; "factual matrix" of agreement clearly extending to its genesis and purpose, and commercial context in which contract made); **see also** *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 W.L.R. 896 (U.K. H.L.) (interpretation being ascertainment of meaning which document would convey to reasonable person having all background knowledge which would reasonably have been available to parties in situation at time of contracting); G.R. Hall, "A Curious Incident in the Law of Contract: The Impact of 22 Words from the House of Lords" (2004), 40 Can. Bus. L.J. 20.

18 *Paddon-Hughes Development Co. v. Pancontinental Oil Ltd.* (1998), 1998 CarswellAlta 940 (Alta. C.A.); leave to appeal refused (1999), 243 N.R. 199 (note) (S.C.C.) (no ambiguity in lease; although extrinsic evidence of parties' intentions inadmissible, acceptable to look at commercial setting to help ascertain parties' intention); *Bank of British Columbia v. Turbo Resources Ltd.* (1983), 1983 CarswellAlta 112 (Alta. C.A.) (consideration of commercial setting not to be confused with parol evidence as to parties' intention); *Eco-Zone Engineering Ltd. v. Grand Falls-Windsor (Town)* (2000), 2000 CarswellNfld 315 (Nfld. C.A.) (parol

evidence rule not prohibiting admissibility of evidence of contextual nature); *Ontario (Minister of Transportation) v. 407 ETR Concession Co.* (2005), 2005 CarswellOnt 36 (Ont. S.C.J.) (commercial consequences of competing interpretations advanced by parties part of factual matrix explaining effects of contractual provisions; factual matrix distinguished from evidence of subjective intention of parties); *Nielsen v. Sartor* (2012), 2012 CarswellBC 4038 (B.C. S.C.) (surrounding evidence used in interpreting parties' intention with regard to commercial contract as literal meaning would bring unrealistic result); **see also** *Ahluwalia v. Richmond Cabs Ltd.* (1995), 1995 CarswellBC 939 (B.C. C.A.) (admissibility of evidence of surrounding circumstances not depending on ambiguity in material term); *Seadane International Inc. v. Morgan International Marketing Co.* (1999), 1999 CarswellNfld 248 (Nfld. C.A.) (evidence of genesis and aim of transaction relevant to proper interpretation, whether parol evidence rule applying or not).

19 *Canada Deposit Insurance Corp. v. Commonwealth Trust Co.* (1997), 1997 CarswellBC 2175 (B.C. C.A.) (surrounding circumstances including object and purpose of agreement); *Duprey v. Seanix Technology (Canada) Inc.* (2002), 2002 CarswellBC 2147 (B.C. S.C.) (genesis and aim to establish rule for payment of commissions); *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League* (2003), 2003 CarswellMan 229 (Man. C.A.); *Labrador Inuit Assn. v. Newfoundland (Minister of Environment & Labour)* (1997), 1997 CarswellNfld 171 (Nfld. C.A.) (knowledge that memorandum of understanding to substitute for fulfilment of general statutory purpose constituting factor informing as to aims of transaction); *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.* (2000), 2000 CarswellNS 235 (N.S. C.A.); leave to appeal refused (2001), 2001 CarswellNS 144 (S.C.C.) (agreement to construct power plant); *Benny Haulage Ltd. v. Carosi Construction Ltd.* (1996), 1996 CarswellOnt 4114 (Ont. Gen. Div.); varied (1998), 1998 CarswellOnt 3036 (Ont. Div. Ct.); leave to appeal refused (1998), 1998 CarswellOnt 2989 (Ont. C.A.); *Canada Square Corp. v. Versafood Services Ltd.* (1981), 1981 CarswellOnt 124 (Ont. C.A.); *Lefort c. Universal Radiators Ltée* (1990), 1990 CarswellQue 31 (Que. C.A.) (contract requiring payment of share purchase price in part as salary; defendants engaging to provide employment for 25 years, not merely to conclude employment contract).

20 *Hi-Tech Group Inc. v. Sears Canada Inc.* (2001), 2001 CarswellOnt 9 (Ont. C.A.) (surrounding circumstances constituting contract's commercial purpose, in turn presupposing knowledge of genesis, background, and context of transaction, and market in which parties operating, citing *Reardon Smith Line v. Hansen-Tangen*).

21 *Guarantee Co. of North America v. Gordon Capital Corp.* (1999), 1999 CarswellOnt 3171 (S.C.C.) (contractual limitation period surviving wrongful rescission of contract; commercial reality best indicator of contractual intention of parties); *Paddon-Hughes Development Co. v. Pancontinental Oil Ltd.* (1998), 1998 CarswellAlta 940 (Alta. C.A.); leave to appeal refused (1999), 243 N.R. 199 (note) (S.C.C.) (natural gas lease to be interpreted in context of commercial reality and with businesslike intention attributed to parties); *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.* (1991), 1991 CarswellAlta 203 (Alta. C.A.); affirmed (1994), 1994 CarswellAlta 50 (S.C.C.) (commercial realities in financial sector not to be ignored when determining reasonableness of notice to debtor); *Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 1997 CarswellBC 2836 (B.C. C.A.) (agreement to sign up subscribers clearly providing for commission arrangement to survive agreement's expiration; plain meaning of contract consistent with commercial reality and other clauses in contract); *32262 B.C. Ltd. v. 271617 B.C. Ltd.* (1996), 1996 CarswellBC 1177 (B.C. C.A.) (court not to set aside contracts for vagueness or to apply contra proferentem rule unless examination of factual matrix and contract as whole in light of its commercial realities failing to yield answer); *Landmark of Thornhill Ltd. v. Maleki-Yazdi* (1998), 1998 CarswellOnt 2311 (Ont. C.A.) (purchaser's suggestion regarding effectiveness of acceleration of closing date giving no commercial reality to agreement of purchase and sale); *1112026 Ontario Inc. v. Forsyth* (2000), 2000 CarswellOnt 1012 (Ont. C.A.) (contract for sale of shares to be interpreted in light of commercial realities of situation); *Scanlon v. Castlepoint Development Corp.* (1992), 1992 CarswellOnt 633 (Ont. C.A.); leave to appeal refused (1993), 157 N.R. 400 (note) (S.C.C.) (negotiated commercial document should be construed in accordance with sound commercial principles and good business sense); *Canadian National Railway v. Royal & SunAlliance Insurance Co. of Canada* (2008), 2008 CarswellOnt 6808 (S.C.C.) ("all risks" insurance policy to be interpreted in manner consistent with common sense and commercial policy); *Imperial Oil Ltd. v. H.H.L. Fuels Ltd.* (2006), 2006 CarswellNB 5 (N.B. C.A.) (while commercial reality a factor in determining contractual intention, court restricting breadth of restrictive covenant); **see also** §552.

22 *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 1998 CarswellOnt 4170 (Ont. C.A.) (approval of change of controlling shareholder of franchisee).

23 *Water Street Pictures Ltd. v. Forefront Releasing Inc.* (2006), 2006 CarswellBC 2476 (B.C. C.A.) (recourse to extrinsic evidence as aid to interpretation of agreement, court's last resort; distribution agreement not complicated, and words "payable" and "remit" could mean only obligation to pay); *Kingsway General Insurance Co. v. Lougheed Enterprises Ltd.* (2004), 2004 CarswellBC 1788 (B.C. C.A.) (definitions in insurance contract); *Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 1997 CarswellBC 2836 (B.C. C.A.) (agreement to sign up subscribers clearly providing for commission arrangement to survive its expiration; plain meaning of contract consistent with commercial reality and other clauses in contract; while factual matrix may deepen understanding of parties' intentions, court cannot make new contract); *J.K. Expressions Jewellery Inc. v. Gerling Global General Insurance Co.* (2002), 2002 CarswellBC 341 (B.C. C.A.); *CSRS Ltd. v. Embley* (2008), 2008 CarswellBC 2737 (B.C.

C.A.) (whether price reduction warranted in sale of business; court's task to construe parties' contract, not to make or improve their contract); *Genesee Enterprises Ltd. v. Abou-Rached* (2001), 2001 CarswellBC 84 (B.C. S.C.) (since contract unambiguously giving party right to call for share conversion, reference to surrounding circumstances relevant in determining whether written words reflecting intentions of parties, but not to interpret them); *St. Raymond Forest Products Ltd. / Produits Forestiers St-Raymond Ltée v. Paul Creek Slicing Ltd.* (2000), 2000 CarswellBC 853 (B.C. S.C.) (as contract containing implied term of reasonable notice, ascertaining meaning of "reasonable" involving interpretation of contract, not implication of further terms or making new agreement).

24 *Water Street Pictures Ltd. v. Forefront Releasing Inc.* (2006), 2006 CarswellBC 2476 (B.C. C.A.) (factual matrix generally restricted to circumstances known to both parties illuminating meaning that reasonable person would give to words employed); *Penderville Apartments Development Partnership v. Cressey Development Corp.* (1990), 1990 CarswellBC 15 (B.C. C.A.) (factual matrix constituting genesis, aim and object of whole transaction, such as once contained in recitals to instruments; matrix not including either party's own reasons for wanting particular clause or form of words used in document or any particular subject addressed by it); *Etheridge v. Sheaves* (2005), 2005 CarswellBC 1001 (B.C. S.C.); *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League* (2003), 2003 CarswellMan 229 (Man. C.A.) (while unnecessary to consider extrinsic evidence where contract clear and unambiguous on its face, principle not precluding court from considering surrounding circumstances or factual matrix in objective sense); *Rana v. Maduck* (2000), 2000 CarswellSask 489 (Sask. Q.B.) (objectively, parties intending to create lease and option to purchase, rather than agreement for sale); **see also** *MacMillan Bloedel Ltd. v. British Columbia Hydro & Power Authority* (1992), 1992 CarswellBC 304 (B.C. C.A.); **see also** §552.

25 *Murphy v. Thompson* (1877), 1877 CarswellOnt 143 (Ont. H.C.); *Broughton Collieries Ltd., Re* (1944), 1944 CarswellNS 2 (N.S. C.A.); *Maxam Opportunities Fund Limited Partnership v. Greenscape Capital Group Inc.* (2013), 2013 CarswellBC 3200 (B.C. C.A.) (agreement's wording must not be overwhelmed by any contextual analysis); *Athwal v. Black Top Cabs Ltd.* (2012), 2012 CarswellBC 703 (B.C. C.A.) (inquiry into factual matrix or surrounding circumstances must be done in limited manner).

26 *Clark's-Gamble of Canada Ltd. v. Grant Park Plaza Ltd.* (1967), 1967 CarswellMan 48 (S.C.C.); *Pawluk v. Bank of Montreal* (1994), 1994 CarswellAlta 134 (Alta. Q.B.); affirmed (1997), 1997 CarswellAlta 5 (Alta. C.A.); leave to appeal refused (1997), 223 N.R. 228 (note) (S.C.C.) (economic feasibility report); *Hemosol Corp., Re* (2006), 2006 CarswellOnt 5836 (Ont. S.C.J. [Commercial List]) (strategic alliance agreement part of factual matrix relating to license agreement); *Benny Haulage Ltd. v. Carosi Construction Ltd.* (1996), 1996 CarswellOnt 4114 (Ont. Gen. Div.); varied (1998), 1998 CarswellOnt 3036 (Ont. Div. Ct.); leave to appeal refused (1998), 1998 CarswellOnt 2989 (Ont. C.A.) (purchase order not contract in itself but unambiguous and incorporating excavation requirements of prime contract; when express agreement absent, courts determining intent of parties through objective analysis of their relationship); **see also** *Miner v. Hinch* (1913), 1913 CarswellMan 317 (Man. C.A.).

27 *McKnight v. Robertson* (1910), 1910 CarswellOnt 530 (Ont. C.A.); **see also** *Tsiribis v. Panopoulos* (1981), 1981 CarswellOnt 532 (Ont. H.C.) (two related agreements considered); *Gilchrist v. Western Star Trucks Inc.* (2000), 2000 CarswellBC 176 (B.C. C.A.) (circumstances surrounding letter agreement including original employment agreement); *Grant v. Tiercel Digital Ltd.* (1994), 1994 CarswellOnt 4539 (Ont. C.A.) ("if the transaction cannot be completed" in agreement of purchase and sale; reasons for not completing transaction, together with wording of original and amended extension agreements executed, admissible).

28 *Commercial Alcohols Inc. v. Suncor Energy Products Inc.* (2006), 2006 CarswellOnt 2273 (Ont. S.C.J.); affirmed (2008), 2008 CarswellOnt 1959 (Ont. C.A.) (evidence of earlier drafts of agreement, inadmissible); *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 1998 CarswellOnt 4170 (Ont. C.A.) (draft documents leading up to license agreement); **but see** *Bogle v. Arkay Casino Management & Equipment (1985) Ltd.* (1998), 1998 CarswellAlta 90 (Alta. Q.B.) (unsigned draft agreement being agreement made by parties); *110250 B.C. Ltd. v. Preisco Foods Ltd.* (2002), 2002 CarswellBC 2488 (B.C. S.C.) (letters of intent admissible, as beyond realm of negotiations).

29 *IAC Edmonton Hotel Acquisition Corp. v. Creditors & Shareholders of IAC Edmonton Hotel Acquisition Corp.* (2001), 2001 CarswellAlta 230 (Alta. Q.B.) (subjective intentions of parties during pre-contractual negotiation inadmissible to detract from actual words of contract); *Prenor Trust Co. of Canada v. Kerkhoff Properties Inc.* (1994), 1994 CarswellAlta 149 (Alta. Q.B.) (evidence of intention inadmissible); *Giles v. Westminster Savings Credit Union* (2006), 2006 CarswellBC 183 (B.C. S.C.); affirmed (2007), 2007 CarswellBC 2071 (B.C. C.A.); leave to appeal refused (2008), 2008 CarswellBC 156 (S.C.C.) (evidence of unilateral intention inadmissible); *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 1998 CarswellOnt 4170 (Ont. C.A.) (evidence of subjective intentions of parties not communicated to each other, inadmissible); **see also** *Bank of British Columbia v. Turbo Resources Ltd.* (1983), 1983 CarswellAlta 112 (Alta. C.A.) (consideration of commercial setting in which contract made not to be confused with parol evidence of parties' intention); **see also** §552.

30 *Canadian Atlas Diesel Engines Co. v. McLeod Engines Ltd.* (1952), 1952 CarswellBC 138 (S.C.C.); *Indian Molybdenum Ltd. v. R.*

(1951), 1951 CarswellNat 280 (S.C.C.); *Fraser v. Houston* (2005), 2005 CarswellBC 1141 (B.C. S.C.); reversed in part on other grounds (2006), 2006 CarswellBC 552 (B.C. C.A.); leave to appeal refused (2006), 2006 CarswellBC 2228 (S.C.C.) (while court may regard factual matrix in construing settlement, many circumstances, and particularly negotiating positions preceding settlement, irrelevant except to issue of rectification); *Gilchrist v. Western Star Trucks Inc.* (2000), 2000 CarswellBC 176 (B.C. C.A.) (option renegotiation agreement; evidence of negotiations after signing of agreement inadmissible to create ambiguity); *Etheridge v. Sheaves* (2005), 2005 CarswellBC 1001 (B.C. S.C.) (inadmissible evidence including what parties said or wrote to each other in course of negotiations, legal advice received before signing contract, and purpose that one party hoped to achieve by entering into contract); *Black Swan Gold Mines Ltd. v. Goldbelt Resources Ltd.* (1996), 1996 CarswellBC 1445 (B.C. C.A.) (court excluding letter setting out opening position, information circular published after agreement and lawyer's impressions); *M & P Logging Ltd. v. Carrier Lumber Ltd.* (1999), 1999 CarswellBC 34 (B.C. S.C.); affirmed on other grounds (2001), 2001 CarswellBC 327 (B.C. C.A.) (evidence of pre-contractual negotiations not part of admissible factual matrix of agreement; recent repairs clause respecting tractor promissory in nature and constituting warranty that repairs made); *Eco-Zone Engineering Ltd. v. Grand Falls-Windsor (Town)* (2000), 2000 CarswellNfld 315 (Nfld. C.A.) (factual matrix generally not including evidence of contractual negotiations); *Commercial Alcohols Inc. v. Suncor Energy Products Inc.* (2006), 2006 CarswellOnt 2273 (Ont. S.C.J.); affirmed (2008), 2008 CarswellOnt 1959 (Ont. C.A.) (evidence pertaining to negotiation of supply agreement inadmissible); *Takhar Investments Inc. v. Household Finance Corp.* (2005), 2005 CarswellOnt 823 (Ont. S.C.J.) (evidence of negotiations excluded under parol evidence rule); **see also** *British Columbia Hydro & Power Authority v. Cominco Ltd.* (1989), 1989 CarswellBC 4 (B.C. C.A.) (reports of work groups, charged with investigating technical matters, not constituting evidence of negotiations between parties); *Hallstrom v. Trans-Isle Freightways Inc.* (2004), 2004 CarswellNat 3238 (F.C.); affirmed (2005), 2005 CarswellNat 1486 (F.C.A.) (after-the-fact recollections of various attorneys involved in negotiation of agreement unreliable and inadmissible; however, transcript taken by court reporter during negotiations admissible); **but see** *Hemosol Corp., Re* (2006), 2006 CarswellOnt 5836 (Ont. S.C.J. [Commercial List]) (extrinsic evidence concerning negotiations of license agreement and as strategic alliance agreement considered).

31 *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.* (2000), 2000 CarswellBC 1229 (B.C. C.A.) (negotiations between parties irrelevant in determining meaning of parties' language because parties often changing views and positions during negotiations; however, fact that parties in negotiations, and reasons for negotiations, including parties' commercial objectives, relevant as part of factual matrix); *Gu v. Tai Foong International Ltd.* (1999), 1999 CarswellOnt 2859 (Ont. S.C.J.); affirmed on other grounds (2003), 2003 CarswellOnt 232 (Ont. C.A.); leave to appeal refused (2003), 2003 CarswellOnt 4493 (S.C.C.) (evidence of parties' intention during negotiations of agreement admissible, if only to provide court with factual matrix surrounding negotiations; on-going disputes over translation of Mandarin language); *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League* (2003), 2003 CarswellMan 229 (Man. C.A.); *Imperial Oil Ltd. v. Young* (1998), 1998 CarswellNfld 224 (Nfld. C.A.), per Green J.A., dissenting (general evidence of nature of negotiations relevant in assisting court in determining factual matrix, and genesis and aim, of transaction); *Labrador Inuit Assn. v. Newfoundland (Minister of Environment & Labour)* (1997), 1997 CarswellNfld 171 (Nfld. C.A.) (prior actions and discussions of parties regarding memorandum of understanding considered part of general factual matrix, but need not be used as integral part of interpretative process); *General Refractories Co. of Canada v. Venturedyne Ltd.* (2002), 2002 CarswellOnt 36 (Ont. S.C.J.) (evidence of both parties concerning discussions and negotiations admissible as evidence of surrounding circumstances); **see also** *110250 B.C. Ltd. v. Preisco Foods Ltd.* (2002), 2002 CarswellBC 2488 (B.C. S.C.) ("aim" or "object" of transaction referring to its nature or commercial purpose at most general level, rather than what parties hoped to achieve; evidence of discussions and dealings leading up to negotiations, inadmissible; letters of intent admissible, as beyond realm of negotiations).

32 *Delisle v. Bulman Group Ltd.* (1991), 1991 CarswellBC 54 (B.C. S.C.) (considering meaning of "invoiced sales" in distribution agreement); *Eco-Zone Engineering Ltd. v. Grand Falls-Windsor (Town)* (2000), 2000 CarswellNfld 315 (Nfld. C.A.); **see also** §§568-571.

33 *Herron v. Hunting Chase Inc.* (2003), 2003 CarswellAlta 973 (Alta. C.A.) (while factual matrix could sometimes clarify parties' intention respecting sale agreement, unable to contradict it); **see also** *Guaranty Trust Co. of Canada v. Hetherington* (1989), 1989 CarswellAlta 94 (Alta. C.A.); leave to appeal refused (1989), [1990] 1 W.W.R. lxxi (S.C.C.) (evidence as to understanding of royalty trust agreement holders not accepted, since terms of agreements not ambiguous); **but see** *Gallen v. Allstate Grain Co.* (1984), 1984 CarswellBC 104 (B.C. C.A.); leave to appeal refused (1984), 56 N.R. 233 (note) (S.C.C.) (exception to parol evidence rule admitting extrinsic evidence "to dispel ambiguities, to establish a term implied by custom, or to demonstrate the factual matrix of the agreement", even where effect may be to add to, subtract from, vary, or contradict the document).

34 *Sauvegarde Life Insurance Co. v. Ayers* (1937), 63 Que. K.B. 291; affirmed (1937), 1937 CarswellQue 37 (S.C.C.).

35 *Hill v. Nova Scotia (Attorney General)* (1997), 1997 CarswellNS 10 (S.C.C.) (perfectly proper, and potentially necessary, to regard surrounding circumstances to ascertain what parties really contracting about); *Métropolitaine, cie d'assurance-vie c. Frenette* (1992), 1992 CarswellQue 95 (S.C.C.) (in searching for parties' intention, court should give particular consideration to terms used

by parties, context in terms used, and purpose sought by parties in using these terms); *Two Forty Engineering Ltd. v. Platte River Resources Ltd.* (1996), 1996 CarswellAlta 296 (Alta. C.A.) (petroleum operating agreement; printed part of form interpreted so as not to be inconsistent with main object and intention of parties); *Canada Deposit Insurance Corp. v. Commonwealth Trust Co.* (1997), 1997 CarswellBC 2175 (B.C. C.A.) (surrounding circumstances including object and purpose of agreement); *Canada (Attorney General) v. 3068529 Manitoba Ltd.* (2000), 2000 CarswellMan 261 (Man. Q.B.); affirmed (2000), 2000 CarswellMan 504 (Man. C.A.) (audit provision surviving termination of benefits contract with pharmacy); *Eco-Zone Engineering Ltd. v. Grand Falls-Windsor (Town)* (2000), 2000 CarswellNfld 315 (Nfld. C.A.) (GST included in construction contract price); *Hi-Tech Group Inc. v. Sears Canada Inc.* (2001), 2001 CarswellOnt 9 (Ont. C.A.) (surrounding circumstances constituting contract's commercial purpose, in turn presupposing knowledge of genesis, background, and context of transaction, and market in which parties operating, citing *Reardon Smith Line v. Hansen-Tangen*); *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 1998 CarswellOnt 4035 (Ont. C.A.) ("purposive approach"); *Dumbrell v. Regional Group of Cos.* (2007), 2007 CarswellOnt 407 (Ont. C.A.) (text of written agreement must be read as whole and in context of circumstances existing when agreement created, including facts known or reasonably capable of being known by parties at such time; "factual matrix" of agreement clearly extending to its genesis and purpose, and commercial context in which contract made); **see also** *Ahluwalia v. Richmond Cabs Ltd.* (1995), 1995 CarswellBC 939 (B.C. C.A.) (commercial purpose to be determined objectively); *110250 B.C. Ltd. v. Preisco Foods Ltd.* (2002), 2002 CarswellBC 2488 (B.C. S.C.) ("aim" or "object" of transaction referring to its nature or commercial purpose at most general level, rather than what parties hoping to achieve; evidence of discussions and dealings leading up to negotiations, inadmissible; letters of intent admissible, as beyond realm of negotiations).

36 *Manulife Bank of Canada v. Conlin* (1996), 1996 CarswellOnt 3941 (S.C.C.), per Iacobucci J., dissenting (cardinal rule of contractual interpretation that court should give effect to parties' intentions as expressed in their written document); *Fehr v. Fehr* (2003), 2003 CarswellMan 182 (Man. C.A.) (nature of sale transaction of farmland accurately reflected in contractual documents); *Canada Trustco Mortgage Co. v. Hyundai Auto Canada Inc.* (1995), 1995 CarswellNS 137 (N.S. S.C.) (parties not foreseeing change in federal sales tax).

37 *Guarantee Co. of North America v. Gordon Capital Corp.* (1999), 1999 CarswellOnt 3171 (S.C.C.) (court giving effect to parties' intentions respecting exclusion clauses, as matter of construction); *Dilcon Constructors Ltd. v. ANC Developments Inc.* (2000), 2000 CarswellAlta 840 (Alta. C.A.) (delays falling squarely within types contemplated in contract; parties addressing both situation that arose and damages to be provided for); *Gary Tonks Ltd. v. Terasen Gas Inc.* (2005), 2005 CarswellBC 2701 (B.C. C.A.) (words "ordinary cultivation and use of the land" in easement agreement not ambiguous, and surrounding circumstances not dictating that parties made bargain needing to be fixed by importing additional terms); *Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 1997 CarswellBC 2836 (B.C. C.A.) (residual commissions payable despite agreement expiring; court unable to make new agreement); *Minoru Park Tower I Ltd. Partnership v. Martens* (1997), 1997 CarswellMan 251 (Man. C.A.) (compound interest requirement not repeated in default provision); *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 2003 CarswellOnt 4834 (Ont. C.A.) (implication of duty of good faith not going so far as to create new, unbargained-for rights and obligations, nor to alter express terms of contract); *Infinite Maintenance Systems Ltd. v. ORC Management Ltd.* (2001), 2001 CarswellOnt 59 (Ont. C.A.); leave to appeal refused (2001), 2001 CarswellOnt 2985 (S.C.C.) (judge basing assessment of damages on assumptions outside realm of surrounding circumstances that court able to consider in construing contract; not court's function to rewrite contract); *Novopharm Ltd. v. Apotex Inc.* (1996), 1996 CarswellOnt 1903 (Ont. C.A.) (reading requirement to "co-operate fully" as including litigation indemnification amounting to rewriting of mutual supply contract); *Davis v. Robertson* (2000), 2000 CarswellOnt 1675 (Ont. S.C.J.); *Direct Integrated Transport Inc. v. Haryett* (2005), 2005 CarswellSask 181 (Sask. Q.B.) (given broad language of non-competition covenant, and absence of evidence of parties' intentions at time service contracts executed, inappropriate for court to rewrite covenant by adding words limiting applicable geographical area); **see also** §§274, 553 (rectification).

38 *Fort Frances (Town) v. Boise Cascade Canada Ltd.* (1981), 1981 CarswellOnt 122 (Ont. C.A.); varied (1983), 1983 CarswellOnt 817 (S.C.C.) (interpretation of clause for determination by third party of any matter in dispute); *Edmonton (City) v. Triple Five Corp.* (1994), 1994 CarswellAlta 195 (Alta. Q.B.) (where contractual clause freely agreed to, court not to readily rescue one party from its bargain; proof of unconscionability required); *Enchant Resources Ltd. v. Dynex Petroleum Ltd.* (1991), 1991 CarswellAlta 540 (Alta. Q.B.) (calculation of royalties); *Wells v. Blain* (1926), 1926 CarswellSask 115 (Sask. C.A.).

39 *Yarrows Ltd. v. France (Republic)* (1949), 1949 CarswellBC 70 (B.C. S.C.); *McKean v. Dalhousie Lumber Co.* (1910), 1910 CarswellNB 73 (N.B. C.A.); *Bowater Newfoundland Ltd. v. Newfoundland & Labrador Hydro* (1978), 1978 CarswellNfld 26 (Nfld. C.A.); *Buildevco Ltd. v. Monarch Construction Ltd.* (1990), 1990 CarswellOnt 757 (Ont. H.C.) (joint venture agreement); *McCuaig v. Leydon* (1955), 1955 CarswellSask 70 (Sask. C.A.).

40 *National Trust Co. v. Mead* (1990), 1990 CarswellSask 165 (S.C.C.); *Petty v. Telus Corp.* (2002), 2002 CarswellBC 325 (B.C. C.A.) (interpreting clause in voluntary resignation agreement as merely conferring opportunity to be considered for variable pay rendering agreement meaningless); *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League* (2003), 2003 CarswellMan 229

(Man. C.A.); *Wardle v. Manitoba Farm Loans Assn.* (1954), 1954 CarswellMan 51 (Man. C.A.); additional reasons at (1954), 1954 CarswellMan 84 (Man. C.A.); reversed on other grounds (1955), 1955 CarswellMan 66 (S.C.C.); *Orlandello v. Nova Scotia (Attorney General)* (2005), 2005 CarswellNS 264 (N.S. C.A.) (indemnity neither meaningless nor inconsistent with release); *Campbell-MacIsaac v. Deveaux* (2004), 2004 CarswellNS 257 (N.S. C.A.) (words "entitled to recover" in endorsement including benefits payable to insured in future; true intent of parties otherwise meaningless); *Bridgewood Building Corp. (Riverfield) v. Lombard General Insurance Co. of Canada* (2006), 2006 CarswellOnt 2017 (Ont. C.A.); leave to appeal refused (2006), 2006 CarswellOnt 7128 (S.C.C.) (policy provision exempting work of subcontractors redundant if general principle applying to exclude coverage); *Scanlon v. Castlepoint Development Corp.* (1992), 1992 CarswellOnt 633 (Ont. C.A.); leave to appeal refused (1993), 157 N.R. 400 (note) (S.C.C.) (agreement for purchase and sale of new condominium; whether developer in anticipatory breach of agreement by extending closing date in excess of two years); *Elliott v. Billings (Township) Board of Education* (1960), 1960 CarswellOnt 124 (Ont. C.A.) (in interpreting contract, where possible, no clause, sentence or word to be considered superfluous, void or insignificant); *Gaudette v. Prince Edward Island* (2002), 2002 CarswellPEI 48 (P.E.I. T.D.) (termination clause in employment contract); **see also** *Block Brothers Realty Ltd. v. Viktora* (1973), 1973 CarswellBC 239 (B.C. C.A.) (real estate commission; where two competing interpretations of clause, one resulting in its being surplusage and the other effecting result that parties could not have intended, former is preferable); *Nicolene Ltd. v. Simmonds* (1953), [1953] 1 All E.R. 822 (Eng. C.A.) (distinction to be drawn between meaningless clauses, which may be ignored, and clause yet to be agreed upon); **see also** §579.

41 *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League* (2003), 2003 CarswellMan 229 (Man. C.A.); *Controls & Equipment Ltd. v. Ramco Contractors Ltd.* (1999), 1999 CarswellNB 19 (N.B. C.A.).

42 *BG Checo International Ltd. v. British Columbia Hydro & Power Authority* (1993), 1993 CarswellBC 1254 (S.C.C.); reconsideration refused (1993), 14 C.C.L.T. (2d) 233 (note) (S.C.C.) (clause placing responsibility for misunderstandings on one party not affecting specific contractual obligation of other party to clear right of way); *Alberta Power Ltd. v. McIntyre Porcupine Mines Ltd.* (1975), 1975 CarswellAlta 61 (Alta. C.A.) (arbitration clause and clause preserving right to sue being alternatives); *Barchak Estate v. Anderson* (1945), 1945 CarswellAlta 37 (Alta. C.A.); *Bray Leasing Ltd. v. Johnson* (2005), 2005 CarswellBC 1709 (B.C. C.A.) (addendum prevailing to extent of inconsistency with standard form time clause in agreement of purchase and sale); *Block Brothers Realty Ltd. v. Viktora* (1973), 1973 CarswellBC 239 (B.C. C.A.) (realtor's commission clause); *Manitoba Hydro Electric Board v. John Inglis Co.* (1999), 1999 CarswellMan 509 (Man. C.A.); *Johnson's Construction Ltd. v. Newfoundland* (2000), 2000 CarswellNfld 19 (Nfld. T.D.) (tender documents interpreted to allow every provision to function); *Tetaka v. BMW Canada Inc.* (2007), 2007 CarswellOnt 118 (Ont. Div. Ct.) (terms of warranty respecting car harmonized); *Buildevco Ltd. v. Monarch Construction Ltd.* (1990), 1990 CarswellOnt 757 (Ont. H.C.); *Maher v. Great Atlantic & Pacific Co. of Canada Ltd.* (2010), 2010 CarswellOnt 3849 (Ont. C.A.) (court should attempt to find interpretation which can reasonably give meaning to each provision); **see also** §§13, 579.

43 *BG Checo International Ltd. v. British Columbia Hydro & Power Authority* (1993), 1993 CarswellBC 1254 (S.C.C.); reconsideration refused (1993), 14 C.C.L.T. (2d) 233 (note) (S.C.C.) (clause placing responsibility for misunderstandings on one party not affecting specific contractual obligation of other party to clear right of way); *Hassard v. Peace River Co-operative Seed Growers Assn.* (1954), 1954 CarswellAlta 77 (S.C.C.); *Two Forty Engineering Ltd. v. Platte River Resources Ltd.* (1996), 1996 CarswellAlta 296 (Alta. C.A.) (reference in operating agreement to right of first refusal under operating procedure not creating independent right of first refusal, but rather specifying how existing right to be exercised; possibility of reference being mere surplusage not making it repugnant); *Knappett Construction Ltd. v. Axor Engineering Construction Group Inc.* (2003), 2003 CarswellBC 112 (B.C. S.C.) (words "standard terms of payment", interpreted in reference to standard form, amounting to mere surplusage); *Bokhari v. Ottawa Customs Consulting Ltd.* (2002), 2002 CarswellOnt 423 (Ont. C.A.) (recovery of commissions permissible beyond life of agreement); *Polstra v. Pierlot Family Farm Ltd.* (2003), 2003 CarswellPEI 83 (P.E.I. C.A.) (reservation clause in deed qualified, but not repugnant to grant of fee simple); *Gaudette v. Prince Edward Island* (2002), 2002 CarswellPEI 48 (P.E.I. T.D.) (interpreting termination provision so as to reasonably give it meaning); *De Beers Canada Inc. v. Shore Gold Inc.* (2006), 2006 CarswellSask 390 (Sask. C.A.) (words in parentheses in clause regarding right of first refusal not intended to create substantial new contractual obligations).

44 *R. v. MacLean* (1882), 1882 CarswellNat 10 (S.C.C.) (Crown contract for printing); *Taylor v. Borger* (1964), 1964 CarswellAlta 98 (Alta. C.A.) (agreement re shares held in escrow); *R.M. Giza Inc. v. British Columbia (Minister of Management Services)* (2004), 2004 CarswellBC 182 (B.C. S.C.) (service agreement with termination provisions and term of one year); *Buildevco Ltd. v. Monarch Construction Ltd.* (1990), 1990 CarswellOnt 757 (Ont. H.C.) (funding under joint venture agreement); *Preload Co. of Canada v. Regina (City)* (1958), 1958 CarswellSask 7 (Sask. C.A.); affirmed (1959), 1959 CarswellSask 68 (S.C.C.) (warranties in contract for manufacture and sale of pipes).

45 *BG Checo International Ltd. v. British Columbia Hydro & Power Authority* (1993), 1993 CarswellBC 1254 (S.C.C.); reconsideration refused (1993), 14 C.C.L.T. (2d) 233 (note) (S.C.C.) (clause placing responsibility for misunderstanding on one party not affecting specific contractual obligation of other party to clear right of way); *Cotter v. General Petroleums Ltd.* (1950),

1950 CarswellAlta 69 (S.C.C.) (later clause not destroying but only qualifying earlier clause); *Lavin Agency Ltd. v. Blackhall & Co.* (2004), 2004 CarswellOnt 1192 (Ont. C.A.) (specific provision regarding expenses in tenancy agreement qualifying general one); *Huronview Home for the Aged v. S.E.I.U., Local 210* (2000), 2000 CarswellOnt 3836 (Ont. C.A.); leave to appeal refused (2001), 2001 CarswellOnt 2265 (S.C.C.) (lay-off clause limiting management rights clause); *Gaudette v. Prince Edward Island* (2002), 2002 CarswellPEI 48 (P.E.I. T.D.) (notice term in contract of employment); **see also** *Fulwood Investments Ltd. v. Clearwater (Municipal District) No. 99* (1998), 1998 CarswellAlta 1140 (Alta. Q.B.) (contract for removal of gravel; agreement not limited to area in schedule but covering whole of property set out in recital); *2887215 Canada Inc. v. AT & T Canada Corp.* (2001), 2001 CarswellOnt 74 (Ont. S.C.J.) (scope of general compensation clause not extending to clause concerning residual incentive payments).

46 *Family Insurance Corp. v. Lombard Canada Ltd.* (2002), 2002 CarswellBC 1101 (S.C.C.) (liability under "other insurance" clauses determined by insurers' intentions vis-à-vis insured; if intentions irreconcilable, conflicting clauses mutually repugnant and inoperative; preferable to interpret contract to determine whether insurers intending to limit obligation to contribute); *Cotter v. General Petroleums Ltd.* (1950), 1950 CarswellAlta 69 (S.C.C.) (no repugnancy re covenant to drill oil well); *Continental Insurance Co. v. Law Society (Alberta)* (1984), 1984 CarswellAlta 151 (Alta. C.A.); leave to appeal refused (1984), 58 N.R. 78 (S.C.C.) (second portion of bond, meaningless in face of clear words of first portion, severable as subsidiary term); *Braber Equipment Ltd. v. Fraser Surrey Docks Ltd.* (1998), 1998 CarswellBC 2192 (B.C. S.C.); affirmed on other grounds (1999), 1999 CarswellBC 2307 (B.C. C.A.) (two inconsistent limitation clauses relied upon, null and void); *McGeough v. Stay 'N Save Motor Inns Inc.* (1994), 1994 CarswellBC 248 (B.C. C.A.) ("other insurance" clauses in insurance policies irreconcilable, and inoperative); *Primex Forest Products Ltd. v. Harken Towing Co.* (1997), 1997 CarswellBC 1740 (B.C. S.C.) (terms of exclusion insufficiently clear to make party aware of exposure to loss and to consider additional insurance; so ambiguous and inconsistent as to be unenforceable); *Bank of Nova Scotia v. MacPherson's Estate* (1985), 1985 CarswellPEI 81 (P.E.I. C.A.); application for reconsideration quashed (1985), 1985 CarswellPEI 17 (P.E.I. C.A.) (incomplete limitation of liability clause in guarantee, meaningless); *Vauban Productions v. Minister of National Revenue* (1975), 1975 CarswellNat 191 (Fed. T.D.); affirmed (1979), 1979 CarswellNat 236 (Fed. C.A.) (need to reject totally redundant, contradictory or meaningless provisions); **see also** §579.

47 *Brinkerhoff International Inc. v. Numac Energy Inc.* (1997), 1997 CarswellAlta 821 (Alta. C.A.).

48 *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1998), 1998 CarswellOnt 2565 (Ont. Gen. Div. [Commercial List]); affirmed on other grounds (1999), 1999 CarswellOnt 2812 (Ont. C.A.); leave to appeal refused (2000), 2000 CarswellOnt 2983 (S.C.C.).

49 *Manulife Bank of Canada v. Conlin* (1996), 1996 CarswellOnt 3941 (S.C.C.), per L'Heureux-Dubé J. (dissenting in result); *Manitoba Hydro Electric Board v. John Inglis Co.* (1999), 1999 CarswellMan 509 (Man. C.A.); *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 2003 CarswellOnt 2038 (Ont. C.A.); *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 1998 CarswellOnt 4035 (Ont. C.A.) (coattail provision "commercial absurdity"; purposive approach applicable to both statutes and contracts); *Simcoe Condominium Corp. No. 67 v. McDermott* (1998), 1998 CarswellOnt 1826 (Ont. Gen. Div.); **but see** §585 (contra proferentem rule inapplicable to contract whose terms prescribed by or in accordance with government regulation).

50 *Imperial Paper Mills Ltd. v. Quebec Bank* (1912), 1912 CarswellOnt 764 (Ont. C.A.); affirmed (1913), 1913 CarswellOnt 439 (Ontario P.C.).

51 *Bank of Montreal v. Guaranty Silk Dyeing & Finishing Co.* (1935), 1935 CarswellOnt 91 (Ont. C.A.).

52 *Dale v. Manitoba* (1995), 1995 CarswellMan 215 (Man. Q.B.); affirmed (1997), 1997 CarswellMan 346 (Man. C.A.) (terms of government's affirmative action, student support program).

End of Document

TAB 6

Canadian Contractual Interpretation Law

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concern about the practice.[74] As in the common law provinces, one might query whether dictionary definitions should be accepted so unquestioningly in an era of contextualism.

3.7 THE PARTIES' OWN DICTIONARY

3.7.1 The principle

Parties to a contract are free to define words or phrases in a manner which differs from their dictionary definitions. This can be accomplished in two different ways.

Most commonly, words or phrases are given meanings different from their dictionary definitions by the use of a defined term. The parties set out a specific meaning for a word or a phrase, and denote the use of a prescribed meaning by capitalizing the defined term whenever it is used in the contract. Courts have no difficulty interpreting defined terms in accordance with the meanings ascribed to them, even if such terms are not consistent with dictionary definitions, as they clearly evince the parties' intentions.

Parties may also ascribe a special meaning to a word or a phrase without using a defined term by their specific use of the word or phrase as demonstrated by a reading of the contract as a whole. This is referred to as adopting "the parties' own dictionary", a label borrowed from the law of wills. In this process, a court will interpret the word or phrase in a manner consistent with the parties' use of it, even if inconsistent with a standard dictionary definition and even in the absence of a defined term in the contract.

Either manifestation is simply an example of giving effect to the parties' intentions by reading a contract contextually and as a whole, and is essential to achieve interpretive accuracy. If a contract read contextually shows, objectively, that the parties intended to use a word or phrase in a special way, either with or without an express definition, only by giving that meaning to the word or phrase can interpretive accuracy be achieved and the intentions of the parties be given effect.

3.7.2 Defined terms

The process of giving effect to defined terms is basic and uncontroversial. If parties have expressly defined a word or phrase to have a particular meaning, interpretive accuracy simply cannot be achieved without giving effect to the meaning agreed by the parties. Thus in a case in which a non-competition covenant precluded "rack jobbing" and defined the term only to include in-store activities, the Ontario Court of Appeal had no difficulty summarily dismissing

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[74] *Industrielle, Cie d'assurance sur la vie v. Bolduc*, [1978] S.C.J. No. 96, [1979] 1 S.C.R. 481 at 491 (S.C.C.); *Carrefour Langelier v. Woolworth Canada inc.*, [2002] Q.J. No. 165 at para. 26 (Qué. C.A.); and *Général Accident, cie d'assurance du Canada v. Donnacona Frigo Service inc.*, [1998] J.Q. no 2918 at para. 12 (Qué. C.A.).

an argument that sought to read "rack jobbing" as including out-of-store activities:

> The core of the appellant's case, with or without the proposed amendments, is that the respondent Astral, in concert with the other respondents, breached the non-competition provisions which bound it first in the 1989 agreement with Saturn and then in the 1995 agreement by which Saturn purchased Astral's interest in Belsat. It is argued that particularly after 1993 Astral violated these provisions by engaging in rack jobbing when it performed warehousing and supply functions that did not involve it in in-store activities for retailers.
>
> This is a position that is bound to lose at trial. *The non-competition clauses used "rack jobbing" as a defined term. The agreements clearly defined "rack jobbing" as in-store servicing such as stock balancing, stock dealing, stock rotating, display materials supplying and rack and/or fixture installing. As used by the parties, "rack jobbing" meant in-store activity.*[75] [Emphasis added.]

In other words, even if a dictionary definition of "rack jobbing" might support an interpretation which would include out-of-store activity, the mere fact that the parties had defined the term otherwise ended the interpretive exercise and was enough for the court to grant summary judgment dismissing a claim based on the broader definition.

3.7.3 Special meaning without a defined term

The notion that the parties can create their own dictionary without using a defined term is borrowed from the law of wills. Testators often use words in a manner which accords with their own usage rather than dictionary definitions. As a result, it is a basic precept of the construction of wills that a court must give effect to the testator's own dictionary. As expressed in a leading House of Lords case on point:

> The rules of construction, in other words, should be regarded as a dictionary by which all parties, including the courts, are bound, but the court should not have recourse to this dictionary to construe a word or a phrase until it has ascertained from an examination of the language of the whole will, when read in the light of the circumstances, whether or not the testator has indicated his intention of using the word or the phrase in other than its dictionary meaning — whether or not, in other words, to use another familiar expression, the testator has been his own dictionary.[76]

Throughout the law of wills, there are numerous examples of cases where courts have invoked this precept to give words or phrases meanings that do not accord with their literal dictionary definitions. For example, in one case the word "nephew" was interpreted to mean "great-nephew" because of the way the

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75 *Belsat Video Marketing Inc. v. Astral Communications Inc.*, [1999] O.J. No. 343, 118 O.A.C. 105 at paras. 6-7 (Ont. C.A.).

76 *Perrin v. Morgan*, [1943] A.C. 399 at 421 (H.L.).

testator had used the word in his will,[77] and in another case "all money in bank" was interpreted to include government bonds held in a bank safety deposit box.[78]

In contractual interpretation, the process is different because the exercise is not to ascertain the intention of a sole testator but rather to ascertain the objectively expressed mutual intentions of all the parties to a contract. While this is an important distinction, the process of giving effect to the parties' own dictionary works very much the same in contractual interpretation as it does in the law of wills. In a case of a dispute over the meaning of the word "damages" in a bond posted to secure a claim, the court gave effect to the meaning evident from the context of the bond as a whole, even though that meaning went beyond a usual definition for the term:

> The reason the word "damages" has a further meaning in that bond is that the parties agreed that it should have. ...
>
> *The parties have supplied their own dictionary as to what the term damages means* and while the word damages, in itself, is a form of legal expression which has no fixed or precise definition, nevertheless it must "be construed in the context and the circumstances out of which it has arisen."[79] [Emphasis added.]

In a case involving a dispute over the meaning of the word "cancel" in an application for an insurance policy, the court looked not to a dictionary definition of the word but to the meaning of the word which flowed from its usage in the application document:

> We must ask ourselves whether the policy in the Travellers Insurance Company was cancelled or not. In Murray's dictionary "cancel" is defined as "annul, render void or invalid by so making". But I think in the interpretation of the word in the application we must consider it in the light of the policy of which the application forms a part. *In other words, the policy is its own dictionary.*[80] [Emphasis added.]

The result of giving effect of the parties creating their own dictionary is very similar to that which occurs when there are expressly defined terms. In *I.T.T. Industries of Canada Ltd. v. Toronto Electric Commissioners*,[81] the Ontario Court of Appeal held that "[t]he agreement makes a clear distinction between 'basic rates' and 'rates'. It supplies its own dictionary."[82] The result is no different than if the parties had defined "Basic Rates" and "Rates" expressly — the court gives effect to the definitions ascribed by the parties rather than what a dictionary would say.

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77 *Re MacMurray Estate*, [1949] O.J. No. 220, [1950] 1 D.L.R. 280 (Ont. H.C.J.).
78 *Re Swindlehurst*, [1951] O.J. No. 527, [1952] O.R. 392 (Ont. H.C.J.).
79 *Carruthers v. Royal Insurance Co.*, [1993] O.J. No. 539 at paras. 15-16 (Ont. Gen. Div.).
80 *Offstein v. Sweet*, [1947] O.J. No. 397 at para. 36, [1948] O.W.N. 22 (Ont. H.C.J.).
81 [1981] O.J. No. 53 (Ont. C.A.).
82 *Ibid.*, at para. 12.

TAB 7

2010 ANNREVINSOLV 6

Annual Review of Insolvency Law

Annual Review of Insolvency Law 2010

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6 — Licensed to Steal: The Rights of IP Licensors and Licensees in an Insolvency

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David Ullmann and Melissa McCready

When considering how to draft a licence to deal with the use of intellectual property, contemplating what to do in the event of an insolvency can be a conundrum for both those who want to licence that intellectual property and those who want to use it.

For example, if a corporation that holds an exclusive licence to manufacture chocolate bars with a specific trade-mark and secret formula in Canada (a licensee) were to become insolvent, what remedies would the owner of the trade-mark and secret formula (the licensor of the intellectual property or "IP") be able to exercise in order to prevent the trade-mark and secret formula from being assigned to an undesirable corporation? Would the owner of the IP, the licensor, be able to prevent the transfer of the IP licence or would the licensee be able to sell the IP licence to the highest bidder? In a perfect world, from the licensor's perspective, the licensor would know that the chosen licensee of its IP will continue to use that IP only under the strict terms which were provided and negotiated. Further, the licensor would know that in the event the licensee, being the party whom the licensor selected and trusts to use his IP on an exclusive basis in the territory, becomes insolvent, that the rights would either revert back to the licensor, or would be sold to a person who the licensor, in its sole and absolute discretion, approves of. Certainly, under no circumstances, should either the licence, or even worse, the potentially secret confidential information which accompanies that licence, be sold to a competitor, a rival or to a party who will diminish the value of the IP.

If, however, the licensor in the above scenario that owns the trade-mark and secret formula were to become insolvent, would the licensee retain the right to manufacture and sell the chocolate bars or could the insolvent licensor terminate the contract to renegotiate the terms or sell the underlying IP to a third party? A tenant has the ability to register its lease on title through a notice of lease, which ensures that its right to occupy the leased premises will not be terminated in the event of the insolvency of the leasor. However, a licensee of IP does not have this ability. In a perfect world, from the licensee's perspective, the contract would ensure that the licensee would have unfettered access to the IP required to run its business (mission critical software subject to copyright, patent protected manufacturing processes, essential and valuable exclusive rights to trademark branded products or designs) regardless of whether or not the owner-licensor of the IP may at some point in the future become insolvent. As long as the licensee is able to pay the fees charged under the licence and meet the other obligations it may have as licensee, its use should be undisturbed.

Chumming up the waters between these two IP licensing utopias is a bankruptcy trustee, a receiver or a company under a *CCAA* restructuring and the creditors of the insolvent licensee or licensor. In each of these cases, these parties are primarily concerned with maximizing the value from the floundering company. If it happens that the most valuable asset of the company is either its IP or an exclusive licence to someone else's IP, the creditors certainly want that asset to form part of the assets available for sale and want to be able to sell them free of restrictions. And why shouldn't they? Certainly the IP assets, of either the licensor or the licensee as the case may be, were brandished as bankable assets at the time the creditors were asked to advance money to the then solvent company. It makes sense then that the creditors should seek to get value from those IP assets now that recovery of their investment is in jeopardy.

Adding to what needs to be considered are the new legislative changes. In particular, on 18 September 2009, amendments to the *Companies' Creditors Arrangement Act*,[1] (*CCAA*) and the *Bankruptcy and Insolvency Act*,[2] (*BIA*) (the "Amendments") came into force. The new IP provisions in the Amendments were touted by many as a remedy to the issues involving IP in the context of insolvency. As a result, many insolvency practitioners may be under the impression that the Amendments cleared up any remaining uncertainty with respect to IP and the treatment of IP licences upon a party's insolvency. However, as set out below, there is still much litigation to be had to resolve these issues, notwithstanding the Amendments.

I. — Intellectual Property, the BIA and the CCAA

Intellectual property is referred to, but not defined in the *BIA* or *CCAA*. The term likely includes traditional registrable IP, such as patents, trade-marks, and copyright, but it is unclear whether unregistered rights such as trade secrets, or common law trade-marks would fall under the definition of IP. It is, however, likely that patents, trade-marks and copyright would fall within the definition of property in the *BIA*, which includes all goods and every description of property, whether real or personal, legal or equitable and whether situated in Canada or elsewhere.[3]

Prior to the Amendments, Canadian courts had permitted an insolvent debtor to disclaim executory contracts, meaning contracts where there were existing outstanding obligations from both parties, including IP licences, but there were no explicit statutory provisions to this effect. Determining whether IP licence agreements were considered executory contracts was the subject of much debate among practitioners. The disclaimer of the licence agreement would leave the licensee with only an unsecured claim for damages resulting from the termination and would require the licensee to cease using the IP. The Amendments were aimed at reducing this risk for licensees and have strengthened the rights of a licensee in certain situations involving the insolvency of the licensor.

As explained below, the Amendments now explicitly permit the disclaimer of any contracts in a *BIA* proposal and *CCAA* proceedings, but provide a carve-out for IP agreements. While this would seem to assist in resolving the uncertainty felt by licensees upon the insolvency of their licensor, it is noted that similar amendments have *not* been made in relation to conventional bankruptcies or receiverships. Although the trustee or receiver's ability to disclaim contracts is still not explicitly permitted in the legislation, as discussed further below, given that the courts have in the past permitted the disclaimer of IP licences by receivers and trustees, and since there is no protective carve-out for licensees of IP in the legislation for bankruptcies or receiverships, it seems that licensees are still at risk in these circumstances of having their licences terminated.

In *BIA* proposal proceedings and *CCAA* proceedings, the new section 65.11(1) of the *BIA*, which is mirrored in section 32(1) of the *CCAA*, explicitly allows the debtor, on notice, to disclaim or resiliate any agreement by the debtor to which the debtor is a party on the day on which the notice of intention or proposal was filed or, for the *CCAA*, when proceedings are commenced. It is interesting to note that the term "executory" contracts is not used in the new provisions. Therefore, the common law exercise of determining whether both parties have outstanding obligations is likely no longer necessary for a disclaimer in these circumstances. The IP carve-out is found in section 65.11(7) of the *BIA* and states:

> . . . if the debtor has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Section 32(6) of the *CCAA* mirrors this IP carve-out in the *BIA*. The carve-out protects licensees from situations involving a restructuring of an insolvent IP owner under the *BIA* or *CCAA*, and allows the licensee to continue to use the licensed IP regardless of the licensor's sale of the IP or purported termination of the licence agreement. The right to continued use of the IP for the licensee is conditional on the licensee's continued performance of its obligations under the terms of the licence agreement.

Indeed, even in the event that the debtor-licensor elects to restructure under the *CCAA* or a *BIA* proposal, such that the licensee could expect to have the protection of the carve-out, which allows continued use of the IP notwithstanding a disclaimer of the IP licence agreement, it may be that the disclaimer of the agreement could terminate the other obligations of the licensor set out in the IP licence. For example, the debtor-licensor could conceivably disclaim the requirement to provide support services for software licence agreements, obligations to provide updates to software or copyright materials or to enforce or maintain the IP in good-standing, renew registrations etc. This raises the question of how the licensee should pay the licence fee and perform its obligations and whether there should be set-off. Most licence agreements for the use of IP will have remaining performance obligations at the time either the licensor or licensee becomes insolvent. Would the licensee be required to pay the entire amount of an ongoing licence fee, even if the updates or support of the IP are not provided by the licensor, or would the licensee be required to only pay a portion of that fee? Further, the Amendments provide the licensee the right to "use" the IP, including the right to "exclusive use", but do not provide a definition or explanation of the term "use." This could therefore be open to interpretation. These questions, which have been created by the Amendments, have yet to be addressed through case law.

The Amendments also give courts the power to order a forced assignment of a licence agreement in a *CCAA* proceeding, a proposal under the *BIA*, or a bankruptcy. Section 84.1(1) of the *BIA* states that

> On application by a trustee and on notice to every party to an agreement, a court may make an order assigning the rights and obligations of a bankrupt under the agreement to any person who is specified by the court and agrees to the assignment.

Section 11.3(1) of the *CCAA* mirrors this section of the *BIA* with respect to the assignment of a debtor company's agreement. It is also mirrored in section 66(1) and 66(1.1) of the *BIA* which have the effect of confirming that a proposal trustee has the same powers.

Receivers do not have the power under the *BIA* to assign a contract or a licence over the objection of the licensor. Section 84.1 applies expressly to trustees in bankruptcy. However, it is our expectation that Receivers shall, when confronted with a licensor who refuses to grant its consent to the assignment, seek an order of the court to assign the company into bankruptcy in order to force the assignment of the licence using section 84.1. This will be done, we expect, in much the same way as is commonly done to force the assignment of a real property lease over the objection of a landlord.

These provisions allow the assignment of the IP licence to a third party in a bankruptcy or *CCAA* proceeding. Crucially, since the consent of the licensor is no longer required, it could result in the assignment of the IP licence to a third party who is undesirable to the licensor, even in the face of a contractual provision that requires the licensor to provide consent prior to assignment. However, it is not certain that the licence will be assigned just because a bankruptcy or proposal trustee or a company in *CCAA* protection asks that it be done. The provisions of the *CCAA* require notice to be given to the licensor and the licensor would therefore have the opportunity to bring any concerns it may have before the court. In determining whether to authorize the assignment, the court is required to consider: i) the appropriateness of the assignment; ii) whether the person to whom the rights and obligations are to be assigned can perform the obligations; and, iii) in the case of a *CCAA* proceeding or a *BIA* proposal, whether the monitor or the proposal trustee, respectively, approved the proposed assignment.[4] The question of the "appropriateness" of the assignment creates room for the court to exercise its discretion, as further discussed below. In addition, the court must be satisfied that all monetary defaults, other than those arising by reason only of the insolvency or as a result of a failure to perform a non-monetary obligation, will be remedied by a date fixed by the court.[5]

II. — When the Licensor is Insolvent

In the case of an insolvent licensor that has elected to restructure under the *BIA* or the *CCAA*, a stay of proceedings is usually granted and would prevent creditors and the licensee from beginning any legal action against the debtor company. Prior to the Amendments, the licensee's main concern in this situation would likely have been that the debtor-licensor would seek to resiliate or disclaim an unfavourable licence agreement and leave the licensee with only an unsecured claim. As outlined above, the Amendments have addressed this concern so that now, under *BIA* proposals and the *CCAA*, a licensee has the security of knowing that it may continue to use the IP regardless of the licensor's sale of the IP or purported termination of the licence agreement. Essentially, an IP licence agreement can no longer be disclaimed by the licensor in a *BIA* proposal or *CCAA* proceeding. In the case of a bankrupt licensor or a licensor in receivership, however, the trustee or receiver can likely continue to terminate the agreement where it is found to be an executory contract.

Courts have previously permitted the disclaimer or termination of executory contracts in insolvency proceedings. For example, the 2005 British Columbia Court of Appeal decision *Re New Skeena Forest Products Inc.*,[6] supports the trustee's ability to disclaim a debtor's executory contracts in bankruptcy. However, it is unclear whether IP licence agreements are included in "executory contracts". In *New Skeena*, the Court of Appeal held that a court-appointed receiver had the power to disclaim logging contracts that were attached to certain tree farm licences and that had vested in the estate. The tree farm licences could then be sold free and clear of any claims of the logging contractors. The Court of Appeal considered whether a trustee in bankruptcy would have the same power as a receiver in comparable circumstances and determined that trustees in bankruptcy have the power, at common law, to disclaim executory contracts and that in the absence of a statutory provision overriding this common law power, trustees should also be permitted to disclaim contracts.

The common law has attempted to address the question as to whether or not a licence can be disclaimed by a trustee or a receiver by considering whether or not a licence is an executory contract or a property right. If the licence creates a proprietary right for the licensee in the IP, then this could restrict the receiver or trustee in bankruptcy's ability to assign the IP or prevent the licensee's use of the IP. In *Re Erin Features No. 1 Ltd.*,[7] the trustee in bankruptcy for the debtor-licensor wished to disclaim a licence agreement where the debtor-licensor had granted Modern Cinema Marketing Ltd. ("MCM") exclusive rights to market films in Canada. The British Columbia Superior Court assumed but did not decide that a trustee in bankruptcy had the ability to disclaim executory contracts. Ultimately, however, the court held that the licence agreement could not be disclaimed since it conveyed a property right to the licensee and was not the property of the estate. Commentators have debated whether the reasoning in *Erin Features* is correct and whether the licence does indeed transfer a property right. In a case comment by Gabor G.S. Takach and Ellen L. Hayes,[8] it is argued that the court in *Erin Features* wrongly decided that the marketing agreement licence passed any property interest. It has also been argued that a better explanation for the outcome in *Erin Features* is that the debtor only licensed the distribution rights and had no ongoing performance obligations. The only outstanding obligation was for the licensee to pay royalties and therefore the contract was not executory in nature and could not be disclaimed.[9]

In *Re T. Eaton Co.*,[10] Eaton's had filed under the *CCAA* and was requesting that the exclusive licence granted to National Retail Credit Services Company ("NRCS") be disclaimed. NRCS had an exclusive licence to supply credit card services to Eaton's customers and was permitted to use the Eaton's trade-marks for such services. NRCS applied to the court for specific performance of the contract during the restructuring but the court stated that restricting "debtor companies from repudiating contracts would become an insurmountable obstacle to effecting compromises and reorganizations" and that "such an approach would be contrary to the purposive approach to *CCAA* proceedings followed by the courts to this date."[11] It was also held that the licensee was not entitled to specific performance because it could be adequately compensated in damages.

Although *Re T. Eaton Co.* would likely be decided differently today since the NRCS licence agreement is arguably an IP licence and would fall into the *CCAA* carve-out prohibiting the disclaimer of IP licences, the decision is helpful in considering whether a licence conveys a proprietary right. In *Re T. Eaton Co.*, the court permitted the repudiation of a licence and the licensee was left with only an unsecured claim for damages. The decision is in contrast with the *Erin Features* decision since in *Re T. Eaton Co.* the court concluded that the licence agreement did not pass any proprietary right to the licensee. The court also relied upon the 1889 English case of *Heap v. Hartley*[12] for the proposition that "a dispensation of licence properly passeth no interest nor alters nor transfers property in anything, but only makes an action lawful which without it had been unlawful." At paragraph 12, the court stated that

> the true nature of an (exclusive) licence is leave or permission to do such a thing, which would otherwise be unlawful (and a contract not to give leave or permission to anyone else to do the same thing). It confers no interest or property in the thing.

Re T. Eaton Co. was cited with approval in the 2008 decision of *Royal Bank v. Body Blue Inc.*[13] ("*Body Blue*"). In *Body Blue*, the licensed IP assets were sold by a court appointed receiver to a third party, free and clear of the existing rights. In that case, the debtor-licensor had granted an exclusive licence to Herbal Care to make and sell certain patented products. The receiver for Body Blue Inc. sold the underlying IP to a third party, pursuant to a court-approved vesting order that provided the assets were to be acquired free and clear of any claims and liens.

Herbal Care commenced an action in Arizona seeking damages for tortious interference, unjust enrichment and declaratory relief and sought a dismissal of the Canadian motion to facilitate a full trial on the issues in the Arizona action. The Arizona Court confirmed that the purchaser acquired the IP in accordance with the approval and vesting order, but held that it acquired rights subject to Herbal Care's contractual interest.

The purchaser of the assets, Body Blue 2006 Inc. sought an Order of the courts in Canada approving its ownership of the IP conveyed to it by the court-approved vesting order and an order that Herbal Care's contractual or licensed rights, if any, ended with the approval and vesting order. Herbal Care took the position that the court-approved vesting order did not affect its exclusive right to manufacture and sell the technology pursuant to the licence. The court disagreed and held that the licence merely created a contractual right and that the assets had been transferred to the purchaser without the burden of the licence. The court also confirmed that the IP licence did not transfer a proprietary right and the licensor could terminate the licence and sell the underlying IP. Herbal Care's only remedy was against the receiver for damages resulting from the breach and termination of the contract.

On the Canadian motion after the Arizona Court's decision, Herbal Care did not put forward any evidence of a property interest in the assets and did not dispute that the royalty agreement created only a contractual interest. It was also noted that Herbal Care had not opposed the approval and vesting order, had not taken any steps to set aside or vary the order, and had not taken any steps to appeal the order.

Body Blue confirmed that a licence creates only contractual rights and does not create a proprietary right. Based on *Body Blue* it therefore appears that licensees are still at risk of having their licence to use IP disclaimed or terminated upon the licensor's bankruptcy or receivership. Had the Amendments, which restrict the protection of licensees to situations where the licensor has sought protection under the *CCAA* or in a *BIA* proposal, been in force at the time *Body Blue* was decided, it would not have provided any remedy to the licensee, Herbal Care.

Therefore, it seems clear that despite the Amendments, a licensee in Canada must continue to be wary of the fact that its right to have the uninterrupted use of the IP which it has licensed for the term of that licence may be abruptly terminated by the insolvency of the licensor.

III. — When the Licensee is Insolvent

When compared to the analysis and case law related to the licensee's concerns when the licensor is the insolvent party, there has been much less focus in the case law on the effects of the licensee's insolvency on the licensor. Generally, if the licensee becomes insolvent, two issues arise. The first issue is the fate of the licence itself. Can the licensee sell and assign the licence as an asset, or at the very least, retain the licence in the case of a restructuring to be used by that licensee upon "exiting" its restructuring? The licensor, on the other hand, would likely prefer to terminate the agreement and regain control over its IP. Clearly the licensor would wish to avoid a situation where the IP would be transferred to a competitor or undesirable party without its consent. The second issue that arises is whether the licensee can continue to use the IP that is the subject of the licence during the restructuring, and if so, do they have to pay for said use? It seems unfair that the licensed IP could be used by the debtor, to the exclusion of all other use in the territory (assuming it is an exclusive licence), without payment being made.

A. — Use during Restructuring by Licensee

In either a *BIA* proposal or *CCAA* restructuring, a stay of proceedings is triggered or typically ordered at the outset. The stay of proceedings prevents the usual remedy which exists in all licence agreements to terminate the licence if payments are outstanding and are not made. It also prevents the licensor from terminating the licence solely because the licensee has filed for insolvency protection, notwithstanding the usual clause in the licence agreement that would allow the licensor to do so.

In what seems to be an attempt to partially balance this unfairness, both the *CCAA* and the *BIA* do allow one new power to the licensor which arises during the licensee's restructuring. Both statutes expressly allow the licensor to require that payments be made for the ongoing "use" of licensed property made by the debtor after filing for protection. This has the effect of allowing, but not requiring, the licensor to unilaterally alter the terms of its licence with the licensee so as to require payment on a C.O.D. basis for the duration of the licensee's restructuring.[14]

What if, despite the ability of the licensor to demand C.O.D. payment, the licensee not only does not want to pay C.O.D. but in fact does not want to pay at all, or wants to pay on its own unilaterally imposed terms? Such was the case in *Re Allarco Entertainment Inc.*[15] There the debtor-licensee attempted to use the *CCAA* proceedings to unilaterally renegotiate the payment terms of a licence agreement.

In *Allarco*, the Allarco Entertainment companies ("Allarco") operated a pay television cable movie channel, "Super Channel". It had Program Licence Agreements ("PLAs") with hundreds of program suppliers, which provided for a variety of payment terms. Most PLAs granted Allarco an exclusive licence to broadcast the films on pay television in Canada. During the *CCAA* stay period, those parties that had supplied content to Allarco were prohibited by the terms of the Initial Order from terminating those agreements and offering their content to other entities. Consequently, their content was now trapped in the Allarco restructuring. They could not sell it to anyone else in Canada unless Allarco agreed to terminate their contracts.

Allarco required the option to use this programming to continue operating during its *CCAA* restructuring, but it could not afford to make the required payments until it restructured. For example, some PLAs required payment for the use of programming whenever the programming was exhibited. It is also worth noting that Allarco was in arrears with respect to its obligations under these PLAs in almost every case, in some cases by hundreds of thousands of dollars. There were also instances where Allarco had not made any payments at all to certain content suppliers since beginning operation.

In order to solve its cash flow issue, Allarco sought to impose, by way of the content of the Initial Order that was presented to the court, a payment regime for their program suppliers which fit Allarco's available cash flow, regardless of the terms of section 11.01 of the *CCAA* and the terms of the contracts in question. According to this regime, with respect to parties that had supplied content prior to the *CCAA* filing, Allarco would only be required to pay for any programming actually broadcast during the *CCAA* proceeding (the "pay-per-play" regime). For example, if Allarco did not broadcast any programming supplied to them by Alliance Films Inc. ("Alliance"), then no payment would be required to be made to Alliance in respect of that programming, even though it was exclusively licensed to Allarco and the agreement with Alliance may have required periodic payments, regardless of whether or not the programs to which that licence applied were broadcast during the term of the licence. While the creative drafting of the Initial Order that was presented to the court appeared to solve Allarco's cash flow problem, the order was obtained effectively on an *ex parte* basis and without consultation with entities such as Alliance. When Alliance became aware of these provisions in the Initial Order, they objected. Unable to reach a deal, Allarco terminated its PLAs with Alliance. Alliance brought a motion objecting to the "pay-per-play" regime and also requested that the court invalidate the PLA termination.

The court found that Allarco had "used" the IP licensed under the Alliance PLAs, based on the fact that the evidence showed that Allarco had advertised its ability to broadcast Alliance programming post-filing (which it could only do under the rights granted under the PLA). The court concluded that since there had been use of the IP, it did not have the jurisdiction to alter the Alliance contract to change the amount it was paid for such use or the timing for such payment, as the Initial Order had purported to do, and that therefore the pay-per-play regime must fall. The court confirmed that Alliance could therefore require immediate payment under section 11.01(a) for the use of the licensed property during the *CCAA* restructuring of Allarco. As the court stated "the effect of imposing a pay-per-play payment term on Alliance at this stage would be to impose upon Alliance the obligation to provide a continuing service — allowing Allarco to continue to advertise the availability of Alliance programming — without providing payment for that service."[16]

The Alberta Court also confirmed that a debtor has the right to terminate or disclaim contracts under *CCAA* proceedings, however this right is subject to judicial oversight. As previously discussed, this right has now been codified in section 32 of the *CCAA*, subject to the court's authorization. In determining whether Allarco's termination of the Alliance PLAs should be invalidated, Allarco was required to show that the termination was fair, appropriate, and reasonable and that the termination occurred after good faith negotiations. The court concluded that Allarco met that test and that the termination of the Alliance PLAs was valid.

Allarco stands for the proposition that there is no authority under the *CCAA* for the court to grant an order that alters a licence agreement to create payment terms more favourable to the licensee if the licensee is using the IP post-filing. If the IP is used, the licensor can demand immediate payment for such use. If confronted, as Allarco was, with a regime that it cannot afford, the licensee's only option is either to terminate the licence, as it did in the case of Alliance following good faith negotiations, or to reach an agreement as it did with others.

What remains unanswered is what constitutes the "use" of IP under licence. Is it "use" to merely hold an exclusive licence, without making "active" post-filing use of the IP to which that licence relates? Does the fact that the licensor is unable to terminate its agreement with the licensee and re-licence that IP to a third party entitle the licensor to payment in accordance with the licence, regardless of what use the licensee makes? Given the court's focus on the fact that the Alliance content had been "used" as a result of advertising by Allarco, it would seem that the court was looking for some kind of active "use" beyond just the existence of the exclusive licence in reaching its decision and applying section 11.01 of the *CCAA*. However, in our view the court did not expressly answer this question.

B. — Assignment of Licence without Consent of Licensor

While some licensees that enter *CCAA* protection continue their businesses and wish to renegotiate or continue to use the licensed IP during their restructuring, other licensees may wish to assign their licence to a third party. In *Re Nexient Learning*

Inc.,[17] Nexient Learning Inc. and Nexient Learning Canada Inc. (collectively, “Nexient”), which was granted *CCAA* protection in June 2009, sought an order authorizing the assignment of a licence held by Nexient from ESI International Inc. (”ESI”), to Global Knowledge Network (Canada) Inc. (”Global Knowledge”). The licence contained a clause which terminated the licence upon the licensee’s insolvency. The licence was also one of a pair of licences granted by ESI to Nexient, which ESI argued had to be considered together. Although ESI’s consent to the assignment was not required under the licence, ESI objected to the assignment, and Nexient (the licensee) and Global Knowledge (the purchaser) requested that the court authorize the assignment over the objection of the licensor and order that the right of the licensee to terminate the contract due to the insolvency of Nexient be permanently stayed.

ESI, Global Knowledge and Nexient provided corporate training and consulting programs in Canada and the United States. ESI and Global Knowledge were competitors in the corporate training market. Nexient was ESI’s Canadian partner. Global Knowledge was the successful bidder for the assets of Nexient through a court approved stalking horse sales process. It entered into an Asset Purchase Agreement (the “APA”) under which it agreed to acquire all of Nexient’s assets as a going concern, including its licences with ESI. However, as Global Knowledge had not completed its due diligence with respect to Nexient’s contracts, the APA provided a 90 day transition following closing during which Global Knowledge could review all of the various Nexient licences it had acquired the right to acquire, and opt to take an assignment of any contract or licence it wished. The transaction closed in August, 2009 and Global Knowledge paid the purchase price in full at that time. Despite the fact that there was this transition period, the transaction was considered to be and was legally closed. From that point on, although the stay under the *CCAA* continued, Nexient’s business had been transferred to Global Knowledge, and Nexient had no further active business of its own. In September, 2009, effectively all the proceeds of sale were distributed to the secured creditors of Nexient. The motion to resolve the dispute between Global Knowledge, Nexient and ESI, did not arise until November 2009.

ESI licensed two courses to Nexient known as the Business Analysis (”BA”) and Project Management (”PM”) courses. The BA and PM program materials in issue were subject to copyright and also included proprietary information owned by ESI. The PM programmes were licensed to Nexient by ESI and granted Nexient the exclusive right to offer the PM course materials in Canada in return for royalty payments (the “PM Agreement”). At the time Nexient filed for protection under the *CCAA*, the PM Agreement was set to expire 6 December 2009, six months after the *CCAA* filing date. The BA program materials were also licensed to Nexient, under a licence which provided Nexient with a perpetual, exclusive royalty-free right to use the materials in Canada (the “BA Agreement”). The royalty free nature of this licence arose from the fact that the BA curriculum has been developed by Nexient, sold to ESI, and then licensed back to Nexient for its use in Canada (while ESI presumably used it in other territories). It was also ESI’s position that the PM Agreement, and the BA Agreement, where to be considered together as one business arrangement, although they existed in separate agreements, and that the agreements could not be assigned separately.

While the licence under the BA Agreement was perpetual, the BA Agreement contained a clause that allowed ESI to terminate the agreement upon any act of insolvency. It also contained a clause prohibiting assignment, except in the event of a merger, reorganization, change of control or sale of all or substantially all of the assets of a Nexient’s business. While there were, at that time, in excess of $600,000 of arrears owing in respect of the PM Agreement, there were no royalties owing in respect of the BA Agreement in light of its royalty-free nature. Global Knowledge elected to take an assignment of the BA Agreement only, over ESI’s objection, and not to take an assignment of the PM Agreement. ESI terminated the BA Agreement upon becoming aware of the *CCAA* proceedings, but that termination was stayed pending the conclusion of the *CCAA* proceedings. It was argued by ESI that the BA Agreement, if it was assigned to Global Knowledge, would instantly terminate once the stay expired.

Global Knowledge asserted that it was entitled to the BA Agreement, free from the right of ESI to terminate it, because the agreement was included in the assets to be assigned to it via the court-approved vesting order. As in the *Body Blue* case, Global Knowledge claimed that the licences would vest free and clear of all “Claims” which they argued included the right of ESI to terminate the licence due to the defaults of Nexient. However, the court in *Nexient* found that neither the vesting order nor the definition of “Claims” contained any language which permanently stayed ESI’s rights of termination based on the insolvency defaults. Also, the authors of this paper maintain that any parallel to *Body Blue* is flawed, as in that case it was the underlying IP which was clearly property of *Body Blue* that was being transferred, not a licence to use certain IP.

In order to address this apparent deficiency in the vesting order, Nexient and Global Knowledge sought an order to permanently stay ESI’s right to terminate the licence because of the insolvency defaults of Nexient. ESI was therefore confronted with the fact that its IP licensed under the BA Agreement was about to be assigned to its competitor, who would be entitled to use it on an exclusive, royalty free basis in perpetuity. Global Knowledge was not electing to also take an assignment of the PM Agreement, which contained an ongoing royalty obligation and in respect of which arrears would have to be cured prior to assignment. At the same time, Global Knowledge was of the view that it had purchased the right to the BA Agreement and the court had agreed that Nexient had the right to sell it.

In determining whether it had the requisite authority to authorize an assignment with the restriction suggested by Global Knowledge, the court referred to *Re Playdium Entertainment Corp.* (”*Playdium*)”.[18] In *Playdium*, an agreement to supply video games to movie theatres was assigned and the termination of the agreement by reason of the assignment or insolvency defaults that arose in the context of the *CCAA* proceedings was permanently stayed. In *Nexient*, it was concluded that the authority for the request was grounded in former section 11(4)(c) of the *CCAA* (now section 11.02(2)) or alternatively in the inherent jurisdiction of the court. As noted in *Playdium*, this authority should be exercised in a fair and effective manner.[19] The *Nexient* court concluded that it had the authority to

> . . . authorize an assignment of an agreement to which a debtor under *CCAA* protection is a party and to permanently stay termination of the agreement by the other party to the contract by reason of either the assignment or any insolvency defaults that arose in the context of the *CCAA* proceedings.[20]

With respect to the test that must be met in order to obtain authorization to assign the contract, it was noted that the test was still unclear after *Playidum*.[21] The reasons in *Playdium* seem to suggest that in order to authorize the assignment, the assignment must be necessary for the sale of the debtor’s assets under the *CCAA* to be completed. However, *Re Woodward’s Ltd.*,[22] which was also cited in *Playdium*, suggests that the test may simply be that the assignment is “important to the reorganization process.” This is the test adopted and set out in *Nexient*:

> It is clear from *Playdium* and *Woodwards* that the authority of the Court to interfere with contractual rights in the context of *CCAA* proceedings, whether it is founded in section 11(4) of the *CCAA* or the Court’s inherent jurisdiction, must be exercised sparingly. Before exercising the Court’s jurisdiction in this manner, the Court should be satisfied that the purpose and spirit of the *CCAA* proceedings will be furthered by the proposed assignment by analyzing the factors identified by Spence J. [in *Playdium*] and any other factors that address the equity of the proposed assignment. The Court must also be satisfied that the requested relief does not adversely affect the third party’s contractual rights beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party.[23]

The “other factors” referred to above that were considered in *Playdium* were whether the relief was consistent with the purpose and spirit of the *CCAA*, such as whether sufficient efforts had been made to obtain the best price such that the debtor was not acting improvidently; whether the proposal takes into consideration the interests of the parties; the efficacy and integrity of the process by which the offers were obtained; and whether there had been unfairness in the working out process.

In *Nexient*, the court ultimately declined to grant the order sought by Global Knowledge, even though the court had the authority to authorize the assignment of the BA Agreement in such circumstances. In reaching this decision, the court applied and refined the *Playdium* test.

The court considered whether or not providing the order sought would assist the restructuring. In determining that it would not, the court considered the following factors: 1) the *CCAA* proceedings had effectively been completed at the time that the business was sold to Global Knowledge; 2) Global Knowledge had paid the full purchase price (which had indeed already been distributed to the creditors at the time of the motion); 3) there was no mechanism in the APA requiring an adjustment of the purchase price in the event a contract or licence (such as the BA Agreement) could not be assigned to Global Knowledge; and 4) that there was no value to the *CCAA* proceedings in granting the proposed order, notwithstanding that it was clearly of value to Global Knowledge and that the assignment was clearly intended by the parties at the time the transaction was approved.

In applying the second part of the revised *Playdium* test (i.e. whether it was consistent with the purpose and spirit of the *CCAA*), the court advised that it had concerns regarding situations in which “a purchaser seeks to assume less than all of the contracts between a debtor and a particular third party with whom the debtor has a continuing or multifaceted arrangement.” The court noted that:

> In many instances in which a purchaser wishes to discriminate among contracts with the same third party, the Court will not exercise its authority under the *CCAA*, or its inherent jurisdiction, to authorize an assignment and/or permanently

> stay termination rights based on insolvency defaults. In such circumstances, the purchaser must assume all contracts with the third party or none at all.[24]

The court considered some examples in applying the third party of the revised *Playdium* test, and ensuring

> . . . that the requested relief does not adversely affect the third party's contractual rights beyond what is *absolutely* required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party.[25]

The court said it would be inappropriate to authorize the assignment where it would involve the assignment of less than all of the debtor's contracts with a third party where the contracts were interconnected either expressly or through an operational relationship (as was the case in *Nexient*), in situations where there are set-off rights between contracts, or where the assignment of only select contracts would leave the third party adversely affected.

The court also confirmed that while the stay in the Initial Order prevented ESI from terminating the BA Agreement during the *CCAA* proceedings, the stay did not extinguish ESI's right to terminate the agreement once the stay was lifted in the absence of a further order of the court. The court noted that granting the Order sought would competitively disadvantage ESI in Canada and that "the court's discretion should not be invoked to competitively disadvantage a licensor to the debtor in favour of a purchaser of the debtor's assets where the licensor has bargained for protection against such event in its contract with the debtor."[26] In other words, allowing a permanent stay of the insolvency termination rights in the contract in these circumstances would essentially "rewrite" the contract which the licensor had negotiated with the licensor. Therefore, in much the same way as in *Allarco*, the court declined to interfere with those negotiated terms or to put itself in the position of renegotiating those terms.

Although *Nexient* dealt with whether or not a court could override a provision in a contract which expressly allowed for termination of that contract in the event of insolvency, it would seem to us that the same argument could be applied in determining when a court will or will not force the assignment of a contract. For example, it could apply where the contract provides for the assignment of that licence upon receiving the consent of the licensor, or indeed in the face of any other provision in a licence which would have the effect of preventing the transfer to a third party without the licensor's consent.

Any parties rejoicing upon reading the foregoing believing that it provides support to licensors who object to the assignment of their licences, and will help prevent the assignment of their licences over their objection should note that it is not certain that the outcome of a *Nexient*-like fact scenario will be the same in future proceedings. Indeed, in *Nexient* it was noted that if Nexient or Global Knowledge had made the request at the negotiation of the APA or the Sale Order for an order akin to the one they were seeking at this later motion, the determination may have been different. The assignment and stay may have been granted, presumably because Global Knowledge and Nexient could have at that time argued, when faced with ESI's objection, that the restructuring hinged on the order then requested. Unfortunately for Nexient, by the time they were confronted with ESI's challenge, that argument was no longer really available.

Both *Nexient* and *Allarco* illustrate the difficulties licensors can face in the insolvency proceedings of a licensee, as well as the factors the court will consider in whether to grant an assignment of a licence agreement, amend the terms of the licence agreement or terminate the licence agreement. Although the Amendments confirm that it is possible for a licensee to assign and, to the extent necessary to effect that assignment, to renegotiate the terms of the licence agreement during *CCAA* proceedings, it appears that the court's authorization will only be granted in situations where the test set out in *Nexient* is met.

IV. — Lessons and Options

In the midst of a changing legislative landscape and relatively few reported decisions, most licensors and licensees would be well advised to attempt to build assurances into their licence agreements in an attempt to proactively address the above noted issues.

A. — The Licensee

Until such time as it is certain that IP licences will be honoured by insolvent licensors, solutions that transfer or secure the IP should be considered. One such example is requiring the licensor to place mission critical software source code in escrow. Typically, a third party escrow agent would hold a copy of the licensor's source code in escrow so that if the licensor becomes insolvent, the source code would be released from escrow to the licensee for the licensee's own use. This would ensure that the licensee can continue to maintain and support the software if the insolvent licensor refuses to do so. It would not, however, solve the problem which would arise if the licensee's right to use the software is terminated.

A different solution is to suggest that the licensor transfer the IP which is the subject of the licence into a holding company which has few or no creditors, in order to protect the licensee from the possible insolvency of the licensor's principal business. A perhaps more extreme variation of this idea would involve the licensee and the licensor becoming joint shareholders of the holding company or otherwise having joint control in which either could buy out the shares of the other upon the other becoming insolvent.

A partial assignment to the licensee of a small percentage of the IP, which is to be returned to the licensor upon the conclusion of the term of the license, may also create a proprietary right in the IP which could not be disclaimed. A trust or security interest over the IP may also aid the licensee. For example, the licensee could require the licensor to grant it a security interest in the IP subject to the licence that would secure the performance of the licensor's obligations or allow the licensee to foreclose upon the IP in the event of insolvency.

Finally, in consideration of the Amendments, a licensee may wish to separate the licence agreement from the agreement for the licensor's ongoing obligations in order to avoid any confusion as to whether ongoing payments can be required from the licensee under the licence during the restructuring, even though the licensor may have ceased performing its service and support obligations under the agreement.

B. — The Licensor

From the licensor's perspective, it may be beneficial or necessary to maintain certain reporting obligations or automatic termination clauses based on early warning signs of insolvency, such as reduced working capital, EBITDA calculations or reduction in debt ratings. This information could provide the licensor with the ability to terminate the licence prior to the debtor obtaining a stay of proceedings at the commencement of its insolvency proceeding which would interfere with the licensor's termination rights. Counsel to a licensor may also wish to negotiate a free-standing right of first refusal on the sale or assignment of IP so that a licensor can regain control of its IP should the licensee become insolvent. Also, in consideration of the Amendments, a licensor may wish to separate the licence agreement from the agreement for the licensor's ongoing obligations. This may allow the licensor to terminate the support agreement without worrying that such termination is prevented by those sections of the *CCAA* or *BIA* which protect licensees and which may be interpreted as preventing the termination of licence agreements.

The licence could also include a requirement that the licensee agrees to make a minimum amount of "use" of the IP during every month of the term of the licence and that such use will be acknowledged in any event to have occurred, in order to make it easier to argue that the licence is in fact being used during any possible period of restructuring and to ensure that the licensor can require C.O.D. payment during that term.

Finally, licensors should consider drafting over-arching agreements that connect any co-dependent licence agreements, as ESI ideally would have done in *Nexient*. By creating formal "umbrella agreements" or partnership arrangements under which the licensee acknowledges that the various licence agreements must be considered as a whole, it may prevent a future purchaser of the licence agreements in the event of the licensee's insolvency from being able to cherry pick certain licences while leaving behind others, as was attempted in *Nexient*.

C. — The Insolvency Professional

For insolvency professionals, there are a few lessons as well. First, to the extent it is available to the parties contemplating the insolvency of a debtor company to select which method of restructuring they intend to use, a restructuring under the *CCAA* or *BIA* may not be an optimal choice if one of the principal assets which the debtor company will be looking to sell is IP owned by the debtor company. Clearly it is better to be able to at least have the option of assigning the IP free and clear of any licences which may have been granted, as was done in the *Body Blue* case, than to be limited to assign it with those licences attached, as would be the case under the Amendments. On the other hand, if assigning a licence over the anticipated objection of a licensor is to be a feature of the insolvency, a *CCAA* proceeding or a *BIA* proposal may be preferable to a receivership, since the Amendments now expressly allow for such an assignment in those proceedings, whereas that power is not expressly available in a receivership.

If there is to be an assignment of a licence over the objection of the licensor, it seems that *Nexient*, even though it pre-dates the coming into force of the Amendments by a few months, provides a guide as to how the court in a *CCAA* case (and likely in a *BIA* proposal as well) may exercise its newly granted statutory power to determine the "appropriateness" of the proposed forced assignment of a contract. Further, although *Nexient* was a *CCAA* case, a more complete review of the facts reveal it to be very much what insolvency professionals have come to recognize as a receivership in disguise. The *Nexient CCAA* proceeded quickly: there was a single sale of the entirety of the business to one purchaser, the court appointed monitor had an enhanced role and controlled much of the process, all the proceeds were paid to the secured creditors, and there was no plan of arrangement. In considering these facts, one might expect that the lessons from *Nexient* could perhaps also be applied in considering when a receiver or even a trustee might ask the court to force the assignment of a licence.

Nexient makes it clear that in a *CCAA* proceeding one can expect that an assignment will only be made in the event that it serves to enhance the goals of the restructuring. If the restructuring is not benefited by the proposed assignment or by the proposed changes to the terms of the contract upon the assignment, the court may decline to grant the assignment. Second, the assignment must be in keeping with the spirit of the *CCAA* and the impact on third parties, which may include the court looking at what the purchaser is attempting to achieve and how the assignment may unfairly prejudice the licensor or how it may deviate from the terms of the contract which the licensor had negotiated with the licensee.

One can also expect, as proved to be the case in *Nexient* and *Allarco*, that the court will be loath to interfere with the terms of the contract, unless absolutely required to do so. The timing of the request to alter the terms of the contract will be a critical factor in this regard. In the context of a proposed assignment, it must be sought no later than the time of the approval of the proposed transaction, not as an afterthought. In this regard, it would be advisable to ensure that any vesting order sought by a purchaser of an IP licence contain a provision that specifically includes that the termination rights of the licensor as they existed against the debtor company for defaults by the company, including the insolvency of the debtor, falls within the definition of "Claims" which are vested out by the Order and that the licensor be given notice of such a motion with time to respond.

It would also be wise for any insolvency professional conducting due diligence or otherwise advising a purchaser contemplating the purchase of contracts through insolvency to consider and advise its client that if there are multiple contracts between the debtor and any particular licensor, that any interdependence or connection between those licences should be considered in deciding what to include within the definition of "purchased assets" and the purchase price to be paid. Failure to take an assignment of all such licences, as occurred in *Nexient*, could result in the assignment being jeopardized. The absence of a purchase price adjustment clause to assist the purchaser in the event the licence is not transferred to the purchaser could be a costly oversight.

Lastly, careful consideration should be given as to the extent to which the debtor company intends to make ongoing use of IP which it has under licence during the restructuring and how that IP is to be paid for during the restructuring. Included in this analysis should be whether or not the debtor can consider not "using" certain IP so as to perhaps avoid paying royalty fees which would otherwise fall due during the restructuring, while still preserving an exclusive licence which can either be sold to a third party who may then use the IP. It may be that a review of the common law would reveal that there is support for the proposition that in a receivership parties should pay for the use of property or rights made after the granting of a stay at the commencement of a receivership. However, there is no statutory provision to that effect. In this scenario, the debtor would wish to retain the benefit of that licence going forward or to ensure that the licence can be used by the debtor company upon exiting its restructuring. On the other hand, if it is necessary that there be use of the IP during the restructuring, proceeding by way of a receivership, where there is no statutory power for the licensor to require immediate C.O.D. payment for use of their property, should be considered instead of proceeding under the *CCAA*.

Footnotes

1 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*].

2 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*].

3 *BIA*, *supra*, note 2, s. 2.

4 *CCAA*, *supra*, note 1, s. 11.3(3); *BIA*, *supra* note 2, ss. 66(1.1) and 84.1(4).

5 *CCAA*, *supra*, note 1, s. 11.3(4); *BIA*, *supra* note 2, s. 84.1(5).

6 *Re New Skeena Forest Products Inc.*, 2005 BCCA 25, 9 C.B.R. (5th) 261 (B.C. C.A. [In Chambers]) [*New Skeena*].

7 *Re Erin Features No. 1 Ltd.* (1991), 8 C.B.R. (3d) 205 (B.C. S.C. [In Chambers]) [*Erin Features*].

8 Gabor G.S. Takach and Ellen L. Hayes, "*Re Erin Features 1 Ltd.*", Case Comment, 15 C.B.R. (3d) 66.

9 Donald E. Milner & R. Graham Phoenix, "The Impact of Insolvency on Technology License and Service Agreements: The Evolving Statutory Landscape"(Paper presented to the 4th Annual Technology in Bloom: New Developments in Technology Law, 3April 2008) [unpublished].

10 *Re T. Eaton Co.* (1999), 14 C.B.R. (4th) 288 (Ont. S.C.J. [Commercial List]).

11 *Ibid.* at para 7.

12 *Heap v. Hartley* (1889), 42 Ch. D. 461, 58 L.J. Ch. 790, 6 R.P.C. 495 (Eng. C.A.).

13 *Royal Bank v. Body Blue Inc.* (2008), 42 C.B.R. (5th) 125 (Ont. S.C.J. [Commercial List]) [*Body Blue*].

14 *CCAA*, *supra*, note 1, s. 11.01(a); and *BIA*, *supra* note 2, s. 84.2(4).

15 *Re Allarco Entertainment Inc.* (2009), 2009 ABQB 503, 12 Alta. L.R. (5th) 341, [2010] 4 W.W.R. 299 (Alta. Q.B.) [*Allarco*]. For an in-depth discussion of *Allarco*, see David Ullmann & Melissa McCready, "Pay-Per-View: When do you have to pay for the use of intellectual property during the CCAA?" (2009), 22 Comm. Insol. R. 13.

16 *Allarco*, *supra*, note 15 at para. 55.

17 *Re Nexient Learning Inc.* (2009), 62 C.B.R. (5th) 248 (Ont. S.C.J.) [*Nexient*].

18 *Re Playdium Entertainment Corp.* (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]) [*Playdium*].

19 *Ibid.* at para. 32.

20 *Nexient*, *supra*, note 17 at para. 53.

21 *Ibid.* at para. 55.

22 *Re Woodward's Ltd.* (1993), 79 B.C.L.R. (2d) 257, 17 C.B.R. (3d) 236 (B.C. S.C.).

23 *Nexient*, *supra*, note 17 at para 59.

24 *Ibid.* at para 62.

25 *Ibid.* at para 59.

26 *Ibid.* at para. 98.

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TAB 8

2004 CarswellOnt 643
Ontario Superior Court of Justice [Commercial List]

Air Canada, Re

2004 CarswellOnt 643, [2004] O.J. No. 576, 129 A.C.W.S. (3d) 21, 47 C.B.R. (4th) 182

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

And In the Matter of section 191 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended

And In the Matter of a plan of compromise or arrangement of Air Canada and those susidiaries listed on schedule "A"

Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Farley J.

Heard: January 29, 2004; February 2-3, 2004
Judgment: February 10, 2004
Docket: 03-CL-004932

Counsel: Leah Price, Gary Grierson for Moving Party
Ashley Taylor for Responding Party, Air Canada
Peter J. Osborne for Monitor, Ernst & Young Inc.
Hilary Clarke for DLM
Michael Barrack, Rita Maxwell for Alberta Co.
Joseph Bellissimo for Orix Corporation, Montrose & Company, Mitsubishi Corporation, Banca Intesca, Lambard Capital, Finova Capital Corp., Pegasus Aviation, et al.
Paul MacDonald for Bank of Nova Scotia
Howard Gorman for Ad Hoc Unsecured Creditors' Committee
Robert Thornton for GECAS

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

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

Lessee leased plane — Agreement provided that lessee would pay lessor rent of $285,000 US per month — Agreement contained reconciliation provision designed to compensate lessor for deterioration of plane and its parts — Lessee applied for Companies' Creditors Arrangement Act (CCAA) protection and initial CCAA order was granted to lessee on

April 1, 2003 — Lessee parked plane on July 4, 2003 — Lessee was sent notice of termination to take effect September 20, 2003 — Lessor brought motion for mandatory order requiring lessee to effect maintenance and repairs necessary to rectify damage to engine and put plane into airworthy condition and for order requiring lessee to pay base rent and reconciliation payments totalling $4,760,540 US — Motion granted — Substance of obligation and interpretation in accordance with commercial reasonableness was that reconciliation obligation was to be split into pre-filing and post-filing obligation of lessee — To do otherwise would allow lessor to obtain priority as to such reconciliation payments which was unwarranted vis-a-vis other lessors who were compromising their claims under ongoing leases — Reconciliation payments claim should be divided in accordance with chart set out in lessee's factum — Lessee was liable for contract rent rate of $285,000 US per month — Lessor was not disadvantaged in any material or relevant way by lessee making plane available on September 20, 2003 — Lease contract rent of $285,000 US per month should be applied until September 20, 2003.

Table of Authorities

Cases considered by *Farley J.*:

AltaSteel Ltd. v. Inverness Petroleum Ltd. (1994), 24 Alta. L.R. (3d) 212, 58 C.P.R. (3d) 489, 161 A.R. 138, 1994 CarswellAlta 245 (Alta. Q.B.) — considered

Maracle v. Travellers Indemnity Co. of Canada (1991), [1991] I.L.R. 1-2728, 125 N.R. 294, 80 D.L.R. (4th) 652, 47 O.A.C. 333, (sub nom. *Travellers Indemnity Co. of Canada v. Maracle)* [1991] 2 S.C.R. 50, 50 C.P.C. (2d) 213, 3 C.C.L.I. (2d) 186, 1991 CarswellOnt 450, 3 O.R. (3d) 510 (note), 1991 CarswellOnt 1019 (S.C.C.) — referred to

Marchischuk v. Dominion Industrial Supplies Ltd. (1991), 30 M.V.R. (2d) 102, [1991] 4 W.W.R. 673, [1991] 2 S.C.R. 61, 73 Man. R. (2d) 271, 3 W.A.C. 271, 3 C.C.L.I. (2d) 173, [1991] I.L.R. 1-2729, 125 N.R. 306, 80 D.L.R. (4th) 670, 1991 CarswellMan 188, 50 C.P.C. (2d) 231, 1991 CarswellMan 283 (S.C.C.) — considered

National Trust Co. v. United Lands Corp. (1996), 1996 CarswellOnt 3250 (Ont. Gen. Div. [Commercial List]) — considered

Owen Sound Public Library Board v. Mial Developments Ltd. (1979), 8 R.P.R. 113, 102 D.L.R. (3d) 685, 26 O.R. (2d) 459, 1979 CarswellOnt 643 (Ont. C.A.) — referred to

Smoky River Coal Ltd., Re (2001), 2001 ABCA 209, 2001 CarswellAlta 1035, [2001] 10 W.W.R. 204, 205 D.L.R. (4th) 94, 28 C.B.R. (4th) 127, 95 Alta. L.R. (3d) 1, 299 A.R. 125, 266 W.A.C. 125 (Alta. C.A.) — followed

Statutes considered:

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

s. 11 — referred to

s. 11.3(a) [en. 1997, c. 12, s. 124] — considered

MOTION by lessor for order requiring lessee to effect maintenance and repairs on damaged engine and put plane into airworthy condition and for order requiring lessee to pay amounts for base rent and reconciliation payments.

***Farley J.*:**

1 As argued, the relief sought against Air Canada (AC) by the moving party lessors (TA) was as follows as set out in para 36 of TA's Supplementary Factum:

36: The lessor (TA) seeks:

(a) A mandatory order requiring Air Canada to forthwith effect, at its expense, such maintenance and repairs as are necessary to rectify the damage to Engine 731585, and put the Aircraft into airworthy condition;

(b) an order requiring Air Canada to forthwith pay to the moving parties, or as they may direct, the sum of:

(i) Base Rent (U.S. $285,000 per month) U.S.		$1,995,000
(ii) Reconciliation payments in the amount of U.S.		$2,765,540
	Total U.S.	$4,760,540

(c) if required, an order declaring that the foregoing orders shall be effective in accordance with their terms notwithstanding any other orders of this Court

together with costs of this motion on a full indemnity scale.

2 One would have thought that this type of a motion in a CCAA proceeding would be unnecessary if both sides had engaged in meaningful and bona fide negotiation on a timely basis. However, if the motion had to be brought, one would also have thought, given the amount of time that the parties had to prepare, that the parties each could have focused to a further degree on the relevant facts and legal submissions; that may be the counsel of perfection. A true compendium would be of assistance.

3 The subject plane was leased by AC from TA pursuant to a lease agreement dated June 27, 1996 (as a result of various assignments being taken into account). AC did not dispute TA's position that subject lease was a "true lease" (not a "financial lease") of the plane. AC applied for CCAA protection on April 1, 2003, at which time the Initial CCAA order was granted. AC did not repudiate the lease, which otherwise would expire in 2006, until sent a notice of termination (more correctly described as repudiation) on September 11, 2003, to take effect September 20, 2003. Apparently, the parts cannibalized from the plane after it was "parked" by AC on July 4, 2003, once it had reached the outermost limit with respect to a heavy maintenance check (HMC), were returned to the plane before the September 20, 2003 date. Apparently, not all of the maintenance records were available either on September 20 or October 27 (when a TA inspecting agent swore his affidavit) notwithstanding that one would ordinarily assume that there was sufficient time to do so. The excuse was given that these documents are stored in various locations; one would have thought that, even in the strained circumstances of a CCAA regime affecting AC, the "ordinary course of business" in such strained circumstances would be that this documentation would have been assembled, and further that it would be relatively easy to do so, even if for some reason the records as to this plane and parts (including engines) were not centralized. TA did not take possession of the plane until November 3, 2003, by towing it across the airport tarmac at Vancouver. TA obtained a special permit to allow it to fly the otherwise non-certified as to airworthiness plane to the Nevada desert where it remains "parked" along with literally thousands of other planes, including one would presume planes of this type. TA did not present any evidence that AC's failure for the time being to provide the plane in a revitalized condition which would allow it to be continued to be certified as airworthy has truly caused TA any harm or damage. To the extent that the plane including parts and specifically an engine which was damaged beyond the refurbishment of wear and tear in the ordinary course, then AC will be responsible for such amount as is necessary to correct/repair the damage. In this respect, it appears that it is still an open question as to when the engine was

damaged — pre or post filing. If pre-filing, then this will be a claim compromisable in the Plan.

4 The lease provided that AC would pay TA rent of $285,000 US per month. In addition, there is a reconciliation provision in the lease which is designed to compensate TA for deterioration of the plane and its parts. It is geared towards an HMC and its ancillary refurbishment. The reconciliation is based on a formula of the hours of use since the last HMC refurbishment times an hourly rate. The substance of the reconciliation provision is to maintain the plane as per the periodic HMCs and recognize that in the interim there will be wear and tear of a refurbishable nature. I note the citation of *Smoky River Coal Ltd., Re* (2001), 205 D.L.R. (4th) 94, 28 C.B.R. (4th) 127 (Alta. C.A.) by TA at para. 24 where the Alberta Court of Appeal stated:

> 24. Coneco was clearly a post-petition trade creditor. The covenant to repair the equipment was just as much a term of the lease and a term of credit as Smoky River's obligation to pay rent. The repair costs were not a damage claim, but a clear contractual obligation that arose during the CCAA period. It is not commercially reasonable that Coneco would lease valuable equipment to Smoky River unless Smoky River maintained it in good operating condition. Had there been no obligation to maintain the equipment, the rental rate would have been considerably higher. This interpretation is consistent with commercial reasonableness.

This interpretation is consistent with commercial reasonableness. See the May 8, 2003 AC letter which indicated that AC would not be complying with the return conditions under the leases.

5 In my view, the substance of this obligation and an interpretation in accordance with commercial reasonableness is that the reconciliation obligation is to be split into a pre-filing and post-filing obligation of AC. To do otherwise would, as well, allow TA to obtain a priority as to such reconciliation payments which is unwarranted vis-a-vis the other lessors who are compromising their claims under their ongoing leases. TA did not dispute the split of the various hourly components as set out at para. 14 of the AC factum. It would seem to me that the reconciliation payments claim should be divided in accordance with that para. 14 chart.

6 That leaves the issue of whether the lease rent rate effective April 1, 2003 should be $285,000 US per month or what AC states to be the current market rate for such planes of $115,000 US per month which has been accepted by various other lessors. TA acknowledges that there were discussions about the adjustment of the rent but it submits that there was never any agreement on the rate (TA did not accept AC's proposal, nor did AC accept TA's counterproposal). S. 11.3 of the CCAA provides:

> s. 11.3 No order made under s. 11 shall have the effect of:
>
> > (a) Prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made.

Thus it would appear that the general stay of proceedings provision of s. 11 would not prohibit TA from either requiring payment for the use of the leased property (in this case the plane) which continued to be provided subsequent to the April 1, 2003 initial order. Can TA insist on the lease contract rate of $285,000 U.S. per month.

7 AC relies on its counsel's letter of May 8, 2003 sent out to all plane lessors including TA wherein it closed off the letter

by stating:

> As the lessee stated at our meeting and in court, any lessors who are unable or unwilling to reach agreement on the restructuring of their lease terms will be given the ability to request a prompt return of their aircraft. Such request will be cooperatively dealt with applying the return protocol outlined above.

However, what AC did not do, at least with respect to TA and the plane in question, is repudiate the lease until September 20, 2003. Indeed it is, I think, strange that AC did not (acting in its own selfish short term best interests, which may not of course be in its long term best interests which may have to accommodate mutual interests) repudiate the lease once it "parked" the plane on July 4, 2003 when it reached its utmost level as to the requirement for an HMC.

8 In response to TA's reliance on Section 15.1 of the lease providing a complete answer, AC asserts that this provision only deals with waiver and not with promissory estoppel. Section 15.1 of the lease provides:

> 15.1 The rights of Lessor under this Agreement are cumulative, may be exercised as often as it considers appropriate and are in addition to its rights under general Law. The rights of Lessor against the Lessee or in relation to the Aircraft (whether arising under this Agreement or the general Law) shall not, as against or in favour of Lessor, be capable of being waived or varied otherwise than by an express waiver or variation in writing; and in particular any failure to exercise or delay in exercising any of such rights shall not operate as a waiver or variation of that or any other such right; and defective or partial exercise of any such rights shall not preclude any other or further exercise of that or any other such right; and no act or course of conduct or negotiation on its part or on its behalf shall in any way preclude it from exercising any such right or constitute a suspension or any variation of any such right.

AC does not provide or rely upon any agreement *in writing* to support its assertion that TA should be limited to a rent of $115,000 US per month. It seems to me that the May 8, 2003 letter does not support an interpretation in these circumstances that by continuing for some period of time to discuss an adjustment in the monthly rent for the period April 1, 2003 on, TA is to be taken as agreeing to whatever the "now" market rate for such a plane would be (asserted as $115,000 US per month by AC) since it did not then and there ask for its plane back. Indeed TA did not do so (ask for the plane back) until September 3, 2003.

9 I note that AC relies upon *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 (S.C.C.) to the effect that a party (here AC) relying on the doctrine of promissory estoppel must establish that the other party (here TA) has by words or conduct, made a promise or assurance, which was intended to affect their legal relationship and to be acted upon. It also relies upon *Owen Sound Public Library Board v. Mial Developments Ltd.* (1979), 102 D.L.R. (3d) 685 (Ont. C.A.) at p. 694 where the Court stated:

> As stated by Riddell J. in *Grimsby Steel Furniture Co. Ltd. v. Columbia Gramophone Co.* (1922), 23 O.W.N. 188 at p. 189, "Silence is sometimes as cogent as speech . . . ". The predictable and reasonable interpretation placed on Brown's promise to obtain the seal, in the circumstances, is sufficient to support a finding that the requisite intent and knowledge existed. This Court is free to draw such an inference from the proven facts. It would be neither equitable nor just to view Mial's statement and conduct as having any other effect than that of leading the Library Board's representative to suppose that the strict payment obligations within the time-limits would not be enforced.

10 AC then went on to distinguish between waiver and estoppel, relying upon *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61, 80 D.L.R. (4th) 670 (S.C.C.) heard concurrently with the *Maracle* case. At p. 672 (D.L.R.) Sopinka J. for the Court stated:

> Kennedy J. reviewed the facts and concluded that while there may be circumstances from which it can be inferred that a claim need not be filed, the facts in this case did not support that conclusion.

It appears clear from the context that Sopinka J. agreed with the views of Kennedy J. as to the distinction. This distinction was applied in *AltaSteel Ltd. v. Inverness Petroleum Ltd.* (1994), 24 Alta. L.R. (3d) 212 (Alta. Q.B.), at pp. 220-2.

11 However, it does not appear to me that the conduct of TA in response to AC's invitation to negotiate would support AC's claim for promissory estoppel. Negotiation is a two-way street. I also note that TA neither billed AC at the $115,000 US per month rate nor accepted payment at that rate. Certainly, if there had been any conduct, acknowledgement or statement by TA which would support a modification of the contractual arrangement so that the rent would be $115,000 US per month, then there would be no necessity for any negotiation past that event as it would have been a *fait accompli*. AC is not in my view, able to point to any such turning point; certainly the tacit acceptance and indeed entering into of negotiations by TA cannot be construed as holding out in words or by conduct, audibly or in silence, that TA was willing to accept the $115,000 US per month rent even if there were no successful conclusion to the negotiations. (In passing, I would note that *National Trust Co. v. United Lands Corp.*, [1996] O.J. No. 2984 (Ont. Gen. Div. [Commercial List]), should not be misconstrued by TA as it dealt with an agreement which had a few more bells and whistles on it as indicated: "Given the (i) *'whole' agreement* and (ii) no waiver or *modification clauses* (s. 38 and s. 31) of the loan agreement, I do not see how United Lands proposes to advance this as a defence." (Emphasis added.))

12 In the result, based on these facts and documentation, it appears to me that AC is liable for the contract rate rent of $285,000 US per month. The next question is, for how long? Given my observation above, it does not appear that TA was in any material or relevant way, disadvantaged by AC making the plane available to TA on September 20, 2003, as it appears obvious to everyone involved that the plane was going to be "parked" in the Nevada desert, then it would seem that the lease contract rent of $285,000 US per month should be applied until September 20, 2003.

13 Counsel are invited to work out the various calculations involved. Counsel should also advise me within five days of the release of these reasons whether any party wishes to pursue costs. This should be done after a discussion amongst counsel. If necessary, the costs issue can be dealt with as to liability and quantum at a 9:30 to be booked for February 19, 2004 or before.

Motion granted.

TAB 9

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **SEPTEMBER 8, 2010**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

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

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
The other Petitioners listed on Schedules "A", "B" and "C"
Debtors / Petitioners

And
ERNST & YOUNG INC.
Monitor

And
THE ROYAL TRUST COMPANY
Mise en cause

JUDGMENT ON RE-AMENDED MOTION FOR DIRECTIONS ON THE IDENTITY OF THE PERSONS WHOSE BENEFITS UNDER THE BOWATER SUPPLEMENTAL EXECUTIVE RETIREMENT PLANS WERE SECURED BY A LETTER OF CREDIT (#677)

JG1793

INTRODUCTION

[1] On April 17, 2009, the Court issued an order (as subsequently amended and restated, the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act* (the "***CCAA***") in respect of (i) Abitibi-Consolidated Inc. ("**ACI**") and subsidiaries thereof (collectively, the "**Abitibi Petitioners**"), (ii) Bowater Canadian Holdings Inc. and affiliates and subsidiaries thereof (collectively, the "**Bowater Petitioners**") and (iii) certain partnerships.

[2] At that time, one of the Bowater Petitioners, Bowater Canadian Forest Products Inc. ("**BCFPI**"), was the sponsor of three Supplemental Executive Retirement Plans (the "**SERPs**"). The SERPs' purpose was to give supplemental retirement benefits to a limited number of executives in addition to the benefits payable from any registered pension plan of BCFPI. The SERPs provided these post-retirement benefits to various members, be they eligible employees or beneficiaries of deceased participants.

[3] Pursuant to a trust agreement (the "**Trust Agreement**"), the benefits payable under the SERPs were partially secured by a letter of credit held by The Royal Trust Company ("**RTC**"), in trust for the eligible members.

[4] On May 1, 2009, as a result of their insolvent status and the issuance of the Initial Order, the Petitioners advised RTC that they had suspended the payments of all SERPs benefits and would not renew the letter of credit securing those[1].

[5] On May 26, 2009, RTC replied that it would call for payment on the letter of credit that it held[2]. It did so on that day and thus received an amount of some $23,065,000[3].

[6] When this letter of credit was called for payment, there were, from a practical standpoint, five different categories of SERPs members:

a) 48 Canadian resident members who had retired before December 31, 2003;

b) 6 Canadian resident members who had retired after December 31, 2003 but before May 26, 2009;

c) 3 U.S. resident members who had retired before December 31, 2003;

d) 11 members who were still active employees of BCFPI; and

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[1] Exhibit R-17.
[2] Exhibit R-18.
[3] Exhibit R-7.

e) 6 members who were deferred vested members, that is, terminated employees who had not yet begun to receive their pension benefits under the SERPs.

[7] Of these five categories, only the first three were being paid pension benefits under the SERPs when BCFPI advised RTC that it was suspending all SERPs payments.

[8] There is a dispute as to which members are entitled to share in the proceeds of this letter of credit and as to how the proceeds are to be distributed. By their Motion[4], the Petitioners seek a declaration that:

a) the only persons entitled to continue to receive monthly SERPs payments from the proceeds of the letter of credit held by RTC are:

   i) The Canadian resident members of the SERPs who retired before December 31, 2003 (listed in Schedule A to the Motion);

   ii) The Canadian resident members of the SERPs who retired after December 31, 2003 but before May 26, 2009, including Mr. Donald Campbell (listed in Schedule B to the Motion), but only on the value of their SERPs benefits accrued up to December 31, 2003; and

   iii) The U.S. resident members of the SERPs, including Mr. Jerry Soderberg (listed in Schedule C to the Motion);

b) RTC should pay the full monthly SERPs payments to the persons entitled to receive such from the proceeds of the letter of credit until they are exhausted in accordance with Schedule F to the Motion or until further order of the Court.

[9] In short, the Petitioners consider that the members who had not yet begun to receive pension benefits under the SERPs on May 26, 2009, namely the active employees (listed in Schedule D to the Motion) and the deferred vested members (listed in Schedule E to the Motion), should not be entitled to share in the proceeds of the letter of credit.

[10] The Petitioners so conclude based upon the wording of the relevant sections of the SERPs, their interpretation and application of their terms, and the letters and notices they sent over the years to the SERPs members in relation to the meaning and intent of the protection afforded by this letter of credit.

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4 Re-Amended Motion for Directions on the Identity of the Persons Whose Benefits Under the Bowater Supplemental Executive Retirement Plans Were Secured by a Letter of Credit dated July 2, 2010 (the "**Motion**").

[11] Of course, the members listed in Schedules A, B and C to the Motion support the conclusions sought. Without surprise, the members listed in Schedules D and E, that the Petitioners consider must be excluded from any sharing, contest the Petitioners' position. They dispute the interpretation of the relevant sections of the SERPs proposed by the Petitioners and insist that no resolution of BCFPI Board of Directors ever approved the purported changes made to the protection given to them by the letter of credit.

[12] Through their Motion, the Petitioners also ask the Court to authorize BCFPI to amend the Trust Agreement in accordance with Amendment No 1 (the "**Amended Trust Agreement**")[5]. Amongst others, the Petitioners want to dissociate BCFPI from all of its obligations under the Trust Agreement and to create a committee of beneficiaries who would take over from BCFPI the power to give directions to RTC and to make all decisions regarding the funds still to be managed.

[13] RTC disagrees with most of the amendments proposed to the Trust Agreement. It does not want to dissociate BCFPI from the Trust Agreement and to be forced to deal from now on with a committee of beneficiaries, on terms and conditions that it finds unacceptable.

THE ISSUES

[14] Two questions are at issue here: 1) Are the future SERPs benefits of the active employees and the deferred vested employees covered by the letter of credit? 2) Should the Court incorporate the changes to the Trust Agreement proposed by the Petitioners?

[15] To analyse the two questions, a review of the applicable SERPs, the letter of credit, the relevant changes made over the years to the SERPs and the most current actuarial valuations of the SERPs is necessary at the outset.

THE SERPs

[16] Bowater Pulp and Paper Canada Inc. ("**BPPC**"), formerly Avenor Inc., implemented the first of the SERPs effective July 16, 1993 (the "**1993 SERP**")[6]. On July 1, 1995, this 1993 SERP was restated into three SERPs (collectively, the "**1995 SERPs**")[7]:

a) The Supplemental Retirement Benefit Plan for Grade 11 and under Employees of Bowater Pulp and Paper Canada Inc.;

b) The Supplemental Retirement Benefit Plan for Grade 12 and under Employees of Bowater Pulp and Paper Canada Inc.; and

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5 Exhibit R-29.
6 Exhibit R-1.
7 Exhibit R-2.

c) The Senior Executive Retirement Plan.

[17] The rules of the 1995 SERPs were afterwards restated in 1997 (collectively, the "**1997 SERPs**")[8].

[18] Finally, effective January 1, 2002, BPPC and BCFPI merged and continued their operations under the name of BCFPI. On the merger date, BCFPI became the sponsor of the 1997 SERPs which were renamed as follows (collectively, the "**2003 SERPs**")[9]:

a) The Supplemental Retirement Benefit Plan for Grade 27 and under Employees of Bowater Canadian Forest Products Inc.;

b) The Supplemental Retirement Benefit Plan for Grade 28 and under Employees of Bowater Canadian Forest Products Inc.; and

c) The Senior Executive Retirement Plan of Bowater Canadian Forest Products Inc.

[19] Throughout the years, each of the 1995 SERPs, the 1997 SERPs and the 2003 SERPs have included the following provisions dealing with BPPC or BCFPI contributions and the letter of credit, the SERPs' interpretation and administration, and BPPC or BCFPI authority to amend the SERPs:

> **SECTION 4- CONTRIBUTIONS**
>
> 4.01 No contribution shall be required from a Participant in respect of benefits payable under this Supplemental Plan.
>
> 4.02 The benefits payable under this Supplemental Plan shall, unless decided otherwise by Avenor Inc. at its entire discretion, be payable by the Corporation out of its operating funds as they become due and the Corporation shall be under no obligation whatsoever to pay contributions in advance to fund such benefits.
>
> 4.03 Notwithstanding Subsection 4.02, the Corporation will arrange for the payment of benefits provided under the Supplemental Plan to be secured through a letter of credit from a financial institution.
>
> **13.08 INTERPRETATION**
>
> a) This provision of this Supplemental Plan shall be interpreted in accordance with the laws of the Province of Quebec and shall be binding upon and enure to the benefit of the Corporation and its successors and assigns.
>
> b) Headings wherever used herein are for reference purposes only, and do not limit or extend the meaning of any of the provisions of this Supplemental Plan.

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8 Exhibit R-3.
9 Exhibit R-4.

SECTION 14- ADMINISTRATION

14.01 The Corporation shall decide on all matters relating to the interpretation, administration and application of this Supplemental Plan, consistently with the text of the Supplemental Plan.

14.02 To facilitate any action required to be taken by the Corporation under the Supplemental Plan, the Board of Directors of the Corporation may, at its discretion, delegate the responsibility for administration of the Supplemental Plan to any person(s) appointed specifically for this purpose to act on behalf of the Corporation.

SECTION 15- FUTURE OF THE PLAN

15.01 Notwithstanding anything to the contrary herein, the Corporation reserves the right to make amendments to this Supplemental Plan. Any such amendment shall be communicated in writing by the Corporation to the Participants indicating the effective date of such amendment which, subject to Subsection 15.02 below, shall not precede the date that such communication is deemed to have been received by the Participants pursuant to Subsection 13.07 hereunder. Furthermore, the Corporation will not have the right to make such amendment only in respect of one or more Participants but such amendment shall have to be made in respect of all Participants, excluding those Participants who have already commenced to receive benefits hereunder.

15.02 When an amendment is made to this Supplemental Plan pursuant to Subsection 15.01 above as a result of a corresponding amendment to the Registered Plan, such amendment shall take effect as of the same effective date as applicable in respect of the corresponding amendment to the Registered Plan.

15.03 No amendment made to this Supplemental Plan by the Corporation pursuant to this Section 15 can have the effect of reducing the amount or value of the benefits accrued by the Participants under this Supplemental Plan prior to the effective date of such amendment.

(Emphasis added)

THE LETTER OF CREDIT

[20] As appears from this section 4.02, BPPC or BCFPI had the obligation to pay the benefits under the SERPs out of their operating funds, as the benefits became due. There were no contributions by the participants (section 4.01) and BPPC or BCFPI were under no obligation to pay contributions in advance to fund the benefits (section 4.02).

[21] Pursuant to section 4.03, BPPC or BCFPI were required, however, to establish a trust to hold documentary credits or letters of guarantee or investments to secure the payment of the benefits under the SERPs to the members.

[22] On August 14, 1996, BPPC entered into the Trust Agreement with Montreal Trust Company ("MTC") so that MTC would hold a letter of credit (initially in the amount of $30,000,000) to secure the payment of the benefits under the SERPs[10].

[23] The Board of Directors' resolution approving the Trust Agreement referred to "an amount sufficient to cover the current level of liabilities of the Corporation under the SERPs" and to the fact that the letter of guarantee would be drawable "in the event the Corporation does not meet payment obligations to participants under the SERPs"[11].

[24] The Trust Agreement provided that MTC was to hold the letter of credit until such time as the Corporation defaulted on the payment of the benefits under the SERPs. MTC was then to call the letter of credit, hold the proceeds in trust for all eligible members of the SERPs, and distribute the proceeds to them to the extent that they were sufficient for that purpose.

[25] MTC was bound by the terms of the SERPs and required to perform such duties imposed upon it pursuant to the Trust Agreement and each related SERPs. MTC was entitled to act on the instructions or written directions of the Corporation.

[26] Effective January 1, 2003, RTC replaced MTC as trustee of the Trust Agreement holding the letter of credit[12].

[27] The letter of credit was renewed annually at various face amounts determined by BCFPI until it was called for payment in May 2009, triggering the receipt by RTC of the amount of approximately $23,065,000[13].

[28] The rules of the Income Tax Act (Canada) (the "**ITA**"), applicable to "Retirement Compensation Arrangements", required RTC to then pay a refundable tax to the Canada Revenue Agency ("**CRA**") of 50% of the amount it received upon calling the letter of credit. In addition, the ITA requires that 50% of any income (interest, dividend or capital gain) realized by RTC on the assets held under the Trust Agreement be paid to the CRA as a refundable tax. These amounts will be refunded by the CRA after the end of each calendar year during which RTC pays SERPs benefits to the eligible SERPs members.

[29] The balance of the proceeds is presently held by RTC in 30-day Government of Canada Treasury Bills.

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10 Exhibit R-5.
11 Exhibit R-5.
12 Exhibit R-6.
13 Exhibit R-7.

THE CHANGES TO THE 2003 SERPS

[30] Since 2003, BCFPI issued three letters and notices to the members to advise them of purported changes to the SERPs that affected which members' benefits were secured by the letter of credit.

[31] On November 24, 2003, BCFPI first sent a letter to the then 38 active (i.e. not retired) SERPs members[14]. The last paragraph of the letter stated that only the benefits of retired SERPs members and only SERPs benefits accrued up to December 31, 2003 would be secured by a letter of credit from then on:

> "Please be advised that <u>SERP benefits for service from January 1st, 2004 for all Canadian operations will not be secured by way of a letter of credit</u>. DB SERP benefits for service up to December 31st, 2003 will continue to be secured that way for former BPPC employees working in Canada. For employees who have elected the DC plan, the DC SERP applicable to service from January 1st, 2003 is not secured by a letter of credit. This limitation of the use of a letter of credit does not affect the calculation of your total pension benefits."
>
> (Emphasis added)

[32] Even though some active members, including, for instance, Mr. Cayouette who testified at hearing, apparently disagreed with BCFPI position, none of them formally raised any kind of opposition to this letter.

[33] On May 27, 2005, BCFPI sent another notice to the then 33 active SERPs members to further clarify what had been said in the 2003 letter, namely that only the benefits of retired SERPs members and only SERPs benefits accrued up to December 31, 2003 would be secured by a letter of credit[15]:

> "**Notice to former BPPC employees eligible for Supplementary Pension benefits**
>
> The purpose of this notice is to clarify the status of the letter of credit that pertains to the members of the Bowater Canadian Forest Products Inc. Supplemental Retirement Benefit Plan for Grade 27 and Under, the Supplemental Retirement Benefit Plan for Grade 28 and Over and the Senior Executive Retirement Plan, which provide benefits to former employees of Bowater Pulp and Paper Canada Inc.
>
> (…)
>
> During this year's annual renewal process for the letter of credit, the Company reviewed the methodology applied to the calculation of the letter of credit in light of the language quoted above. <u>The Company determined that the letter of credit will be calculated based on the following methodology</u>:

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[14] Exhibit R-8.
[15] Exhibit R-9.

- The letter of credit will secure the payment of benefits to retirees and survivors who have started to receive their pension under the plans; it will not secure in advance the payment of benefits that may become payable sometime in the future to active employees or to terminated employees who are not yet in pay status (terminated vested participants).

- As you have been previously notified in the letter describing the pension re-design, the letter of credit will only secure benefits attributable to service accrued through December 31, 2003, or through December 31, 2002 for members who have elected to participate in the DC plan effective January 1, 2003.

- Further, the letter of credit will only secure the payment of benefits attributable to service that is accrued through December 31, 2003 or through December 31, 2002 for members who have elected to participate in the DC plan effective January 1, 2003, based upon the earnings determined as of December 31, 2003 and based on the early retirement provisions that would have applied if termination of employment or retirement had occurred on December 31, 2003 taking into account the maximum pension payable from the registered plan at pension commencement.

- The benefits to be secured by the letter of credit are to be calculated as though the plans were wound up and benefits settled on the valuation date for members in receipt of a pension on that date.

The Company is currently updating the letter of credit in accordance with the principles described above. The amount of the letter of credit will be recalculated on a periodic basis.

The calculations applicable to the letter of credit do not affect the calculation of your individual pension benefits. Your future retirement benefits will continue to be computed in accordance with the plan provisions, regardless of the amount of, or method of calculation applicable to, the letter of credit. If you should have any questions, please contact Georges Cabana at […]."

(Emphasis added)

[34] On May 30, 2005, a similar letter[16] was sent to seven SERPs members who were deferred vested members on that date. It stated:

"**Notice to former BPPC employees eligible for Supplementary Pension benefits**

The purpose of this notice is to clarify the status of the letter of credit that pertains to the members of the Bowater Canadian Forest Products Inc. Supplemental Retirement Benefit Plan for Grade 27 and Under, the Supplemental Retirement Benefit Plan for Grade 28 and Over and the Senior

[16] Exhibit R-10.

> Executive Retirement Plan, which provide benefits to former employees of Bowater Pulp and Paper Canada Inc. (BPPC).
>
> (…)
>
> During this year's annual renewal process for the letter of credit, the Company reviewed the methodology applied to the calculation of the letter of credit in light of the language quoted above. <u>The Company has determined that the letter of credit will secure the payment of benefits to retirees and survivors who have started to receive their pension under the plans. It will not secure in advance the payment of benefits that may become payable sometime in the future to active employees or to terminated employees who are not yet in pay status (terminated vested participants).</u> The benefits to be secured by the letter of credit are to be calculated as though the plans were wound up and benefits settled on the valuation date for members in receipt of a pension on that date.
>
> The Company is currently updating the letter of credit in accordance with the principles described above. The amount of the letter of credit will be recalculated on a periodic basis.
>
> The calculations applicable to the letter of credit do not affect the calculation of your individual pension benefits. Your future retirement benefits will continue to be computed in accordance with the plan provisions, regardless of the amount of, or method of calculation applicable to, the letter of credit. If you should have any questions, please contact Georges Cabana at […]."
>
> (Emphasis added)

[35] None of the active or deferred vested members apparently reacted to the letters or notices sent in 2005. Even if Mr. Cayouette testified that he did not remember reading the e-mail that was then allegedly sent to him as active employee, no one seriously disputes that these letters and notices were in fact duly sent by BCFPI. The Contestation filed by the members listed in Schedules D and E indeed appeared to accept the existence of these letters and notices. On the balance of probabilities, the Court finds that they were remitted to the members concerned by BCFPI.

[36] Subsequently, around September 2005, BCFPI requested that restatements of the SERPs be prepared effective as of January 1, 2003, including amendments that would reflect the content of the 2003 letters and the 2005 letters (the "**2003 Draft Restatement**").

[37] The 2003 Draft Restatement thus amended sections 1.02 and 4.03 of the BCFPI SERPs as follows[17]:

> "1.02 The restated text of this Supplemental Plan is effective as of January 1, 2003 and as of such date replaces and cancels the application of any prior plan or agreement, whether oral or written, between a participant therein and the Corporation and providing for supplemental retirement benefits to be paid to such

[17] Exhibit R-11.

> participant in addition to those payable from any registered pension plan of the Corporation. However, this Supplemental Plan shall not apply to or otherwise modify benefits payable or the terms and conditions for payment of such benefits to any former employee who has retired from or otherwise terminated his employment with Bowater Canadian Forest Products Inc. or its predecessors or their affiliates prior to the effective date of this Supplemental Plan.
>
> 4.03 Notwithstanding Subsection 4.02, the Corporation will arrange for the payment of benefits provided under the Supplemental Plan to be secured through a letter of credit from a financial institution. <u>For greater certainty, such letter of credit shall not apply during active employment with the Corporation and shall only apply from pension commencement</u>. Furthermore, the letter of credit shall <u>only apply in respect of benefits provided under this Supplemental Plan for Credited Service prior to January 1, 2004</u>, based on Final Average Earnings and Average Incentive Target up to December 31, 2003 and taking into account the early retirement reduction that would have applied if employment had terminated or retirement had occurred on December 31, 2003 but taking into account the maximum pension applicable under the Registered Plan at pension commencement. The letter of credit shall not apply either in respect of Participants subject to US tax as a result of being a US citizen, a US resident or being employed by Bowater Inc. or any affiliated company in the US, unless they have elected in writing to be covered by the letter of credit."
>
> (Emphasis added)

[38] However, Petitioners have not been able to locate a resolution of BCFPI Board of Directors amending sections 1.02 and 4.03 of the 2003 SERPs as they read in this 2003 Draft Restatement, nor one resolution adopting the 2003 Draft Restatement.

[39] Later on, in July 2009, an officer of BCFPI executed a further restatement of the SERPs, this time "effective January 1, 2003, including amendments up to January 1, 2009 inclusive" (the "**2009 Restatement**")[18]. In that document, the wording of section 4.03 was similar to that of the 2003 Draft Restatement. Yet, the BCFPI Board of Directors did not adopt either a resolution to give effect to this 2009 Restatement.

THE ACTUARIAL VALUATIONS

[40] That said, at various times during the relevant years, BCFPI obtained from Mercer actuarial valuations of its liabilities pursuant to the SERPs for the purpose of establishing the face amount of the letter of credit held by RTC.

[41] Actuarial valuations as of June 2005 and March 2008 were so performed, in compliance with the 2003 Draft Restatement and the letters sent in 2003 and 2005 to the SERPs members[19].

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18 Exhibit R-13.

19 Exhibits R-15 and R-16.

[42] Both the June 2005 and the March 2008 actuarial valuations of Mercer disclosed the following information:

> "To Bowater Canadian Forest Products Inc.
>
> At your request, we have conducted an actuarial valuation of the liabilities as at (…) in respect of certain Supplemental Retirement Plans of Bowater Canadian Forest Products Inc. The purpose of this valuation is to determine the face amount of the letter of credit as of such date. We are pleased to present the results of the valuation.
>
> (…)
>
> Based on the terms of the Supplemental Retirement Plans and on notices provided to active and vested terminated members, <u>the letter of credit covers pensions in payment relative to benefits for service up to December 31, 2003</u> (December 31, 2002 for any member who elected to participate in the DC plan effective January 1, 2003), based on earnings up to December 31, 2003 taking into account the early retirement reductions that would have applied if termination or retirement had occurred on December 31, 2003 and also taking into account the maximum pension applicable at pension commencement.
>
> In accordance with the RCA Trust Agreement between Avenor Inc. and Montreal Trust Company, the amount of the letter of credit shall be equivalent to Bowater Canadian Forest Products Inc.'s determination of its liabilities to beneficiaries. Such determination shall be based on actuarial valuations which the Trustee shall be under no obligation to review or assess."
>
> (Emphasis added)

[43] In both valuations, Mercer also indicated that "liabilities correspond only to liabilities for pensions in payment, consistent with the notices provided (by BCFPI) to affected members".

ANALYSIS

[44] In the end, this Judgment deals with yet another unfortunate consequence of the insolvency of the Petitioners and their filing for Court protection under the *CCAA*. Simply put, BCFPI does not have the financial resources to continue funding the payment of the SERPs benefits to eligible members. Only the letter of credit remains for those entitled to its proceeds.

[45] And still, even if the entitlement is limited to those members identified by the Petitioners in the Motion, according to Schedule F and Mercer's projections[20], there will not be enough to cover everyone for everything they are entitled to under the SERPs. The available funds are expected to run out sometime in January 2026.

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[20] Exhibit R-31.

[46] Be that as it may, the Court must decide the pending issues based upon the interpretation of the relevant sections of the SERPs and the behaviour of the parties in relation thereto.

[47] With due respect to the arguments raised by the members listed in Schedules D and E, the Court considers that the Petitioners' position is correct under the circumstances. Only the members listed on Schedules A, B and C are entitled to share in the proceeds of the letter of credit.

[48] For what it is worth, this does not negate to the members listed in Schedules D and E their entitlement to the SERPs benefits and their claims in that regard in the context of the restructuring. This Judgment is only concerned with the proceeds of the letter of credit securing, in part, the benefits payable under the SERPs.

[49] With respect to the amendments sought by the Petitioners to the Trust Agreement, however, the Court is of the view that it does not have the authority to impose such upon the interested parties in the absence of any consensus on the nature, extent and wording of the provisions at issue.

[50] The Court's explanations follow.

1) THE MEMBERS ENTITLED TO SHARE IN THE LETTER OF CREDIT

A) The Canadian Members Who Retired Before December 31, 2003

[51] 48 members of the SERPs are Canadian who retired before December 31, 2003. They include the 44 retirees and four beneficiaries listed in Schedule A to the Motion.

[52] No one disputes that the benefits of these members are covered by the letter of credit. The Court agrees.

[53] The language of the 2003 SERPs provides that the payment of their benefits is to be secured by the letter of credit. They were never advised that their benefits, in whole or in part, were not covered by the letter of credit. The amendments to the 2003 SERPs reflected in the 2003 Draft Restatement and the 2009 Restatement provide that their benefits are covered by the letter of credit. The actuarial valuations prepared by Mercer in 2005 and 2008 included their benefits in the calculation of the amount of the letter of credit.

B) The Canadian Members Who Retired After December 31, 2003

[54] Six members of the SERPs are Canadian who retired after December 31, 2003 and before May 26, 2009. They are listed in Schedule B to the Motion.

[55] Similarly to the Canadian members who retired before December 31, 2003, no one disputes that the benefits of these members are covered by the letter of credit, as long as they are limited to the benefits accrued up to December 31, 2003. Again, the Court agrees with that assertion.

[56] Although the language of the 2003 SERPs provides that the payment of benefits is to be secured by a letter of credit, BCFPI's intention was clearly that only SERPs benefits accrued up to December 31, 2003, would be secured by the letter of credit.

[57] Letters were sent on November 24, 2003 to the SERPs members who were active as of that date in order to advise them that only the benefits of retired SERPs members and only SERPs benefits accrued up to December 31, 2003, would be secured by the letter of credit. This change was also reflected in the 2003 Draft Restatement and the 2009 Restatement.

[58] In addition, the actuarial valuations prepared by Mercer in 2005 and 2008 limited the liabilities of the SERPs towards the members who retired after December 31, 2003 to the value of the benefits that accrued up to December 31, 2003, such that the face value of the letter of credit was based on the pre-December 31, 2003 earnings and service.

[59] The Court also agrees with Petitioners that Mr. Donald Campbell should be included in that group. He was on salary continuance on April 17, 2009 when the Initial Order was issued. As a result of the Initial Order, his salary continuance was discontinued and his active employment was terminated as of April 15, 2009. Thereafter, Mr. Campbell elected to retire on May 1, 2009.

[60] It is appropriate to treat him as a Canadian resident member who retired after December 31, 2003 but before May 26, 2009, as opposed to an active employee.

C) The U.S. Members

[61] There were, at the date of the Motion, three members of the SERPs who were U.S. citizens: one retiree who is a Canadian resident (Mr. Warren Woodworth), one beneficiary who is a U.S. resident (Mrs. Alyce Flenniken), and Mr. Jerry Soderberg. All three members of this group retired prior to December 31, 2003. They are listed in Schedule C to the Motion.

[62] The SERPs liabilities to Mrs. Flenniken and Mr. Woodworth are covered by the letter of credit. The language of the 2003 SERPs provides that the benefits of all members, including the U.S. members, are covered by the letter of credit and these members have not received any notice or letter from BCFPI whereby they were advised that their benefits, in whole or in part, were not covered by the letter of credit.

[63] True, there were, however, negative tax consequences in the United States if the benefits of a U.S. member were secured by a letter of credit. The tax rules of the Internal Revenue Code (the "**IRC**") provided that securing SERPs benefits of SERPs members who were taxpayers of the United States resulted in the obligation for such SERPs members to include in the income for the year during which such security was granted the value of the benefits so secured.

[64] For that reason, in the 2003 Draft Restatement and in the 2009 Restatement, it was indicated that the liabilities of the SERPs to the members of this group were not secured by the letter of credit unless they elected in writing to be covered by the letter of credit.

[65] Accordingly, the value of the SERPs liabilities to Mrs. Flenniken and Mr. Woodworth were not included in the calculation of the face value of the letter of credit held by RTC in 2005 or 2008. The 2008 actuarial valuation indeed stated:

> "For tax reasons U.S. taxpayers are not covered by the letter of credit unless they elect to be covered. We understand that U.S. taxpayers have been notified by Bowater Canadian Forest Products Inc. to this effect."

[66] Nevertheless, the Petitioners do not have any indication in their files that these U.S. members were at any time invited to make such an election. Therefore, their liabilities should have been included in the valuations.

[67] As for Mr. Soderberg, also a citizen and resident of the United States, on August 4, 1995, he was given confirmation, through two letters, of changes to his compensation package which included participation in the 1993 SERP[21]. On January 6, 1997, he was advised that his SERPs benefits were secured by a letter of credit held by MTC[22]. On February 25, 1997, he was further advised that although he was and would continue to be a participant of the Avenor America Inc. pension plan (a U.S. pension plan), he would remain entitled to the pension benefits set forth in the letter of August 4, 1995 describing his pension entitlements[23].

[68] Still on January 6, 1997, he was granted a Change of Control Agreement by Avenor. During August 1998, there was a change of control, such that the agreement was therefore triggered. On September 3, 1998, Mr. Soderberg was informed of the computation of his benefits pursuant to this Change of Control Agreement and, as a result, fully released and discharged Avenor Inc. and BPPC from all further obligations. He retired on October 1, 1998 and on October 2, 1998[24], he was advised that he would start to receive a pension from the U.S. pension plan and that his SERPs benefits would be assumed by Bowater Inc. and paid from the U.S.

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[21] Exhibit R-24.
[22] Exhibit R-25.
[23] Exhibit R-26.
[24] Exhibit R-28.

[69] Yet, the value of the SERPs liabilities to Mr. Soderberg was not included in the calculation of the face value of the letter of credit held by RTC in 2005 or 2008 because he did not and does not participate in a Canadian registered pension plan.

[70] Despite this, based on the above-mentioned letters sent to Mr. Soderberg, the Court agrees with Petitioners that he should also be entitled to continue to receive, from May 1, 2009, his monthly SERPs payments from the proceeds of the letter of credit.

D) The Active Employees and The Deferred Vested Members

[71] On May 26, 2009, eleven members of the SERPs were still active employees and six were deferred vested members. They are listed in Schedules D and E to the Motion.

[72] Petitioners submit that the benefits of the active employees and the deferred vested members should not be covered by the letter of credit for four main reasons:

- On a proper interpretation, the relevant sections of the SERPs do not allow for it;
- The active employees and the deferred vested members received letters dated November 24, 2003, May 27, 2005, and May 30, 2005 which specified that the letter of credit did not secure the payment of benefits that may become payable some time in the future to active employees or deferred employees;
- The 2003 Draft Restatement and the 2009 Restatement both provided that the letter of credit did not secure benefits during active employment with the corporation or to deferred vested members and shall only apply from pension commencement;
- The actuarial valuations prepared by Mercer in 2005 and 2008 did not include the benefits of the active members and of the deferred vested members.

[73] The Court agrees that the active employees listed on Schedule D and the deferred vested members listed on Schedule E are not entitled to receive monthly SERPs payments from the proceeds of the letter of credit.

[74] First, it is a reasonable interpretation of the relevant provisions of the SERPs to suggest that the letter of credit covers benefits in payment to the retirees and their beneficiaries, and not the potential future payments to active employees and deferred vested employees.

[75] The SERPs are contracts of successive performance. Subsection 4.02 provides that BCFPI shall pay the benefits payable thereunder as they become due.

[76] Benefits payable under the SERPs are benefits payable on a monthly basis pursuant to Sections 5 to 11, i.e. on Normal Retirement Date (age 65), Early Retirement

Date (age 55), postponed retirement date (after age 65), disability date, death or the date of termination of employment. No benefits are due nor become due before the earliest of such dates.

[77] BCFPI's undertaking pursuant to Subsection 4.03 can be interpreted as securing the payment of the benefits provided by the SERPs, not the benefits payable in se or per se. Accordingly, only benefits that are in payment are secured by the letter of credit.

[78] The SERPs provide in Subsection 13.08 that their provisions shall be interpreted in accordance with the laws of the Province of Quebec. The relationship between a SERP Participant and BCFPI is contractual and the relevant rules on interpretation are set out in Articles 1425 to 1434 *CCQ*.

[79] Pursuant to these rules of interpretation, Subsections 4.02 and 4.03 of the SERPs should not be construed in a vacuum but in relation to each other and other provisions of the SERPs (Article 1427 *CCQ*).

[80] Second, under the SERPs, it was for BCFPI to decide on all matters relating to the (i) interpretation, (ii) administration, and (iii) application of the plans.

[81] In the exercise of these powers, BCFPI issued the letters dated November 24, 2003 (Exhibit R-8), May 27, 2005 (Exhibit R-9) and May 30, 2005 (Exhibit R-10).

[82] The Court agrees that BCFPI's decision to only secure benefits in payment and not benefits under accrual was a reasonable decision reached pursuant to Subsection 14.01.

[83] When such decisions are reasonable and reached without consideration of reasons or motives that are outside of the scope of the discretion granted to the "decision-making person", the Courts will not lightly intervene in the "decision-making" process[25].

[84] As can be seen from the language of the 2003 and 2005 letters, there were reasonable reasons for BCFPI to reach such decisions. In *James Robert Marchant* v. *The Royal Trust Company* and *Bowater Pulp and Paper Canada Inc*.[26], the Court upheld the administrator's decision to deny an enhanced benefit since the decision was reasonable and not taken in bad faith.

[85] Third, even if the letters and notices sent in 2003 and 2005 were viewed as amendments to the SERPs rather than interpretation, administration or application of the SERPs, they were nevertheless valid amendments pursuant to Subsection 15.01.

[86] This provision imposes three conditions to the validity of an amendment:

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[25] See *Neville* v. *Wynne*, 2005 BCSC 483, confirmed 2006 BCCA 460, and *Patrick Communications Inc.* v. *Telus*, 2006 BCSC 854, confirmed 2007 BCCA 200.

[26] (1999), 26 C.C.P.B. 126, (S.C., 1999-09-30), SOQUIJ AZ-99026555.

(1) The amendment must be communicated in writing by BCFPI to the Participants;

(2) The communication must indicate the effective date of the amendment which must not precede the date that the communication is deemed to have been received by the Participants; and

(3) The amendment must be made in respect of all Participants, excluding those who have already commenced to receive benefits under the SERPs.

[87] These conditions were met here. The letters were communicated in writing by BCFPI to the Participants in accordance with the first condition. The first letter was dated November 24, 2003 and came into effect on January 1, 2004. The second letters were dated May 27 and 30, 2005 and came into effect immediately. Therefore, the three letters met the second condition. Finally, the amendment affected all active employees and deferred vested members, as required by the third condition.

[88] That is not all.

[89] The validity of the letters was never challenged by any active employee or deferred vested employee before the current proceedings. This is quite telling. In matters of contractual interpretation, Article 1426 *CCQ* states that the interpretation given by the parties and their behaviour in that regard are factors to be taken into account.

[90] In comparison, the subsequent behaviour of both BCFPI and Mercer was in strict compliance with such changes.

[91] The mentions appearing in the 2003 Draft Restatement and 2009 Restatement cited before show clearly that it was either BCFPI's interpretation, administration or application of the SERPs that the letter of credit guaranteed only the benefits then in payment to the retirees or their beneficiaries or, at the very least, its definite intention to amend the SERPs along those lines.

[92] It is true that BCFPI has not been able to locate a resolution of its Board of Directors amending Subsections 1.02 and 4.03 of the SERPs as they read in the 2003 Draft Restatement, nor adopting the 2003 Draft Restatement. It is also true that the Board of Directors did not adopt a resolution to give effect to the 2009 Restatement.

[93] Nevertheless, this is not fatal to the validity of BCFPI's decision respecting the interpretation, administration and application of the plans or the amendments brought about by the 2003 and 2005 letters.

[94] The active employees and the deferred vested employees who have contested the Motion allege that a resolution of the Board of Directors was required to modify the SERPs or to authorize officers to modify the SERPs.

[95] However, they have not pointed to any provision of BCFPI's articles or by-laws that would require such a resolution for such an amendment. Moreover, nothing in the *Canada Business Corporations Act* ("***CBCA***") requires a board resolution in such a case.

[96] At worst, the active employees and deferred vested employees can argue that the delegation to Mr. Cabana, the V.P. Human Resources & Public Affairs, Canadian Operations of BCFPI who signed the letters at issue, was not in accordance with Subsection 14.02 of the SERPs.

[97] If that is the argument, there has been subsequent ratification by BCFPI, whether through the employer certifications referred to in the Mercer valuations and executed by another officer, or through the provision of a letter of credit that was calculated without taking into account the benefits that would have eventually become due to the active employees and the deferred vested employees.

[98] In addition, Section 16(3) of the *CBCA* provides a safe harbour as follows:

> "(3) Rights preserved – No act of a corporation, including any transfer of property to or by a corporation, is invalid by reason only that the act or transfer is contrary to its articles or this Act."

[99] Lastly, on that point, Maurice and Paul Martel are of the opinion that the co-contracting party ("*le tiers*") cannot attack the contract by invoking internal corporate irregularities such as the lack of appropriate authorization[27]:

> **"***Donc, lorsqu'une irrégularité de régie interne entache une transaction, elle ne peut être invoquée par le tiers pour faire annuler cette transaction. Seule la compagnie ou un de ses actionnaires pourrait l'invoquer. Quant à la compagnie, une telle démarche est vouée à l'échec dès le départ si elle veut l'entreprendre pour faire annuler la transaction, car le tiers est protégé par la règle de l'indoor management. Reste l'actionnaire: il ne pourrait pas faire annuler la transaction, car la règle de l'indoor management joue ici encore en faveur du tiers. D'ailleurs, il n'est même pas sûr que l'actionnaire jouisse d'un tel recours, surtout si l'irrégularité a été ratifiée par la majorité des actionnaires.*"

[100] In closing, from a mere practical standpoint, one could add that pursuant to the Mercer actuarial valuations, the amount of the letter of credit was based on the assumption that only retirees and their beneficiaries were covered by the letter of credit, with the result that funds have not been put aside for the active employees and the deferred vested employees. Any deficit that already exists in terms of the coverage of the benefits payable to retirees would therefore be increased if they were included.

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[27] Maurice MARTEL et Paul MARTEL, *La Compagnie au Québec: les aspects juridiques,* v. 1, Montreal: Wilson & Lafleur / Martel ltée, 2010, paragraph 26-20.

[101] Moreover, neither the calculation of the SERPs benefits of the active employees and the deferred vested employees, nor the way in which the active employees and the deferred vested employees would benefit from the letter of credit, is clear. In fact, both would create problems because of the number of unknown assumptions that would likely influence the calculations of any benefits.

[102] The Court will therefore limit the SERPs members' entitlement to the proceeds of the letter of credit to the members listed in Schedules A, B and C to the Motion. As requested by the Petitioners, this conclusion will be binding upon all SERPs members. The Court is satisfied that the Motion, be it in its original or amended forms, has been duly communicated to the Service List and to the attorneys who have appeared on behalf of many of the members, while being at the same time always sent by registered mail to all SERPs members and posted on the Monitor's website.

[103] That said, there are, in principle, three ways in which the proceeds of the letter of credit can be distributed to the members entitled to share in those:

a) RTC can continue to make monthly payments to the members entitled to share in the proceeds of the letter of credit until the funds are exhausted. By Judgment rendered July 2, 2010, the Court, with the consent of everyone, has already ordered RTC to resume the monthly payments to the members listed in Schedules A, B and C to the Motion for all outstanding arrears payable since May 1, 2009;

b) RTC can distribute the balance of the proceeds on a pro rata basis based on the value of each member's benefits as at the date of this Judgment; or

c) RTC can distribute the balance of the proceeds on a pro rata basis based on the value of each member's benefits as at May 26, 2009.

[104] The Court agrees with Petitioners that the first approach is to be preferred for the time being. It is fairer to the members entitled to receive monthly SERPs payments from the proceeds of the letter of credit. It is, in fact, in accordance with the approach already followed by the Court in its Judgment of July 2, 2010.

[105] Conversely, the second and third approaches would likely require an amendment to the SERPs and the Trust Agreement in order to pay lump sums, which creates a problem under the circumstances, as will be discussed below.

[106] Since there is no real debate on the entitlement of the members listed in Schedules A, B and C to receive their monthly SERPs payments from the proceeds of the letter of credit, and in view of the advanced age of many of these members, it is appropriate to order the provisional execution of this Judgment notwithstanding appeal.

2. AMENDMENTS TO THE TRUST AGREEMENT

[107] In the Motion, BCFPI asks the Court to also authorize it to amend the Trust Agreement entered into with RTC, notably to dissociate itself from all of its obligations under the Trust Agreement.

[108] There is no provision in the Trust Agreement dealing with amendments and the interested parties, including BCFPI, RTC or, for that matter, the members listed in Schedules A, B and C to the Motion, do not agree on the nature, extent or wording of the amendments sought.

[109] Under these circumstances, the Court considers that the Trust Agreement entered into between BCFPI and RTC cannot be amended and that BCFPI cannot ask the Court to modify it. This negotiation belongs to the parties themselves. It is not for the Court to substitute itself to this process.

[110] It is inappropriate for a Court to attempt to draw up a contract for the parties when these parties do not agree to modify its contractual terms. Contracts represent a law which private parties have agreed applies to them and they normally cannot be varied by the Courts. This remains true as well in the context of a *CCAA* restructuring[28].

[111] Without RTC's consent, BCFPI cannot have the Trust Agreement amended to remove all of its rights and obligations and give those rights and obligations to a committee of beneficiaries.

[112] For the time being, the Trust Agreement entered into between BCFPI and RTC is still in force and has not been terminated.

[113] Although BCFPI contemplates terminating the SERPs to replace them with new SERPs that are described in section 6.9 of the Plan of Arrangement[29], and argues that the termination of the SERPs entails the termination of the Trust Agreement, this Plan of Arrangement is yet to be voted upon and sanctioned by the Court.

[114] Indeed, based on the representations made at hearing, it appears that the interested parties do not even agree on the impact of the potential termination of the SERPs upon the Trust Agreement.

[115] This issue, if it ever arises, will have to be dealt with in due course. For the purposes of this Judgment, it is not necessary to decide this question and rule upon the potential consequences that may follow from any answer.

[116] For now, it will suffice to state that RTC will continue the monthly payments of SERPs benefits from the proceeds of the letter of credit in conformity with the terms of

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28 *Allarco Entertainment Inc. (Re)*, 2009 CarswellAlta 1458 (Alta. Q.B.).
29 Exhibit R-32.

this Judgment up until the earlier of the date on which the Trust Agreement is terminated or a further order of the Court.

[117] That said, in its contestation to the amendments sought by the Petitioners to the Trust Agreement, RTC itself seeks declarations that the RCA Plan Trust Fund were properly invested in 30-day Government of Canada Treasury Bills and that it shall not be liable for any damage or complaint relating to these investments.

[118] These declarations are not necessary. The provisions of the Trust Agreement govern the rights and obligations of the interested parties. Short of any difficulties or disagreements that no one alluded to, it is not for the Court to give advanced rulings on potential future disputes.

[119] RTC also seeks declarations that it shall not be liable for any delays caused by the filing of the Motion, in a context where no one appears to raise any issue in that regard. This declaration is again unnecessary.

[120] Finally, RTC wants a declaration that it cannot be held liable for any consequence of its reliance upon the decision to be rendered by the Court on the Motion. The Court's conclusions are, of course, binding upon those that are subject to their terms. They are quite sufficient as they stand for any concerned parties to conduct themselves accordingly. It is not the role of the Court to go any further than that.

FOR THESE REASONS, THE COURT:

[1] **GRANTS, BUT IN PART ONLY,** the Re-Amended Motion for Directions on the Identity of the Persons Whose Benefits Under the Bowater Supplemental Executive Retirement Plans Were Secured by a Letter of Credit (the "**Motion**");

[2] **EXEMPTS**, if applicable, the Petitioners from any further service of the Motion and from any further notice or delay of presentation;

[3] **DECLARES** that the service of the Motion by registered mail or mail to the SERPs members, who are not represented by attorneys, is valid;

[4] **DECLARES** that this Judgment is binding on all members of the SERPs and their beneficiaries;

[5] **DECLARES** that only the following members of the SERPs benefit from the letter of credit (Exhibit R-7) and are entitled to receive, from May 1, 2009, monthly SERPs payments from the proceeds of the letter of credit (Exhibit R-7) held by The Royal Trust Company ("RTC"):

a) The Canadian resident members of the SERPs who retired before December 31, 2003 (listed in Schedule A to the Motion);

b) The Canadian resident members of the SERPs who retired after December 31, 2003 but before May 26, 2009, including Mr. Donald Campbell (listed in Schedule B to the Motion), but only on the value of their SERPs benefits accrued up to December 31, 2003; and

c) The U.S. members of the SERPs, including Mr. Jerry Soderberg (listed in Schedule C to the Motion);

[6] **DECLARES** that the Active Employees and the Deferred Vested Employees whose names are listed in Schedules D and E to the Motion are not entitled to have the value of their accrued benefits under the SERPs secured by the amount held by RTC and that no person other than the persons referred to in the preceding paragraph is entitled to have the value of his or her accrued benefits under the SERPs secured by the amount held by the RTC, nor to receive any monthly SERPs payment from the proceeds of the letter of credit (Exhibit R-7) held by RTC;

[7] **ORDERS** RTC, up until the earlier of the date on which the Trust Agreement (Exhibit R-5) is terminated or a further order of the Court, to continue the monthly SERPs payments, without interest, from the proceeds of the letter of credit (Exhibit R-7), in conformity with the terms of this Judgment;

[8] **DECLARES** that, for the purpose of the Trust Agreement (Exhibit R-5), RTC acting in accordance with this Judgment shall be construed and have the same effect as if RTC relied and acted upon the written instructions of Bowater Canadian Forest Products Inc;

[9] **ORDERS** the provisional execution of this Judgment notwithstanding any appeal and without the necessity of furnishing any security;

[10] **WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C.

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Dates of hearing: August 30 and 31, 2010

SCHEDULE "A"

ABITIBI PETITIONERS

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

SCHEDULE "B"

BOWATER PETITIONERS

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

SCHEDULE "C"

18.6 CCAA PETITIONERS

1. ABITIBIBOWATER INC.
2. ABITIBIBOWATER US HOLDING 1 CORP.
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

TAB 10

2011 QCCS 276
Cour supérieure du Québec

Boutique Jacob inc., Re

2011 CarswellQue 709, 2011 QCCS 276, 198 A.C.W.S. (3d) 271, 74 C.B.R. (5th) 103, J.E. 2011-327, EYB 2011-185747

In the Matter of the Plan of Compromise or Arrangement of : Boutique Jacob inc., 9101-2096 Québec inc. et 9192-4126 Québec inc. (Petitioners) c. PricewaterHouseCoopers inc. (Monitor) et Austeville Properties Ltd. (Petitioner)

Martin Castonguay, J.C.S

Heard: 31 janvier 2011
Judgment: 2 février 2011
Docket: C.S. Montréal 500-11-039940-107

Counsel: Me Guy Martel, Me Danny Duy Vu pour Boutique Jacob inc.
Me Marc Duchesne pour Pricewaterhousecoopers inc.
Me Jonathan Warin pour Austeville Properties Inc.

Subject: Insolvency; Property

Classes d'abrègement connexes
Pour toutes les classes canadiennes d'abrègement pertinentes, reportez-vous au plus haut niveau de cause dans l'historique.

Note liminaire

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Divers

Débitrice exploitait plusieurs boutiques dans l'ouest canadien et louait un espace à bureau du locateur — En juillet 2008, les deux parties ont convenu de modifier les conditions du bail de façon à ce que la débitrice puisse mettre fin au bail avec un préavis de six mois — En 2010, de nouvelles modifications ont été apportées au bail en vertu desquelles cette option n'était plus offerte à la débitrice — À la fin de 2010, la débitrice a éprouvé de graves difficultés financières et une ordonnance initiale a été émise en vertu de la Loi sur les arrangements avec les créanciers des compagnies — Débitrice a fermé plusieurs boutiques dans l'ouest canadien et a réduit son personnel de gestion en conséquence — Débitrice a alors décidé de relocaliser le personnel demeurant en fonction à ses diverses boutiques et de résilier le bail — Locateur a déposé une requête demandant au tribunal d'ordonner que le bail ne soit pas résilié — Requête rejetée — Article 32 de la Loi prévoit que, pour décider s'il rend l'ordonnance, le tribunal devrait prendre en considération l'acquiescement du contrôleur au projet de résiliation, la question de savoir si la résiliation favoriserait la conclusion d'un arrangement viable et le risque que la résiliation puisse vraisemblablement causer de sérieuses difficultés financières à une partie au bail — En l'espèce, la preuve démontrait que le contrôleur était d'accord avec la décision de la débitrice de résilier le bail — Tribunal était d'avis que la décision de résilier le bail était une bonne décision d'un point de vue financier et favorisait la conclusion d'un arrangement viable — Tribunal était aussi d'avis que le locateur n'avait pas réussi à démontrer qu'il subirait de graves préjudices financiers s'il fallait que le tribunal refuse d'émettre l'ordonnance recherchée — Par conséquent, la requête du locateur devrait être rejetée.

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

Debtor operated many stores in western Canada and leased office space from lessor — In July 2008, both parties agreed to modify terms of lease so that debtor could terminate lease with six months' notice — In 2010, new modifications were brought to lease whereby that option was no longer available to debtor — In late 2010, debtor was experiencing serious financial difficulties and initial order was issued under Companies' Creditors Arrangement Act — Debtor closed many stores in western Canada and reduced its management staff accordingly — Debtor then decided to relocate its remaining staff at its various stores and to resiliate lease — Lessor brought motion seeking order that lease was not to be resiliated — Motion dismissed — Section 32 of Act provides that in deciding whether to make order sought by lessor, court should consider whether monitor approved proposed resiliation, whether resiliation would enhance prospects of viable arrangement and whether resiliation would likely cause significant financial hardship to party to agreement — Here, evidence showed that monitor agreed with debtor's decision to resiliate lease — Court was of view that decision to resiliate lease was good decision from financial point of view and enhanced prospects of viable arrangement — Court was also of view that lessor failed to show that it would suffer serious financial prejudice should court refuse to issue order sought — Therefore, lessor's motion should be dismissed.

Table des précédents

Cases considered by *Martin Castonguay, J.C.S.*:

Abitibibowater inc., Re (2009), 2009 CarswellQue 12167, 58 C.B.R. (5th) 1, 2009 CarswellQue 4937, 2009 QCCS 2188, [2009] R.J.Q. 1738 (Que. S.C.) — considered

Doman Industries Ltd., Re (2004), 45 B.L.R. (3d) 78, 29 B.C.L.R. (4th) 178, 2004 CarswellBC 1262, 2004 BCSC 733, 1 C.B.R. (5th) 7 (B.C. S.C.) — considered

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

PCI Chemicals Canada Inc., Re (2002), 2002 CarswellQue 831, [2002] R.J.Q. 1093 (Que. S.C.) — considered

T. Eaton Co., Re (1999), 14 C.B.R. (4th) 288, 1999 CarswellOnt 3542 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

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

Generally — referred to

s. 32 — considered

s. 32(4) — considered

REQUÊTE du locateur visant à obtenir l'annulation de la résiliation du bail par la compagnie débitrice.

***Martin Castonguay, J.C.S.*:**

1 Austeville Properties Ltd. (ci-après « Austeville »), demande au Tribunal d'annuler l'avis de résiliation que lui a transmis le 22 décembre 2010 Boutique Jacob inc. (ci-après « Jacob »), relatif à la location de locaux situés au 475, West Georgia Street, à Vancouver, Colombie-Britannique (ci-après les « Lieux Loués »).

2 Pour supporter sa demande, Austeville invoque principalement les faits particuliers entourant la signature des diverses ententes ayant eu cours, de même que cette résiliation lui occasionnerait une perte financière significative.

3 Jacob conteste cette demande en invoquant son droit explicite de résilier certains contrats, dans le cadre de sa réorganisation, le tout conformément à la *Loi sur les arrangements avec les créanciers des compagnies*[1] (ci-après la « Loi »).

4 Jacob avance également que Austeville n'a pas fait la démonstration que cette résiliation lui causera « de sérieuses difficultés financières ».

LES FAITS

5 Jacob, au début des années 2000, exploitait dans l'Ouest canadien (Manitoba, Alberta, Colombie-Britannique) quelque 18 points de vente.

6 Au fil des ans, expansion oblige, ce nombre de points de vente passe à 34 en 2010.

7 L'administration courante de ces commerces au détail nécessite une équipe de gestion constituée de cinq personnes. Ils occupent les Lieux Loués d'une superficie de 1 973 pieds carrés dans un immeuble comptant 98 000 pieds carrés.

8 La relation d'affaires entre les parties débute en novembre 2005, alors qu'elles signent un premier bail pour les Lieux Loués, sa durée étant du 1er février 2006 au 31 janvier 2009[2].

9 Le 30 juillet 2008, les parties conviennent de certaines modifications au bail, soit pour un terme de deux ans au taux de 23 $ le pied carré. Fait particulier, Jacob peut y mettre fin en tout temps, en signifiant à Austeville un préavis de six mois. La location s'étend du 1er février 2009 au 31 janvier 2011[3].

10 En mai 2010, les parties entament de nouvelles négociations qui résulteront en une entente que les parties désignent sous le vocable « Lease Modification and Extension »[4] .

11 Les principales modifications sont les suivantes :

a) Nouveau terme de cinq ans débutant le 1er octobre 2010;

b) Pour les mois d'octobre, novembre et décembre 2010, Jacob bénéficie d'une occupation gratuite;

c) Le taux par pied carré passe de 23 $ à 20 $;

d) Jacob abandonne la faculté de mettre fin au bail sur simple préavis de six mois.

12 Madame Hélène D'Amour (ci-après « D'Amour »), notaire de formation et directrice du secteur immobilier chez Jacob, relate que cette négociation s'est faite dans le cours normal des affaires, Jacob recherchant la meilleure entente financière possible.

13 D'Amour précise que la négociation et l'analyse des baux sont sa responsabilité, l'engagement formel, soit la signature de baux ou d'ententes, est l'oeuvre de l'unique administrateur de Jacob, M. Joseph Basmaji. D'ailleurs, le document constatant les modifications au bail est signé par celui-ci.

14 D'Amour, à l'époque de la négociation des modifications au bail des Lieux Loués, n'est pas informée des difficultés financières de Jacob.

15 D'Amour explique que depuis novembre 2010 et dans le cadre de sa réorganisation, Jacob a résilié, dans l'Ouest canadien, les baux de sept points de vente, tandis que six autres ont fait l'objet d'une entente particulière. Celle-ci prévoyant que le loyer payable est fonction des ventes réalisées par Jacob et que le locateur en cause peut mettre fin à l'entente à l'aide d'un préavis de 60 jours.

16 Selon D'Amour, la situation de ces six points de vente est temporaire, chacun y trouvant son compte. Jacob ne payant qu'en fonction des ventes et le locateur disposant d'un minimum de revenus, le temps de trouver un autre locataire.

17 Quoiqu'il en soit, en raison de la diminution des points de vente dans l'Ouest canadien, le personnel administratif passera de cinq à trois employés.

18 D'Amour est également très impliquée dans l'aspect immobilier de la restructuration de Jacob et elle a tôt fait de constater que les Lieux Loués étaient superflus dans les circonstances, les trois employés pouvant être relocalisés au sein de points de vente.

19 De là la décision de Jacob de résilier le bail quant aux Lieux Loués. Le Contrôleur a témoigné de son accord avec cette décision, il a d'ailleurs signé conjointement avec Jacob l'avis de résiliation transmis à Austeville[5].

20 Il s'agit là de l'essentiel de la preuve avancée par Jacob quant au bail la liant à Austeville.

21 Austeville n'a pas produit de témoin et s'en remet à l'affidavit signé par Monsieur Christopher Samis « Chief Financial Officier » d'Austeville.

22 Cet affidavit de deux paragraphes indique que les faits allégués à la Requête sont vrais.

23 Celle-ci, outre les faits entourant les diverses négociations entourant les baux ayant eu cours quant aux Lieux Loués et qui ne sont pas niés, avance que Jacob, en mai 2010, était déjà en mode restructuration et que c'est en toute connaissance de cause qu'elle a signé la Convention de Modification de bail lui accordant trois mois de loyers gratuits.

24 En fait, l'essentiel de son argumentaire se retrouve aux paragraphes 23 et 24 de sa Requête, que le Tribunal juge utile de reproduire :

> 23. Therefore, this Court should not allow Jacob, after having benefited from a free rent period, to resiliate the Lease that had been duly negociated at a time where Jacob was well aware that its situation was just as precarious as it was on November 18, 2010 when Jacob obtained the issuance of the initial order.
>
> 24. If the proposed resiliation is to take place, Austeville will suffer significant financial losses, notably in that it will not be able to collect rent in the amount of $334,962.79 ($184,146.67 owed as Basic Rent and an estimated $150,816.12 owed as Additional Rent (as these terms are defined in the Lease)).
>
> (nos soulignés)

25 La Requête, tout comme la contestation de Jacob, trouvent leur fondement dans l'article 32 de la Loi, lequel est ainsi libellé :

> Résiliation de contrats
>
> **32.**(1) Sous réserve des paragraphes (2) et (3), la compagnie débitrice peut — sur préavis donné en la forme et de la manière réglementaires aux autres parties au contrat et au contrôleur et après avoir obtenu l'acquiescement de celui-ci relativement au projet de résiliation — résilier tout contrat auquel elle est partie à la date à laquelle une procédure a été intentée sous le régime de la présente loi.
>
> Contestation
>
> **Dans les quinze jours suivant la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1), toute partie au contrat peut, sur préavis aux autres parties au contrat et au contrôleur, demander au tribunal d'ordonner que le contrat ne soit pas résilié.**
>
> Absence d'acquiescement du contrôleur
>
> **Si le contrôleur n'acquiesce pas au projet de résiliation, la compagnie peut, sur préavis aux autres parties au contrat et au contrôleur, demander au tribunal d'ordonner la résiliation du contrat.**

Facteurs à prendre en considération

Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) l'acquiescement du contrôleur au projet de résiliation, le cas échéant;

b) la question de savoir si la résiliation favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

c) le risque que la résiliation puisse vraisemblablement causer de sérieuses difficultés financières à une partie au contrat.

Résiliation

Le contrat est résilié :

a) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1), si aucune demande n'est présentée en vertu du paragraphe (2);

b) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1) ou à la date postérieure fixée par le tribunal, si ce dernier rejette la demande présentée en vertu du paragraphe (2);

c) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (3) ou à la date postérieure fixée par le tribunal, si ce dernier ordonne la résiliation du contrat en vertu de ce paragraphe.

Propriété intellectuelle

Si la compagnie a autorisé par contrat une personne à utiliser un droit de propriété intellectuelle, la résiliation n'empêche pas la personne de l'utiliser ni d'en faire respecter l'utilisation exclusive, à condition qu'elle respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce pour la période prévue au contrat et pour toute période additionnelle dont elle peut et décide de se prévaloir de son propre gré.

Pertes découlant de la résiliation

En cas de résiliation du contrat, toute partie à celui-ci qui subit des pertes découlant de la résiliation est réputée avoir une réclamation prouvable.

Motifs de la résiliation

Dans les cinq jours qui suivent la date à laquelle une partie au contrat le lui demande, la compagnie lui expose par écrit les motifs de son projet de résiliation.

Exceptions

Le présent article ne s'applique pas aux contrats suivants :

a) les contrats financiers admissibles;

b) les conventions collectives;

c) les accords de financement au titre desquels la compagnie est l'emprunteur;

d) les baux d'immeubles ou de biens réels au titre desquels la compagnie est le locateur.

26 L'article 32 de la Loi est en vigueur depuis le 18 septembre 2009.

27 Précédemment à son entrée en vigueur, les tribunaux canadiens, confrontés à des situations de résiliation de contrats, et en l'absence de dispositions législatives claires, ont eu recours à la théorie de la juridiction inhérente pour décider de cette question.

28 Voici comment s'exprimait alors le juge Farley de la Cour suprême de l'Ontario dans l'affaire *Dylex*[6] :

> [8] It is clear that s. 11 of the CCAA gives the power to the court to sanction a plan which includes termination of leases as part of the debtor's plan of arrangement: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.), at p. 625; *Re Armbro Enterprises Inc.* (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.) at p. 84. In the interim between the filing and the approval of a plan, the court has the inherent jurisdiction to fill in gaps in 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: see *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.S. S.C.), at pp. 93-94 and generally *Lehndorff*, supra, at pp. 35-38. While not specifically mentioned in *Re Triangle Drugs Inc.* (1993), 12 O.R. (3d) 219 (Bktcy.), it was inherent jurisdiction which I was relying on to fill the gap in that legislation, namely the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (as amended by S.C. 1992, c. 27) (« BIA »).

29 Ainsi, nos tribunaux ont avalisé le principe voulant que dans certaines circonstances, un débiteur puisse mettre fin à un contrat dans le cadre de sa réorganisation.

30 Dans cet ordre d'idées et en l'absence de précisions du législateur, nos tribunaux ont élaboré divers concepts visant à assurer un encadrement à la résiliation de contrats par un débiteur à l'occasion de sa restructuration.

31 Ces concepts élaborés au fil des diverses affaires entendues par les tribunaux ont encore leur utilité, mais il faut dorénavant tenir compte de la Loi, telle qu'amendée.

32 Ainsi, Austeville plaide-t-elle que les critères énoncés à l'article 32 (4) de la Loi ne sont pas exhaustifs et que le Tribunal peut puiser des enseignements des décisions de nos tribunaux *ante* 18 septembre 2009, alors que ceux-ci exerçaient leur juridiction inhérente.

33 Cependant, lorsque Austeville cite les propos du juge Tysoe, dans l'affaire *Doman Industries Ltd., Re*[7], elle occulte complètement les dispositions de l'article 32 de la Loi. Voici comment celui-ci s'exprimait alors :

> [35] On the other hand, there will be circumstances where it will not be appropriate to authorize the debtor company to terminate contracts. For example, suppose that a debtor company became insolvent because its business had been operating at a loss but market conditions had changed and, with a financial restructuring of its existing debt, it was expected to be profitable in the future. Suppose further that the debtor company was party to a contract which did not cause the company to operate the relevant aspect of its business at a loss but the contract was not as favourable as the market would permit the company to obtain if it could divest itself of the existing contract. If the company could terminate the contract and enter into a new one with different rates, it could become substantially more profitable into

the future. In these circumstances, it may well be inappropriate for the court to authorize the termination of the contract.

34 Si le Tribunal convient qu'il peut tirer certains enseignements des décisions antérieures à l'entrée en vigueur des récents amendements à la Loi, encore faut-il qu'ils soient en lien avec ces nouvelles dispositions législatives.

35 En ce sens, le Tribunal adhère à la théorie avancée par les auteurs Georgina R. Jackson et Janis Sarra[8], qu'il faut en tout premier lieu s'en tenir à la Loi :

> On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. <u>The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act</u>, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. <u>Only after exhausting this statutory interpretive function should the court consider whether it is appropriate to assert an inherent jurisdiction</u>. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.
>
> (nos soulignés)

36 Le législateur ayant pris soin de préciser dans quel cadre un débiteur peut résilier un contrat et quels en sont les moyens de contestation, c'est à travers ce prisme que le Tribunal procèdera à l'analyse du cas sous étude.

L'acquiescement du contrôleur au projet de résiliation, le cas échéant.

37 Il s'agit d'une simple question de fait qui, en l'instance, a été prouvée.

La question de savoir si la résiliation favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie.

38 Ce concept a maintes fois été abordé dans les décisions de nos tribunaux *ante* 2009 et elles sont d'une utilité certaine.

39 Voici comment s'exprimait la juge Mayrand, dans l'affaire *PCI*[9] sur les motifs justifiant la résiliation d'un contrat :

> 87. La réorganisation de PCI a été rendue nécessaire par le processus de réorganisation gigantesque de l'ensemble des compagnies du groupe Pioneer entrepris à la grandeur de l'Amérique du Nord. Ceci implique que dans le meilleur

intérêt économique et financier de l'entreprise, elle peut mettre fin aux contrats qui ne sont manifestement pas avantageux d'un point de vue économique et financier avec les conséquences qui en découlent.

40 Au même effet, le juge Farley, de la Cour supérieure de l'Ontario, dans l'affaire *T. Eaton Co., Re*[10] :

7. It is clear that under CCAA proceedings debtor companies are permitted to unilaterally terminate in the sense of repudiate leases, and contracts without regard to the terms of those leases and contracts including any restrictions conferred therein that might ordinarily (i.e. outside CCAA proceedings) prevent the debtor company from so repudiating the agreement. To generally restrict debtor companies would constitute an insurmountable obstacle for most debtor companies attempting to effect compromises and reorganizations under the CCAA.

Such a restriction would be contrary to the purposive approach to CCAA proceedings followed by the courts to this date.

41 Quant à l'interprétation du verbe « favorisera », le Tribunal retient la compréhension qu'en a la juge Mayrand suite à une analyse exhaustive de la jurisprudence, dans l'affaire *SFK*[11] :

23. Ceci étant, la norme retenue par les tribunaux permet à la débitrice de résilier un contrat dans la mesure où telle résiliation s'avère avantageuse et bénéfique pour sa réorganisation sans qu'elle n'ait à établir qu'il s'agit d'un élément essentiel à celle-ci.

42 Le Tribunal ne peut et ne doit se limiter à considérer seulement la situation de Austeville et des Lieux Loués. Il doit également tenir compte de l'ensemble des mesures envisagées par la débitrice pour assainir ses finances.

43 Différents types d'industries peuvent avoir diverses façons de se restructurer, mais dans le cas sous étude et tel qu'il appert du rapport du Contrôleur, un arrangement viable passe nécessairement par l'élimination des points de vente non rentables.

44 En l'instance, la résiliation visant les Lieux Loués est une suite logique de la résiliation des baux relatifs aux points de vente dans l'Ouest canadien.

45 Le personnel administratif chutant de cinq à trois employés, le maintien d'un local pouvant abriter cinq personnes est non seulement incongru, mais également sans logique économique.

46 Le Tribunal conclut que la résiliation du bail, quant aux Lieux Loués, est avantageuse et favorisera un arrangement viable.

Le risque que la résiliation puisse vraisemblablement causer de sérieuses difficultés financières à une partie au contrat.

47 D'emblée, le Tribunal ne peut que constater que non seulement Austeville n'allègue pas à ses procédures que la résiliation peut lui causer de « sérieuses difficultés financières » mais, qu'au surplus, il n'y a pas un iota de preuve en ce sens, le seul argument invoqué étant qu'elle subira une perte significative.

48 Le fait de subir une perte significative n'est pas le seul apanage d'Austeville, tous les autres locateurs dont les baux furent résiliés encourront également des pertes significatives.

49 En fait, Austeville se plaint que Jacob, se sachant en difficulté financière, lui ait soutiré trois mois de loyers gratuits.

50 Cependant, la preuve ne révèle aucune mauvaise foi de la part de Jacob lors de la négociation des modifications au bail.

51 Qui plus est, l'objectif de la Loi n'est pas de punir une partie suite à des manoeuvres commerciales et pour lesquelles un créancier se sentirait lésé.

52 Le but recherché par l'article 32 est double :

a) Préciser dans quel cadre et à quelles conditions un débiteur peut résilier un contrat;

b) Empêcher que par le fait de cette résiliation, le créancier ne soit lui-même placé dans une situation précaire.

53 Quant à ce deuxième objectif, il faudrait que le créancier établisse que dans la situation qui lui est propre, l'absence de ces revenus ou encore du profit généré par cette activité fragiliserait de façon importante sa situation financière.

54 Dans la présente affaire, Austeville n'a pas cru bon présenter semblable preuve, peut-être tout simplement parce qu'elle n'existe pas. Rappelons que les Lieux Loués ne représentent en superficie que 2% de l'immeuble, propriété de Austeville.

CONCLUSION

55 Le Tribunal conclut que Jacob a rencontré les deux premiers critères de l'article 32 (4) de la Loi et que Austeville ne s'est pas déchargée de son fardeau de prouver que la résiliation lui causerait de sérieuses difficultés financières.

POUR CES MOTIFS, LE TRIBUNAL :

56 *REJETTE* la requête;

57 Avec dépens.

Requête rejetée.

Notes de bas de page

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

2 Pièce R-1, page 7

3 Pièce R-2

4 Pièce R-3

5 Pièce R-4

6 *Dylex Ltd., Re* [1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List])], 1995 CanLII, par. 8

7 *Doman Industries Ltd., Re*, 2004 BCSC 733 (B.C. S.C.), par. 35

8 Georgina R. JACKSON et Janis SARRA, *Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters*

9 *PCI Chemicals Canada Inc., Re*, 2002 CarswellQue 831 (Que. S.C.)

10 *T. Eaton Co., Re*, [1999] O.J. No. 4216 (Ont. S.C.J. [Commercial List])

11 *Abitibibowater inc., Re*, 2009 CarswellQue 4937 (Que. S.C.)

TAB 11

2004 BCSC 733
British Columbia Supreme Court

Doman Industries Ltd., Re

2004 CarswellBC 1262, 2004 BCSC 733, [2004] B.C.W.L.D. 870, [2004] B.C.J. No. 1149, 131 A.C.W.S. (3d) 859, 1 C.B.R. (5th) 7, 29 B.C.L.R. (4th) 178, 45 B.L.R. (3d) 78

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

IN THE MATTER OF THE COMPANY ACT R.S.B.C. 1996, c. 62

IN THE MATTER OF THE CANADA BUSINESS CORPORATIONS ACT R.S.C. 1985, c. C-44

IN THE MATTER OF THE PARTNERSHIP ACT R.S.B.C. 1996, c. 348

IN THE MATTER OF DOMAN INDUSTRIES LIMITED, ALPINE PROJECTS LIMITED, DIAMOND LUMBER SALES LIMITED, DOMAN FOREST PRODUCTS LIMITED, DOMAN'S FREIGHTWAYS LTD., DOMAN HOLDINGS LIMITED, DOMAN INVESTMENTS LIMITED, DOMAN LOG SUPPLY LTD., DOMAN-WESTERN LUMBER LTD., EACOM TIMBER SALES LTD., WESTERN FOREST PRODUCTS LIMITED, WESTERN PULP INC., WESTERN PULP LIMITED PARTNERSHIP, and QUATSINO NAVIGATION COMPANY LIMITED (PETITIONERS)

Tysoe J.

Heard: May 25, 2004
Judgment: May 25, 2004*
Docket: Vancouver L023489

Counsel: E.J. Harris, Q.C., P.D. McLean for Petitioner, Western Forest Products Ltd.
I.G. Nathanson, Q.C., S.R. Schachter, Q.C. for Hayes Forest Services Ltd.
M.I. Buttery for Tricap Restructuring Fund
S.R. Ross for Strathcona Contracting Ltd.
K. Zych for Committee of Unsecured Noteholders
C.E. Hirst for Petro-Canada Inc.

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

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

Insolvent company was in process of attempting restructuring under Companies' Creditors Arrangement Act — Insolvent company brought application for approval of termination of contracts it had with H Ltd. and S Ltd. — Application dismissed — Insufficient evidence existed to support conclusion that proposed contract terminations were fair and reasonable in all circumstances — Available evidence simply supported conclusion that insolvent company would have opportunity of being more profitable if contracts were terminated — It was not demonstrated that loss of this opportunity to be more profitable would outweigh prejudice that would be suffered by H Ltd. and S Ltd. if contracts were terminated — Termination of contracts as condition precedent of restructuring plan was not contained in initial draft of plan and there was no evidence as to why it was inserted later — It could not be said that condition precedent was result of adversarial negotiation and that restructuring was unlikely to proceed if it was not satisfied — It is not necessary for insolvent company to demonstrate that termination of contract is essential to making of viable plan or arrangement.

Table of Authorities

Cases considered by *Tysoe J.*:

Blue Range Resource Corp., Re (1999), 1999 CarswellAlta 597, 245 A.R. 154, 1999 ABQB 1038 (Alta. Q.B.) — not followed

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

Repap British Columbia Inc., Re (June 11, 1997), Doc. Vancouver A970588 (B.C. S.C.) — considered

Skeena Cellulose Inc., Re (2002), 43 C.B.R. (4th) 178, 2002 BCSC 1280, 2002 CarswellBC 2032, 5 B.C.L.R. (4th) 193 (B.C. S.C.) — considered

Skeena Cellulose Inc., Re (2003), 43 C.B.R. (4th) 187, 184 B.C.A.C. 54, 302 W.A.C. 54, 2003 BCCA 344, 2003 CarswellBC 1399, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — distinguished

T. Eaton Co., Re (1999), 1999 CarswellOnt 3542, 14 C.B.R. (4th) 288 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

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

Forest Act, R.S.B.C. 1996, c. 157
Generally — referred to

Forestry Revitalization Act, S.B.C. 2003, c. 17
Generally — referred to

Regulations considered:

Forest Act, R.S.B.C. 1996, c. 157

Timber Harvesting Contract and Subcontract Regulation, B.C. Reg. 22/96

Generally

APPLICATION by insolvent company for approval of termination of contracts.

***Tysoe J.* (orally):**

1 One of the Petitioners, Western Forest Products Ltd., ("Western") applies, in these proceedings under the *Companies Creditors Arrangement Act* (the "*CCAA*") involving the Doman group of companies, for authorization or approval of the termination of contracts it has with Hayes Forest Services Ltd. ("Hayes") and Strathcona Contracting Ltd. ("Strathcona").

2 The Doman group of companies ("Doman") carry on business in the B.C. forestry industry. Doman encountered financial difficulties and has been in the process of attempting to restructure under the *CCAA* for approximately one and a half years. The liabilities of *Doman* consist of secured term debt in the principal amount of U.S. $160 million, unsecured term notes in the principal amount of U.S. $513 million, unsecured trade debt in excess of $20 million, a secured operating line of credit and other miscellaneous obligations.

3 The restructuring process is nearing completion. A plan of compromise and arrangement (the "Restructuring Plan") has been filed and the meeting of creditors to consider it has been scheduled to be held in approximately two weeks. The deadline for creditors to file proofs of claim is today.

4 In very simple terms, the Restructuring Plan contemplates that the lumber and pulp assets of Doman will be transferred into new corporations and that the unsecured noteholders, trade creditors and other unsecured creditors will have their debt converted into shares in one of the new corporations, which will own the lumber assets and the shares of the other corporation holding the pulp assets. The secured term debt is to be refinanced and the secured operating line of credit will be unaffected. The existing shareholders of Doman are to receive warrants entitling them to purchase a limited number of shares in the new parent corporation.

5 The implementation of the Restructuring Plan is subject to the fulfilment of numerous conditions precedent. One of the conditions is the termination of the contracts with Hayes and Strathcona which are the subject matter of this application.

6 Western holds certain forest tenure, including licenses relating to an area known as the Nootka Region on Vancouver Island and at least one island off the coast of Vancouver Island called Nootka Island. In 1991, the B.C. government decided that logging contractors should have a form of security similar to the tenure enjoyed by license holders and created the concept of replaceable contracts under the *Forest Act*.

7 The attributes of replaceable contracts were discussed at length by the B.C. Court of Appeal in *Skeena Cellulose Inc., Re*, 2003 BCCA 344 (B.C. C.A.) and I will not repeat all of them here. In short, a replaceable contract is a form of evergreen contract which contains statutorily mandated provisions, the most important of which is that the license holder must offer a new or replacement contract to the contractor upon each expiry of the term of the contract as long as the contractor is not in default under the contract. If the parties are not able to agree on the new rates under the replacement contract, an arbitrator will determine the rates, which are mandated to be competitive within the industry and to permit the contractor to earn a reasonable profit on top of its costs. The contractors with such contracts are known in the industry as Bill 13 contractors. A license holder must have at least 50% of its annual allowable cut harvested by Bill 13 contractors.

8 Western has 7 full-phase Bill 13 logging contracts with 6 contractors for the Nootka Region. Hayes is one of those contractors and it has the full-phase contract for the Plumper Harbour area of the Nootka Region. A full-phase contract includes all aspects of logging ranging from road construction, falling, hauling, sorting and delivery to transportation points. Hayes sold the road construction aspect of its contract, and the replaceable contract for road construction was assigned to Strathcona.

9 When Doman first commenced these *CCAA* proceedings, it was anticipated that the restructuring process would be completed in a relatively short period of time. It was contemplated that all unsecured debt other than the unsecured bondholders would be paid in full and that the unsecured bondholders would take most, but not all, of the equity in Doman in exchange for some of the indebtedness owed to them and would take security for the remainder of their indebtedness. The confirmation or come-back Order of December 6, 2002 authorized a downsizing process for Doman, but it was not instituted in view of the anticipated restructuring.

10 The restructuring initially contemplated by Doman did not take place, in part because I made a ruling that the covenants in the trust deed for the secured term debt could not be overridden into the future. By the beginning of April 2004, the unsecured bondholders were pressing for their own restructuring plan and had made it clear that there should be some downsizing in Doman's operations, particularly the closure of Doman's pulp mill in Port Alice. On April 6, 2004, I declined Doman's application for an extension of the stay for the sole purpose of pursuing refinancing of its debt and the sale of the Port Alice pulp mill, but I also declined an application of the unsecured bondholders to call a meeting of creditors to consider its plan of arrangement. I extended the stay for the purpose of allowing Doman to file its own restructuring plan while still pursuing refinancing and sale alternatives, but I imposed a fairly concrete deadline by directing that the creditors meeting be held on June 7. In my April 6 Order, I authorized Doman to reinstitute its downsizing process with special emphasis on the closure of the Port Alice pulp mill if a purchaser was not located. I also placed a restriction on any downsizing by providing that any termination of a replaceable contract under the *Forest Act* was not to be effective unless authorized by the court.

11 By letters dated April 27, 2004, Western terminated its contracts with Hayes and Strathcona effective upon court approval of the terminations. An affidavit of Mr. Zimmerman, a Western employee, provided the following rationale for the decision to terminate these replaceable contracts:

> As part of the reorganization and "downsizing" processes of [Western], we have looked at methods to rationalize harvesting operations in the Nootka Region so as to reduce costs and improve profitability of [Western]. [Western] has worked in conjunction with representatives of the Bondholder committee who have asked for recommendations so as to increase profitability. [Western] has determined that within the Nootka Region, operational efficiencies can be achieved and significant cost savings can be achieved if the number of contractors is reduced and if that contractor's allocated volume is re-allocated to the remaining contractors. [Western] has recommended this reduction to the Bondholders Committee and the representatives of the Committee have asked that [Western] institute a rationalization and termination of contract, which is subject to Court approval as provided in this Court's Order of April 6, 2004.

The affidavit goes on to state that the rationalization can best be carried out by the termination of the Plumper Harbour contracts, principally because the contractor costs associated with this location are the highest in the Nootka Region. The volume under the contracts would then be re-allocated to other Bill 13 contractors in the Nootka Region. The average contract rate for logging a cubic metre of timber under the Hayes contract for the period from 1998 to 2001, as determined by arbitration, was approximately $4 higher than the average rate under the other contracts for the Nootka Region.

12 Mr. Zimmerman's affidavit indicated that Western did not intend to harvest at Plumper Harbour for the next three years and set out the savings that Western would be able to achieve by terminating the Hayes and Strathcona contracts. These savings were estimated at $5 million over the next three years and $800,000 for each year thereafter. These included annual savings of approximately $165,000 in road building costs, but the main reason Western wants to terminate its contract with Strathcona is that the full-phase contractor replacing Hayes may have its own road building capabilities. Mr. Zimmerman also exhibited to his affidavit a proposal which Hayes had made to Western in 1999 whereby Hayes offered to exchange its rights under its Bill 13 contract for the exclusive right to do helicopter logging in the Nootka Region with an annual minimum guarantee. In the proposal, Hayes stated that the average cut for many of the Bill 13 contractors had been reduced below an efficient economic operating level and that higher costs were being passed on to Western. The proposal was not accepted by Western because it did not want to give exclusive rights for helicopter logging with a guaranteed entitlement.

13 Representatives of Hayes and Strathcona swore affidavits disputing that the savings would be of the magnitude estimated by Mr. Zimmerman. They also set out the prejudice which their companies would suffer if the contracts were terminated, including the loss of employment and the inability to utilize fixed assets. Mr. Hayes deposed that there is no reasonable or rational economic reason for Western to forego harvesting in Plumper Harbour this year because most of the engineering and road construction costs have already been incurred. Mr. Hayes estimated that if Western harvested the timber on its logging plan for this year in Plumper Harbour, it would receive revenue, net of additional harvesting costs, of approximately $2 million.

14 The affidavit of Mr. Hayes also stated that Hayes recognized that the operations of the Bill 13 contractors in the Nootka Region are inefficient, unwieldy and costly. Despite this acknowledgment, Mr. Hayes expressed a view that the termination of its contract will not have a material impact on cost reduction in the Nootka Region when one takes into account that the Province will be taking back approximately 20% of Western's annual allowable cut in the Nootka Region pursuant to the recently enacted *Forestry Revitalization Act* and will thereby cause a reduction in the volumes harvested by all of the Bill 13 contractors. No affidavit was sworn by a Western representative to dispute this statement.

15 Mr. Zimmerman, Mr. Hayes and the deponent on behalf of Strathcona were cross-examined on their affidavits. In his cross-examination, Mr. Zimmerman stated that Western did intend to liquidate the developed timber at Plumper Harbour of approximately 130,000 cubic metres over the next two years before putting the area in abeyance for a three year period. Western has not introduced any evidence with respect to the anticipated costs if this developed timber is harvested or is harvested by other Bill 13 contractors rather than Hayes.

16 In addition to the *Skeena Cellulose Inc.* decision which dealt with the termination of replaceable contracts in *CCAA* proceedings, counsel referred me to several other cases involving the termination of contracts, leases or licenses in *CCAA* proceedings.

17 In *Dylex Ltd., Re*, [1995] O.J. No. 595 (Ont. Gen. Div. [Commercial List]), Farley J. authorized the insolvent company to repudiate the leases of three of its stores as part of a program to close 200 of its stores across Canada. The three stores had

been a financial drain on Dylex. Although the closures were going to have a detrimental effect on the shopping centres in which the stores were located, Farley J. held that in weighing the balancing of interests in a *CCAA* context, the court's discretion should be exercised in favour of Dylex over the landlord, which was in sound financial condition. Farley J. declined to import into the *CCAA* the requirement applicable to proposals under the *Bankruptcy and Insolvency Act* that the insolvent company has to show that it would not be able to make a viable proposal unless it terminated the leases in question.

18 In *Blue Range Resource Corp., Re*, 1999 ABQB 1038 (Alta. Q.B.), the insolvent company had been authorized by the court under the initial stay order to terminate such of its contracts as it deemed appropriate to permit it to proceed with an orderly restructuring of its business. Blue Range terminated some of its natural gas supply contracts and three of the parties to such contracts sought to challenge the termination of their contracts. One of the issues they raised was that the stay order should be varied to provide that Blue Range would only be permitted to terminate the contracts if it was incapable of performing them or if the termination was essential to the success of their restructuring. Lo Vecchio J. dismissed the application to vary the stay order in this fashion. He made the following comments at paras. 36 through 38, which have been quoted in subsequent cases:

> The purpose of the CCAA proceedings generally and the stay in particular is to permit a company time to reorganize its affairs. This reorganization may take many forms and they need not be listed in this decision. A common denominator in all of them is frequently the variation of existing contractual relationships. Blue Range might, as any person might, breach a contract to which they are a party. They must however bear the consequences. This is essentially what has happened here.
>
> A unilateral termination, as in any case of breach, may or may not give rise to a legitimate claim in damages. Although the Order contemplates and to a certain extent permits unilateral termination, nothing in Section 16.e or in any other part of the Order would suggest that Blue Range is to be relieved of this consequence; indeed Blue Range's liability for damages seems to have been assumed by Duke and Engage in their set-off argument. The application amounts to a request for an order of specific performance or an injunction which ought not to be available indirectly. In my view, an order authorizing the termination of contracts is appropriate in a restructuring, particularly given that it does not affect the creditors' rights to claim for damages.
>
> The Applicants are needless to say not happy about having to look to a frail and struggling company for a potentially significant damages claim. They will be relegated to the ranks of unsecured judgment creditors and may not, indeed likely will not, have their judgments satisfied in full. While I sympathize with the Applicants' positions, they ought not to, in the name of equity, the guide in CCAA proceedings, be able to elevate their claim for damages above the claims of all the other unsecured creditors through this route.

19 Lo Vecchio J. held that the court has the necessary jurisdiction to permit termination of contracts and that the termination of the contracts in question was necessary to the company's survival program.

20 In *T. Eaton Co., Re*, [1999] O.J. No. 4216 (Ont. S.C.J. [Commercial List]), Farley J. refused to order specific performance of an exclusive license to provide credit card services that had been repudiated by the insolvent company as part of a sale of its assets which was the foundation of its restructuring plan. He held that the licensee could be adequately compensated in damages and should not have a higher claim than any other unsecured creditor. In the course of his reasons, he quoted the above portions of the *Blue Range Resource Corp.* decision, and said the following at para. 7:

> It is clear that under CCAA proceedings debtor companies are permitted to unilaterally terminate in the sense of repudiate leases, and contracts without regard to the terms of those leases and contracts including any restrictions conferred therein that might ordinarily (i.e. outside CCAA proceedings) prevent the debtor company from so repudiating the agreement. To generally restrict debtor companies would constitute an insurmountable obstacle for most debtor

> companies attempting to effect compromises and reorganizations under the CCAA. Such a restriction would be contrary to the purposive approach to CCAA proceedings followed by the courts to this date.

Farley J. also spoke about being cognizant of the function of a balancing of prejudices within the general approach to the *CCAA*.

21 The issue of the court's jurisdiction to authorize the termination of replaceable contracts under the *B.C. Forest Act* was first addressed in the predecessor to the *CCAA* proceedings of Skeena Cellulose, *Repap British Columbia Inc., Re* (June 11, 1997), Doc. Vancouver A970588 (B.C. S.C.). Thackray J. held that the court had the jurisdiction under the *CCAA* to authorize the insolvent company to terminate replaceable contracts. None of the replaceable contracts in question were actually terminated until the subsequent Skeena Cellulose proceedings.

22 In the Skeena Cellulose proceedings, the come-back order authorized the company to terminate replaceable contracts in order to facilitate the downsizing and consolidation of its business and operations. As part of Skeena Cellulose's plan of compromise and arrangement, a third party agreed to purchase the shares in the company for $8 million, which was to be used for distribution to the creditors having claims in excess of $400 million. It was a condition precedent to the purchase that two of Skeena Cellulose's five replaceable contracts be terminated, and letters of termination were sent. The two contractors applied to the court for a declaration that the terminations were invalid.

23 Brenner C.J.S.C. dismissed the application. In his decision (cited at 2002 BCSC 1280 (B.C. S.C.) [*Skeena Cellulose Inc., Re*]), he said the following at para. 25:

> SCI has no authority to decline to replace the applicants' replaceable contracts under the terms of those contracts, or in accordance with the provisions of the Regulation that deal with when and how a replaceable contract can be terminated. The only authority for SCI to terminate, or indeed, jurisdiction for this court to approve such terminations, must be found in the terms of the Come-back Order, and in the provisions of the CCAA. To be effective, the terminations must:
>
> > (a) comply with the procedures and conditions stipulated in the Come-back Order; and,
> >
> > (b) conform to the broader principles of economic necessity and fairness which underlie the court's discretionary jurisdiction under the CCAA.

Brenner C.J.S.C. expressed the view that the statutory privileges given to the Bill 13 contractors are not sufficient to justify the creation or recognition of a preference in favour of the contractors over other creditors.

24 The appeal from Brenner C.J.S.C.'s decision was dismissed. In its decision, the B.C. Court of Appeal held that the court had an equitable jurisdiction to supplement the *CCAA* by approving a plan of arrangement which contemplates the termination of contracts by the debtor corporation. Newbury J.A. held that in approving such a plan involving the termination of replaceable contracts, the court was not overriding provincial legislation because nothing in the legislation purported to invalidate a termination of a replaceable contract but that, in any event, the doctrine of paramountcy would result in preference being given to the *CCAA* over the *B.C. Forest Act* in the case of a conflict.

25 The Court of Appeal found no error in the exercise of discretion by Brenner C.J.S.C. Newbury J.A. said the following

about the concept of fairness at para. 60:

> I have no difficulty in accepting the appellants' argument that fairness as between them and the other three evergreen contractors and as between the appellants and Skeena was a legitimate consideration in the analysis of this case. (Indeed, I believe the Chief Justice considered this aspect of fairness, even though he did not mention it specifically in this part of his Reasons.) The appellants are obviously part of the "broad constituency" served by the CCAA. But the key to the fairness analysis, in my view, lies in the very breadth of that constituency and wide range of interests that may be properly asserted by individuals, corporations, government entities and communities. Here, it seems to me, is where the flaw in the appellants' case lies: essentially, they wish to limit the scope of the inquiry to fairness as between five evergreen contractors or as between themselves and Skeena, whereas the case-law decided under the CCAA, and its general purposes discussed above, require that the views and interests of the "broad constituency" be considered. In the case at bar, the Court was concerned with the deferral and settlement of more than $400 million in debt, failing which hundreds of Skeena's employees and hundreds of employees of logging and other contractors stood to lose their livelihoods. The only plan suggested at the end of the extended negotiation period to save Skeena from bankruptcy was NWBC's acquisition of its common shares for no consideration and the acceptance by its creditors of very little on the dollar for their claims.

The Court of Appeal concluded that there was a business case for the terminations. Newbury J.A. stated that the situation in *Dylex Ltd.* was no different in principle because, like the leases in *Dylex Ltd.*, the replaceable contracts were too costly for Skeena Cellulose to continue operating under them.

26 Although the Court of Appeal's decision in *Skeena Cellulose Inc.* settles that the court has the necessary jurisdiction to deal with the termination of contracts, none of the above decisions includes any detailed discussion with respect to the basis upon which the court becomes involved in decisions to terminate contracts. Newbury J.A. discussed the jurisdiction in terms of the court approving a plan of arrangement which involves the termination of contracts, but the court will often authorize the termination of contracts prior to the formulation of a plan of arrangement.

27 If a debtor company repudiated a contract prior to commencing *CCAA* proceedings, the court would not have any direct involvement in the termination of the contract unless, possibly, the other party to the contract sought specific performance of the contract (which, as Brenner C.J.S.C. pointed out in *Skeena Cellulose Inc.*, is particularly inappropriate in an insolvency). The other party to the contract would have a claim for damages in respect of the repudiation and would be treated like any other unsecured creditor for the purposes of the plan of arrangement.

28 Once an insolvent company seeks the assistance of the court by commencing *CCAA* proceedings, the company comes under the supervision of the court. The supervision also involves a consideration of the interests of the broad constituency served by the *CCAA* mentioned in *Skeena Cellulose Inc.* by Newbury J.A. These interests, when coupled with the exercise by the court of its equitable jurisdiction, bring into play the requirements for fairness and reasonableness in weighing the interests of affected parties.

29 Generally speaking, the indebtedness compromised in *CCAA* proceedings is the debt which is in existence at the time of the *CCAA* filing, and the debtor company is expected to honour all of its obligations which become owing after the *CCAA* filing. It is common for the initial stay order or the come-back order to provide that the debtor company is to continue carrying on its business and to honour its ongoing obligations unless the court authorizes exceptions.

30 In many reorganizations under the *CCAA*, it is necessary for the insolvent company to restructure its business affairs as well as its financial affairs. Even if the financial affairs are restructured, the company may not be able to survive because portions of the business will continue to incur ongoing losses. In such cases, it is appropriate for the court to authorize the company to restructure its business operations, either during the currency of the *CCAA* proceedings or as part of a plan of arrangement. The process is commonly referred to as a downsizing if it involves certain aspects of the business coming to an end. The liabilities which are incurred as a result of the restructuring of the business operations, for such things as termination of leases and other contracts, are included in the obligations compromised by the plan of arrangement even though the debtor company will have been honouring its ongoing commitments under the leases and other contracts after the commencement of the *CCAA* proceedings. The inclusion of these liabilities in the plan of arrangement is an exception to the general practice of debtor companies paying the full extent of post-filing liabilities and compromising only the pre-filing liabilities.

31 It is within this context that the court is called upon to authorize the termination of contracts which the debtor company could have repudiated without any authorization prior to the commencement of *CCAA* proceedings. The liabilities to be compromised have, in general terms, been crystallized by the filing of the *CCAA* petition, and the affairs of the debtor company are under the supervision of the court, which is required to exercise its equitable jurisdiction fairly and reasonably.

32 I do not approach the matter in the same fashion as Lo Vecchio J. did in *Blue Range Resource Corp.* I do not see the resistance of a party to the termination of a contract with the debtor company to be an attempt to elevate their claim for damages above the claims of all the other unsecured creditors. Apart from any monies which may have been outstanding under the contract at the time of the *CCAA* filing, the party to the contract was not an unsecured creditor who was going to be subjected to a compromise under a plan of arrangement. The party only becomes a creditor in respect of its damage claim if the contract is terminated. Although Lo Vecchio J. could be interpreted as suggesting in the quoted paragraphs 36 to 38 that a debtor company may terminate contractual relations as long as the resulting damage claim is included in its plan of arrangement, I do note that he subsequently commented that the termination of the contracts in that case was necessary to the company's survival program.

33 I prefer the approach of Farley J. in *Dylex Ltd.*, which involves the court weighing the competing interests and prejudices in deciding what is fair and reasonable. I would anticipate that in the majority of cases a debtor company will be able to persuade the court to exercise its discretion in favour of the termination of contracts and other steps required to downsize or rationalize its business affairs. A debtor company must be insolvent to qualify under the *CCAA* and the insolvency may have been caused by over-expansion or continual losses by a part of the business. If the company is to have a reasonable prospect of surviving into the indefinite future, it will be appropriate to downsize its operations or bring an end to the losing aspects of the business. The interests of the broad constituency of stakeholders in taking reasonable steps to ensure the ongoing viability of the business will often outweigh the prejudice caused to parties having their contracts or other arrangements with the debtor company terminated and their consequential damage claim being included in the plan of arrangement. There is no single test for the debtor company to satisfy apart from demonstrating that the termination is fair and reasonable in all of the circumstances. As held in *Dylex Ltd.*, it is not necessary for the debtor company to demonstrate that the termination of the contract is essential to the making of a viable plan of arrangement.

34 An example of this type of situation has already occurred in these proceedings. Doman's pulp mill at Port Alice has been losing money for a significant period of time and causing a financial drain on Doman's resources. At the suggestion of the bondholders, it was decided that the mill should be closed and should not be part of the restructured company. Although the closure of the mill would have had a devastating effect on the employees of the pulp mill and the Village of Port Alice as a whole, I authorized the closure because it would not have been reasonable to require the restructured company to operate a division of its business which was anticipated to continue to lose money. Fortunately, Doman was able to find another party who was willing to take over the pulp mill prior to its closure.

35 On the other hand, there will be circumstances where it will not be appropriate to authorize the debtor company to terminate contracts. For example, suppose that a debtor company became insolvent because its business had been operating at a loss but market conditions had changed and, with a financial restructuring of its existing debt, it was expected to be profitable in the future. Suppose further that the debtor company was party to a contract which did not cause the company to operate the relevant aspect of its business at a loss but the contract was not as favourable as the market would permit the company to obtain if it could divest itself of the existing contract. If the company could terminate the contract and enter into a new one with different rates, it could become substantially more profitable into the future. In these circumstances, it may well be inappropriate for the court to authorize the termination of the contract. The risk of the failure of the debtor company after its restructuring would be relatively low and, depending on the terms of the plan of arrangement, the future benefit of the contract termination may accrue to the shareholders of the company or to the creditors of the company who took risks in exchange for high rates of return.

36 On the present application, all that the evidence establishes is that Doman will likely be able to reduce its costs to some extent at some point in the future if it can terminate the two contracts in question. Mr. Zimmerman's affidavit states that the reason Western made the recommendation to terminate the two contracts was to improve or increase its profitability. There is no evidence on this application with respect to the following points:

(a) whether the logging at Plumper Harbour under the existing contracts has produced a loss in the past or is expected to produce a loss in the future;

(b) whether other logging operations of Doman produce a greater loss;

(c) whether other aspects of Doman's business produce a loss and, if so, what consideration has been given to rationalizing that loss in comparison to the termination of the contracts in question;

(d) whether it is expected that the restructured company will operate at a profit;

(e) what parts of the constituency of stakeholders will benefit from the termination of the contracts in question;

(f) whether the developed timber at Plumper Harbour can be harvested in the next two years by other contractors at a cost less than the cost under the contracts in question; and

(g) what is the fallacy, if any, in the assertion of Mr. Hayes that the termination of the contracts will have no material impact on cost reduction after taking into account the 20% government take-back.

37 Some reliance was placed by counsel on the fact that the termination of these contracts is a condition precedent of the Restructuring Plan. In my view, this condition precedent is materially different than the condition precedent in *Skeena Cellulose Inc.* In that case, it was an independent purchaser of the shares in *Skeena Cellulose Inc.* that negotiated the condition on the basis that it was not prepared to purchase the shares unless two of the five replaceable contracts were terminated. The condition resulted from an arm's length negotiation which required the purchaser to put up funds to purchase the shares. In the present case, the bondholder committee produced the initial draft of the Restructuring Plan, which was finalized after a limited negotiation that served to advance the interests of the existing directors and shareholders of Doman. The condition precedent in question was not contained in the initial draft of the Restructuring Plan put forward by the bondholders and there is no evidence as to why the condition was inserted in the Restructuring Plan. I am unable to conclude that the condition precedent was the result of a truly adversarial negotiation and that, unlike the situation in *Skeena Cellulose Inc.*, the restructuring is unlikely to proceed if the condition is not satisfied.

38 In my opinion, therefore, there is insufficient evidence for me to conclude that the proposed contract terminations are fair and reasonable in all of the circumstances. All that the evidence available to me supports is a conclusion that the

restructured company will have an opportunity of being more profitable if the contracts are terminated. It has not been demonstrated that the loss of this opportunity will outweigh the prejudice which will be suffered by Hayes and Strathcona if the contracts are terminated. In weighing the competing interests on the evidence before me, it is my conclusion that I should exercise my discretion against approving the contract terminations. I dismiss the application with costs.

Application dismissed.

Footnotes

* Leave to appeal refused *Doman Industries Ltd., Re* (2004), 2004 BCCA 382, 2004 CarswellBC 1545 (B.C. C.A. [In Chambers]).

End of Document

Court File No: CV-13-10274-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 8440522 CANADA INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS INC., AND DATA & AUDIO-VISUAL ENTERPRISES HOLDINGS INC.
Applicants

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PROCEEDING COMMENCED AT TORONTO

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