

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF PERFORMANCE SPORTS GROUP LTD., BAUER HOCKEY CORP., BAUER HOCKEY
RETAIL CORP., BAUER PERFORMANCE SPORTS UNIFORMS CORP., BPS CANADA
INTERMEDIATE CORP., BPS DIAMOND SPORTS CORP., EASTON
BASEBALL/SOFTBALL CORP., KBAU HOLDINGS CANADA INC., PERFORMANCE
LACROSSE GROUP CORP., PSG INNOVATION CORP., BAUER HOCKEY RETAIL INC.,
BAUER HOCKEY, INC., BAUER PERFORMANCE SPORTS UNIFORMS INC., BPS
DIAMOND SPORTS INC., BPS US HOLDINGS INC., EASTON BASEBALL/SOFTBALL
INC., PERFORMANCE LACROSSE GROUP INC., PSG INNOVATION INC.**

(Applicants)

**BRIEF OF AUTHORITIES OF Q30 SPORTS, LLC, Q30 SPORTS SCIENCE, LLC, BRUCE
ANGUS AND THOMAS HOEY**

**(Re: Objection to the Sale Motion and the Proposed
Assumption and Assignment of the Q30 Agreements)**

February 4, 2017

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Thomas Hoey

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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DIAMOND SPORTS INC., BPS US HOLDINGS INC., EASTON BASEBALL/SOFTBALL
INC., PERFORMANCE LACROSSE GROUP INC., PSG INNOVATION INC.**

(Applicants)

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12. Office of the Superintendent of Bankruptcy Canada, *Summary of Key Legislative Changes in Chapter 47 of the Statutes of Canada, 2005, and Chapter 36 of the Statutes of Canada, 2007*, online: Innovation, Science and Economic Development Canada <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01782.html>
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TAB 1

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.

) MONDAY, THE 31ST

JUSTICE NEWBOULD

) DAY OF OCTOBER, 2016
)



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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
PERFORMANCE SPORTS GROUP LTD., BAUER HOCKEY CORP., BAUER HOCKEY
RETAIL CORP., BAUER PERFORMANCE SPORTS UNIFORMS CORP., BPS CANADA
INTERMEDIATE CORP., BPS DIAMOND SPORTS CORP., EASTON
BASEBALL/SOFTBALL CORP., KBAU HOLDINGS CANADA, INC., PERFORMANCE
LACROSSE GROUP CORP., PSG INNOVATION CORP., BAUER HOCKEY RETAIL
INC., BAUER HOCKEY, INC., BAUER PERFORMANCE SPORTS UNIFORMS INC.,
BPS DIAMOND SPORTS INC., BPS US HOLDINGS INC., EASTON
BASEBALL/SOFTBALL INC., PERFORMANCE LACROSSE GROUP INC., PSG
INNOVATION INC.

(Applicants)

AMENDED AND RESTATED INITIAL ORDER

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Mark Vendetti sworn October 31, 2016 (the "Vendetti Affidavit") and the Exhibits thereto, the affidavit of Brian J. Fox sworn November 13, 2016 and the Exhibits thereto, the affidavit of Brian J. Fox sworn November 21, 2016, the pre-filing report of Ernst & Young Inc. ("EY") in its capacity as proposed monitor (the "Monitor") to the Applicants dated October 31, 2016, and the

first report of the Monitor dated November 28, 2016 and on hearing the submissions of counsel for the Applicants, the Monitor, the ABL DIP Lenders (as defined below), Sagard Capital Ltd. ("Sagard"), Fairfax Financial Holdings Limited ("Fairfax"), the ad hoc committee of certain Pre-Filing Term Lenders (as defined below) (the "Ad Hoc Committee of Pre-Filing Term Lenders"), the directors of Performance Sports Group Ltd. ("PSG"), the Official Committee of Unsecured Creditors (the "UCC"), the ad hoc committee of certain equityholders of PSG (the "Ad Hoc Committee of Equityholders"), Q30 Sports, LLC and Q30 Sports Science, LLC and MIPS AB, no one appearing for any other party although duly served as appears from the affidavits of service, filed, and on reading the consent of EY to act as the Monitor:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Applicants are companies to which the CCAA applies.

PLAN OF ARRANGEMENT

3. **THIS COURT ORDERS** that the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "Plan").

POSSESSION OF PROPERTY AND OPERATIONS

4. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situated including all proceeds thereof (the

"Property"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their business (the "Business") and Property. The Applicants are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "Assistants") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. **THIS COURT ORDERS** that the Applicants shall be entitled to continue to utilize the central cash management system currently in place as described in the Vendetti Affidavit or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as defined below) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. **THIS COURT ORDERS** that, subject to the terms of the ABL DIP Agreement (as defined below) and the Term Loan DIP Credit Agreement (as defined below) and the Budget (as defined in the ABL DIP Agreement), the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

- (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;
- (b) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges;
- (c) amounts owing for goods and services actually supplied to the Applicants, or to obtain the release of goods contracted for prior to the date of this Order:
 - (i) by common carriers, dedicated carriers, freight-forwarders, ocean and lake carriers, parcel carriers, consolidators, brokers and customs agents, with the prior consent of the Monitor for any amounts in excess of \$5,000 per transaction, if, in the opinion of the Applicants, it is necessary to prevent the possibility of possessory liens being asserted against any raw materials or finished products ("Merchandise") and to continue their business uninterrupted;
 - (ii) by third-party warehousemen, distributors and logistics providers, based at various locations, with the prior consent of the Monitor for any amounts in excess of \$5,000, if, in the opinion of the Applicants, it is necessary to prevent the possibility of possessory liens being asserted against any Merchandise and to continue their business uninterrupted;
 - (iii) by third parties such as contractors, builders, and repairers, who may potentially assert liens under applicable law against the Applicants, with the prior consent of the Monitor and in the aggregate maximum amount of \$3,000,000, if, in the opinion of the Applicants, it is necessary to prevent the possibility of liens, whether possessory or non-possessory, being

asserted against any Property and to continue their business uninterrupted;

- (iv) by non-United States or Canadian suppliers from which the Applicants source their manufacturing operations who the Applicants have determined to be critical to the continued operations of the their business, with the prior consent of the Monitor for any amounts in excess of \$10,000;
 - (v) with the prior consent of the Monitor for amounts in excess of \$5,000, by any suppliers who delivered goods to the U.S. PSG Entities (as defined in the Vendetti Affidavit) in the twenty days before their filing date in the United States, provided that such suppliers are entitled to be paid pursuant to section 503(9) of Chapter 11 of Title 11 of the United States Code ("**U.S. Code**");
 - (vi) by any other suppliers, with the prior consent of the Monitor for any amounts in excess of \$10,000, if, in the opinion of the Applicants, the supplier is critical to the business and ongoing operations of the Applicants;
- (d) any amounts owing in connection with the Applicants' customer programs, which include gift cards, loyalty programs, discounts, warranties allowing refunds and exchanges, and other offers or accommodations the Applicants, in their business judgment, provide to their wholesale customers and/or directly to retail customers;
 - (e) any province, state or federal taxes or fees up to an individual amount of \$1,000 and up to \$15,000 in the aggregate; and
 - (f) amounts owing to employees or former employees of the Applicants on account of termination or severance obligations in connection with the termination of such employees' employment with Applicants, up to the amount if US \$12,850.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

- (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and
- (b) payment for goods or services actually supplied to the Applicants following the date of this Order.

8. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or pay:

- (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;
- (b) all goods and services or other applicable sales taxes (collectively, "**Sale Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicant, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and
- (c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of

municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicant.

9. **THIS COURT ORDERS** that until a real property lease in respect of property located in Canada is disclaimed or resiliated in accordance with the CCAA, the Applicants shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Applicants and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, in accordance with the terms of the lease, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court:

- (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date, provided however that the Applicants are hereby authorized and directed to make: (i) all such payments under the ABL DIP Agreement (as defined below), including amounts under the pre-filing asset-based revolving credit facility and interest thereon; and (ii) all payments authorized under the Term Loan DIP Credit Agreement (as defined below), including the payments necessary to complete the Refinancing (as defined in the Term Loan DIP Credit Agreement) and (iii) all payments of interest (at the applicable default rate), fees, costs, expenses (including professional advisor fees and expenses) indemnities and other amounts owing under the term loan credit agreement dated April 15, 2014 (as amended, restated and otherwise modified, the

"Term Loan Agreement") between PSG, as borrower, and a syndicate of lenders, as lenders, (the "Pre-Filing Term Lenders"); provided that the lenders ("Pre-Filing ABL Lenders") under the Applicants' revolving ABL credit facility dated as of April 15, 2014 (the "Pre-Filing ABL Facility") shall be entitled to apply receipts and deposits (not including any deposits on account of any advances made under any DIP facility) made to the Applicants' bank accounts against the indebtedness of the Applicants pursuant to their pre-filing ABL credit agreement, whether such indebtedness arose before or after the date of this Order;

- (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property other than as may be contemplated by the U.S. Court (as defined below) in respect of the Applicants' proceedings under Chapter 11 of the U.S. Code; and
- (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

11. **THIS COURT ORDERS** that the Applicants shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the ABL DIP Definitive Documents or Term Loan DIP Definitive Documents (as defined below), have the right to:

- (a) permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding \$250,000 in any one transaction or \$1,000,000 in the aggregate;
- (b) terminate the employment of such of their employees or temporarily lay off such of its employees as it deems appropriate; and

- (c) pursue all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "Restructuring").

12. **THIS COURT ORDERS** that the Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises in Canada at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the Canadian leased premises to observe such removal and, if the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicant, or by further Order of this Court upon application by the Applicants on at least two (2) days notice to such landlord and any such secured creditors. If the Applicants disclaim or resiliate the lease governing such Canadian leased premises in accordance with Section 32 of the CCAA, they shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer or resiliation of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer or resiliation is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such

landlord may have against the Applicants in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

14. **THIS COURT ORDERS** that until and including November 30, 2016, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding" and collectively "Proceedings") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

16. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

17. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicants, and that the Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

18. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of

this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

19. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

20. **THIS COURT ORDERS** that the Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicants after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

21. **THIS COURT ORDERS** that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on the Property, which charge shall not exceed an aggregate amount of USD \$7.5 million, as security for the indemnity provided in paragraph 20 of this Order. The Directors' Charge shall have the priority set out in paragraphs 57 and 60 herein.

22. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or

claim the benefit of the Directors' Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 20 of this Order.

APPROVAL OF ENGAGEMENT OF CHIEF RESTRUCTURING OFFICER

23. **THIS COURT ORDERS** that the agreement dated as of October 24, 2016 (the "CRO Engagement Letter") pursuant to which the Applicants have engaged the services of Brian J. Fox to act as the chief restructuring officer of the Applicants (the "CRO"), is hereby approved as of the date of the CRO Engagement Letter, including, without limitation, the payment of fees and expenses contemplated thereby, and the Applicants are authorized to continue the engagement of the CRO on the terms set out in the CRO Engagement Letter.

24. **THIS COURT ORDERS** that the CRO shall be entitled to the benefit of the Administration Charge (as defined below) in respect of any obligations of the Applicants under the CRO Engagement Letter, whether for payment of compensation, fees, expenses, indemnities or otherwise.

25. **THIS COURT ORDERS** that any claims of the CRO under the CRO Engagement Letter shall be treated as unaffected and may not be compromised in any Plan or proposal filed under the *Bankruptcy and Insolvency Act* of Canada (the "BIA") in respect of the Applicants.

26. **THIS COURT ORDERS** that the CRO shall incur no liability or obligations as a result of its engagement or the carrying out of its mandate under the CRO Engagement Letter, save and except for gross negligence or willful misconduct on its part.

APPROVAL OF CLAIMS AND NOTICING AGENT

27. **THIS COURT ORDERS** that the agreement dated as of September 29, 2016 (the "Prime Clerk Engagement Letter"), pursuant to which the Applicants have engaged Prime Clerk LLC to act claims and noticing agent in the United States (the "Claims and Noticing Agent") is hereby approved as of the date of the Prime Clerk Engagement Letter, including without limitation, the payment of fees and expenses contemplated thereby, and the Applicants are authorized to continue the engagement of the Claims and Noticing Agent on the terms set out in the Prime Clerk Engagement Letter.

BID PROTECTION CHARGE

28. **THIS COURT ORDERS** that 9938982 Canada Inc. shall be entitled to the benefits of and are hereby granted a charge on the Property for the Break Fee and the expense reimbursement payable under the Stalking Horse Agreement as those terms are defined and referred to in paragraph 161 of the Vendetti Affidavit (the "Bid Protection Charge"), which charge shall not exceed USD \$20.75 million in respect of all the Property. The Bid Protection Charge shall have the priority set out in paragraphs 57 and 60 herein.

ABL ESCROW

29. **THIS COURT ORDERS** that the Applicants shall pay to the Pre-Filing ABL Lenders the sum of US \$250,000 to be held in segregated account to secure contingent indemnification obligations arising under or related to the Pre-Filing ABL Facility (the "ABL Escrow"), which shall be released to the Applicants promptly following the expiration of the Challenge Period (as that term is defined in paragraph 53 herein).

APPOINTMENT OF MONITOR

30. **THIS COURT ORDERS** that EY is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the

Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

31. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- (a) monitor the Applicants' receipts and disbursements;
- (b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;
- (c) assist the Applicants, to the extent required by the Applicants, in their dissemination, to the ABL DIP Lenders, the Term Loan DIP Lenders, the Pre-Filing ABL Lenders, the Pre-Filing Term Lenders (until the Refinancing been completed), the UCC and Ad Hoc Committee of Equityholders and their respective counsel, financial and other information as agreed to between the Applicants and the ABL DIP Lenders, the Term Loan DIP Lenders, the Pre-Filing ABL Lenders, and the Pre-Filing Term Lenders (until the Refinancing has been completed) which may be used in these proceedings including reporting on a basis to be agreed with the ABL DIP Lenders, the Term Loan DIP Lenders, and the Pre-Filing ABL Lenders and the UCC;
- (d) advise the Applicants in their preparation of the Applicants' cash flow statements and reporting required by the ABL DIP Lenders and the Term Loan DIP Lenders, which information shall be reviewed with the Monitor and delivered to the ABL DIP Lenders, the Term Loan DIP Lenders, the Pre-Filing ABL Lenders, the UCC and the Ad Hoc Committee of Equityholders and their respective counsel;

- (e) advise the Applicants in their development of the Plan and any amendments to the Plan;
- (f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
- (g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicants, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform their duties arising under this Order;
- (h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;
- (i) monitor and have full access to and transparent and timely information regarding the sale process of the Applicants; and
- (j) perform such other duties as are required by this Order or by this Court from time to time.

32. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

33. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or

other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

34. **THIS COURT ORDERS** that that the Monitor shall provide any creditor of the Applicants, including the Pre-Filing ABL Lenders, the Pre-Filing Term Lenders, the ABL DIP Lenders and the Term Loan DIP Lenders, with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

35. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

36. **THIS COURT ORDERS** that the Monitor, United States and Canadian counsel to the Monitor, United States and Canadian counsel to the Applicants, and counsel to the directors of PSG (the "**Case Professionals**") shall be paid their reasonable fees and disbursements in respect of work done in relation to these CCAA proceedings, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Case Professionals on a weekly basis and, in addition, the Applicants are hereby authorized to pay to the Case Professionals retainers in amounts of CAD \$100,000 for each Canadian counsel and for the Monitor and USD \$100,000 for each United States counsel, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

37. **THIS COURT ORDERS** that the Monitor and its United States and Canadian counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its United States and Canadian counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

38. **THIS COURT ORDERS** that the Case Professionals and the CRO shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed USD \$3.75 million in respect of the Fixed Asset (Term) Priority Collateral (as defined in the Vendetti Affidavit), USD \$3.75 million in respect of the ABL Priority Collateral (as defined in the Vendetti Affidavit) for an aggregate amount of USD \$7.5 million on all Property (including the Fixed Asset (Term) Priority Collateral and the ABL Priority Collateral), in each case plus all accrued and unpaid fees, disbursements, costs and expenses incurred by the Case Professionals and the CRO as at the date on which notice is delivered in the Chapter 11 Proceedings (as defined in the Vendetti Affidavit) requiring the Applicants to fund the Carve-Out, as security for their professional fees and disbursements incurred at the standard rates and charges of the Case Professionals and the CRO. The Administration Charge shall have the priority set out in paragraphs 57 and 60 herein. For greater

certainly, the Administration Charge includes the funds in the Carve-Out and may be satisfied, in whole or in part, from such funds.

ABL DIP FINANCING

39. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to obtain and borrow under a credit facility (the "**ABL DIP Facility**") from the lenders party to the ABL DIP Agreement (as defined below) (collectively, the "**ABL DIP Lenders**") in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed USD \$200 million unless permitted by further Order of this Court.

40. **THIS COURT ORDERS** that the ABL DIP Facility shall be on the terms and subject to the conditions set forth in the Superpriority Debtor-In-Possession ABL Credit Agreement dated as of October 31, 2016 between the Applicants and the ABL DIP Lenders (the "**ABL DIP Agreement**") as modified by the US Final DIP Order (defined below).

41. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**ABL DIP Definitive Documents**"), as are contemplated by the ABL DIP Agreement or as may be reasonably required by the ABL DIP Lenders pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ABL DIP Lenders under and pursuant to the ABL DIP Agreement and the ABL DIP Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

42. **THIS COURT ORDERS** that the ABL DIP Lenders shall be entitled to the benefit of and are hereby granted a charge (the "**ABL DIP Charge**") on the Property, which ABL DIP Charge shall not secure an obligation that exists before the date of this Order. The ABL DIP Charge shall have the priority set out in paragraphs 57 and 60 herein.

43. **THIS COURT ORDERS** that, subject to the ABL/Term Intercreditor Agreement dated as of October 31, 2016 (the "**Post-Filing ICA**"), notwithstanding any other provision of this Order:

- (a) the ABL DIP Lenders may take such steps from time to time as they may deem necessary or appropriate to file, register, record or perfect the ABL DIP Charge or any of the ABL DIP Definitive Documents;
- (b) upon the occurrence of an event of default under the ABL DIP Definitive Documents or the ABL DIP Charge, the ABL DIP Lenders, upon 7 days' notice to the Applicants the Monitor and the UCC, may, unless this Court orders otherwise, exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the ABL DIP Agreement, ABL DIP Definitive Documents and the ABL DIP Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the ABL DIP Lenders to the Applicants against the obligations of the Applicants to the ABL DIP Lenders under the ABL DIP Agreement, the ABL DIP Definitive Documents or the ABL DIP Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and
- (c) the foregoing rights and remedies of the ABL DIP Lenders shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

44. **THIS COURT ORDERS AND DECLARES** that the ABL DIP Lenders shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the BIA, with respect to any advances made under the ABL DIP Agreement and the ABL DIP Definitive Documents.

TERM LOAN DIP FINANCING

45. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to obtain and borrow under a credit facility (the "**Term Loan DIP Facility**") from 9938982 Canada Inc. and the other lenders party to the Term Loan DIP Credit Agreement (as defined below) (collectively, the "**Term Loan DIP Lenders**") in order to complete the Refinancing (as defined below) and to finance the Business and general corporate purposes and capital expenditures of the Applicants, provided that (a) the Applicants shall not be permitted to borrow under any Delayed Draw Term Loans (as defined in the Term Loan DIP Credit Agreement) until the Refinancing has been completed; and (b) borrowing under such credit facility shall not exceed USD \$361.3 million unless permitted by further order of this Court.

46. **THIS COURT ORDERS** that the Term Loan DIP Facility shall be on the terms and subject to the conditions set forth in the Superpriority Debtor-In-Possession Term Loan Credit Agreement dated as of October 31, 2016 between the Applicants and the Term Loan DIP Lenders (the "**Term Loan DIP Credit Agreement**") as modified by the U.S. Final DIP order.

47. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees, amendments and other definitive documents (collectively, the "**Term Loan DIP Definitive Documents**"), as are contemplated by the Term Loan DIP Credit Agreement or as may be reasonably required by the Term Loan DIP Lenders pursuant to the terms thereof, and the

Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the Term Loan DIP Lenders under and pursuant to the Term Loan DIP Credit Agreement and the Term Loan DIP Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

48. **THIS COURT ORDERS** that the Term Loan DIP Lenders shall be entitled to the benefit of and are hereby granted a charge (the "**Term Loan DIP Charge**") on the Property, which Term Loan DIP Charge shall not secure an obligation that existed before the date of this Order. The Term Loan DIP Charge shall have the priority set out in paragraphs 57 and 60 herein.

49. **THIS COURT ORDERS** that, subject to the Post-Filing ICA, notwithstanding any other provision of this Order:

- (a) the Term Loan DIP Lenders may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect or any of the Term Loan DIP Definitive Documents;
- (b) upon the occurrence of an event of default under the Term Loan DIP Definitive Documents or the Term Loan DIP Charge, Term Loan DIP Lenders, upon 7 days' notice to the Applicants, the Monitor and the UCC, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the Term Loan DIP Credit Agreement and Term Loan DIP Definitive Documents or the Term Loan DIP Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the Term Loan DIP Lenders to the Applicants against the obligations of the Applicants to the Term Loan DIP Lenders under the Term Loan DIP Credit Agreement, the Term Loan DIP Definitive Documents or the Term Loan DIP Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against

the Applicants and for the appointment of a trustee in bankruptcy of the Applicants;
and

- (c) the foregoing rights and remedies of the Term Loan DIP Lenders shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

50. **THIS COURT ORDERS AND DECLARES** that the Term Loan DIP Lenders shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the BIA, with respect to any advances made under the Term Loan DIP Credit Agreement and the Term Loan DIP Definitive Documents.

51. **THE COURT ORDERS** that the Company in consummating the transactions contemplated by the Term Loan DIP Agreement, which is a "related party transaction" for purposes of Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions* ("MI 61-101") and subject to a court order under applicable bankruptcy or insolvency laws, is not required to comply with both the formal valuation and minority approval requirements under Sections 5.4 and 5.6, respectively, of MI 61-101.

REFINANCING

52. **THIS COURT ORDERS** that the Refinancing is hereby approved and the Applicants are authorized and directed to carry out the Refinancing in accordance with the terms of the Term Loan DIP Credit Agreement and are further authorized and empowered to complete all transactions and take all actions necessary or desirable to complete the Refinancing.

53. **THIS COURT ORDERS** that, subject to the terms of the Term Loan DIP Credit Agreement and paragraph 54 hereof, the Applicants shall (a) repay in full the obligations outstanding under the Term Loan Agreement (the "Pre-Filing Term Loan

Obligations") by distributing the proceeds of the applicable refinancing loans advanced under the Term Loan DIP Facility pursuant to the Term Loan DIP Credit Agreement to the administrative agent under the Term Loan Agreement (the "**Pre-Filing Term Loan Agent**"), and (b) pay in full all of the reasonable and documented fees and expenses of the Pre-Filing Term Loan Agent and of the professional advisors retained by the Ad Hoc Committee of Pre-Filing Term Lenders or the Pre-Filing Term Loan Agent, and (c) upon receipt of the Applicants' payment in satisfaction of the Pre-Filing Term Loan Obligations contemplated in subparagraph (a) above, the Pre-Filing Term Loan Agent shall be authorized and directed to make distributions to the Pre-Filing Term Lenders in accordance with the Term Loan Agreement.

54. **THIS COURT ORDERS** that notwithstanding:

- (a) the pendency of these proceedings
- (b) any assignment in bankruptcy or any petition for a bankruptcy order now or hereafter issued pursuant to the BIA and any order issued pursuant to any such petition;
- (c) any application for a receivership order; or
- (d) any provisions of any federal or provincial legislation;

the payments, distributions, and disbursements to or for the account of the Pre-Filing Term Lenders, the Pre-Filing Term Loan Agent and the professionals retained by the Ad Hoc Committee of Pre-Filing Term Lenders or the Pre-Filing Term Loan Agent in connection with the Refinancing, shall be made indefeasibly, free and clear of any Encumbrances (as defined below), including the Charges, shall be binding on any trustee in bankruptcy, interim receiver or receiver that may be appointed in respect of any of the Applicants, and shall not be void or voidable nor deemed to be a preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, as

against the Applicants, the Monitor, the Term Loan DIP Lenders and the Pre-Filing Term Lenders and shall not constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation; provided, however, that nothing in this paragraph 54 shall derogate from any rights which a Challenge Party may have to commence a Challenge during the Challenge Period (as such terms are defined in the *Final Order (I) Authorizing the Debtors to Obtain Post-Petition Secured Financing Pursuant to 11 U.S.C. § 364, (II) Authorizing the Debtors' Use of Cash Collateral Pursuant to 11 U.S.C. § 363; (III) Granting Adequate Protection to Prepetition Secured Creditors Pursuant to 11 U.S.C. §§ 361, 362, 363 and 364; and (IV) Granting Related Relief, issued by the U.S. Court dated November 30, 2016 (the "U.S. Final DIP Order")*), but strictly and solely pursuant to paragraph 31 of the U.S. Final DIP Order, or from the ability of this Court or the U.S. Court to fashion an appropriate remedy in respect of a successful Challenge, and provided further that nothing herein or in the U.S. Final DIP Order shall derogate from the rights of the Pre-Filing Term Lenders and the Pre-Filing Term Loan Agent in response to any such Challenge and the Pre-Filing Term Loan Agent and the Pre-Filing Term Lenders reserve all such rights. Any stakeholder may also reserve its rights with respect to the allocation of any property of the Applicants between jurisdictions.

55. **THIS COURT ORDERS** that, upon completion of the Refinancing, the Pre-Filing Term Loan Agent and the Pre-Filing Term Lenders shall be entitled to and are hereby granted a charge (the "**Pre-Filing Term Loan Charge**") on the Property, which Pre-Filing Term Loan Charge shall secure any indemnification or other obligations (including as to the payment of reasonable and documented legal fees) which may arise under the Term Loan Agreement in the period from and after the Refinancing and throughout the Challenge Period and any related Challenge proceedings, and which Pre-Filing Term Loan Charge shall have the priority set out in paragraphs 57 and 60 herein.

INTERCOMPANY FINANCING

56. **THIS COURT ORDERS** that to the extent that any one or more of the Applicants (the "Lending Applicant") after the date of this Order, makes any payment or incurs or discharges any obligation that is a payment or obligation of any one or more of the other Applicants or otherwise transfers value to or for the benefit of one or more of the other Applicants, each of the Lending Applicants are hereby granted a charge (the "Intercompany Charge") on all of the Property in the amount of such payment or obligation or transfer. The Intercompany Charge shall have the priority set out in paragraphs 57 and 60 herein.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

57. **THIS COURT ORDERS** that, until further Order of this Court and subject to paragraph 58 of this Order, the priorities of the Directors' Charge, the Administration Charge, the ABL DIP Charge, Term Loan DIP Charge, the Bid Protection Charge, the Pre-Filing Term Loan Charge, and the Intercompany Charge, as among them and certain existing encumbrances, shall be, with respect to the type of collateral at issue, as follows:

(a) With respect to the Fixed Asset (Term) Priority Collateral:

First - the Administration Charge (to the maximum amount of USD \$3.75 million plus all accrued and unpaid fees, disbursements, costs and expenses incurred by the Case Professionals and the CRO as at the date on which notice is delivered in the Chapter 11 Proceedings requiring the Applicants to fund the Carve-Out in respect of the Property specifically in respect of the Fixed Asset (Term) Priority Collateral);

Second - the Term Loan DIP Charge;

Third- the Pre-Filing Term Loan Facility Security (as defined in the Vendetti Affidavit) prior to the completion of the Refinancing, and the Pre-Filing Term Loan Charge from and after the completion of the Refinancing;

Fourth - the ABL DIP Charge;

Fifth - the Pre-Filing ABL Facility Security (as defined in the Vendetti Affidavit);

Sixth - the Bid Protection Charge;

Seventh - the Directors' Charge; and

Eighth - the Intercompany Charge.

(b) With respect to the ABL Priority Collateral:

First - the Administration Charge (to the maximum amount of USD \$3.75 million plus all accrued and unpaid fees, disbursements, costs and expenses incurred by the Case Professionals and the CRO as at the date on which notice is delivered in the Chapter 11 Proceedings requiring the Applicants to fund the Carve-Out in respect of the Property specifically in respect of the ABL Priority Collateral);

Second - the ABL DIP Charge;

Third - the Pre-Filing ABL Facility Security;

Fourth - the Pre-Filing Term Loan Facility Security (prior to the Refinancing);

Fifth - the Term Loan DIP Charge;

Sixth - the Bid Protection Charge;

Seventh - the Directors' Charge; and

Eighth - the Intercompany Charge.

- (c) With respect to the assets, property and undertakings of PSG Innovation Corp. and PSG Innovation Inc. (the "**PSG Innovation Collateral**");

First - the Administration Charge;

Second - the Term Loan DIP Charge;

Third - the ABL DIP Charge;

Fourth - the Bid Protection Charge;

Fifth - the Directors' Charge; and

Sixth - the Intercompany Charge.

- (d) With respect to all other Property that is not Fixed Asset (Term) Priority Collateral or ABL Priority Collateral or PSG Innovation Collateral:

First - the Administration Charge;

Second - the Term Loan DIP Charge;

Third - the ABL DIP Charge;

Fourth - the Bid Protection Charge;

Fifth - the Directors' Charge; and

Sixth - the Intercompany Charge.

provided, however, that (i) as between the Pre-Filing ABL Lenders, the ABL DIP Lenders and the Term Loan DIP Lenders, nothing in this Order shall derogate from the priorities agreed to by them in the Post-Filing ICA; and (ii) to the extent the PSG Innovation Collateral or the Property described in Paragraph 57(d) above would otherwise constitute ABL Priority Collateral, it shall be treated as such (and otherwise shall be treated as Fixed Asset (Term) Priority Collateral as reflected above).

58. **THIS COURT ORDERS** that, upon completion of the Refinancing, until further Order of this Court, the priorities of the Directors' Charge, the Administration Charge, the ABL DIP Charge, Term Loan DIP Charge the Bid Protection Charge, the Pre-Filing Term Loan Charge, and the Intercompany Charge, as among them and certain existing encumbrances, shall be, with respect to the ABL Priority Collateral:

First - the Administration Charge (to the maximum amount of USD \$3.75 million specifically in respect of the ABL Priority Collateral);

Second - the ABL DIP Charge;

Third - the Pre-Filing ABL Facility Security;

Fourth - the Term Loan DIP Charge;

Fifth - the Directors' Charge (to the maximum amount of USD \$7.5 million);

Sixth - the Intercompany Charge;

Seventh - the Pre-Filing Term Loan Charge; and

Eighth - the Bid Protection Charge.

59. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge, the ABL DIP Charge, the Term Loan DIP Charge, the Bid

Protection Charge, the Pre-Filing Term Loan Charge, the Intercompany Charge or the Director's Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

60. **THIS COURT ORDERS** that each of the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person except as specifically as set out in paragraph 57.

61. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Applicants also obtain the prior written consent of the Monitor, the ABL DIP Lenders, the Term Loan DIP Lenders and the beneficiaries of the Intercompany Charge, the Directors' Charge and the Administration Charge, or further order of this Court.

62. **THIS COURT ORDERS** that the Directors' Charge, the Administration Charge, the Term Loan DIP Credit Agreement, the Term Loan DIP Definitive Documents, the Term Loan DIP Charge, the ABL DIP Agreement, the ABL DIP Definitive Documents and the ABL DIP Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the ABL DIP Lenders and the Term Loan DIP Lenders thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors

made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

- (a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the ABL DIP Agreement, the ABL DIP Definitive Documents, the Term Loan DIP Credit Agreement and Term Loan DIP Definitive Documents, shall create or be deemed to constitute a breach by the Applicants of any Agreement to which it is a party;
- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicants' execution, delivery or performance of the ABL DIP Agreement, the Term Loan DIP Credit Agreement, the creation of the Charges, or the execution, delivery or performance of the ABL DIP Definitive Documents or the Term Loan DIP Definitive Documents; and
- (c) the payments made by the Applicants pursuant to this Order, ABL DIP Agreement, the ABL DIP Definitive Documents, the Term Loan DIP Credit Agreement and the Term Loan DIP Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law subject to paragraph 54 hereof.

63. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicants' interest in such real property leases.

CROSS BORDER PROTOCOL

64. **THIS COURT ORDERS** that the cross border protocol, in the form attached as Schedule "1" hereto, is hereby approved and shall become effective upon its approval by the U.S. Court and the parties to these proceedings and any other Person shall be governed by it and shall comply with same.

MARSHALLING

65. **THIS COURT ORDERS THAT** none of the Term Loan DIP Lenders, the ABL DIP Lenders, Pre-Filing Term Lenders or the Pre-Filing ABL Lenders shall be subject to the equitable doctrine of "marshaling" or any other similar doctrine; provided, however, that, notwithstanding the foregoing, (i) at any time, upon the occurrence or continuation of an Event of Default under either DIP Facility, any stakeholder retains the right to argue, and the Court retains the right to so order, that the proceeds of assets, property and undertakings which are not Fixed Asset (Term) Priority Collateral or ABL Priority Collateral (the "Unencumbered Assets") should only be used to satisfy the obligations under the ABL DIP Facility or Term Loan DIP Facility to the extent such obligations cannot be satisfied in full first from other collateral and/or to argue that such Unencumbered Assets should be sold separately and no earlier than the sale, transfer, foreclosure or other disposition of such other collateral; and (ii) the Applicants, Term Loan DIP Lenders, the ABL DIP Lenders, the Pre-Filing Term Lenders and the Pre-Filing ABL Lenders each reserve their rights to oppose such arguments.

SERVICE AND NOTICE

66. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in the national edition of *The Globe and Mail*, the *Wall Street Journal* and *Le Devoir* a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor

who has a claim against the Applicants of more than \$5,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder, provided that, for the purposes of this list, the Monitor shall not make the names and addresses of creditors who are individuals publicly available.

67. **THIS COURT ORDERS** that the Applicants shall create, maintain and update as necessary a list of all Persons appearing in person or by counsel in this proceeding (the "Service List"). The Monitor shall post the Service List, as may be updated from time to time, on the Case Website (as defined below) as part of the public materials to be recorded thereon in relation to this proceeding. Notwithstanding the foregoing, the Monitor shall have no liability in respect of the accuracy of or the timeliness of making any changes to the Service List.

68. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a case website (the "Case Website") shall be established in accordance with the Protocol with the following URL: www.ey.com/ca/psg.

69. **THIS COURT ORDERS** that the Claims and Noticing Agent is entitled to serve and distribute all motion materials and other notices in these proceedings on behalf of

the Applicants and the Monitor (when and if so instructed by the Applicants or the Monitor) by electronic service in accordance with the Protocol.

70. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicants, the Monitor and the Claims and Noticing Agent are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

71. **THIS COURT ORDERS** that, except with respect to urgent motions, all motions in this proceeding are to be brought on not less than seven (7) days' notice to all persons on the Service List and shall specify a date and time for the hearing of the motion.

GENERAL

72. **THIS COURT ORDERS** that the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

73. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

74. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals,

regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

75. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

76. **THIS COURT ORDERS** that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

77. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.



ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

NOV 30 2016

PER / PAR: 

Schedule 1

Cross-Border Restructuring Protocol

**Between the United States Bankruptcy Court for the District of Delaware
(Case No. 16-12373 (KJC)) and the Ontario Superior Court of Justice (Court File No.
CV-16-11582-00CL)**

This cross-border insolvency protocol (the "Protocol") shall govern the conduct of all parties in interest in the Restructuring Proceedings (as such term is defined herein).

The Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the "Guidelines") attached hereto as Schedule "A" are hereby incorporated by reference and form part of this Protocol. Where there is any discrepancy between the Protocol and the Guidelines, this Protocol shall govern.

A. Background

1. Performance Sports Group Ltd. ("PSG"), a company incorporated in the Province of British Columbia, is the ultimate parent company of an international enterprise that designs, develops and manufactures high performance sports equipment and related apparel through its various subsidiaries and affiliates in the United States of America (the "U.S."), Canada and other countries. On October 31, 2016 (the "Filing Date"), PSG and its direct and indirect subsidiaries listed on Schedule "B" (collectively, the "Debtors") commenced cases (the "Chapter 11 Cases") under chapter 11 of title 11 of the United States Bankruptcy Code (the "Bankruptcy Code") in the U.S. in the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") and commenced a reorganization proceeding in Canada (the "Canadian Proceeding" and together with the Chapter 11 Cases, the "Restructuring Proceedings") by filing an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "CCAA") with the

Ontario Superior Court of Justice (the "Canadian Court" and together with the U.S. Court, the "Courts" and each individually, a "Court").

2. On the Filing Date, the Canadian Court issued an Order (as may be amended from time to time, the "Initial Order") which, *inter alia*: (a) granted the Debtors relief under the CCAA; (b) appointed Ernst & Young Inc. as monitor of the Debtors (in that capacity, the "Monitor"), with the rights powers, duties and limitations upon liabilities set forth in the CCAA and the Initial Order; and (c) granted a stay of proceedings in respect of the Debtors.

3. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession under the supervision of the Courts pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, the CCAA and the Initial Order. In connection with the Restructuring Proceedings, a Superpriority Debtor-In-Possession Term Loan Credit Agreement dated as of October 31, 2016, was entered into between the Debtors and 9938982 Canada Inc. and the other lenders party to such agreement (collectively, the "Term Loan DIP Lenders").

4. The Office of the United States Trustee (the "U.S. Trustee") has appointed an official committee of unsecured creditors (the "Creditors' Committee") in the Chapter 11 Cases.

B. Purpose and Goals

5. While the Chapter 11 Cases and the Canadian Proceeding are full and separate proceedings pending in the U.S. and Canada, the implementation of administrative procedures and cross-border guidelines is both necessary and desirable to coordinate certain activities in the Restructuring Proceedings, protect the rights of parties thereto, ensure the maintenance of each Court's respective independent

jurisdiction and give effect to any applicable doctrines, including, comity. Accordingly, this Protocol has been developed to promote the following mutually desirable goals and objectives in the Restructuring Proceedings:

- a. harmonize and coordinate activities in the Restructuring Proceedings before the Courts;
- b. promote the orderly and efficient administration of the Restructuring Proceedings to, among other things, maximize the efficiency of the Restructuring Proceedings, reduce the costs associated therewith and avoid duplication of effort;
- c. honor the independence and integrity of the Courts and other courts and tribunals of the U.S. and Canada, respectively;
- d. promote international cooperation and respect for comity among the Courts, the Debtors, the Creditors' Committee, the U.S. Representatives (defined below), the Canadian Representatives (defined below), the U.S. Trustee, the Term Loan DIP Lenders and other creditors and interested parties in the Restructuring Proceedings;
- e. facilitate the fair, open and efficient administration of the Restructuring Proceedings for the benefit of all of the Debtors' creditors and other interested parties, wherever located; and
- f. implement a framework of general principles to address basic administrative issues arising out of the cross-border nature of the Restructuring Proceedings.

As the Restructuring Proceedings progress, the Courts may also jointly determine that other cross-border matters that may arise in the Restructuring Proceedings should be dealt with under and in accordance with the principles of this Protocol. Subject to the provisions of this Protocol, where an issue is to be addressed only to one Court, in rendering a determination in any cross-border matter, such Court may: (a) to the extent practical or advisable, consult with the other Court; and (b) in its sole discretion while considering principles of comity, either (i) render a binding

decision after such consultation; (ii) defer to the determination of the other Court by transferring the matter, in whole or part, to the other Court; or (iii) seek a joint hearing of both Courts.

C. Comity and Independence of the Courts

6. The approval and implementation of this Protocol shall not divest nor diminish the U.S. Court's and the Canadian Court's respective independent jurisdiction of the subject matter of the Chapter 11 Cases and the Canadian Proceeding, respectively. By approving and implementing this Protocol, neither the U.S. Court, the Canadian Court, the Debtors, the Canadian Representatives (as defined below), the U.S. Representatives (as defined below), nor any creditors or interested parties shall be deemed to have approved or engaged in any infringement on the sovereignty of the U.S. or Canada.

7. The U.S. Court shall have sole and exclusive jurisdiction and power over the conduct of the Chapter 11 Cases and the hearing and determination of matters arising in the Chapter 11 Cases. The Canadian Court shall have sole and exclusive jurisdiction and power over the conduct of the Canadian Proceeding and the hearing and determination of matters arising in the Canadian Proceeding.

8. In accordance with the principles of comity and independence recognized herein, nothing contained herein shall be construed to:

- a. increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the U.S. Court, the Canadian Court or any other court or tribunal in the U.S. or Canada, including the ability of any such court or tribunal to provide appropriate relief under applicable law on an *ex parte* or "limited notice" basis;
- b. require the U.S. Court to take any action that is inconsistent with its obligations under the laws of the U.S.;

- c. require the Canadian Court to take any action that is inconsistent with its obligations under the laws of Canada or the laws of the applicable Province therein;
- d. require the U.S. Representatives, the Canadian Representatives (collectively, the "Estate Representatives"), the Debtors, the Monitor, the Creditors' Committee, or the U.S. Trustee to take any action or refrain from taking any action that would result in a breach of any duty imposed on them by any applicable law;
- e. authorize any action that requires the specific approval of one or both of the Courts under the Bankruptcy Code or the CCAA after appropriate notice and a hearing (except to the extent that such action is specifically described in this Protocol); or
- f. preclude the Debtors, the Monitor, the Creditors' Committee, the Estate Representatives, the U.S. Trustee, the Term Loan DIP Lenders, any creditor or other interested party from asserting such party's substantive rights under the applicable laws of the U.S., Canada or any other relevant jurisdiction including, without limitation, the rights of parties in interest to appeal from the decisions taken by one or both of the Courts.

9. The Debtors, the Creditors' Committee, the Estate Representatives and their respective employees, members, agents and professionals shall respect and comply with the independent, non-delegable duties imposed upon them by the Bankruptcy Code, the CCAA, the Initial Order, other applicable laws and orders of the Courts.

D. Cooperation

10. To assist in the efficient administration of the Restructuring Proceedings and in recognizing that the Debtors may each be creditors of another Debtor's estate, each of the Debtors and its respective Estate Representatives shall, where appropriate:

- (a) cooperate with the others in connection with actions taken in both the U.S. Court and the Canadian Court; and
- (b) take any other appropriate steps to coordinate the

administration of the Restructuring Proceedings for the benefit of the Debtors' respective estates and stakeholders.

11. To harmonize and coordinate the administration of the Restructuring Proceedings, the U.S. Court and the Canadian Court each may coordinate activities and consider whether it is appropriate to defer to the judgment of the other Court. In furtherance of the foregoing:

- a. The U.S. Court and the Canadian Court may communicate with one another, with or without counsel present, with respect to any procedural matter relating to the Restructuring Proceedings.
- b. If the issue of the proper jurisdiction of either Court to determine an issue is raised by an interested party in either of the Restructuring Proceedings or a written request for a Joint Hearing (as defined below) is made with respect to any relief sought in either Court, the Courts may consult with one another to determine an appropriate process by which the issue of jurisdiction will be determined. Such process shall be subject to submissions by the Debtors, the U.S. Trustee, the Creditors Committee, the Estate Representatives, the Monitor, the Term Loan DIP Lenders and any interested party prior to any determination on the issue of jurisdiction or Joint Hearing request being made by either Court, and such issue of jurisdiction or Joint Hearing request shall be decided prior to the adjudication of the matter in the Court such matter was originally brought.
- c. The Courts may, but are not obligated to, coordinate activities in the Restructuring Proceedings such that the subject matter of any particular action, suit, request, application, contested matter or other proceeding is determined in a single Court.
- d. The U.S. Court and the Canadian Court may conduct joint hearings (each a "Joint Hearing") with respect to any matter relating to the conduct, administration, determination, or disposition of any aspect of the Chapter 11 Cases or the Canadian Proceeding, including, the interpretation or implementation of this Protocol, where both Courts consider such a Joint Hearing to be necessary

or advisable, or as otherwise provided herein. With respect to any Joint Hearings, unless otherwise ordered or otherwise agreed to by the Courts, the following procedures will be followed:

- i. A telephone or video link shall be established so that both the U.S. Court and the Canadian Court shall be able to simultaneously hear the proceedings in the other Court.
- ii. Notices, submissions, motions or applications by any party (collectively, the "**Pleadings**") that are or become the subject of a Joint Hearing shall be made or filed initially only to the Court in which such party is appearing and seeking relief. Promptly after the scheduling of any Joint Hearing, the party submitting such Pleadings to one Court shall file courtesy copies with the other Court. In any event, Pleadings in respect of relief sought from both Courts shall be filed with both Courts.
- iii. Any party intending to rely on any written evidentiary materials in support of a submission to the U.S. Court or the Canadian Court in connection with any Joint Hearing or application (collectively, the "**Evidentiary Materials**") shall file or otherwise submit such materials to both Courts in advance of the Joint Hearing. To the fullest extent possible, the Evidentiary Materials filed in each Court shall be identical and shall be consistent with the procedural and evidentiary rules and requirements of each Court.
- iv. If a party has not previously appeared in or attorned or does not wish to attorn to the jurisdiction of a Court, it shall be entitled to file Pleadings or Evidentiary Materials in connection with the Joint Hearing without, by the mere act of such filings or appearance, being deemed to have attorned to the jurisdiction of the Court in which such material is filed, so long as it does not request in its materials or submissions any affirmative relief from such Court.
- v. The Judge of the U.S. Court and the Justice of the Canadian Court who will preside over the Joint Hearings shall be entitled to communicate with each other in advance of any Joint Hearing, with or without counsel being present, to: (a) establish guidelines for

the orderly submission of Pleadings, Evidentiary Materials, and other papers and for the rendering of decisions by the Courts; and (b) to address any related procedural, administrative or preliminary matters.

- vi. The Judge of the U.S. Court and the Justice of the Canadian Court who preside over any Joint Hearing, shall be entitled to communicate with each other during or after any Joint Hearing, with or without counsel present, for the purposes of (a) determining whether consistent rulings can be made by both Courts; (b) coordinating the terms upon the Courts' respective rulings; and (c) addressing any other procedural or administrative matters.

12. Notwithstanding the terms of paragraph 11 above, this Protocol recognizes that the U.S. Court and the Canadian Court are independent courts. Accordingly, although the Courts will seek to cooperate and coordinate with each other in good faith, each Court shall be entitled at all times to exercise its independent jurisdiction and authority with respect to: (a) matters presented to and properly before such Court; and (b) the conduct of the parties appearing in such matters.

13. Notwithstanding the foregoing, or anything to the contrary herein, in the interest of cooperation and coordination of these proceedings, each Court shall recognize and consider all privileges applicable to communications between counsel and parties, including those contemplated by the "common interest doctrine " or like privileges, which would be applicable in each respective Court. Such privileges in connection with communications shall be applicable in both Courts with respect to all parties to these proceedings having any requisite common interest.

14. Where one Court has jurisdiction over a matter which requires the application of the law of the jurisdiction of the other Court in order to determine an issue before it, the Court with jurisdiction over such matter may, among other things,

hear expert evidence or seek the advice and direction of the other Court in respect of the foreign law to be applied, subject to paragraph 30 herein.

E. Recognition of Stay of Proceedings

15. The Canadian Court hereby recognizes the validity of the stay of proceedings and actions against or respecting the Debtors and their property under section 362 of the Bankruptcy Code (the "U.S. Stay"). In implementing the terms of this paragraph, the Canadian Court may consult with the U.S. Court regarding: (a) the interpretation, extent, scope and applicability of the U.S. Stay and any orders of the U.S. Court modifying or granting relief from the U.S. Stay; and (b) the enforcement of the U.S. Stay in Canada.

16. The U.S. Court hereby recognizes the validity of the stay of proceedings and actions against or respecting the Debtors, their property and the directors and officers of the Debtors under the CCAA and the Initial Order (the "Canadian Stay"). In implementing the terms of this paragraph, the U.S. Court may consult with the Canadian Court regarding: (a) the interpretation, extent, scope and applicability of the Canadian Stay and any orders of the Canadian Court modifying or granting relief from the Canadian Stay; and (ii) the enforcement of the Canadian Stay in the U.S.

17. Nothing contained herein shall affect or limit the Debtors' or other parties' rights to assert the applicability or nonapplicability of the U.S. Stay or the Canadian Stay to any particular proceeding, property, asset, activity or other matter, wherever pending or located. Subject to the terms hereof, (a) any motion with respect to the application of the stay of proceedings issued by the Canadian Court in the CCAA shall be heard and determined by the Canadian Court and (b) any motion with respect

to the application of the stay under section 362 of the Bankruptcy Code shall be heard and determined by the U.S. Court.

F. Retention and Compensation of Representatives and Professionals

18. The Monitor, its officers, directors, employees, counsel, agents, and any other professionals retained therefor, wherever located, (collectively, the "Monitor Parties") and any other estate representatives in the Canadian Proceeding, including any Company representatives who appear in the Canadian Proceeding (collectively, the "Canadian Representatives") shall be subject to the sole and exclusive jurisdiction of the Canadian Court with respect to all matters, including: (a) the Canadian Representatives' appointment and tenure in office; (b) the retention and compensation of the Canadian Representatives; (c) the Canadian Representatives' liability, if any, to any person or entity, including the Debtors and any third parties, in connection with the Restructuring Proceedings; and (d) the hearing and determination of any other matters related to the Canadian Representatives arising in the Canadian Proceeding under the CCAA or other applicable Canadian law. Additionally, the Canadian Representatives: (x) shall not be required to seek approval of their retention in the U.S. Court for services rendered to the Debtors; (y) shall be compensated for their services solely in accordance with the CCAA, the Initial Order and other applicable laws of Canada and the applicable Provinces, or orders of the Canadian Court; and (z) shall not be required to seek approval of their compensation in the U.S. Court.

19. The Monitor Parties shall be entitled to the protections of section 306 of the Bankruptcy Code, the same protections and immunities in the U.S. as those granted to them under the CCAA and the Initial Order. In particular, except as otherwise provided in any subsequent order entered in the Canadian Proceeding, the Monitor

Parties shall incur no liability or obligations as a result of the appointment of the Monitor, the carrying out of its duties or the provisions of the CCAA and the Initial Order by the Monitor Parties, except any such liability arising from actions of the Monitor Parties constituting gross negligence or willful misconduct.

20. Any estate representative appointed in the Chapter 11 Cases, including without limitation, any restructuring officer appointed under section 363 of the Bankruptcy Code and any examiners or trustees appointed in accordance with section 1104 of the Bankruptcy Code (collectively, the "U.S. Representatives") shall be subject to the sole and exclusive jurisdiction of the U.S. Court with respect to all matters, including: (a) the U.S. Representatives' appointment and tenure in office; (b) the retention and compensation of the U.S. Representatives; (c) the U.S. Representatives' liability, if any, to any person or entity, including the Debtors and any third parties, in connection with the Restructuring Proceedings; and (d) the hearing and determination of any other matters related to the U.S. Representatives arising in the Chapter 11 Cases under the Bankruptcy Code or other applicable laws of the U.S. Additionally, the U.S. Representatives and their counsel and other professionals retained therefor (in all cases, whether in Canada or U.S.): (x) shall not be required to seek approval of their retention in the Canadian Court; (y) shall be compensated for their services to the Debtors solely in accordance with the Bankruptcy Code and other applicable laws of the U.S. or orders of the U.S. Court; and (z) shall not be required to seek approval of their compensation in the Canadian Court.

21. Any professionals retained by or with the approval of the Debtors for activities performed in Canada or in connection with the Canadian Proceeding, including, in each case, counsel, financial advisors, accountants, consultants and experts

(collectively, the "Canadian Professionals") shall be subject to the sole and exclusive jurisdiction of the Canadian Court. Accordingly, the Canadian Professionals: (a) shall be subject to the procedures and standards for retention and compensation applicable in the Canadian Court under the CCAA, the Initial Order any other applicable Canadian law or orders of the Canadian Court; and (b) shall not be required to seek approval of their retention or compensation in the U.S. Court.

22. Any professionals retained by or with approval of the Debtors for activities performed in the U.S. or in connection with the Chapter 11 Cases, including, in each case, counsel, financial advisors, accountants, consultants and experts (collectively, the "U.S. Professionals") shall be subject to the sole and exclusive jurisdiction of the U.S. Court. Accordingly, the U.S. Professionals: (a) shall be subject to the procedures and standards for retention and compensation applicable in the U.S. Court under the Bankruptcy Code and any other applicable laws of the U.S. or orders of the U.S. Court; and (b) shall not be required to seek approval of their retention or compensation in the Canadian Court.

23. Subject to paragraph 24 herein, any professional retained by the Creditors' Committee, including in each case, without limitation, counsel and financial advisors (collectively, the "Committee Professionals") shall be subject to the sole and exclusive jurisdiction of the U.S. Court. Such Committee Professionals: (a) shall be subject to the procedures and standards for retention and compensation applicable in the U.S. Court under the Bankruptcy Code and any other applicable laws of the United States or orders of the U.S. Court; and (b) shall not be required to seek approval of their retention or compensation in the Canadian Court or any other court.

G. Appearances

24. Upon any appearance or filing, as may be permitted or provided for by the rules of the applicable Court, the Debtors, their creditors and other interested parties in the Restructuring Proceedings, including the Monitor Parties, Creditors Committee, the Estate Representatives, the U.S. Trustee and the Term Loan DIP Lenders, each of which parties shall have the right to appear and be heard in the Chapter 11 Cases and Canadian Proceeding, shall be subject to the personal jurisdiction of the Canadian Court or the U.S. Court, as applicable, with respect to the particular matters as to which they appear before that Court.

H. Claims Protocol

25. It may be necessary to implement a specific claims protocol to address, among other things and without limitation, the timing process, jurisdiction and applicable governing law to be applied to the resolution of claims filed by the Debtors' creditors (including intercompany claims) in the Canadian Proceeding and the Chapter 11 Cases. In such event, and in recognition of the inherent complexities of the inter-company claims that may be asserted in the Restructuring Proceedings, the Debtors shall use commercially reasonable efforts to negotiate a specific claims protocol, in form and substance satisfactory to the Debtors, the Monitor, and the Creditors' Committee, which protocol shall be submitted to the Canadian Court and the U.S. Court for approval. In the event that the Debtors fail to reach agreement among such parties, the Debtors shall file a motion in both the Canadian Court and the U.S. Court seeking approval of such claims protocol.

I. Notices

26. Notice of any Pleading or paper filed in one or both of the Restructuring Proceedings involving or relating to matters addressed by this Protocol and notice of any related hearings or other proceedings shall be given by appropriate means (including, where circumstances warrant, by courier, telecopier, email or other electronic forms of communication) to the following: (a) creditors and interested parties, in accordance with the practice and procedural rules of the jurisdiction where the papers are filed or the proceedings are to occur and orders of the applicable Court; and (b) to the extent not otherwise entitled to receive notice under clause (a) of this paragraph, to counsel to the (i) the Debtors; (ii) the Monitor; (iii) the U.S. Trustee; (iv) the Creditors' Committee; (v) the agents under the Debtors' debtor-in-possession financing facilities; (vi) the agent under the Debtors' prepetition term loan facility and counsel to the ad hoc committee of certain lenders under the prepetition term loan facility (until such facility has been refinanced); (vii) the agent under the Debtors' prepetition ABL facility; (viii) any other statutory committee appointed in the Restructuring Proceedings and such other parties as may be designated by either of the Courts from time to time. Notice in accordance with this paragraph shall be given by the party otherwise responsible for effecting notice in the jurisdiction where the underlying papers are filed or the proceedings are to occur. In addition to the foregoing, upon request by either Court, the Debtors shall provide the U.S. Court or the Canadian Court, as the case may be, with copies of any orders, decisions, opinions, or similar papers issued by the other Court in the Restructuring Proceedings.

27. When any cross-border issues or matters addressed by this Protocol are to be addressed before a Court, notices shall be provided in the manner and to the parties referred to in paragraph 26 above.

J. Effectiveness; Modification

28. This Protocol shall become effective only upon its approval by both the U.S. Court and the Canadian Court.

29. This Protocol may not be supplemented, modified, terminated, or replaced in any manner except upon the approval of both the U.S. Court and the Canadian Court after notice and a hearing. Notice of any legal proceedings to supplement, modify, terminate, or replace this Protocol shall be given in accordance with the notice provisions set forth in paragraph 26 above.

K. Procedure for Resolving Disputes Under This Protocol

30. Disputes relating to the terms, intent, or application of this Protocol may be addressed by interested parties to the U.S. Court, the Canadian Court, or both Courts upon notice in accordance with the notice provisions outlined in paragraph 26 above. In rendering a determination in any such dispute, the Court to which the issue is addressed: (a) shall consult with the other Court; and (b) may, in its sole and exclusive discretion, either: (i) render a binding decision after such consultation; (ii) defer to the determination of the other Court by transferring the matter, in whole or in part, to such other Court; or (iii) seek a Joint Hearing of both Courts in accordance with paragraph 11 above. Notwithstanding the foregoing, in making a determination under this paragraph, each Court shall give due consideration to the independence, comity, and inherent jurisdiction of the other Court established under existing law.

31. In implementing the terms of this Protocol, the U.S. Court and the Canadian Court may, in their sole discretion, provide advice or guidance to the other Court with respect to legal issues in accordance with the following procedures:

- a. the U.S. Court or the Canadian Court, as applicable, may determine that such advice or guidance is appropriate under the circumstances;
- b. the Court issuing such advice or guidance shall provide it to the other Court in writing;
- c. copies of such written advice or guidance shall be served by the applicable Court in accordance with paragraph 26 hereof; and
- d. the Courts may jointly decide to invite the Debtors, the Estate Representatives, the U.S. Trustee, the Monitor, the Creditors' Committee, the Term Loan DIP Lenders and any other affected or interested party to make submissions to the appropriate Court in response to or in connection with any written advice or guidance received from the other Court.

32. For clarity, the provisions of paragraph 31 shall not be construed to restrict the ability of either Court to confer as provided in paragraph 11 above whenever it deems it appropriate to do so.

L. Preservation of Rights

33. Except as specifically provided herein, neither the terms of this Protocol nor any actions taken under the terms of this Protocol shall: (a) prejudice or affect the powers, rights, claims, and defenses of the Debtors and their respective estates, the Creditors' Committee, the Estate Representatives, the U.S. Trustee, the Term Loan DIP Lenders or any of the Debtors' creditors under applicable law, including the Bankruptcy Code and the CCAA, and the orders of the Courts; or (b) preclude or prejudice the rights

of any person to assert or pursue such person's substantive rights against any other person under the applicable laws of Canada or the U.S.

Schedule 1

Schedule "B" - List of Debtor Entities

Corporation(s) incorporated under the laws of British Columbia

1. Performance Sports Group Ltd.

Corporation(s) incorporated under the laws of Canada

2. KBAU Holdings Canada, Inc.
3. Bauer Hockey Corp.
4. Easton Baseball/Softball Corp.
5. BPS Diamond Sports Corp.
6. Bauer Hockey Retail Corp.
7. PSG Innovation Corp.
8. Bauer Performance Sports Uniforms Corp.
9. Performance Lacrosse Group Corp.
10. BPS Canada Intermediate Corp.

Corporation(s) incorporated under the laws of Vermont

11. Bauer Hockey, Inc.

Corporation(s) incorporated under the laws of Delaware

12. BPS U.S. Holdings Inc.
13. Easton Baseball/Softball Inc.
14. BPS Diamond Sports Inc.
15. Bauer Hockey Retail Inc.
16. PSG Innovation Inc.
17. Bauer Performance Sports Uniforms Inc.
18. Performance Lacrosse Group Inc.

Schedule 1

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Schedule A

THE AMERICAN LAW INSTITUTE

in association with

THE INTERNATIONAL INSOLVENCY INSTITUTE

**Guidelines Applicable to Court-to-Court
Communications in Cross-Border Cases**

*As Adopted and Promulgated in Transnational Insolvency:
Principles of Cooperation Among the NAFTA Countries*

BY

THE AMERICAN LAW INSTITUTE

At Washington, D.C., May 16, 2000

And as Adopted by

THE INTERNATIONAL INSOLVENCY INSTITUTE

At New York, June 10, 2001



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The Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases were developed by The American Law Institute during and as part of its Transnational Insolvency Project and the use of the *Guidelines* in cross-border cases is specifically permitted and encouraged.

The text of the *Guidelines* is available in English and several other languages including Chinese, French, German, Italian, Japanese, Korean, Portuguese, Russian, Swedish, and Spanish on the website of the International Insolvency Institute at <http://www.iiiglobal.org/international/guidelines.html>.

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Foreword by the Director of The American Law Institute

In May of 2000 The American Law Institute gave its final approval to the work of the ALI's Transnational Insolvency Project. This consisted of the four volumes eventually published, after a period of delay required by the need to take into account a newly enacted Mexican Bankruptcy Code, in 2003 under the title of *Transnational Insolvency: Cooperation Among the NAFTA Countries*. These volumes included both the first phase of the project, separate Statements of the bankruptcy laws of Canada, Mexico, and the United States, and the project's culminating phase, a volume comprising *Principles of Cooperation Among the NAFTA Countries*. All reflected the joint input of teams of Reporters and Advisers from each of the three NAFTA countries and a fully transnational perspective. Published by Juris Publishing, Inc., they can be ordered on the ALI website (www.ali.org).

A byproduct of our work on the Principles volume, these *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* appeared originally as Appendix B of that volume and were approved by the ALI in 2000 along with the rest of the volume. But the *Guidelines* have played a vital and influential role apart from the *Principles*, having been widely translated and distributed, cited and applied by courts, and independently approved by both the International Insolvency Institute and the Insolvency Institute of Canada. Although they were initially developed in the context of a project arrived at improving cooperation among bankruptcy courts within the NAFTA countries, their acceptance by the IIL, whose members include leaders

of the insolvency bar from more than 40 countries, suggests a pertinence and applicability that extends far beyond the ambit of NAFTA. Indeed, there appears to be no reason to restrict the *Guidelines* to insolvency cases; they should prove useful whenever sensible and coherent standards for cooperation among courts involved in overlapping litigation are called for. See, e.g., American Law Institute, International Jurisdiction and Judgments Project § 12(e) (Tentative Draft No. 2, 2004).

The American Law Institute expresses its gratitude to the International Insolvency Institute for its continuing efforts to publicize the *Guidelines* and to make them more widely known to judges and lawyers around the world; to III Chair E. Bruce Leonard of Toronto, who as Canadian Co-Reporter for the Transnational Insolvency Project was the principal drafter of the *Guidelines* in English and has been primarily responsible for arranging and overseeing their translation into the various other languages in which they now appear; and to the translators themselves, whose work will make the *Guidelines* much more universally accessible. We hope that this greater availability, in these new English and bilingual editions, will help to foster better communication, and thus better understanding, among the diverse courts and legal systems throughout our increasingly globalized world.

LANCE LIEBMAN

Director

The American Law Institute

January 2004

Foreword by the Chair of the International Insolvency Institute

The International Insolvency Institute, a world-wide association of leading insolvency professionals, judges, academics, and regulators, is pleased to recommend the adoption and the application in cross-border and multinational cases of The American Law Institute's *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases*. The *Guidelines* were reviewed and studied by a Committee of the III and were unanimously approved by its membership at the III's Annual General Meeting and Conference in New York in June 2001.

Since their approval by the III, the *Guidelines* have been applied in several cross-border cases with considerable success in achieving the coordination that is so necessary to preserve values for all of the creditors that are involved in international cases. The III recommends without qualification that insolvency professionals and judges adopt the *Guidelines* at the earliest possible stage of a cross-border case so that they will be in place whenever there is a need for the courts involved to communicate with each other, e.g., whenever the actions of one court could impact on issues that are before the other court.

Although the *Guidelines* were developed in an insolvency context, it has been noted by litigation professionals and judges that the *Guidelines* would be equally valuable and constructive in any international case where two or more courts are involved. In fact, in multijurisdictional litigation, the positive effect of the *Guidelines* would be even greater in cases where several courts are involved. It

is important to appreciate that the *Guidelines* require that all domestic practices and procedures be complied with and that the *Guidelines* do not alter or affect the substantive rights of the parties or give any advantage to any party over any other party.

The International Insolvency Institute expresses appreciation to its members who have arranged for the translation of the *Guidelines* into French, German, Italian, Korean, Japanese, Chinese, Portuguese, Russian, and Swedish and extends its appreciation to The American Law Institute for the translation into Spanish. The III also expresses its appreciation to The American Law Institute, the American College of Bankruptcy, and the Ontario Superior Court of Justice Commercial List Committee for their kind and generous financial support in enabling the publication and dissemination of the *Guidelines* in bilingual versions in major countries around the world.

Readers who become aware of cases in which the *Guidelines* have been applied are highly encouraged to provide the details of those cases to the III (fax: 416-360-8877; e-mail: info@iiiglobal.org) so that everyone can benefit from the experience and positive results that flow from the adoption and application of the *Guidelines*. The continuing progress of the *Guidelines* and the cases in which the *Guidelines* have been applied will be maintained on the III's website at www.iiiglobal.org.

The III and all of its members are very pleased to have been a part of the development and success of the *Guidelines* and commend The American Law Institute for its vision in developing the *Guidelines* and in supporting

their worldwide circulation to insolvency professionals, judges, academics, and regulators. The use of the *Guidelines* in international cases will change international insolvencies and reorganizations for the better forever, and the insolvency community owes a considerable debt to The American Law Institute for the inspiration and vision that has made this possible.

E. BRUCE LEONARD

Chairman

The International Insolvency Institute

Toronto, Ontario

March 2004

Judicial Preface

We believe that the advantages of co-operation and co-ordination between Courts is clearly advantageous to all of the stakeholders who are involved in insolvency and reorganization cases that extend beyond the boundaries of one country. The benefit of communications between Courts in international proceedings has been recognized by the United Nations through the *Model Law on Cross-Border Insolvency* developed by the United Nations Commission on International Trade Law and approved by the General Assembly of the United Nations in 1997. The advantages of communications have also been recognized in the European Union Regulation on Insolvency Proceedings which became effective for the Member States of the European Union in 2002.

The *Guidelines for Court-to-Court Communications in Cross-Border Cases* were developed in the American Law Institute's Transnational Insolvency Project involving the NAFTA countries of Mexico, the United States and Canada. The *Guidelines* have been approved by the membership of the ALI and by the International Insolvency Institute whose membership covers over 40 countries from around the world. We appreciate that every country is unique and distinctive and that every country has its own proud legal traditions and concepts. The *Guidelines* are not intended to alter or change the domestic rules or procedures that are applicable in any country and are not intended to affect or curtail the substantive rights of any party in proceedings before the Courts. The *Guidelines* are intended to encourage and facilitate co-operation in international cases while observing all applicable rules and procedures of the Courts that are respectively involved.

The *Guidelines* may be modified to meet either the procedural law of the jurisdiction in question or the particular circumstances in individual cases so as to achieve the greatest level of co-operation possible between the Courts in dealing with a multinational insolvency or liquidation. The *Guidelines*, however, are not restricted to insolvency cases and may be of assistance in dealing with non-insolvency cases that involve more than one country. Several of us have already used the *Guidelines* in cross-border cases and would encourage stakeholders and counsel in international cases to consider the advantages that could be achieved in their cases from the application and implementation of the *Guidelines*.

Mr. Justice David Baragwanath
High Court of New Zealand
Auckland, New Zealand

Hon. Sidney B. Brooks
United States Bankruptcy Court
District of Colorado
Denver

Chief Justice Donald I. Brenner
Supreme Court of British Columbia
Vancouver

Hon. Charles G. Case, II
United States Bankruptcy Court
District of Arizona
Phoenix

Mr. Justice Miodrag Dordević
Supreme Court of Slovenia
Ljubljana

Hon. James L. Garrity, Jr.
United States Bankruptcy Court
Southern District of New York (Ret'd)
Shearman & Sterling
New York

Mr. Justice Paul R. Heath
High Court of New Zealand
Auckland, New Zealand

Chief Judge Burton R. Lifland
United States Bankruptcy Appellate
Panel for the Second Circuit
New York

Hon. George Paine II
United States Bankruptcy Court
District of Tennessee
Nashville

Mr. Justice Adolfo A.N. Rouillon
Court of Appeal
Rosario, Argentina

Mr. Justice Wisit Wisitsora – At
Business Reorganization Office
Government of Thailand
Bangkok

Mr. Justice J.M. Farley
Ontario Superior Court of Justice
Toronto

Hon. Allan L. Gropper
Southern District of New York
United States Bankruptcy Court
New York

Hon. Hyungdu Kim
Supreme Court of Korea
Seoul

Mr. Justice Gavin Lightman
Royal Courts of Justice
London

Hon. Chiyong Rim
District Court
Western District of Seoul
Seoul, Korea

Hon. Shinjiro Takagi
Supreme Court of Japan (Ret'd)
Industrial Revitalization Corporation of Japan
Tokyo

Mr. Justice R.H. Zulman
Supreme Court of Appeal of South Africa
Parklands

Guidelines

Applicable to Court-to-Court Communications in Cross-Border Cases

Introduction:

One of the most essential elements of cooperation in cross-border cases is communication among the administering authorities of the countries involved. Because of the importance of the courts in insolvency and reorganization proceedings, it is even more essential that the supervising courts be able to coordinate their activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises.

These Guidelines are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved. Communications by judges directly with judges or administrators in a foreign country, however, raise issues of credibility and proper procedures. The context alone is likely to create concern in litigants unless the process is transparent and clearly fair. Thus, communication among courts in cross-border cases is both more important and more sensitive than in domestic cases. These Guidelines encourage such communications while channeling them through transparent procedures. The Guidelines are meant to permit rapid cooperation in a developing insolvency case while ensuring due process to all concerned.

A Court intending to employ the Guidelines — in whole or part, with or without modifications — should adopt them formally before applying them. A Court may wish to make its adoption of the Guidelines contingent upon, or temporary until, their adoption by other courts concerned in the matter. The adopting

Court may want to make adoption or continuance conditional upon adoption of the Guidelines by the other Court in a substantially similar form, to ensure that judges, counsel, and parties are not subject to different standards of conduct.

The Guidelines should be adopted following such notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances. If communication with other courts is urgently needed, the local procedures, including notice requirements, that are used in urgent or emergency situations should be employed, including, if appropriate, an initial period of effectiveness, followed by further consideration of the Guidelines at a later time. Questions about the parties entitled to such notice (for example, all parties or representative parties or representative counsel) and the nature of the court's consideration of any objections (for example, with or without a hearing) are governed by the Rules of Procedure in each jurisdiction and are not addressed in the Guidelines.

The Guidelines are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases and to change and evolve as the international insolvency community gains experience from working with them. They are to apply only in a manner that is consistent with local procedures and local ethical requirements. They do not address the details of notice and procedure that depend upon the law and practice in each jurisdiction. However, the Guidelines represent approaches that are likely to be highly useful in achieving efficient and just resolutions of cross-border insolvency issues. Their use, with such modifications and under such circumstances as may be appropriate in a particular case, is therefore recommended.

Guideline 1

Except in circumstances of urgency, prior to a communication with another Court, the Court should be satisfied that such a communication is consistent with all applicable Rules of Procedure in its country. Where a Court intends to apply these Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted before they are applied. Coordination of Guidelines between courts is desirable and officials of both courts may communicate in accordance with Guideline 8(d) with regard to the application and implementation of the Guidelines.

Guideline 2

A Court may communicate with another Court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdiction.

Guideline 3

A Court may communicate with an Insolvency Administrator in another jurisdiction or an authorized Representative of the Court in that jurisdiction in connection with the coordination and harmonization of the proceedings before it with the proceedings in the other jurisdiction.

Guideline 4

A Court may permit a duly authorized Insolvency Administrator to communicate with a foreign Court directly, subject to the approval of the foreign Court, or through an Insolvency Administrator in the other jurisdiction or through an autho-

rized Representative of the foreign Court on such terms as the Court considers appropriate.

Guideline 5

A Court may receive communications from a foreign Court or from an authorized Representative of the foreign Court or from a foreign Insolvency Administrator and should respond directly if the communication is from a foreign Court (subject to Guideline 7 in the case of two-way communications) and may respond directly or through an authorized Representative of the Court or through a duly authorized Insolvency Administrator if the communication is from a foreign Insolvency Administrator, subject to local rules concerning ex parte communications.

Guideline 6

Communications from a Court to another Court may take place by or through the Court:

- (a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other Court and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;
- (b) Directing counsel or a foreign or domestic Insolvency Administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the Court to the other Court in such fashion as may be appropriate and providing advance notice to counsel for affect-

ed parties in such manner as the Court considers appropriate;

- (c) Participating in two-way communications with the other Court by telephone or video conference call or other electronic means, in which case Guideline 7 should apply.

Guideline 7

In the event of communications between the Courts in accordance with Guidelines 2 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by either of the two Courts:

- (a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;
- (b) The communication between the Courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of both Courts, should be treated as an official transcript of the communication;
- (c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of either Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both

Courts subject to such Directions as to confidentiality as the Courts may consider appropriate; and

- (d) The time and place for communications between the Courts should be to the satisfaction of both Courts. Personnel other than Judges in each Court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by either of the Courts.

Guideline 8

In the event of communications between the Court and an authorized Representative of the foreign Court or a foreign Insolvency Administrator in accordance with Guidelines 3 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by the Court:

- (a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;
- (b) The communication should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of the Court, can be treated as an official transcript of the communication;
- (c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of the Court, and of any official tran-

script prepared from a recording should be filed as part of the record in the proceedings and made available to the other Court and to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Court may consider appropriate; and

- (d) The time and place for the communication should be to the satisfaction of the Court. Personnel of the Court other than Judges may communicate fully with the authorized Representative of the foreign Court or the foreign Insolvency Administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the Court.

Guideline 9

A Court may conduct a joint hearing with another Court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved Protocol applicable to such joint hearing:

- (a) Each Court should be able to simultaneously hear the proceedings in the other Court.
- (b) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the Directions of that Court, be transmitted to the other Court or made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other Court or its public availability in an electronic system should not subject the party filing the material in one Court to the jurisdiction of the other Court.

- (c) Submissions or applications by the representative of any party should be made only to the Court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other Court to make submissions to it.
- (d) Subject to Guideline 7(b), the Court should be entitled to communicate with the other Court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the Courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.
- (e) Subject to Guideline 7(b), the Court, subsequent to the joint hearing, should be entitled to communicate with the other Court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both Courts and to coordinate and resolve any procedural or nonsubstantive matters relating to the joint hearing.

Guideline 10

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the other jurisdiction without the need for further proof or exemplification thereof.

Guideline 11

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that Orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such Orders require no further proof or exemplification for purposes of the proceedings before it, subject to all such proper reservations as in the opinion of the Court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such Orders.

Guideline 12

The Court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a Service List that may include parties that are entitled to receive notice of proceedings before the Court in the other jurisdiction ("Non-Resident Parties"). All notices, applications, motions, and other materials served for purposes of the proceedings before the Court may be ordered to also be provided to or served on the Non-Resident Parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the Court in accordance with the procedures applicable in the Court.

Guideline 13

The Court may issue an Order or issue Directions permitting the foreign Insolvency Administrator or a representative of creditors in the proceedings in the other jurisdiction or an authorized

Representative of the Court in the other jurisdiction to appear and be heard by the Court without thereby becoming subject to the jurisdiction of the Court.

Guideline 14

The Court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the Court, not apply to applications or motions brought by such parties before the other Court or that relief be granted to permit such parties to bring such applications or motions before the other Court on such terms and conditions as it considers appropriate. Court-to-Court communications in accordance with Guidelines 6 and 7 hereof may take place if an application or motion brought before the Court affects or might affect issues or proceedings in the Court in the other jurisdiction.

Guideline 15

A Court may communicate with a Court in another jurisdiction or with an authorized Representative of such Court in the manner prescribed by these Guidelines for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the other Court wherever there is commonality among the issues and/or the parties in the proceedings. The Court should, absent compelling reasons to the contrary, so communicate with the Court in the other jurisdiction where the interests of justice so require.

Guideline 16

Directions issued by the Court under these Guidelines are subject to such amendments, modifications, and extensions as

may be considered appropriate by the Court for the purposes described above and to reflect the changes and developments from time to time in the proceedings before it and before the other Court. Any Directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both Courts. If either Court intends to supplement, change, or abrogate Directions issued under these Guidelines in the absence of joint approval by both Courts, the Court should give the other Courts involved reasonable notice of its intention to do so.

Guideline 17

Arrangements contemplated under these Guidelines do not constitute a compromise or waiver by the Court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the Court or before the other Court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the Orders made by the Court or the other Court.

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

Court File No. CV-16-11582-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF PERFORMANCE SPORTS GROUP LTD ET. AL.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**AMENDED AND RESTATED INITIAL
ORDER**

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Lawyers for the Applicants

TAB 2

CITATION: Zayo Inc. v. Primus Telecommunications Canada Inc., 2016 ONSC 5251
COURT FILE NO.: CV-16-11257-00CL
DATE: 20160818

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF PRIMUS TELECOMMUNICATIONS CANADA INC.,
PRIMUS TELECOMMUNICATIONS, INC. AND LINGO, INC.

BEFORE: Justice Penny

COUNSEL: *Maria Konyukhova and Vlad Calina* for the Primus Entities

Steve Weisz and Aryo Shalviri for FTI Consulting Canada Inc. in its capacity as
Monitor of the Primus Entities

Matthew Gottlieb and Larissa Moscu for the Moving Party, Zayo Inc.

Jason Wadden for the Purchaser, Birch Communications Inc.

Matthew Milne-Smith and Natasha MacParland for the Lending Syndicate (BMO
as Agent)

HEARD: August 9, 2016

ENDORSEMENT

Overview

[1] This motion, brought by Zayo Inc., is for an order that FTI Consulting Canada, in its capacity as court-appointed Monitor for the applicants, pay Zayo the amount of \$1,228,799.81 from proceeds of sale of the applicants' assets. This amount represents the applicants' (pre-CCAA filing) arrears owed to Zayo in relation to agreements assigned by the applicants, with Zayo's consent, to Birch Communications Inc. in an asset purchase transaction which closed on April 1, 2016. The transaction was approved by orders of this Court made on February 25, 2016 and March 2, 2016 and certified completed by the Monitor on April 1, 2016.

[2] Initially on January 25 and formally no later than March 2, 2016, Zayo unequivocally consented to the assignment of its contracts with the applicants to Birch.

[3] Zayo argues that the process by which its consent to the assignment of its contracts with the applicants was obtained was not transparent or fair. Had the process been transparent and fair, Zayo says, it would have refused its consent in the absence of full satisfaction of its pre-filing arrears and would, as a result, ultimately have been paid those arrears as a condition of the assignment of its contracts. Zayo relies on s. 11 of the CCAA which provides that the court may, in the context of CCAA proceedings, “make any order that it considers appropriate in the circumstances.”

[4] This motion, therefore, engages the application and scope of the discretion of the court under s. 11 of the CCAA. The issue for determination is whether that discretion should be exercised, in the particular circumstances of this case, to order payment out of the proceeds of sale of the applicants’ assets, to Zayo of the full amount of its pre-filing arrears under the assigned contracts.

[5] For the reasons that follow, I have concluded that the discretion afforded the court under s. 11 of the CCAA does not encompass an order for the payment of Zayo’s pre-filing arrears. Accordingly, Zayo’s motion is dismissed.

Background

[6] The applicants (collectively Primus) carried on business in Canada and the United States reselling telecommunications services. Thus, Primus purchased telecommunication services for resale from other (often large) telecommunications companies, including Allstream (now Zayo), Bell, Telus and the like. In late 2014, Primus ran into financial difficulty. It was unable to satisfy its obligations to creditors, including a syndicate of secured creditors represented in these proceedings by the Bank of Montréal. After February 2015, Primus operated under the forbearance of its syndicate of secured lenders.

[7] Primus conducted a privately structured and supervised pre-filing sales and investor solicitation process in consultation with a financial advisor and with the oversight of FTI (in its capacity as the proposed Monitor). Birch emerged as the successful bidder.

[8] On January 19, 2016, Primus entered into an asset purchase agreement with Birch, conditional on court approval. Primus sought and obtained protection under the CCAA pursuant to an Initial Order granted by this Court on the same day.

[9] The APA contemplated that Birch would assume certain Primus contracts with third parties. Because of Primus’s financial difficulties, many of these contracts were in arrears. The APA contemplated the possibility that payment of such arrears might be required in order to effect the assignment of some of these contracts. These payments were defined as “cure costs.” The APA contemplated that there would be negotiations regarding either the payment or settlement of these cure costs. Those negotiations with counterparties, if they occurred, could only be conducted in the presence of a representative of each of Primus, Birch and the Monitor.

[10] The first \$3 million of cure costs were to be treated as a reduction in the purchase price. Cure costs in excess of \$3 million were to be split equally between Birch and Primus.

[11] Birch had the right to insist upon the assignment of any contract which it considered essential. Birch also had the right, however, to waive this right at any time and to remove any contract from the list of essential or assumed contracts.

[12] Primus was obliged to use commercially reasonable efforts to obtain consents to the assignment of the identified contracts. The APA set out a two-step process for Primus to follow. First, Primus was obliged to use all commercially reasonable efforts to obtain a counterparty's consent to the assignment of any required contract. Second, Primus was required to bring a motion under s. 11.3 of the CCAA seeking court-ordered assignment of essential contracts, but only with respect to contracts for which *consent* to assignment could not be obtained by a particular date.

[13] Section 11.3 of the CCAA provides that the court may make an order assigning the rights and obligations of the debtor under an agreement to any person who is specified by the court and agrees to the assignment. In deciding to make such an order, the court must consider, among other things:

- (a) whether the monitor approved the proposed assignment;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligation; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

[14] Section 11.3(4) of the CCAA imposes a further restriction on a court-ordered assignment. It provides that the court may not make an order requiring an assignment unless it is satisfied that all monetary defaults in relation to the agreement will be remedied.

[15] Initially, the essential contracts list identified by Birch had approximately 300 contracts. From January to the end of February 2016, the list underwent significant reduction. By the end of the review process, the number on the essential contracts list had been reduced to 209 contracts. Ultimately, consents to assign in respect of 117 essential contracts were obtained from 93 contract counterparties, including Zayo. Of these, two parties demanded payment of pre-filing amounts. The assignment order of this court, ultimately obtained on March 2, 2016, provided for the assignment of the remaining 92 contracts with 35 counterparties and for the payment of aggregate cure costs in respect of those contracts of about \$4.5 million.

[16] Obtaining consents from what turned out to be over 120 counterparties was a substantial and time-consuming job. A main reason for the pre-filing SISF was to reduce the risk of value erosion as word of the Primus insolvency, and possible service interruptions and other disruptions, got out. Thus, the timeframe for concluding a transaction was necessarily compressed. In consultation with its own professional advisors, the Monitor and the purchaser,

Primus drafted a template letter to be delivered to all counterparties to the contracts in respect of which consent was required to be sought.

[17] The consent letters advised the recipient that:

- (i) Primus had sought protection under the CCAA;
- (ii) Primus ran the SISP and selected Birch as the successful bidder;
- (iii) the APA contemplated the assignment of their contract with one of one of the Primus entities to Birch;
- (iv) at the time, the transaction was anticipated close in late February; and
- (v) the motion materials for the approval investing order would be available on the Monitor's website.

[18] The consent letter requested the recipient's consent to assign its contract to Birch by a specified date and advised that, if consent was not received by that date, Primus would seek relief under s. 11.3 of the CCAA, with motion materials being served only on those parties who did not provide consent. The text of the letter said:

We hope to have received consents from all counterparties to the Assumed Contracts by January 29, 2016. However, to the extent any consent with respect to any of the Assumed Contracts is not received by January 29, 2016, in order to ensure that all Assumed Contracts are assigned to the Purchaser, the Primus Entities will rely on the provisions of section 11.3 of the CCAA, which gives the court the jurisdiction to order the assignment of a contract without consent on certain terms and conditions set forth in section 11.3 of the CCAA. The Primus Entities will be seeking an order for the assignment of any Assumed Contracts for which consent to assign has not been given at a motion currently scheduled to be heard February 17, 2016. *If we have not received your consent by January 29, 2016, we will serve you with notice of the motion* as well as the motion materials in connection with this request and evidence in support thereof. [emphasis added]

[19] The consent letters also expressly advised all recipients that Birch would only be responsible for obligations arising under the assigned contract arising after the closing of the purchase transaction.

[20] The dates in the consent letter for completion of the assignments had to be changed as a result of circumstances having nothing to do with this motion. The substance of the letter and the process described, however, remained the same.

[21] By April 1, 2016 all conditions under the APA were fully satisfied and the transaction closed. Birch acquired the assets of Primus for about \$44 million. Among other things, the Monitor came into receipt of the sale proceeds and delivered a certificate certifying that the

transaction had been completed to the satisfaction of the Monitor. The Monitor then commenced dispersing the proceeds in accordance with the payment scheme provided in the distribution order of this court which had been made on February 25, 2016. The exact amount of the proceeds has not been finalized but it is expected that the proceeds will be insufficient to satisfy outstanding obligations owing to the syndicate of secured lenders and that no distributions will be made in respect of \$20 million owed to Primus's subordinate secured creditor, Manulife.

[22] This motion for payment of Zayo's pre-filing arrears out of the proceeds of sale was first initiated on May 13, 2016. It is opposed by Primus, Birch, the secured lenders and the Monitor.

The Zayo Consent

[23] Prior to these events, Primus had a lengthy business relationship with Allstream Inc. which spanned over 15 years. Allstream was a wholly-owned subsidiary of Manitoba Telecom Services. Allstream sold wholesale telecommunications services to Primus which Primus then resold as part of its business, including long-distance phone, local internet and voice over internet protocol services. Primus had telecom supply contracts with a number of Allstream entities and for a number of services.

[24] In November 2015, Zayo acquired Allstream from MTS for \$465 million. This was only one of about 30 acquisitions made by Zayo between 2007 and 2016.

[25] Because Zayo acquired a number of Allstream entities with Primus contracts, Zayo received three copies of the virtually identical consent request letter; one on January 22, 2016, another on January 26 2016 and a third on January 28, 2016. These consent request letters were sent to three senior Allstream executives, depending on which person or entity was identified in the relevant contract as the point of contact for all notices, etc.

[26] These letters were brought to the attention of Ms. Julie Wong Barker, a lawyer with the Zayo (Allstream) legal department.. Ms. Wong Barker was Senior Legal Counsel at Zayo Canada Inc. She has a B.A. and an M.A. and graduated with distinction from McGill University Law School. She was called to the Bar of Ontario in 2007. She worked for a major Bay Street Toronto law firm for two years and, following a maternity leave, joined Allstream as legal counsel in 2011. She became Senior Legal Counsel a few months later and has worked in the Allstream/Zayo Toronto legal department since then.

[27] Ms. Wong Barker became aware that Primus had filed for CCAA protection on the day the Initial Order was granted, January 19, 2016. Ms. Wong Barker deposed that she is not "well-versed" with the CCAA process and that, as a result, she searched for information on the internet and discovered that the Monitor was FTI.

[28] Ms. Wong Barker sent an email to the Monitor on January 21, 2016, indicating that Allstream was a significant supplier to and creditor of Primus. Her email states:

Please kindly confirm that we will be added to any creditor's list and provided with all required notices accordingly. Further to that, pls kindly advise when the proof of claim forms will it be available, or kindly email it to me?

[29] On the following day, the Monitor replied, saying:

Hello Julie,

We confirm that Allstream Inc. is included on the list of known creditors and as such, you will be receiving a "Notice to Creditors" document in the mail in the coming days. At this time, there is no claims process approved by the Court so there is no proof of claim forms that need to be submitted. Any status updates will be posted on the website listed below.

The Monitor's email provided the URL link to the Monitor's Primus website (containing all the documents filed with the Court) and invited Ms. Wong Barker to feel free to contact him if she had any further questions or wanted to discuss the matter.

[30] On January 26, 2016, Ms. Wong Barker sent one further email to the Monitor. In this communication, she asked who would be receiving the notice to creditors and at what address. She also asked when the asset purchase agreement between Primus and Birch would be available on the Monitor's website. She asked whether the two documents could be emailed to her and, once again, inquired about whether there would be a claims process.

[31] Later the same day, the Monitor responded that the notice to creditors had been mailed to Allstream's Wellington Street address and that a copy of that document was also available on the Monitor's Primus website. The Monitor went on to indicate that a copy of the asset purchase agreement was not available "as it is not a public document yet." The Monitor reiterated that a claims process had not been initiated as no process had been approved by the court. Finally, the Monitor once again referred Ms. Wong Barker to the website for any status updates regarding the CCAA proceedings and invited any further questions.

[32] The evidence is that these were the only two communications between Ms. Wong Barker and the Monitor and that Ms. Wong Barker made no further inquiries of the Monitor regarding these CCAA proceedings. There is no suggestion, and certainly no evidence, that anything the Monitor said to Ms. Wong Barker in these email communications was in any way incorrect.

[33] On January 25, 2016, Ms. Wong sent to Primus a letter from the Allstream president in which Allstream and MTS advised they were consenting to the assignment of contracts between them and Primus. The Allstream consent letter went on to request a reciprocal consent from Primus in respect of certain contracts between MTS and Primus, so that the MTS contracts could be assigned to Allstream and MTS be released from any future obligation under these contracts.

[34] Further draft consent letters, and negotiations over the consolidation and wording of revised consent letters took place between February 5 and March 2, 2016, at which time Ms.

Wong Barker confirmed that a revised and executed form of consent to the assignment had been finalized.

The Zayo Argument

[35] Zayo's argument falls into three basic categories:

- (1) the inadequacy of the form of consent request letter sent by Primus to Zayo. The complaint is, in essence, that the consent request letter was misleading because it omitted any explanation of the process under s. 11.3 of the CCAA and failed to disclose the provision for "cure costs" in the APA or to advise Zayo that it might have gained bargaining leverage regarding payment of its pre-filing arrears under s. 11.3(4) if it were to withhold its consent and force Primus to move before the court under s. 11.3(1);
- (2) the failure to send Zayo a copy of the APA; and
- (3) the failure of the Monitor/Primus to serve Zayo with the s. 11.3 motion materials filed to obtain the assignment order and the related failure to place Zayo on the e-service list for receipt of all Court material.

[36] The starting point for these arguments is the decision of the Supreme Court of Canada in *Ted Leroy Trucking (Century Services) Ltd., Re*, [2010] 3 S.C.R. 379. In that case the court observed that the incremental exercise of discretion under conditions aptly described as "the hothouse of real-time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs. It is frequently said that the remedial purpose of the CCAA is to avoid or ameliorate the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations by attempting to reorganize the financial affairs of the debtor under court supervision. The Supreme Court held that in pursuing this purpose, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. The supervising court should be mindful that the chance for successful reorganization is enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[37] The moving party also relies on the decision of G.B. Morawetz R.S.J. in *Target Canada Co.*, 2016 ONSC 316 where he said (at para. 72):

It is incumbent upon the court, in its supervisory role, to ensure that the CCAA process unfolds in a fair and transparent manner.

[38] Specifically, under s. 11.3 of the CCAA, the court should consider whether an assignment will meet the twin goals of assisting the reorganization process while also treating the counterparty fairly and equitably, *Veris Goldcorp., Re*, 2015 BCSC 1204.

[39] Zayo argues that in this case, the process for obtaining Zayo's consent to the assignment of its contracts to the purchaser, Birch, was neither transparent nor fair. Zayo says it was a counterparty to a number of essential contracts with Primus and that the business carried on by Primus could not continue as a going concern without these contracts. Birch, it says, therefore needed those contracts and would not have disclaimed them had Zayo not provided its consent to the assignment. In that scenario, Zayo argues that s. 11.3(4) would have required payment in full of its arrears.

[40] Zayo argues that the consent request letters, however, intentionally omitted any reference to "cure costs". In the APA, cure costs are defined as the costs necessary to pay pre-filing arrears in order to compel an assignment of an essential contract under s. 11.3.

[41] Ms. Wong Barker's evidence was that she did not understand that she was waiving any right to be paid Zayo's arrears when Zayo, through her, consented to the assignment of its contracts. Nothing in the consent request letters sent to Zayo even mentioned cure costs and they did not indicate that cure costs would not be paid to counterparties who consented to the assignment of their contracts. Ms. Wong Barker's evidence is, further, that Zayo would not have consented to the assignment of its contracts had it been aware that it would be considered to be waiving any rights to be paid to its arrears.

[42] Zayo also argues that the APA was unavailable for review before the consent deadline. The APA contemplated payment of pre-filing arrears ("cure costs") for essential contracts assigned by court order on of a motion under s. 11.3 of the CCAA. Zayo argues that it was unfair for Primus to demand that Zayo consent to assign its contracts without providing it with a copy of the APA.

[43] Finally, Zayo argues that it should have been served with the motion material filed in support of the motion for the assignment order. In this regard, Zayo also argues that it ought to have been placed on the e-service list, which would have resulted in all motion materials being served on it.

[44] Zayo relies on the 2015 decision in *Veris Gold*, where Fitzpatrick J. concluded that it was "not apparent" that the counterparties to the contract which was sought to be ordered to be assigned under s. 11.3, did, in fact, receive a copy of the application materials. She held that the "best practice... is to serve all counterparties to the particular contracts that are sought to be assigned, whether they are on the service list or not", *Veris Gold, supra*, paras. 59-61.

[45] In this case, Primus served the motion record for the assignment order on counterparties whose consent was still outstanding as of February 9 to 16, 2016. Because Zayo had delivered its initial consents well before February 9, 2016, it was not named in or served with the motion to require the assignment of the non-consenting parties' contracts.

[46] Zayo argues that it had an interest in the motion and that, had it been served with the assignment order motion record, it would have become aware of the “cure costs” provisions of the APA and the possibility that withholding its consent might lead to the payment of some or all of its pre-filing arrears. It also argues that, at the very least, it could have attended at the motion and advised the court that its intention had always been to be paid the pre-filing arrears owed by Primus.

[47] On the question of causation, Zayo asserts that, had it withheld its consent to the assignment of the Zayo contracts, then, at the assignment motion, Zayo would have recovered all of the arrears owed by Primus by virtue of the application of s. 11.3(4) of the CCAA. Zayo relies for this argument on the evidence of Primus, embedded in the language of the APA, that Birch regarded the Zayo contracts as “essential”. Zayo also relies on the consent request letter, which stated that if consents were not forthcoming, Primus *would* move for an order requiring the assignment of the Zayo contracts under s. 11.3.

[48] While conceding that the consent request letter mentioned s. 11.3 of the CCAA, Ms. Wong Barker deposed that she looked at s. 11.3 at the time but did not understand it to mean that Zayo’s consent to the assignment would foreclose any claim to pre-filing arrears.

[49] Finally, Zayo argues that no party will suffer prejudice if the motion is granted. This argument is premised on the assumption that Primus and/or Birch would have known the total amount of arrears owed by Primus to Zayo as of the date of the CCAA filing and would have paid this entire amount to Zayo had Zayo refused to consent to the assignment and been a party to the assignment order motion. Zayo’s submits that it is not prejudicial for a party to be required to pay an amount that otherwise would have been payable. Thus, Zayo argues, there is no substantive prejudice to Primus, Birch or the secured lenders because, had all relevant facts been known to Zayo at the time, the arrears would have been paid and both reflected in the purchase price under the APA and reflected in the amounts received by the Monitor available to satisfy the secured lenders.

[50] Zayo, therefore, argues that this Court should not condone a process that results in a counterparty to an essential contract being financially disadvantaged for having cooperated with the debtor and consented to the assignment of that essential contract.

Analysis

[51] A great deal of the written and oral argument was devoted to the question of whether this Court has the jurisdiction to make the order sought by the Zayo in this case. There is no doubt that s. 11 is a broad grant of discretion. It is not, however, without limits. Specifically, the s. 11 authority is “subject to the restrictions set out in this Act”. Further, the common law applies to the CCAA without modification unless the common law rule is “ousted” by the language of the CCAA, *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610 at 614.

[52] In the view I take of the matter, it is not necessary to resolve the legal question of jurisdiction. I say this because, assuming the jurisdiction is available, I would not exercise it to

grant the relief sought by Zayo in the circumstances of this case. I say this for the following reasons.

The Consent Request Letters

[53] The centerpiece of Zayo's argument is that the consent request letters sent by Primus were misleading, or perhaps more precisely, lacked transparency and were unfair. Zayo argues that the consent request letters did not disclose the details of the APA and the "cure costs" regime embedded in the APA. Nor did the letters provide sufficient explanation for the recipient to understand that bargaining leverage vis-à-vis pre-filing arrears might be gained by refusing to consent to the assignment of contracts because of the provisions of s. 11.3(4).

[54] I am not satisfied that the consent request letters were either unfair or lacked transparency. There were over 300 contracts outstanding, with well over 100 counterparties. Most of the counterparties, including Zayo/Allstream, were large, sophisticated telecommunications companies. There is no question Zayo/Allstream was a sophisticated party. Zayo acquired Allstream in late 2015 for \$465 million. Allstream's revenues exceeded \$640 million. This is more than 10 times what Primus earned. Every counterparty received the same form of letter. No other counterparty appears to have had any difficulty with the consent request letter or the decision to consent or not to consent. A large number of counterparties appear to have consented.

[55] Ms. Wong Barker worked in a legal department at Allstream comprised of about half a dozen lawyers. At least two other lawyers in the department had supervisory or other involvement in the Primus CCAA proceedings. Ms. Wong Barker, who carried the ball in the Primus CCAA proceedings, was an exceptional student and graduated with distinction from one of Canada's leading law schools. She went to Allstream with experience at a Bay Street law firm, and had worked there for about five years when Primus commenced its CCAA proceedings. Ms. Wong Barker admitted that CCAA litigation is a highly specialized area with which she was not familiar and that she chose not to seek advice from another lawyer with CCAA experience.

[56] Allstream received three consent request letters. The initial consent provided by Zayo on January 25, 2016 was not agreeable to Primus and there were extensive negotiations over various drafts, such that the form of the consent was not actually finalized until March 2, 2016. Part of the negotiation involved Allstream obtaining reciprocal consents from Primus to the assignment of MTS contracts with Primus to Allstream and the release of MTS from further obligation under those contracts. I do not accept Ms. Wong Barker's evidence that these reciprocal consents were just part of the consents requested by Primus. It is clear that Allstream took this opportunity to put its own house in order due to the sale of Allstream by MTS to Zayo just a few months earlier.

[57] Nothing in the consent request letters is incorrect. The APA was not disclosed initially because it was not yet in the public realm. The evidence is that the APA was posted on the Monitor's website no later than February 3, 2016. Zayo was repeatedly advised to check the Monitor's website for new and updated information. Ms. Wong Barker admitted she did not do

so until late in the piece and, in any event, did not see the APA when she did so, although it is clear that the APA was, by that time, available.

[58] The consent request letters did make explicit reference to s. 11.3 of the CCAA and a possible motion if consents were not forthcoming. Ms. Wong Barker deposed that she looked at that section of the CCAA. She appears to have misunderstood its meaning and effect. Her review of s. 11.3(4) in particular did not, in any event, cause her to consider whether court-ordered, as opposed to consent, assignments might *require* payment of pre-filing arrears. It is important to remember that contract formation and enforcement is, in essence, an objective, not a subjective, exercise. Ms. Wong Barker's subjective understanding and misconception of the assignment process was, in any event, not known to Primus, Birch or the Monitor.

[59] Zayo argues that, as a matter of policy, debtors ought not to be given incentives to be stingy with the disclosure of material information. I do not disagree with this proposition. However, by the same token, creditors or other stakeholders ought not to be given incentives to be less than duly diligent in the protection of their commercial interest and the assessment of their options in real-time insolvency proceedings. In any event, I do not find "policy" arguments particularly helpful in the context of this case.

[60] The Supreme Court of Canada in *Century Services* emphasized the importance of appropriateness and good faith in the conduct of CCAA proceedings, to be sure. It is significant, however, particularly given the acknowledged "hothouse of real-time litigation" aspect of CCAA proceedings and the underlying remedial purpose of avoiding bankruptcy liquidation, that "due diligence" is also a baseline consideration, *Century Services*, *supra*, para. 70.

[61] Commercial parties do not have an obligation to provide each other with legal advice in the ordinary course of their dealings. Rather, they are entitled to pursue their own economic self-interest to the best of their ability. Contract and commercial law assumes that parties are vigilant in the pursuit of their own interests. It is not illegitimate for a party to bargain hard and advance its own interest. The general rule, with very limited exceptions, is that sophisticated parties will be held to the bargains they make. The mere fact that a bargain proves to be improvident is no basis to relieve the counterparty of its contractual obligations absent the application of one of these limited exceptions. Generally speaking, courts will only relieve a party of the consequences of a poor bargain in circumstances of unconscionability, unilateral mistake, misrepresentation or duress.

[62] Here, I have already found as a matter of fact that there was no misrepresentation. I also find, as matter of fact, that the preconditions for the application of the doctrine of unilateral mistake are not met. This is because, put simply, neither Primus nor the Monitor were aware of Zayo's misunderstanding of the assignment process and no advantage was taken of Zayo's mistaken understanding. The parties were both clearly sophisticated players in the telecommunications business and had comparable bargaining power. Zayo had every opportunity to speak with independent legal counsel and had realistic alternatives to the consent ultimately given. There was no duress.

[63] The consent request letters were, in my view, both fair and transparent. Every counterparty was given the same information. Every counterparty was advised to check the Monitor's website for new and updated information. The information necessary to put counterparties on notice of the issues was provided. There was no obligation to provide legal advice or to highlight the possible choices counterparties might make to improve their bargaining leverage. All the counterparties had ample time and every opportunity to obtain professional advice and to consider their options. Zayo, with the benefit of a good-sized legal department, in fact did so.

Disclosure of the APA

[64] I have already dealt in substance with the availability of the APA. The Monitor responded promptly to Ms. Wong Barker's request for a copy by advising that it was not yet publicly available. The Monitor did not promise to provide a hard copy of the APA to Ms. Wong Barker when it became available. Ms. Wong Barker was advised to check the Monitor's website on an ongoing basis. Within days of her request, the APA was, in fact, posted on the Monitor's website. Zayo was also invited, repeatedly, to call the Monitor with any additional questions. After January 26, 2016, however, Zayo had no further communication with the Monitor. If Zayo wanted to review the APA before finalizing its consent, it was incumbent upon Zayo to insist upon that step or take the necessary action to ensure that it was able to do so.

Service

[65] Zayo also complains that service was deficient and that it ought to have been served with the assignment order motion record. Had this been done, it argues, it would have discovered all about the cure costs and the fact that a number of counterparties were likely to be paid some or all of their pre-filing arrears.

[66] The proper analysis of this issue begins with the Initial Order, which governs the procedure for notice and service in this CCAA proceeding. The Initial Order adopts the e-service protocol of the Commercial List. Under that protocol, any party that has delivered a notice of appearance, any party that should be served in accordance with the Rules and any party who has filed a request for electronic service must be placed on the e-service list. Stakeholders who wish to be placed on the e-service list in order to receive service of court documents in a timely and efficient manner "shall email to the E-service List Keeper" a duly completed request for electronic service in the prescribed form.

[67] The evidence on this motion is that Zayo at no time filed a notice of appearance in this proceeding or submitted a request for electronic service. Zayo asked the Monitor to be placed on the list of creditors and that was done. Zayo received the relevant notice shortly thereafter. As noted above, the Monitor also, on two occasions, specifically advised Zayo to review the Monitor's website for new and updated information.

[68] The motion material for the approval and vesting order (which contained the APA) was posted on the Monitor's website on February 3, 2016. The motion material for the assignment

order appears to have been posted on the Monitor's website on or shortly after February 16, 2016.

[69] Neither of the aforementioned motion records were served on Zayo because the Rules did not require service and Zayo had neither appeared nor asked to be placed on the e-service list. In particular, the assignment order motion was only in respect of counterparties to contracts which Birch insisted be assigned and for which no consent had been obtained. The cutoff date for consent was, ultimately, between February 9 and 16, 2015. Because Zayo/Allstream had already consented to the assignment of its contracts, neither Allstream nor any Allstream contracts were included in the motion for the assignment order. Not being a party to that motion or having asked to be placed on the e-service list, Zayo was not entitled to service and was not served.

[70] Zayo's reliance on the *Veris Gold* case is misplaced. That case involved a failure to serve a counterparty whose contract was going to be assigned by virtue of a court order and whose interest under s. 11.3(4) was clearly engaged. Even though the party had not appeared and did not ask to be placed on an e-service list, Fitzpatrick J. held that the party ought to have been served since its interest was directly engaged by the relief sought.

[71] That is, with respect, not the situation here. In the present case, by virtue of its consent, Zayo's contracts did not form any part of the subject matter of the assignment order motion. Ms. Wong Barker was aware of, and presumably read, the Initial Order. It was open to Zayo to request that it be served with all court filings. It did not do so. It was advised to consult the Monitor's website for new and updated material. The motion material in support of the approval and vesting order and the assignment order were posted on the Monitor's website in a timely manner. Specifically, both motion records were posted on the Monitor's website at least several days prior to March 2, 2016 when the consent documents between Zayo and Primus were ultimately finalized and the assignment order was made. Ms. Wong Barker admitted that she looked on the Monitor's website and found this material but it is not clear when she did so. What is clear is that she did not spend sufficient time with the material to find any of the information that Zayo now says was critical to it.

[72] I find, therefore, that Zayo was entitled to request e-service of all court filings but did not do so. Zayo was placed on the creditors list, as it requested, and received all relevant notices in that regard. Zayo, having consented to the assignment of its contracts, was not affected by, and therefore not entitled to notice of, the motion for the assignment order. There was, in the circumstances, no failure of service or notice on the part of the debtor or the Monitor.

Prejudice

[73] Zayo argues, finally, that the order for payment of its \$1.2 million out of the proceeds of sale should be made because it would not prejudice anyone. Distribution issues in this case are a zero sum game because, on the evidence, there is certain to be a shortfall. Zayo argues, however, that if it had not consented to the assignment of its contract it would have been a party to the

assignment order motion and would have been paid in full. Thus, other parties seeking distribution from the proceeds of sale would be no worse off now, if the order sought is made, than they would have been if the assignment order had been made in respect of Zayo's contracts in the first place.

[74] Given my disposition of the issues above, the fate of Zayo's motion does not turn on this issue. However, because many of the issues are intertwined, it seems appropriate to deal with this issue as well.

[75] The principal flaws in Zayo's argument are the assumptions that:

- (a) Zayo had a right to have its contract assigned by a court order; and
- (b) Zayo would have been paid its pre-filing arrears in full.

[76] Under the terms of the APA, Birch had the right to add to and take away from the list of essential contracts. The evidence is very clear that the essential contract list was in a state of flux for several weeks and that, in the end, almost 100 contracts were removed from the list of contracts that Birch initially wanted to take on.

[77] The assignment process envisioned under s. 11.3 is a debtor driven, not creditor or counterparty driven process. Section 11.3(1) begins "on application by a debtor company..." Thus, a counterparty cannot require an insolvent debtor to assign its contract to a purchaser. Section 11.3 envisions a market-driven process under which a purchaser, in consultation with the debtor and the monitor, may decide (after possible negotiations with the counterparties) which contracts it wants and needs and which it does not. The APA in this case specifically required that any negotiations with counterparties had to be conducted in the presence of not only the debtor and Monitor but Birch as well.

[78] I agree with the responding parties to this motion that it cannot now be known what Birch might have done, what negotiations might have taken place or what monetary threshold Zayo and Birch might have had for keeping or disclaiming the contract, if Zayo had declined its consent to the assignment of its contracts.

[79] Zayo argues that this "infinite possibilities" argument is not available to the respondents on this motion because there is no evidence to support it. Zayo argues that the only evidence is that: a) Zayo's contracts *were* on the essential contracts list; b) the consent request letter told Zayo that, in the absence of its consent, a motion *would be* brought for an order assigning its contracts under s. 11.3; and c) the assignment order provided for the assignment of 92 essential contracts with 35 counterparties along with payment of cure costs in the aggregate amount of \$4,518,997.51. Neither Birch nor anyone else filed any evidence on what they would have done had Zayo not provided its consent.

[80] Notwithstanding Mr. Gottlieb's forceful argument on this point, I do not think the record is so devoid of evidence as he makes out. Birch did have the right to remove contracts from the list and did so – almost 100 were dropped from the list. Over 90 contract counterparties granted consent to assign without making their consent conditional on payment of pre-filing amounts. The consent request letter, stating that a motion would be brought under s. 11.3 in the absence of consent to the assignment, was a statement of present intention, not an enforceable promise.

[81] There is also evidence that negotiations took place around the amounts of any payment of pre-filing arrears. As the Supreme Court made clear in *Century Services*, much of what actually happens under CCAA proceedings depends upon the parties' negotiations. In those negotiations, parties to service contracts must weigh the risks of insisting upon their desired position (i.e., they may get nothing if the contract is disclaimed) against the benefits of a future income stream due to the assignment of their contract from an insolvent party to a new, more robust, entity.

[82] It is entirely understandable, and fair, for Birch not to have filed evidence purporting to say what it would have done had Zayo not provided its consent. This is because, having been deprived (by virtue of Zayo's consent) of the opportunity to consider that scenario, negotiate with Zayo and weigh the costs and the benefits of each available option, Birch could not now know what it would have done. Any attempt to purport to say otherwise would inevitably involve speculation.

[83] There is a further complication in that the APA sets a ceiling of \$3 million on cure costs which are deducted from the purchase price. Above \$3 million, the cure costs of court-ordered assignments under s. 11.3 are shared equally between Primus and Birch. This too would have been a relevant factor in Birch's approach to any discussion about payment of Zayo's pre-filing arrears and formed the basis of two prior orders of the Court.

[84] I am unable to agree with Zayo's submission that no amendment of the approval and vesting order or of the assignment order would be required. It seems to me that both orders were premised on Zayo's consent to assignment of its contracts. The relief sought by Zayo on this motion would require a variation of the approval and vesting order as well as the assignment order. Given that the transaction has now closed, and the Monitor has issued its certificate, the additional complication of the allocation of the shortfall resulting from a payment to Zayo as between Primus and Birch would also have to be resolved. This is a situation, in my view, where the proverbial egg cannot be unscrambled.

[85] For these reasons, I conclude that prejudice would be suffered by, at the very least, the syndicate of secured lenders and Birch were the relief sought on this motion to be granted.

Conclusion

[86] For the foregoing reasons, Zayo's motion for an order requiring payment by the Monitor of Zayo's pre-filing arrears out of the proceeds of the sale to Birch is dismissed.

Costs

[87] I encourage the parties to seek an accommodation on costs. Failing agreement, any party seeking costs shall do so by filing a brief written submission, not to exceed two typed, double-spaced pages, together with a Bill of Costs within 10 days of the release of these Reasons. Anyone wishing to respond to such a request shall do so by filing a brief written submission, subject to the same page limit, within a further 10 days.

Penny J.

Date: August 18, 2016

TAB 3

2015 BCCA 421
British Columbia Court of Appeal

Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership

2015 CarswellBC 2863, 2015 BCCA 421, [2015] B.C.W.L.D. 7694, [2015] B.C.W.L.D. 7713, [2015] B.C.W.L.D. 7919, [2015] B.C.W.L.D. 7920, [2016] 4 W.W.R. 531, 258 A.C.W.S. (3d) 61, 30 C.B.R. (6th) 250, 377 B.C.A.C. 237, 391 D.L.R. (4th) 108, 50 B.L.R. (5th) 1, 648 W.A.C. 237, 81 B.C.L.R. (5th) 289

Barafield Realty Ltd. and Bristol Investments Ltd., Respondents (Plaintiffs) and Just Energy (B.C.) Limited Partnership [formerly ES (BC) Limited Partnership], dba Energy Savings B.C. and in its capacity as successor to CEG Energy Options Inc., and the same Just Energy (B.C.) Limited Partnership, Appellant (Defendant)

D. Smith, Willcock, Savage JJ.A.

Heard: September 10, 2015

Judgment: October 7, 2015 *

Docket: Vancouver CA41943

Proceedings: reversing *Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership* (2014), 2014 BCSC 945, 2014 CarswellBC 1485, 13 C.B.R. (6th) 163, Jenkins J. (B.C. S.C.)

Counsel: J.S. McLean, J.V. Ensom, for Appellant

D.L. Dalke, M.C. Hamata, for Respondent

Subject: Contracts; Insolvency

Headnote

Contracts — Parties to contract — Privity — Miscellaneous

Plaintiffs owned residential apartment buildings and entered into contracts with CEG to purchase natural gas at fixed rate for five years — During term of contracts, CEG entered into proceedings under Companies' Creditors Arrangements Act (CCAA), and defendant purchased contracts — Following notice of defendant's purchase of contracts, plaintiffs terminated contracts but defendant did not accept termination — Plaintiffs brought action for breach of contract — Trial judge found that defendant was in breach of contract when it failed to get plaintiffs' consent to assignment of contracts — Plaintiffs were awarded damages of \$824,888.13 — Defendant appealed — Appeal allowed — Trial judge erred in finding that defendant was in breach of contract — Logical consequence of trial judge's findings that provisions of contracts required plaintiffs to consent to any assignment, that plaintiffs refused to consent, and there was no novation through CCAA proceedings such that defendant stood in place of CEG, was that there was no privity of contract between parties — Defendant could not be liable for breach of contract — Trial judge did not err in finding that contracts required consent to assignment, and that vesting order made in CCAA proceedings did not create novation — Contracts expressly required consent to assignment and terms of asset purchase agreement contained provisions that CEG was required to obtain consents to transfer purchased contracts and to provide consents to defendant — CEG did not provide consents to assignments and defendant did not rescind asset purchase agreement — Vesting order did not expressly or impliedly waive need to obtain plaintiffs' consent to assignment of contracts — Terms of vesting order and asset purchase agreement did not support proposition that novation was intended or received.

Contracts — Novation — Nature and elements

Plaintiffs owned residential apartment buildings and entered into contracts with CEG to purchase natural gas at fixed rate for five years — During term of contracts, CEG entered into proceedings under Companies' Creditors Arrangements Act (CCAA), and defendant purchased contracts — Following notice of defendant's purchase of contracts, plaintiffs terminated contracts but defendant did not accept termination — Plaintiffs brought action for breach of contract — Trial judge found that defendant was in breach of contract when it failed to get plaintiffs' consent to assignment of contracts — Plaintiffs were awarded damages of \$824,888.13 — Defendant appealed — Appeal allowed — Trial judge erred in finding that defendant was in breach of contract — Logical consequence of trial judge's findings that provisions of contracts required plaintiffs to consent to any assignment, that plaintiffs refused to consent, and there was no novation through CCAA proceedings such that defendant stood in place of CEG, was that there was no privity of contract between parties — Defendant could not be liable for breach of contract — Trial judge did not err in finding that contracts required consent to assignment, and that vesting order made in CCAA proceedings did not create novation — Contracts expressly required consent to assignment and terms of asset purchase agreement contained provisions that CEG was required to obtain consents to transfer purchased contracts and to provide consents to defendant — CEG did not provide consents to assignments and defendant did not rescind asset purchase agreement — Vesting order did not expressly or impliedly waive need to obtain plaintiffs' consent to assignment of contracts — Terms of vesting order and asset purchase agreement did not support proposition that novation was intended or received.

Table of Authorities

Cases considered by *Savage J.A.*:

Brent v. Slegg Construction Materials Ltd. (2007), 2007 BCSC 661, 2007 CarswellBC 1019, 63 C.L.R. (3d) 55 (B.C. S.C.) — considered

Eadie v. Brantford (Township) (1967), [1967] S.C.R. 573, 63 D.L.R. (2d) 561, 1967 CarswellOnt 71 (S.C.C.) — considered

London Drugs Ltd. v. Kuehne & Nagel International Ltd. (1992), [1993] 1 W.W.R. 1, [1992] 3 S.C.R. 299, (sub nom. *London Drugs Ltd. v. Brassart*) 143 N.R. 1, 73 B.C.L.R. (2d) 1, 43 C.C.E.L. 1, 13 C.C.L.T. (2d) 1, (sub nom. *London Drugs Ltd. v. Brassart*) 18 B.C.A.C. 1, (sub nom. *London Drugs Ltd. v. Brassart*) 31 W.A.C. 1, 97 D.L.R. (4th) 261, 1992 CarswellBC 315, 1992 CarswellBC 913 (S.C.C.) — referred to

Mady Development Corp. v. Sandwich West (Township) (1997), 1997 CarswellOnt 725, 39 M.P.L.R. (2d) 232 (Ont. C.A.) — considered

Maskell v. Horner (1914), 84 L.J.K.B. 1752, [1915] 3 K.B. 106, [1914] All E.R. Rep. 595 (Eng. C.A.) — considered

Nexient Learning Inc., Re (2009), 2009 CarswellOnt 8071, 62 C.B.R. (5th) 248 (Ont. S.C.J.) — referred to

Peel (Regional Municipality) v. Canada (1992), 144 N.R. 1, 12 M.P.L.R. (2d) 229, 98 D.L.R. (4th) 140, [1992] 3 S.C.R. 762, 59 O.A.C. 81, 1992 CarswellNat 15, 55 F.T.R. 277 (note), 1992 CarswellNat 659 (S.C.C.) — considered

Suen v. Suen (2013), 2013 BCCA 313, 2013 CarswellBC 1957, 88 E.T.R. (3d) 179, 46 B.C.L.R. (5th) 248, [2013] 10 W.W.R. 311, 340 B.C.A.C. 176, 579 W.A.C. 176 (B.C. C.A.) — followed

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1 (S.C.C.) — considered

Veris Gold Corp., Re (2015), 2015 BCSC 1204, 2015 CarswellBC 1949, 26 C.B.R. (6th) 310 (B.C. S.C.) — followed

Statutes considered:

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

Generally — referred to

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

APPEAL by defendant from judgment reported at *Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership* (2014), 2014 BCSC 945, 2014 CarswellBC 1485, 13 C.B.R. (6th) 163 (B.C. S.C.), finding defendant in breach of contract and awarding damages.

Savage J.A.:

I. Introduction

1 At trial the appellant companies Just Energy (B.C.) Limited Partnership [formerly ES (BC) Limited Partnership], dba Energy Savings B.C. and in its capacity as successor to CEG Energy Options Inc. and the same Just Energy (B.C.) Limited Partnership ("Just Energy") were found to be in breach of a contract to supply natural gas. The respondent companies Barafield Realty Ltd. and Bristol Investments Ltd. ("Barafield") were awarded \$824,888.13 in damages. Just Energy appeals the trial judge's order, finding them in breach of contract and awarding damages.

II. Background

2 Barafield owns residential apartment buildings in the Greater Vancouver area. Prior to April 2006, Barafield had purchased natural gas for its apartments from Terasen. The rates paid for natural gas fluctuated based on market price. In January 2006 Barafield entered into contracts with CEG Energy Options Inc. ("CEG") to provide natural gas at a fixed rate for 5 years (the "Contracts"), from May 1, 2006, up to and including April 30, 2011. Since the Contracts were at a fixed rate, Barafield would benefit if the market rates for natural gas increased above \$9.29 per gigajoule.

3 During the term of the Contracts, CEG entered into bankruptcy and *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [CCAA], proceedings. Just Energy purchased a portion of CEG's contracts including the Contracts. The purchase of the Contracts was approved by the Alberta CCAA court on August 18, 2008 (the "Vesting Order"), although Barafield did not receive notice of the proceeding. The Contracts included a clause that gave Barafield the right to terminate the Contracts in the event of default, which acts of default included the insolvency of CEG.

4 Following notice of the purchase of the Contracts by Just Energy, Barafield terminated the Contracts based on the contractual terms, of which, it says, Just Energy was aware, and had made a calculated risk. There was ample evidence to support the assertion that Just Energy made a calculated risk, which was a finding in the court below. On the other hand, Barafield saw the insolvency of CEG as an opportunity to rid itself of what it saw as an unfavourable fixed-price contract for natural gas, as the market rates for natural gas had fallen.

5 The termination of the Contracts was not accepted by Just Energy on the basis that the assignment of the Contracts, approved by the Vesting Order, was an acquisition permitted without the consent of Barafield. Barafield continued to assert its right to terminate the Contracts but paid for the natural gas based on invoicing from Terasen. At the end of the Contracts' term Barafield sued.

6 The trial judge, in reasons indexed as *Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership*, 2014 BCSC 945 (B.C. S.C.), found that Just Energy was in breach of contract when it failed to get Barafield's consent to the assignment of the Contracts. Barafield was awarded \$824,888.13 in damages for breach of contract, being the difference between the amount Barafield paid Just Energy for natural gas less the amount it would have had to pay a third party.

III. Issues on Appeal

7 Just Energy says that the trial judge committed two errors.

8 First, Just Energy says the trial judge erred in concluding that Just Energy was liable to Barafield for breach of contract. The findings below precluded any privity of contract between Just Energy and Barafield, and therefore Just Energy could not be liable for breach of contract.

9 Barafield says that the order below was correct. Just Energy's argument that there was no privity of contract between the parties is a new argument raised for the first time on appeal. The court should exercise its discretion not to entertain this argument. The acquisition of the Contracts was by assignment. In the alternative, the judge's order is justified by the doctrine of money had and received, which was also pleaded and argued.

10 Second, Just Energy says that the trial judge erred in failing to find that the Vesting Order provided for novation of the Contracts without the consent of Barafield. Thus there was no breach of the Contracts that would allow Barafield to terminate the Contracts.

11 On this argument Barafield says that the trial judge did not err in interpreting the Vesting Order, and applied the leading cases correctly. Absent explicit language, a vesting order should not be interpreted to abrogate a third party's rights to terminate a contract based on insolvency, or to make an agreement where consent or notice is required.

IV. New Issue on Appeal

12 Barafield says that the question of privity should not be considered as this raises a new issue on appeal.

13 In *Suen v. Suen*, 2013 BCCA 313 (B.C. C.A.), this Court discussed the circumstances in which it would entertain argument on a new issue on appeal:

[67] ...The circumstances in which a new issue may be raised on appeal were addressed in *Athey v. Leonati*, [1996] 3 S.C.R. 458. There, the Supreme Court of Canada found that this Court erred in refusing to consider certain of the appellant's arguments on the grounds that they were not raised at trial. The Supreme Court set out a two-fold test to be met for an appellate court to entertain a new argument on appeal (at paras. 51 and 52): (i) all the relevant evidence to the submission must be found in the record (para. 51), and (ii) the respondent must not suffer prejudice by the failure of the appellant to raise the new argument at trial (para. 52).

14 Thus, this Court may consider the privity of contract issue if: (1) all evidence relevant to the issue is in the record before the court, and (2) there is no prejudice by failing to raise the issue at trial.

15 In my view this test is met. The argument of Just Energy is not a new theory or defence that would have required additional evidence at trial. It raises a question of law that arises directly from the findings of the court below. Nor do I see any prejudice to Barafield from this matter not being argued below. As the issue arises from the findings of the court below (as a result of the court's rejection of other arguments) it cannot prejudice Barafield.

V. Privity of Contract

16 The trial judge's reasoning in finding Just Energy liable for breach of contract can be summarized as follows: (1) the Contracts were assigned to Just Energy in the *CCAA* proceedings; (2) the provisions of the Contracts required that Barafield consent to any assignment; (3) Barafield refused consent to the assignment of the Contracts; (4) there was no novation through the *CCAA* proceedings such that Just Energy stood in the place of CEG; (5) as consent to the assignment was refused, Just Energy was in breach of the Contracts; therefore (6) Just Energy is liable to Barafield for breach of the Contracts.

17 I agree with Just Energy that the flaw in this reasoning is that the logical consequence of steps (2), (3) and (4) is that there was no privity of contract between Just Energy and Barafield such that Just Energy could be liable for breach of contract. Barafield says that the court's decision below was a factual finding or finding of mixed law and fact entitled to deference. Further, Barafield says that the award of damages is supportable on the basis of the doctrine of money had and received.

18 With respect to the first point, in my view, the argument of Just Energy on the privity issue is a pure question of law. It says that on the findings made below there was no privity of contract; there was no contract and therefore, as a matter of law damages for breach of contract are not available: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.).

19 I agree that the court below erred in finding Just Energy in breach of the Contracts based on the reasons above. There was no privity of contract between Just Energy and Barafield. That said, Just Energy also argues that the court below erred in failing to find novation, and coupled with the terms of the Vesting Order, Barafield was precluded from refusing the assignment, and thus there was no breach.

20 The second matter raised by Barafield, that the trial judge's conclusion is supportable on the doctrine of money had and received, is a matter that was pleaded but not dealt with by the trial judge. I will deal with the consequences of that below.

VI. Vesting Order and Novation

21 In order to understand Just Energy's arguments it is necessary to refer to the Contracts assignment provision, the terms of the Asset Purchase Agreement and the terms of the Vesting Order.

22 The Contracts contain the following provision:

9. Assignment - The parties may only assign their respective rights and obligations under this Agreement with the written consent of the other party, which consent shall not be unreasonably withheld. Any company that acquires substantially all of the properties of either party, whether by purchase or merger, will assume the rights and obligations created by this Agreement. In the event that the Customer attempts to assign this Agreement or any part hereof without the consent of CEG, at CEG's option, this Agreement may be terminated with 2 days notice and CEG may make a claim for damages for breach of this Agreement as per Section 3 (Liquidated Damages). ...

[Emphasis added.]

23 The relevant paragraphs in Madam Justice Romaine's Vesting Order are:

2. The purchase and sale agreement for the sale of all of the customer contracts ("CCs") (including customer lists, books and records, and accounts receivable associated therewith) of CEG located in British Columbia (the "B.C. Assets") dated August 11, 2008, between ESBC and CEG (hereinafter referred to as the "Purchase Agreement"), attached as Exhibit "A" to the Affidavit of Kelly Blanch sworn August 12, 2008, and the transaction contemplated

therein pursuant to which ESBC has agreed to purchase CEG's right to title and interest in the B.C. Assets, be and it is hereby approved.

3. Approval is hereby granted to CEG and CEG is hereby authorized and directed to proceed with the transaction(s) contemplated by the Purchase Agreement and in particular, the sale by CEG to ESBC of all of CEG's right, title and interest in and to the B.C. Assets, and to take all steps necessary to complete the transaction(s) contemplated therein (the "Transaction") and, for greater certainty the sale of the B.C. Assets is also approved pursuant to paragraph 15(a) of the Amended and Restated Initial Order dated July 30, 2008 (the "Amended and Restated Initial Order"), granted by Madam Justice B.E.C. Romaine in these *CCAA* proceedings.

4. Upon closing of the Purchase Agreement, all of the right, title, and interest of CEG, and any parties claiming through it in and to the B.C. Assets will be extinguished and all of CEG's right, title and interest in and to the B.C. Assets shall vest absolutely and forever in ESBC, free and clear of and from any and all estate, right, title, interest, claims, hypothecs, mortgages, charges, liens (whether contractual, statutory or otherwise), options, agreements, disputes, debts, encumbrances, or other rights, limitations or restrictions of any nature whatsoever, or any other contractual, financial or monetary claims of any nature whatsoever, whether or not any of the foregoing have attached or been perfected, registered or filed, and whether secured, unsecured or otherwise (collectively, the "Encumbrances") and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to CEG's right, title and interest in the B.C. Assets are hereby expunged and discharged as against the B.C. Assets.

[Emphasis added.]

24 The purchase agreement (the "Asset Purchase Agreement") contains the following provisions:

Article 2 - Purchase and Sale

2.1 **Purchased Contracts** - On and subject to the terms and conditions of this Agreement, Vendor agrees to sell, assign and transfer to the Purchaser, and the Purchaser agrees to purchase and accept from the Vendor, all of the Vendor's right, title and interest in and to the Purchased Contracts as of and with the effect as of the Effective Time.

...

2.5 **Benefits and Obligations.** Subject to the Closing having occurred:

...

(b) the Purchaser shall be entitled to all benefits and responsible for all obligations of any kind and nature accrued or accruing, paid or payable, received or receivable with respect to the Purchased Contracts to the extent such benefits and obligations relate to a time after the Effective Time or to natural gas consumed by the Customer under such Purchased Contract after the Effective Time ...

...

3.1 **Assumption of Liabilities by Purchaser.** Subject to the provisions of this Agreement and to the Closing having occurred, the Purchaser agrees to assume, pay, satisfy, discharge, perform and fulfil, from and after the Time of Closing, those obligations and liabilities of the Vendor, and each of them, in relation to the Purchased Contracts which arise or accrue and are to be paid, satisfied, discharged, performed and fulfilled after the Effective Time (the "Assumed Liabilities")

...

7.2 **Conduct Prior to Closing Date.** Without in any way limiting any other obligations of the Vendor hereunder, during the period from the date hereof to the Closing Date:

...

(b) **Contractual Consents** - The Vendor shall use its commercially reasonable efforts to obtain, at or prior to the Time of Closing, the consents, approvals and release of information required to transfer the Purchased Contracts to the Purchasers, including with respect to the Utility, and Purchasers shall co-operate reasonably with Vendor in obtaining such consents, approvals and release of information, including providing financial information concerning the Purchasers if such information is required to obtain a consent or approval.

...

Article 9 - Conditions of Closing

9.1 Conditions of Closing in Favour of Purchaser

(a) The purchase of the Purchased Contracts is subject to the following terms and conditions for the exclusive benefit of the Purchaser, to be performed or fulfilled at or prior to the Time of Closing:

...

(ii) Covenants. All of the obligations, covenants and agreements contained in this Agreement to be complied with or performed by each of the Vendor at or prior to the Time of Closing shall have been complied with or performed in all material respects.

...

(b) If any of the conditions contained in Section 9.1(a) for the benefit of the Purchaser shall not have been satisfied at the Closing, the Purchaser may, without limiting any other right that the Purchaser may have at law or in equity, at its sole option, waive compliance with any such term, covenant or condition in whole or in part on such terms as may be agreed upon without prejudice to any of its rights of rescission in the event of non-performance of any other terms, covenant or condition in whole or in part.

...

Article 10 - Closing, Transfer of Possession and Post Closing Matters

...

10.4 Vendor's Closing Deliveries. At the Closing, the Vendor shall deliver or shall cause to be delivered to the Purchaser the following documents:

...

(b) copies of such consents and approvals (regulatory or otherwise) in respect of the Purchased Contracts which the Vendor has obtained pursuant to the terms hereof as of the Closing Date.

[Emphasis added.]

25 The trial judge found that the Contracts required consent to their assignment and the Vesting Order did not create a novation. I substantially agree with that analysis.

26 The Contracts expressly required consent to their assignment. The terms of the Asset Purchase Agreement contain provisions by which CEG was required to obtain consents to the transfer of the Purchased Contracts (Art. 7.2(b)) and to provide those consents to Just Energy before closing (Art. 9.1(a)(ii)).

27 If CEG failed to provide the consents required under Article 9.1(b), then Just Energy was entitled to waive delivery of consents by CEG or Just Energy was entitled to rescind the Asset Purchase Agreement (Art. 10.4(b)). CEG did not provide consents to the assignments. Just Energy did not rescind the Asset Purchase Agreement as it was entitled to when CEG failed to provide the consents.

28 The question then arises, as argued by Just Energy, whether the Vesting Order created a novation such that Just Energy stood in the place of CEG and thus Barafield was not required to provide its consent.

29 Paragraph 2 of the Vesting Order includes approval of the purchase of the Contracts. There is no provision in the Vesting Order, or in the application for that order, that specifically dispensed with the need to obtain Barafield's consent to the assignment of the Contracts. The Vesting Order does not expressly or by necessary implication waive the provision requiring Barafield's consent to any assignment.

30 Paragraph 4 of the Vesting Order allows for the transfer, assignment and acquisition of the Contracts to Just Energy unfettered by "claims" of CEG's creditors against the Contracts. Barafield is not, however, a creditor of CEG. Nor does Barafield make claims through CEG. Paragraph 4 of the Vesting Order provides that on closing (1) the right, title and interest of CEG, or parties claiming through CEG, are extinguished in, *inter alia*, the Contracts, (2) the CEG assets are vested in Just Energy free and clear of all claims, and (3) all encumbrances against the Contracts are expunged and discharged. The Vesting Order says nothing about the rights of the counterparty to the Contracts. It does not by its terms dispense with Barafield's right to require its consent to any assignment.

31 I see nothing, then, in the express terms of the Vesting Order that entails that there was a novation. Is there something in the context of these proceedings that by necessary implication entails that a novation was intended, notwithstanding that the Asset Purchase Agreement provides that Just Energy could resile from completing the Asset Purchase Agreement if CEG did not provide the consents? I see nothing to that end.

32 Indeed, as Barafield notes, Just Energy was at all material times aware of the clause in the Contracts that assignment required consent, and both before and after the Vesting Order in its internal communications addressed that issue, and how it could be dealt with. It is apparent from those communications that Just Energy's actions were calculated assessing the risks to it of not obtaining consents to the assignments.

33 Just Energy was a party to the proceedings giving rise to the Vesting Order, was aware that there was a risk that third parties, such as Barafield, might not consent, and yet the Vesting Order does not expressly provide for novation. Barafield was not a party to the proceedings giving rise to the Vesting Order and, indeed, had no notice of the proceeding.

34 That raises the neat point of whether notice of the proceedings is necessary before a court in *CCAA* proceedings may make an order affecting the substantive rights of third parties. Of course invariably the initial order made in *CCAA* proceedings, staying proceedings, will affect third party rights. In this case, however, the position of Just Energy is that the *CCAA* court making the Vesting Order did and could make an order which abrogated Barafield's rights to terminate the Contracts arising from the insolvency of CEG or to refuse assignment of the Contracts. In other words, the Vesting Order assigned the benefits of the Contracts to Just Energy, but not the burdens, all without notice to Barafield.

35 In that regard I find instructive the decision of Madam Justice Fitzpatrick, in *Veris Gold Corp., Re*, 2015 BCSC 1204 (B.C. S.C.) [*Veris*], in which she discussed the current statutory authority to approve assignments found in s. 11.3 of the *CCAA*. Section 11.3 came into force in September 2009, after the Vesting Order made in these proceedings. Section 11.3 codified and clarified what had been the general approach to assignment issues. The court found that the best practice is to serve all counterparties to particular contracts that are sought to be assigned: *Veris* at paras. 56, 59-64.

36 The approach in earlier cases was to give "appropriate" relief that should result in "fair" treatment to all stakeholders: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para. 70. The effect on assignment to the counterparty is relevant

and third party rights should only be affected as is absolutely required to assist the reorganization and in a manner fair to the counterparty: *Nexient Learning Inc., Re*, [2009] O.J. No. 5507 (Ont. S.C.J.) at para 59.

37 In my view, these authorities are inconsistent with Just Energy's position that the Vesting Order should be read expansively to abrogate the right of the counterparty to the Contracts to exercise their right under the Contracts to terminate the Contracts upon defined acts of default.

38 The Asset Purchase Agreement expressly refers to CEG providing consents, and gives Just Energy the ability to resile from the agreement if the terms are not met. The Asset Purchase Agreement, referred to in the Vesting Order, and the Vesting Order must be read together. The only reasonable inference from that reading is that the Vesting Order did not provide for novation in the circumstances here, but contemplated the assignments requiring the consent of Barafield.

39 While this matter is ancillary to a CCAA proceeding, the matter we are considering is one where a third party purchases contracts of the debtor corporation, without notice to the counterparty of the contracts, knowing of and therefore assuming the risk of not obtaining consent to an assignment. There is no CCAA purpose that enures to the benefit of the interpretation of Just Energy in these circumstances. The terms of the Vesting Order and Asset Purchase Agreement must be considered based on the meaning of the language employed. In my opinion, neither supports the proposition that a novation was intended or achieved.

VII. Money Had and Received

40 Barafield seeks to support the judgment below based on the doctrine of money had and received. This was pleaded in the court below but not addressed. Just Energy replies that the doctrine has no application in circumstances here where it is shown that there was no practical compulsion. These matters were not addressed by the judge below because of his finding that Just Energy breached the Contracts.

41 Under the doctrine of money had and received, a party that pays money which it is not bound to pay, "under the compulsion of urgent and pressing necessity", can recover the payment: *Maskell v. Horner* (1914), [1915] 3 K.B. 106 (Eng. C.A.) [*Maskell*], approved by *Eadie v. Brantford (Township)*, [1967] S.C.R. 573 (S.C.C.), at 581 [*Eadie*].

42 Just Energy submits that where a payor, like Barafield, has a fair opportunity of contesting its liability through some form of administrative or adjudicative process, but instead elects to give way and pay, the payment is voluntary and there is no practical compulsion.

43 Justice Spence in *Eadie* rejected the suggestion that compulsion requires the payor to have been faced with a situation where there was no other alternative but to pay. He held that "... a practical compulsion is alone necessary. In each of the three cases in this Court approving *Maskell v. Horner* ... there were other courses available to the plaintiffs but those other courses were time consuming and impractical.": *Eadie* at 582.

44 The case law cited by Just Energy does not establish a general proposition that the payor must either litigate or have his or her payment deemed voluntary. In *Maskell*, the plaintiff continually paid, under protest, tolls to the defendant for 12 years. The defendant threatened to seize, and indeed did seize on occasion, the plaintiff's goods if the tolls were not paid. Only after the tolls were found to be illegal in a separate action, not brought by the plaintiff, did the plaintiff litigate for the return of the money paid. Lord Buckley rejected the defendant's contention that by not seeking to litigate the plaintiff's payments were voluntary at 123:

Mr. Upjohn ... contended that that learned judge meant to lay down as a general proposition that under circumstances such as those in the present case the party called upon to make payment has an option either (1.) to litigate the question or (2.) to submit and pay, and that if he does the latter, the payment is by way of gift to the person to whom he pays and closes the transaction between them... In my opinion it is not the fact that there exist only those two alternatives of which the person called upon to make payment must elect one, and that if he elects to pay, his payment is by way of gift and is voluntary.

45 The cases that Just Energy relies on in support of the general proposition involve situations where one party has sufficient time to seek an adjudicative decision and yet chooses not to do so.

46 In *Mady Development Corp. v. Sandwich West (Township)*, [1997] O.J. No. 1395 (Ont. C.A.), the Ontario Court of Appeal found that there was no practical compulsion because the plaintiff had ample time, over three months, before entering into an agreement to apply to the court for an interpretation of a by-law. In *Brent v. Slegg Construction Materials Ltd.*, 2007 BCSC 661 (B.C. S.C.), the plaintiff was anxious to obtain a further mortgage so he paid the defendant's builders lien to obtain a discharge rather than resorting to his statutory remedies. In both of these cases, the plaintiff had no pressing, pre-existing, agreement that compelled the plaintiff to make a payment. The plaintiff chose to make the payment for the sake of commercial expediency.

47 These decisions, in my view, stand for the proposition that where a party seeks to enter into an agreement which is dependent on it making a payment for which the party disputes it must pay, and the party has time to seek a determination of the validity of the payment but chooses not to do so, then the party is not practically compelled to make the payment.

48 Barafield's choice to delay litigation does not necessarily mean its continued payments to Just Energy were not practically compelled. The question to be answered is whether Barafield was truly practically compelled to continue paying Just Energy for two years under urgent and pressing necessity rather than pursuing other options, including litigating against Just Energy or requesting Terasen return Barafield to their market natural gas supply.

49 Barafield argues that it was compelled to pay Just Energy because had it stopped paying, its gas supply would have been cut off, resulting in a breach of its obligation to supply heat to its tenants. In *Maskell*, continued payments over 12 years were found to be compelled under the threat that the defendant would seize the plaintiff's goods if the plaintiff failed to pay. Barafield submits that the present case is analogous to *Maskell* in that it was compelled to make continued payments for a long period of time at the risk of having its goods, gas supplied to heat its tenants' homes, withheld.

50 Barafield submits that it was unable to communicate with Terasen directly in regards to its natural gas supply because in 2006 it signed a "Notice of Appointment of Marketer" that gave CEG sole authority to deal with Terasen on Barafield's behalf:

Authorization — I give my Marketer the authority to do what is required with respect to the supply of natural gas for the premises including entering into the necessary agreements with Terasen. I acknowledge that Terasen will be entitled to rely solely on communications from the Marketer with respect to my enrollment in the applicable Commodity Unbundling Service for the premises as well as the termination or expiry of my natural gas supply agreement for the Premises with the Marketer. I direct Terasen to release to my Marketer any and all historical and ongoing consumption information for the Premises.

51 Just Energy says that there is no evidence in the record as to what would have been done if Barafield did not make its payments to Terasen: Barafield did not raise this issue with Terasen at the time, gave no notice of protest to Terasen, and did not call someone from Terasen to give evidence related to this topic.

52 The trial judge's finding that Barafield had no choice but to pay was not made in the context of considering the alternative basis of liability, money had and received, and the issue of practical compulsion as discussed in the authorities, nor did it consider the evidence of Barafield's principal, Mr. Shrum, in that context.

53 With respect to remedy, Just Energy submits that if Barafield is entitled to a remedy for money had and received, the appropriate remedy should be limited to the disgorgement of the profits made by Just Energy and not the contractual damages as assessed by the trial judge.

54 The doctrine of money had and received is a restitutionary claim. In restitution it is generally not material that the plaintiff has suffered a loss if the defendant has gained no benefit. No recovery exists by a claim of restitution without a

benefit which has "enriched" the defendant and which can be restored to the donor *in specie* or by money: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at 789 a-790b.

55 During the hearing, counsel presented the court with a formula for calculating the gross profits Just Energy made on the gas supplied to Barafield. In response to a request by the court, in submissions received after the hearing, counsel have agreed that the gross profit earned by Just Energy during the relevant period (August 2008 to April 2011) is \$218,704.90.

56 This Court is not in a position to determine if Barafield should recover on the alternative ground, money had and received, including the issue of whether the standard of practical compulsion was met, as that would require making factual findings on matters at issue which were not considered and decided in the first instance. Likewise, the appropriate remedy, if any, is a matter for the trial judge.

VIII. Order

57 In the result, I would allow the appeal and remit the matter to the trial judge to consider the alternative arguments which were not addressed.

58 The appellant is entitled to its costs in this Court.

D. Smith J.A.:

I AGREE.

Willcock J.A.:

I AGREE.

Appeal allowed.

Footnotes

* A corrigendum issued by the court on October 14, 2015 has been incorporated herein.

TAB 4

2008 ONCA 587
Ontario Court of Appeal

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

2008 CarswellOnt 4811, 2008 ONCA 587, [2008] O.J. No. 3164, 168 A.C.W.S. (3d) 698, 240
O.A.C. 245, 296 D.L.R. (4th) 135, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 92 O.R. (3d) 513

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

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

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

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

Heard: June 25-26, 2008

Judgment: August 18, 2008 *

Docket: CA C48969

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

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Subject: Insolvency; Civil Practice and Procedure

Headnote

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

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

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

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

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s. 6 — considered

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s. 91 ¶ 21 — referred to

s. 92 — referred to

s. 92 ¶ 13 — referred to

Words and phrases considered:

arrangement

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

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

R.A. Blair J.A.:

A. Introduction

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

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

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

Leave to Appeal

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

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

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

Appeal

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

B. Facts

The Parties

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

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

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

The ABCP Market

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

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

12 The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over \$116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately \$32 billion of non-bank sponsored ABCP the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

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

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

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

Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

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

The Liquidity Crisis

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

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

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

The Montreal Protocol

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

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

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

23 Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible, and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the

ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

The Plan

a) Plan Overview

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

25 The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

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

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

b) The Releases

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

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

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

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

- a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;
- b) Sponsors — who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information — give up their existing contracts;
- c) The Canadian banks provide below-cost financing for the margin funding facility and,
- d) Other parties make other contributions under the Plan.

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

The CCAA Proceedings to Date

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

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

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

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

37 A second sanction hearing — this time involving the amended Plan (with the fraud carve-out) — was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis

both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

38 The appellants attack both of these determinations.

C. Law and Analysis

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

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

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

(1) Legal Authority for the Releases

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

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company.¹ The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

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

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

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

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

e) the prevailing jurisprudence supports these conclusions.

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

Interpretation, "Gap Filling" and Inherent Jurisdiction

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

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the

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

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

46 These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"² and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools — statutory interpretation, gap-filling, discretion and inherent jurisdiction — it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

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

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

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

49 I adopt these principles.

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

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

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

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

... [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".³ Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.* [Emphasis added.]

Application of the Principles of Interpretation

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

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

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

Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.

In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

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

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

The Statutory Wording

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

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

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

59 Sections 4 and 6 of the CCAA state:

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as

altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or Arrangement

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

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

62 A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230 (S.C.C.) at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (Ont. C.A.) at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) at para. 6; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at 518.

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

64 *T&N Ltd., Re*, *supra*, is instructive in this regard. It is a rare example of a court focussing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. *Companies Act 1985*, a provision virtually identical to the scheme of the CCAA — including the concepts of compromise or arrangement.⁴

65 T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund

against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

66 Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence — cited earlier in these reasons — to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example.⁵ Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

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

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

The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind *all* creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes⁶ and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The Required Nexus

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

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

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

- a) The parties to be released are necessary and essential to the restructuring of the debtor;
- b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it;*
- c) The Plan cannot succeed without the releases;
- d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;* and
- e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

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

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

[77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

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

The Jurisprudence

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Canadian Airlines Corp., Re* (2000), 265 A.R. 201 (Alta. Q.B.), leave to appeal refused by (2000), 266 A.R. 131 (Alta. C.A. [In Chambers]), and (2001), 293 A.R. 351 (note) (S.C.C.). In *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

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

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

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

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*,⁷ of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument — dealt with later in these reasons — that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

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

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

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

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

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

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

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

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

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

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

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

involving significant contributions by the beneficiaries of the release — as is the situation here. Thus, *NBD Bank, Canada* is of little assistance in determining whether the court has authority to sanction a plan that calls for third party releases.

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

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

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

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

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

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

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

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

[42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.

.....

[54] The Act offers the respondent a way to arrive at a compromise with its creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.

.....

[58] The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

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

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

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

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

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

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

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

The 1997 Amendments

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

5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 122.

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

98 The maxim is not helpful in these circumstances, however. The reality is that there *may* be another explanation why Parliament acted as it did. As one commentator has noted:⁸

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

99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg Inc.*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The

assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden & Morawetz, vol.1, *supra*, at 2-144, E§11A; *Royal Penfield Inc., Re*, [2003] R.J.Q. 2157 (C.S. Que.) at paras. 44-46.

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

The Deprivation of Proprietary Rights

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

The Division of Powers and Paramountcy

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

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

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

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

Conclusion With Respect to Legal Authority

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

(2) The Plan is "Fair and Reasonable"

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

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

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

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

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

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

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

113 At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate

them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

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

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

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

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

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

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

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

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

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

D. Disposition

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

J.I. Laskin J.A.:

I agree.

E.A. Cronk J.A.:

I agree.

Schedule A — Conduits

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

Schedule B — Applicants

ATB Financial

Caisse de dépôt et placement du Québec

Canaccord Capital Corporation

Canada Mortgage and Housing Corporation

Canada Post Corporation

Credit Union Central Alberta Limited

Credit Union Central of BC

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank of Canada/National Bank Financial Inc.

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

Schedule A — Counsel

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

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

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

- 4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.
- 5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals)
- 6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor
- 7) Mario J. Forte for Caisse de Dépôt et Placement du Québec
- 8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada
- 9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)
- 10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.
- 11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank
- 12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees
- 13) Usman Sheikh for Coventree Capital Inc.
- 14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
- 15) Neil C. Saxe for Dominion Bond Rating Service
- 16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP
- 17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
- 18) R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Application granted; appeal dismissed.

Footnotes

- * Leave to appeal refused at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.).
- 1 Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.
- 2 Justice Georgina R. Jackson and Dr. Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law*, 2007 (Vancouver: Thomson Carswell, 2007).

- 3 Citing Gibbs J.A. in *Chef Ready Foods*, *supra*, at pp.319-320.
- 4 The Legislative Debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the *Companies Act 1985* (U.K.); see *House of Commons Debates (Hansard)*, *supra*.
- 5 See *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 192; *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s. 182.
- 6 A majority in number representing two-thirds in value of the creditors (s. 6)
- 7 *Steinberg Inc.* was originally reported in French: *Steinberg Inc. c. Michaud*, [1993] R.J.Q. 1684 (C.A. Que.). All paragraph references to *Steinberg Inc.* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055 (C.A. Que.)
- 8 Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp.234-235, cited in Bryan A. Garner, ed., *Black's Law Dictionary*, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

TAB 5

2009 BCSC 1169
British Columbia Supreme Court

Hayes Forest Services Ltd., Re

2009 CarswellBC 2286, 2009 BCSC 1169, [2009] B.C.W.L.D. 7080, [2009] B.C.W.L.D. 7082,
[2009] B.C.W.L.D. 7252, [2009] B.C.J. No. 1725, 180 A.C.W.S. (2d) 861, 57 C.B.R. (5th) 52

**In the Matter of the Companies' Creditors Arrangement Act, R.S.C.
1985, c. C-3 And In the Matter of the Business Corporations Act,
S.B.C. 2002, c. 57 And In the Matter of Hayes Forest Services Limited,
Hayes Holding Services Limited and Hayes Helicopter Services Ltd.**

Burnyeat J.

Heard: July 8, 10, 24, 2009; August 14, 2009

Judgment: August 27, 2009

Docket: Vancouver S085453

Counsel: S.C. Fitzpatrick for Teal Cedar Products Ltd.

J.I. McLean for Hayes Forest Services Limited, Hayes Holding Services Limited, Hayes Helicopter Services Ltd.

E.J. Milton, Q.C. for Western Forest Products Inc.

J. Cytrynbaum for G.E. Canada Corporation

J. Mistry for Steelworkers Locals 1-80, 1-85

F.R. Dearlove for Canadian Imperial Bank of Commerce

Subject: Natural Resources; Civil Practice and Procedure; Corporate and Commercial; Public; Insolvency; Estates and Trusts

Headnote

Natural resources --- Timber — Timber licences — Miscellaneous

H Ltd. filed for protection under Companies' Creditors Arrangement Act ("CCAA") — H Ltd. logged timber for T Ltd. under contract in respect of tree farm licence — In accordance with regulation, contract provided that H Ltd. could assign its rights or interest under agreement provided H Ltd. obtained T Ltd.'s consent which would not be unreasonably withheld — Contract provided for disputes to be referred to arbitration — H Ltd. requested consent of T Ltd. to assignment of contract to N Ltd. — T Ltd. advised that it was withholding consent because N Ltd. was not suitable assignee — T Ltd. brought application to lift stay of proceedings so that it could commence arbitration proceedings in respect of issue of whether it was reasonable to withhold its consent to assignment of contract — H Ltd. brought application for approval of sale of contract to N Ltd. — Application to lift stay of proceedings dismissed; application for approval of sale granted — Issue should be dealt with in CCAA proceedings — Language of s. 11(4) of CCAA was broad enough to allow decision in CCAA proceedings to be substituted for arbitration process contemplated under contract — H Ltd. met burden of showing that reasonable person would not have withheld consent — T Ltd. should have had no hesitation in concluding that equipment, crew and expertise to undertake work required under contract would be available to N Ltd. — If N Ltd. failed to perform under contract, H Ltd. would be in position to take back contract and perform required logging — Concerns regarding financial capability of N Ltd. and lack of business plan were answered — Part of T Ltd.'s refusal to provide consent was designed to achieve collateral purpose of having contract revert to T Ltd. — T Ltd. did not meet burden of showing that it was reasonable to approve offer of another company, 858 Ltd., since no information was provided regarding financial capability of 858 Ltd. and offer contained conditions precedent that were not met.

Alternative dispute resolution --- Relation of arbitration to court proceedings — Where jurisdiction of court ousted by statute

H Ltd. filed for protection under Companies' Creditors Arrangement Act ("CCAA") — H Ltd. logged timber for T Ltd. under contract in respect of tree farm licence — In accordance with regulation, contract provided that H Ltd. could assign its rights or interest under agreement provided H Ltd. obtained T Ltd.'s consent which would not be unreasonably withheld — Contract provided for disputes to be referred to arbitration — H Ltd. requested consent of T Ltd. to assignment of contract to N Ltd. — T Ltd. advised that it was withholding consent because N Ltd. was not suitable assignee — T Ltd. brought application to lift stay of proceedings so that it could commence arbitration proceedings in respect of issue of whether it was reasonable to withhold its consent — H Ltd. brought application for approval of sale of contract to N Ltd. — Application to lift stay of proceedings dismissed; application for approval of sale granted — Issue should be dealt with in CCAA proceedings — But for filing under CCAA, disputes under contract would have been governed by dispute resolution provisions under contract, Forest Act and related regulations — Language of s. 11(4) of CCAA was broad enough to allow decision in CCAA proceedings to be substituted for arbitration process — Determination of issue was less expeditious and more expensive under arbitration provisions — Time constraints imposed by N Ltd. could not be met by arbitration proceedings — Issue was commonly dealt with by court and required no forestry related experience — Assignment could be approved even if conclusion was reached that it was not unreasonable for T Ltd. to withhold its consent.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court

H Ltd. filed for protection under Companies' Creditors Arrangement Act ("CCAA") — H Ltd. logged timber for T Ltd. under contract in respect of tree farm licence — In accordance with regulation, contract provided that H Ltd. could assign its rights or interest under agreement provided H Ltd. obtained T Ltd.'s consent which would not be unreasonably withheld — Contract provided for disputes to be referred to arbitration — H Ltd. requested consent of T Ltd. to assignment of contract to N Ltd. — T Ltd. advised that it was withholding consent because N Ltd. was not suitable assignee — T Ltd. brought application to lift stay of proceedings so that it could commence arbitration proceedings in respect of issue of whether it was reasonable to withhold its consent — H Ltd. brought application for approval of sale of contract to N Ltd. — Application to lift stay of proceedings dismissed; application for approval of sale granted — Issue should be dealt with in CCAA proceedings — But for filing under CCAA, disputes under contract would have been governed by dispute resolution provisions under contract, Forest Act and related regulations — Language of s. 11(4) of CCAA was broad enough to allow decision in CCAA proceedings to be substituted for arbitration process — Determination of issue was less expeditious and more expensive under arbitration provisions — Time constraints imposed by N Ltd. could not be met by arbitration proceedings — Issue was commonly dealt with by court and required no forestry related experience — Assignment could be approved even if conclusion was reached that it was not unreasonable for T Ltd. to withhold its consent — H Ltd. met burden of showing that reasonable person would not have withheld consent.

Table of Authorities**Cases considered by *Burnyeat J.*:**

Ambro Enterprises Inc., Re (1993), 1993 CarswellOnt 241, 22 C.B.R. (3d) 80 (Ont. Bkcty.) — referred to

Doman Industries Ltd., Re (2003), 2003 BCSC 376, 2003 CarswellBC 538, 14 B.C.L.R. (4th) 153, 41 C.B.R. (4th) 29 (B.C. S.C. [In Chambers]) — referred to

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

Exxonmobil Canada Energy v. Novagas Canada Ltd. (2002), 2002 CarswellAlta 739, 30 B.L.R. (3d) 262, [2003] 3 W.W.R. 657, 318 A.R. 99, 10 Alta. L.R. (4th) 80, 2002 ABQB 455 (Alta. Q.B.) — considered

Gauntlet Energy Corp., Re (2003), 2003 ABQB 718, 2003 CarswellAlta 1209, 45 C.B.R. (4th) 47, [2004] 4 W.W.R. 373, 336 A.R. 302, 36 B.L.R. (3d) 250, 20 Alta. L.R. (4th) 314, 5 P.P.S.A.C. (3d) 236 (Alta. Q.B.) — considered

Hayes Forest Services Ltd. v. Teal Cedar Products Ltd. (2008), [2008] 11 W.W.R. 612, 257 B.C.A.C. 105, 432 W.A.C. 105, 2008 CarswellBC 1325, 2008 BCCA 283, 82 B.C.L.R. (4th) 110 (B.C. C.A.) — referred to

Landawn Shopping Centres Ltd. v. Harzena Holdings Ltd. (1997), 1997 CarswellOnt 4328, 44 O.T.C. 288 (Ont. Gen. Div. [Commercial List]) — considered

Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd. (1987), 46 R.P.R. 34, 13 B.C.L.R. (2d) 367, 1987 CarswellBC 128 (B.C. S.C.) — referred to

Philip's Manufacturing Ltd., Re (1991), 9 C.B.R. (3d) 1, [1992] 1 W.W.R. 651, 60 B.C.L.R. (2d) 311, 1991 CarswellBC 502 (B.C. S.C.) — referred to

Playdium Entertainment Corp., Re (2001), 2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) — followed

Playdium Entertainment Corp., Re (2001), 2001 CarswellOnt 4109, 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]) — referred to

Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — considered

Smoky River Coal Ltd., Re (1999), 12 C.B.R. (4th) 94, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, [1999] 11 W.W.R. 734, 1999 CarswellAlta 491 (Alta. C.A.) — considered

T. Eaton Co., Re (1997), 1997 CarswellOnt 5954 (Ont. Gen. Div.) — referred to

T. Eaton Co., Re (1997), 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.) — referred to

1455202 Ontario Inc. v. Welbow Holdings Ltd. (2003), 2003 CarswellOnt 1761, 33 B.L.R. (3d) 163, 9 R.P.R. (4th) 103 (Ont. S.C.J.) — considered

Statutes considered:

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

Generally — referred to

s. 11 — referred to

s. 11(4) — referred to

Forest Act, R.S.B.C. 1996, c. 157

Generally — referred to

s. 160 — referred to

s. 162 — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

R. 3(3.1) [en. B.C. Reg. 191/2000] — pursuant to

R. 10 — pursuant to

R. 12 — pursuant to

R. 13(1) — pursuant to

R. 13(6) — pursuant to

R. 14 — pursuant to

R. 44 — pursuant to

Regulations considered:

Forest Act, R.S.B.C. 1996, c. 157

Timber Harvesting Contract and Subcontract Regulation, B.C. Reg. 22/96

Generally — referred to

s. 4(1) — referred to

s. 5 — referred to

ss. 48-51 — referred to

APPLICATION by company under *Companies' Creditors Arrangement Act* for approval of sale of logging contract; APPLICATION to lift stay of proceedings.

Burnyeat J.:

1 Hayes Forest Services Limited, Hayes Holding Services Limited and Hayes Helicopter Services Ltd. ("Hayes") apply pursuant to the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), the *Forest Act*, R.S.B.C. 1996, c. 157 and its Regulations, Rules 3(3.1), 10, 12, 13(1), 13(6), 14 and 44 of the *Rules of Court* and the inherent jurisdiction of the Court for Orders approving the sale of that "certain replaceable stump to dump logging contract" ("Contract") between Hayes Forest Services Limited and Teal Cedar Products Ltd. ("Teal") to North View Timber Ltd. ("North View") relating to Timber Forest Licence 46 ("*TRL46*"). A \$50,000.00 deposit has been paid by North View, and a further \$277,000.00 would be paid at the time of the closing contemplated by the purchase. The balance of the purchase price of \$1,614,266.00 is to be paid at the rate of \$3.00 per cubic metre of the timber harvested under the Contract.

2 In opposing that application, Teal applies to lift the stay of proceedings granted under the July 31, 2008 Order so that Teal may commence arbitration proceedings in respect of the issue of whether it is reasonable to withhold its consent to the assignment of the Contract to North View and adjourning the application of Hayes pending the completion of the

arbitration proceedings. In the alternative, Teal requests an order adjourning the application pending the production of certain documentation and information concerning the proposed sale to North View. In the further alternative, Teal seeks an order that a sale of the Contract be approved to 0858434 B.C. Ltd. ("858") for a purchase price of \$1,400,000.00, with a down payment of \$400,000.00, and with the balance of the purchase price to be paid at the rate of \$2.00 per cubic metre of timber harvested under the Contract.

3 As part of a July 31, 2008 Order, a Monitor was appointed to report to the Court and the creditors from time to time. In a June 25, 2009 letter to counsel for Hayes, the Monitor states in part regarding the proposed sale to North View:

In our opinion, the offer represents a reasonable price for this asset in today's market and we believe that the Company has diligently attempted to market this asset over an extended period of time.

The purchase price is payable based on Northview logging activity under the contract. We believe that this is the only realistic mechanism to conclude a sale at this value. In order to protect its position and ensure future payments are made, the Company will receive a deposit of \$327,000 on completion of the sale, and take security over the contract such that in the event Northview defaults on its future obligations the Company will be in a position to enforce that security and retake ownership of the contract.

Background

4 A "replaceable stump to dump" logging contract in respect of Tree Farm Licence 46 dated January 9, 1990 was entered into by Fletcher Challenge Canada Ltd. as the holder of the contract and Pat Carson Bulldozing Ltd. as the contractor. The interests of the original parties have both been acquired by other parties. The interest of Pat Carson Bulldozing Ltd. was acquired by Hayes Forest Services Limited. The interest of Fletcher Challenge Canada Ltd. was acquired by Teal pursuant to a January 19, 2004 Asset Purchase Agreement and a May 6, 2004 Assignment of Agreement. From January 1, 2008 through August 2, 2008, Hayes logged approximately 43,000 cubic meters of timber for Teal under the Contract.

5 These proceedings under the *CCAA* were commenced on July 31, 2008. At the time of the July 31, 2008 "initial Order", there were four ongoing disputes regarding key operating and financial terms of the Contract. In each dispute, the dispute resolution mechanism under the provisions under the *Forest Act* and its Regulations and under the Contract required mediation, arbitration and court proceedings. The applicable "Dispute Resolution" mechanism under the Contract was set out in paragraph 22.01:

The Company and the Contractor mutually agree that where a dispute arises between them regarding a term, condition or obligation under this Agreement, and the Work under this Agreement is carried out on lands managed by the Company under a Tree Farm Licence or Forest Licence, then either party may require the dispute to be resolved in accordance with the Dispute Resolution Clause attached as Schedule "D" to this Agreement.

6 Portions of the Schedule "D" referred to in Paragraph 22.01 of the Contract are attached as Appendix "A" to these Reasons for Judgment.

7 In a September 30, 2008 letter, Hayes notified Teal that Hayes was in the process of seeking expressions of interest with respect to the purchase of the Contract as part of the restructuring contemplated under the *CCAA* filing. In an October 10, 2008 response, counsel for Teal advised counsel for Hayes that:

Teal is certainly prepared to consider any potential assignee of the contract, and will expect the usual information, including financial information, that would normally be produced in that process.

8 The relationship between Hayes and Teal was such that a number of positions were taken by Teal which resulted in applications by Hayes in the *CCAA* proceedings. Hayes took the position that monies were owing by Teal under the Contract. Against what was owing, Teal attempted to set-off "unliquidated claims" it alleged it had under rate disputes arising out of the Contract. An Order was made on August 15, 2008 prohibiting such a set-off.

9 An attempt was made by Teal along with Western Forest Products Ltd. ("Western") to set aside the *CCAA* proceedings on September 4, 2008. That application was unsuccessful.

10 In October, 2008, Teal reduced the contract rate payable to Hayes for work done under the Contract. An order was made compelling payment on the existing contractual rates.

11 Teal sought to lift the stay of proceedings imposed under the July 31, 2008 Order to permit it to proceed with the various ongoing rate disputes under which it claimed Hayes owed it in excess of \$2,500,000. Hayes consented to the lifting of the stay of proceedings to permit those claims to proceed. By November, 2008, Teal had not taken any steps to prosecute the arbitrations contemplated under the Contract. Hayes obtained an order establishing a "bar date" by which time Teal was required to have those claims arbitrated. Before the bar date was reached, Teal and Hayes settled all rate disputes between them on the basis that Hayes was not indebted to Teal. That settlement agreement was approved by the Court in February, 2009.

12 In November 2008, Teal made an offer to Hayes to purchase the Contract for \$764,112 with \$191,028 on closing and the remainder at the rate of \$2.00 per cubic meter of timber harvested under the Contract paid quarterly with the first payment to be made on April 1, 2009. The offer had a December 15, 2009 completion date. The offer provided that Teal would be the successor employer for those employees of Hayes engaged under the Contract who were not eligible for compensation under the B.C. Forestry Revitalization Trust. The offer was open for acceptance until December 1, 2008. The offer was not accepted by Hayes.

13 Under the Contract, Teal was to provide a 2009 logging plan to Hayes. The 2009 logging plan was provided to Hayes on December 9, 2008. On January 12, 2009, a representative of Teal advised a representative of Hayes that Teal was "... suspending operations indefinitely with respect to the work allocated to Hayes ..." Since December, 2008, Teal has not assigned work under the Contract to Hayes. Under the Contract, Hayes is entitled to 34.6% of the stump to dump logging work available relating to TFL46.

Possible Transfer of the Contract to North View

14 The *Timber Harvesting Contract and Subcontract Regulation*, B.C. Reg. 22/93, and paragraph 18 of the Contract governs the question of whether the Contract can be assigned. Section 4(1) of the Regulation provides: "Every replaceable contract must provide that the interests of the contractor are assignable, subject to the consent of the licence holder, and that consent must not be withheld unreasonably." In accordance with that section, paragraph 18 of the Contract provides:

18.01 The Contractor may assign any of its rights or interests under this Agreement, provided the Contractor first obtains the consent of the Company. The Company will not unreasonably withhold its consent to any assignment proposed by the Contractor.

18.02 Any assignment or transfer by the Contractor of this Agreement or of any interest therein ... without the written consent of the Company will be void....

15 In a May 8, 2009 letter to Teal, Hayes requested the consent of Teal to the assignment of the Contract to North View and advised that they contemplated completing the transfer prior to June 15, 2009. The letter also stated:

16 The outstanding payments under the Purchase Agreement will be secured by a security interest granted by the Purchaser (North View) to Hayes in all of the Purchaser's rights, title and interest in and to the Logging Contract and all proceeds thereof or therefrom.

17 In a May 14, 2009 letter, Hayes provided further information to Teal with respect to North View. In a May 15, 2009 letter, Teal sought information concerning North View and forwarded a questionnaire for completion and return. In a May 22, 2009 letter, Hayes provided the questionnaire to Teal. At that stage, it is clear that not all of the questions set

out in the questionnaire had been answered in full. In any event, the questionnaire was not answered to the satisfaction of Teal. Despite the fact that all of the questions it had set out had not been answered, Teal wrote to Hayes on May 29, 2009 advising that it would be withholding their consent to the assignment of the Contract because Teal was of the view that the information provided did not justify providing their consent.

18 The matters which remained of concern to Teal were set out in that letter, being that North View:

1. is not a going concern;
2. when it last operated, was a minor business with revenues of about 1 to 2% of what the Contract currently delivers to the contractor and financial statements that suggest it is financially not viable or capable of performing the Contract;
3. has no experience performing a Coastal stump to dump contract;
4. has no equipment or crew or substantive projections of the equipment or crew it needs to perform its obligations under the Contract;
5. despite the difficult circumstances in the Coastal forest industry, has no business plan demonstrating that it can viably perform the obligations under the Contract, and no apparent financial resources to fund acquisition of equipment or ongoing expenses of operations; and
6. has no executed assignment of the Contract conditional on our consent being provided.

19 The letter then detailed the nature of the concerns of Teal. Despite the position having been taken, Hayes continued to provide information and Teal continued to request further information. On June 5, 2009, Hayes provided further information regarding North View and on June 8, 2009, Teal requested further information. In a June 12, 2009 letter, Teal advised that it was continuing to withhold its consent setting out detailed reasons regarding why they were continuing to take that position. The following "summary" was provided by Teal regarding the proposed assignment to North View:

In summary, the evidence continues to indicate North View is not a suitable assignee. It is a small and virtually inactive company, particularly in the context of the operation required under the Contract. It has no experience performing a Coastal stump to dump operation, let alone a significant one; no experience with a union operation; few financial resources; no commitments from financial institutions or others to provide the necessary working capital to begin operations; and no equipment or crew. Moreover, it has no firm plans to address these issues in the context of the five-year replaceable contract it seeks to obtain.

In our view, these and the other concerns we have raised comprise, at any time, reasonable grounds for us to withhold consent.

However, beyond this, you are proposing to assign this important Contract to a company with these shortcomings at a time when the Coast forest industry is, as you acknowledge, in a severe downturn. In these conditions, few licensees, Teal included, can afford to expend scarce resources dealing with weak or failing contractors. Teal has already incurred significant time and expenses addressing the financial difficulties experienced by you as the current contractor. You incurred these difficulties despite your significant resources and experience in Coastal, unionized, stump to dump operations. If a contractor with significant resources and experience has had difficulties, it is most probable an under-resourced and inexperienced contractor such as North View will also face significant difficulties. Teal is no position to bear the costs in time, money and process of another failure of the contractor holding this Contract. It is unreasonable to expect Teal to put itself in that position by consenting to an assignment to a contractor with North View's shortcomings.

Should the Dispute Go to Arbitration?

20 The "Dispute Resolution Clause" set out in the Contract provides for a period of 30 days for the parties to attempt to resolve any dispute arising, the ability of either party to then refer the matter to arbitration, the ability of each party to have two days to complete their submissions and the requirement that the arbitrator shall hand down the arbitral award within seven days of the completion of the submissions. However, each party is entitled to an "examination for discovery" as that term is defined in the Rules of Court, including discovery of documents and discovery of one officer representative of the other party, to a maximum of three days. Once the award of the arbitrator has been received, a party would be at liberty to apply to this Court to have the award set aside. Any party not satisfied with the decision of a Judge of this Court could then apply to the Court of Appeal to overturn the decision reached by a Judge of this Court. These parties have had a history of a number of their disputes going to the Court of Appeal.

21 Teal contacted Mr. Daniel B. Johnston regarding his availability to act as an arbitrator. Although Mr. Johnston is Counsel for the law firm representing Hayes, Mr. Johnston has served as an mediator and arbitrator in disputes between Hayes and Teal pertaining to the Contract in the past and has advised Teal that it is "highly likely" that he would be available for "a few days over the next six weeks to act as the arbitrator...."

22 But for the filing under the *CCAA*, disputes under the Contract would be governed by the Dispute Resolution provisions under the Contract and under ss. 162 and 160 of the *Forest Act* and ss. 5 and 48 - 51 of the Regulation under that Act: *Hayes Forest Services Ltd. v. Teal Cedar Products Ltd.* (2008), 82 B.C.L.R. (4th) 110 (B.C. C.A.). However, the Court under the *CCAA* has the jurisdiction to decide a dispute which arises under the Contract between Hayes and Teal despite the provincial statutory authority and the terms of the Contract: *Smoky River Coal Ltd., Re* (1999), 175 D.L.R. (4th) 703 (Alta. C.A.).

23 In *Luscar, supra*, the Court dealt with the issue of whether a judge had the discretion under the *CCAA* to establish a procedure for resolving a dispute between the parties who had previously agreed under a contract to arbitrate their disputes. The question before the Court was whether the dispute should be resolved as part of the "supervisory role of the reorganization" of the company under the *CCAA* or whether the Court should stay the proceedings while the dispute was resolved by an arbitrator. The decision of the Learned Chambers Judge was that the dispute should be resolved as expeditiously as possible by the Court of Queen's Bench under the *CCAA* proceedings.

24 In upholding the ruling of the Learned Chambers Judge, and concluding that the discretion of the Learned Chambers Judge had been exercised properly, Hunt J.A., on behalf of the Court stated:

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

(at para. 33)

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

(at para. 50)

25 I agree that the language of s. 11(4) of the *CCAA* is broad enough to allow this Court to substitute a decision in these proceedings for the arbitration process contemplated under the Contract. In this regard, see also the decision in *Landawn Shopping Centres Ltd. v. Harzena Holdings Ltd.* (1997), 44 O.T.C. 288 (Ont. Gen. Div. [Commercial List]) where the Court allowed the arbitration stipulated under a contract to be replaced by a claim of the landlord being dealt with by the Court under the terms of a plan of arrangement.

26 Of similar effect are other decisions where the contracts between landlords and tenants were affected by the power contained under s. 11 of the *CCAA*: *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.); *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]); *Philip's Manufacturing Ltd., Re* (1991), 9 C.B.R. (3d) 1 (B.C. S.C.); *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) with additional reasons at (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]); *Armbro Enterprises Inc., Re* (1993), 22 C.B.R. (3d) 80 (Ont. Bkcty.); and *Skeena Cellulose Inc., Re* (2003), 13 B.C.L.R. (4th) 236 (B.C. C.A.).

27 *Skeena, supra*, dealt with the interaction between logging contracts established under the *Forest Act* and the scheme of judicial stays and creditors' compromises available under the *CCAA*. The Court authorized the termination of contracts similar to the Contract here despite the provisions in the contracts themselves. In this regard, Newbury J.A. on behalf of the Court stated at paragraph 37:

In the exercise of their 'broad discretion' under the *CCAA*, it has now become common for courts to sanction the indefinite, or even permanent, affecting of contractual rights. Most notably, in *Re Dylex Ltd.* (1995) 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), Farley J. followed several other cases in holding that in "filling in the gaps" of the *CCAA*, a court may sanction a plan of arrangement that includes the termination of leases to which the debtor is a party. (See also the cases cited in *Dylex*, at para. 8; *Re T. Eaton Co.* (1999) 14 C.B.R. (4th) 288 (Ont. S.C.), at 293-4; *Smoky River Coal; supra*, and *Re Armbro Enterprises Inc.* (1993) 22 C.B.R. (3d) 80 (Ont. Ct. (Gen. Div.)), at para. 13.) In the latter case, R.A. Blair J. said he saw nothing in principle that precluded a court from "interfering with the rights of a landlord under a lease, in the *CCAA* context, any more than from interfering with the rights of a secured creditor under a security document. Both may be sanctioned when the exigencies of the particular re-organization justify such balancing of the prejudices." In its recent judgment in *Syndicat national de l'amianté Asbestos inc. v. Jeffrey Mines Ltd.*, [2003] Q.J. No. 264, the Quebec Court of Appeal observed that "A review of the jurisprudence shows that the debtor's right to cancel contracts prejudicial to it can be provided for in an order to stay proceedings under s. 11." (para. 74.)

28 In May 31, 2008 Oral Reasons for Judgment (Supreme Court of British Columbia Action No. S080752). In *Backbay Retailing Corporation, and Gray's Apparel Company Ltd.*, the Court approved an assignment of the interests of the Petitioner's interests in leases in certain retail outlets to a third party despite the objection of the landlords and despite the fact that leases provided that the approval or consent of the landlords was required prior to the transfer, assignment or assumption of the leases. The new tenants were not prepared to agree to be liable for past defaults under the leases and required that all of the rights under the leases including those that were expressed to be personal to Petitioners be assigned to them. The petitioners had asserted no common law entitlement to the orders that they sought but, rather, had submitted that the Court has a statutory discretion under the *CCAA* to make the orders sought so long as that is consistent with the objectives of the *CCAA* to facilitate a restructuring. Citing with approval the decision in *Playdium, supra*, Hinkson J. concluded that the proposed purchase and sale agreement was in the best interests of the Petitioners, would afford significant benefits to their landlords, and that the refusal of the proposed tenants to assume the liabilities of the immediate predecessors was not a reasonable basis upon which to withhold consent.

29 Hinkson J. also cited with approval the decision of Kent J. in *Gauntlet Energy Corp., Re* (2003), 336 A.R. 302 (Alta. Q.B.): "Interference with contractual rights of creditors and non-creditors is consistent with the objective of the *CCAA* to allow struggling companies an opportunity to survive whenever reasonably possible." (at para. 58). Hinkson J. also relied on the decision in *Doman Industries Ltd., Re* (2003), 14 B.C.L.R. (4th) 153 (B.C. S.C. [In Chambers]) and *T.*

Eaton Co., Re, [1997] O.J. No. 6388 (Ont. Gen. Div.). In July 11, 2008 Oral Reasons for Judgment, Levine J.A. denied leave to appeal the Order of Hinkson J.

30 I have concluded that I should override the arbitration provisions in this Contract to allow a Court determination of the issue of whether Teal is or is not unreasonably withholding its approval for the transfer of the Contract to North View. First, I am satisfied that the determination of this issue is less expeditious and more expensive under the arbitration provisions. The past history between these parties is that the arbitration proceedings have been both lengthy and incredibly costly. In the context of a previous application, counsel for Teal indicated that the cost of an arbitration might approach \$250,000.00. Second, an arbitration award is subject to judicial review, further lengthening and complicating the decision-making process. Third, there are time constraints imposed by North View regarding the purchase of this Contract. Those deadlines cannot be met by the arbitration proceedings contemplated under the Contract. Fourth, there is no reason why the question whether the consent has been unreasonable withheld or not cannot be determined by the Court. Although a number of arbitrators are experienced in dealing with the type of issues that would arise in the arbitration of other issues which have arisen between Hayes and Teal, the question of whether consent has been unreasonably or reasonably withheld is an issue which is commonly dealt with by the Court and requires no forestry related expertise. Taking into account all of those factors, I am satisfied that the issue raised by the dispute between the parties should be dealt with by this Court in the CCAA proceedings. The application of Teal to lift the stay of proceedings granted on July 31, 2008 is dismissed.

Can the Court Approve the Assignment of the Contract, Even Though It Is Not Unreasonable for Teal to Withhold Its Consent?

31 I am satisfied that the CCAA Court can approve an assignment even if I reach the conclusion that it is not unreasonable for Teal to withhold its consent. In *Playdium*, *supra*, Spence J. dealt with a proposal to transfer all of the assets of Playdium to a new corporation as the only viable alternative to a liquidation of the assets of the company. Under that tenancy, an agreement could not be assigned without the consent of Famous Players, which consent could not be unreasonably withheld. Famous Players had argued that it had not been properly requested to consent and it had not received adequate financial information and assurances regarding management expertise and how their agreement might be brought into good standing. Save for the CCAA Order in place, Spence J. concluded that there could be no assignment but that the CCAA Order affords "... a context in which the court has the jurisdiction to make the order." Spence J. concluded that he had jurisdiction to compel the assignment of leases over the objections of other parties and held that he had the jurisdiction to approve the assignment of leases even though it would not have been unreasonable for Famous Players to withhold its consent to the assignment. I am prepared to adopt the path taken by Spence J. in *Playdium*, *supra*, if I conclude that it is reasonable for the consent of Teal to be withheld.

Has the Consent of Teal Been Unreasonably Withheld?

32 The determination of the reasonableness of withholding consent is a question of whether a reasonable person would have withheld consent in the circumstances. The determination will be dependent on such factors as the commercial realities of the marketplace, the economic impact of the assignment, and the financial position of the proposed assignee. *Exxonmobil Canada Energy v. Novagas Canada Ltd.*, [2003] 3 W.W.R. 657 (Alta. Q.B.), dealt with the assignment of the management of the interest of Exxonmobil Canada Energy in a gas processing plant. Regarding the argument that the assignment had been unreasonably withheld, Park J. concluded that it was reasonable to have refused the consent to the assignment and, in these regards, made the following statements:

The reasons for including a consent requirement in the assignment was to allow each party the opportunity of reasonably assessing any future contractual partners. If a proposed assignee did not meet the criteria reasonably required by the other party, the assignment should not proceed. (at para. 54)

On an objective basis it is entirely reasonable to enquire into the financial capability of a proposed business partner in determining whether to accept that party as a business partner. There must be adequate information provided

to EMC regarding the strength of the Solex financial covenant. Further, if NCLP and Solex wish to argue (as they did) that EMC would be in a better position with the financial covenant of each of Solex and NCLP, in the absence of Solex being novated into the Agreement, then it would be reasonable for Solex and NCLP to provide adequate information on the strengths of those financial covenants rather than leaving EMC to surmise.

However, it is not the final strength or weakness of Solex's financial covenant which prevents consent. Rather it is the failure of Solex to provide relevant and material financial information which will enable EMC to assess the financial strength of Solex on a go forward basis. The absence of financial information provided by Solex means that EMC has reasonably withheld its consent. EMC in the circumstances cannot satisfy itself as to the financial ability of Solex to meet its prospective obligations as the proposed assignee under the Agreement.

Finally, I note that EMC has not withheld its consent for improper reasons. As I noted previously, the desire of EMC to resolve outstanding issues between itself and NCLP is a separate issue, and is not tied to EMC's desire to receive proper and adequate financial information from Solex as a separate entity. EMC did not withhold its consent in order to secure additional benefits as argued by Solex and NCLP.

(at paras. 58-60)

33 The reasonableness of withholding consent has often been considered in the context of leases. In *1455202 Ontario Inc. v. Welbow Holdings Ltd.* (2003), 9 R.P.R. (4th) 103 (Ont. S.C.J.), Cullity J. concluded that the landlord was justified in its decision based on the lack of information concerning the business experience of the proposed assignee stating:

In determining whether the Landlord has unreasonably withheld consent, I believe the following propositions are supported by the authorities cited by counsel and are of assistance:

1. The burden is on the Tenant to satisfy the court that the refusal to consent was unreasonable: *Shields v. Dickler*, [1948] O.W.N. 145 (C.A.), at pages 149-50; *Sundance Investment Corporation Ltd. v. Richfield Properties Limited et al*, [1983] 2 W.W.R. 493 (Alta. C.A.), at page 500; cf. *Welch Foods Inc. v. Cadbury Beverages Canada Inc.* (2001), 140 O.A.C. 321 (C.A.), at page 331. In deciding whether the burden has been discharged, the question is not whether the court would have reached the same conclusion as the Landlord or even whether a reasonable person might have given consent; it is whether a reasonable person could have withheld consent: *Whitminster Estates v. Hedges Menswear Ltd.* (1972), 232 Estates Gazette 715 (Ch. D.), at pages 715-6; *Zellers Inc. v. Brad-Jay Investments Ltd.*, [2002] O.J. No. 4100 (S.C.J.), at para. 35.

2. In determining the reasonableness of a refusal to consent, it is the information available to - and the reasons given by - the Landlord at the time of the refusal - and not any additional, or different, facts or reasons provided subsequently to the court - that is material: *Bromley Park Garden Estates Ltd. v. Moss*, [1982] 2 All E.R. 890 (C.A.), at page 901-2 per Slade L.J. Further, it is not necessary for the Landlord to prove that the conclusions which led it to refuse consent were justified, if they were conclusions that might have been reached by a reasonable person in the circumstances: *Pimms, Ltd. v. Tallow Chandlers in the City of London*, [1964] 2 All E.R. 145 (C.A.), at page 151.

3. The question must be considered in the light of the existing provisions of the lease that define and delimit the subject matter of the assignment as well as the right of the Tenant to assign and that of the Landlord to withhold consent. The Landlord is not entitled to require amendments to the terms of lease that will provide it with more advantageous terms: *Jo-Emma Restaurants Ltd. v. A. Merkur & Sons Ltd.* (1989), 7 R.P.R. (2d) 298 (Ont. Div. Ct.); *Re Town Investments Ltd.*, [1954] Ch. 301 (Ch. D.) -but, as a general rule, it may reasonably withhold consent if the assignment will diminish the value of its rights under it, or of its reversion: *Federal Business Development Bank v. Starr* (1986), 55 O.R. (2d) 65 (H.C.), at page 72. A refusal will, however, be unreasonable if it was designed to achieve a collateral purpose, or benefit to the Landlord, that was wholly

unconnected with the bargain between the Landlord and the Tenant reflected in the terms of the lease: *Bromley Park Garden Estates Ltd. v. Moss*, above, at page 901 per Dunn L.J.)

4. A probability that the proposed assignee will default in its obligations under the lease may, depending upon the circumstances, be a reasonable ground for withholding consent. A refusal to consent will not necessarily be unreasonable simply because the Landlord will have the same legal rights in the event of default by the assignee as it has against the assignor: *Ashworth Frazer Ltd. v. Gloucester City Council*, [2001] H.L.J. 57.

5. The financial position of the assignee may be a relevant consideration. This was encompassed by the references to the "personality" of an assignee in the older cases see, for example, *Shanley v. Ward* (1913), 29 T.L.R. 714 (C.A.); *Dominion Stores Ltd. v. Bramalea Ltd.*, [1985] O.J.No. 1874 (Dist. Ct.)

6. The question of reasonableness is essentially one of fact that must be determined on the circumstances of the particular case, including the commercial realities of the market place and the economic impact of an assignment on the Landlord. Decisions in other cases that consent was reasonably, or unreasonably, withheld are not precedents that will dictate the result in the case before the court: *Bickel et al. v. Duke of Westminster et al.*, [1976] 3 All E.R. 801 (C.A.), at pages 804-5; *Ashworth Frazer Ltd. v. Gloucester City Council*, above, at para. 67; *Dominion Stores Ltd. v. Bramalea Ltd.*, above, at para. 25.

(at para. 9)

34 Of the six general areas of concern raised by Teal, the objection that there was no executed Assignment of Contract is no longer an issue as an executed assignment conditional on the consent of Teal has now been provided.

35 Regarding the concern regarding the lack of equipment or crew, I am satisfied that this should not be an impediment to the assumption of the contractual obligations by North View. Some of the crew that will be required has already been contracted through Horsman Trucking Ltd. ("Horsman"), who has entered into a services subcontract with North View. In general, I accept the evidence of Donald P. Hayes who makes this statement in his July 2, 2009 Affidavit:

At present there is no work available under the Teal Bill 13 Contract and no equipment is currently required. When logging recommences under the Contract, the Purchaser will be able to acquire equipment either directly or be able to subcontract out portions of the work (as is currently done by Hayes) and service the Contract without difficulty.

There is currently a surplus of logging equipment on Vancouver Island. The most recent auction of equipment was held in June, 2009 by Ritchie Bros. in Duncan, BC. The sale prices at that recent Ritchie Bros.' auction were extremely low and any contractor on the Island will have no difficulty acquiring the necessary equipment at some of the lowest historic prices for that equipment.

There is current an abundance of logging equipment from Coastal BC operations that has been returned to various leasing companies. I am aware of certain lessors that are now re-leasing this equipment without the requirement of a down payment by the new lessee. Essentially the new lessee simply makes payments based on the returned value of the equipment. This will make it very easy for any contractor or subcontractor to acquire any equipment needed to service a contract for logging or road building.

36 I am also satisfied that North View sets out a satisfactory explanation regarding equipment in its July 16, 2009 letter to Teal:

I have made inquiries in the market as to the availability of equipment. Hayes has all of the equipment for sale that I would require to start the operations. I confirm that in the event of short notice from Teal that Hayes would rent or rent to purchase suitable equipment as required including a grapple yarder, log loaders, back spar, cat etc.

Finning also has new and used inventory in stock. I am also aware of several contractors who are shut down and will likely have equipment for short term rent or rental purchase.

Pick up trucks are readily available for purchase or lease in the market and Hayes will sell me the industrial box liners required.

Until there is a logging plan and a start date, I have not tried to firm up equipment arrangements. Without the logging plan and a start date, I cannot be sure of the equipment actually required or the timing of that requirement.

37 Regarding the concern that North View is not a going concern, while it is clear that North View is an entity which is not presently operating, my review of the experience of the principals of North View allows me to conclude that the principals have sufficient experience to allow North View to be successful in performing the work that is provided by Teal under the Contract. The principal of North View has over 35 years of logging experience and worked as a subcontractor for Hayes between 2005 and 2008 on the work required under the Contract. As well, North View will have the assistance of the principals of Hayes, and has contracted with an experienced hauler to subcontract the hauling of timber to the dump operations.

38 I also accept the following evidence regarding the proposed operations of North View under the Contract which is set out in the July 24, 2009 Affidavit of Donald P. Hayes:

The contract will be operated as follows:

(a) Falling. The falling work under the contract is currently done by a sub contractor, Gemini, they had done the falling work for years, and will continue to do so for North View Timber Ltd. ("North View");

(b) Yarding. Mr. Horsman is one of the most experienced yarders on the coast and has done this work on this contract for Hayes. He will do this work;

(c) Loading. This work will be contracted out to an experienced loader. The loading takes place in close proximity to the yarding and can be supervised by the yarder, in this case Mr. Horsman;

(d) Hauling. The hauling will be subcontracted to Horsman Trucking Ltd, a well know and experienced hauler on the Island. I have know them for years and they have a good reputation.

39 I am satisfied that Teal should have no hesitation in concluding that the equipment, crew and expertise to undertake the work required under the Contract will be available to North View. In this regard, I am also mindful of the fact that, if North View fails to perform under the Contract, Hayes will be in a position to take back the Contract and then perform the logging required under the Contract. In the past, Teal was satisfied with the performance of Hayes under the Contract, and should have some solace that Hayes will be in a position to perform under the Contract if North View does not.

40 Regarding the concern of Teal that North View is not financially capable, I note that a \$50,000.00 deposit has already been paid, that an agreement has been reached with Horsman to sell to Horsman the hauling subcontract for \$400,000.00 so that the further \$277,000.00 required at the date of closing will be available, that \$100,000.00 will be set aside to meet capital requirements, and that preliminary discussions are underway with B.D.C. and Caterpillar Finance regarding financing once any logging plan proposed by Teal is known. In this regard, I am satisfied that the payments under the Contract must be made by Teal every two weeks, and I take into account the advice received from North View that its expenses need to be paid monthly so that the working capital that would otherwise be required to service this Contract is reduced.

41 Finally, Teal is concerned that North View has no "business plan". I am satisfied that this concern is answered in the July 16, 2009 letter from North View to Teal:

I have not regularly prepared business plans. My practice is to study the logging plan, when I receive it and then determine the equipment and people that I need. I then closely supervise the production and all purchases to control the cash flow.

I have had Mr. Donald P. Hayes assist me with the preparation of the

Business Plan. Mr. Hayes is a Chartered Accountant and the President of Hayes Forest Services Limited, the current operator of the contract. This is a much more detailed plan than I could produce myself. I have reviewed it with Mr. Hayes and based on my knowledge I confirm that in my opinion the Business Plan reflects the economic conditions in the industry and uses reasonable assumptions concerning rates, costs, financing and working capital needs including the payment of the \$3.00 per cubic meter promissory note to Hayes. I further confirm that I believe that the contract is viable at market rates.

This Business Plan has not been independently reviewed but was developed in conjunction with Mr. Hayes who has operated this contract for over 20 years and is extremely knowledgeable in respect of this contract. Once the actual logging plan is provided, it will likely require material changes to the Business Plan.

42 As well, it should be obvious to Teal that it is difficult to put forward a "business plan" when the 2009 and 2010 work allocated under the Contract is not known. While it is clear that North View does not have the present capacity or business plan in place to handle a cut of 125,000 cubic metres, it is also clear that there is no current work under the Contract and this yearly volume has not been required of Hayes for over three years.

43 In the context of leases, the Court must look at all of the circumstances to determine if consent has been reasonably withheld: *Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd.* (1987), 13 B.C.L.R. (2d) 367 (B.C. S.C.) at para. 51. The *Forest Act* and the *Timber Harvesting Regulations* require similar contracts to be assignable and puts the onus on licence holders such as Teal to justify their refusal to consent to any assignment. Taking into account all of the circumstances surrounding this question, I am satisfied that Teal has not shown that it is reasonable to withhold its consent. At the same time, I am satisfied that Hayes has met the burden of showing that a reasonable person would not have withheld consent.

44 In this regard, I have concluded that at least part of the refusal to provide consent was designed by Teal to achieve a collateral purpose that is wholly unconnected with the bargain between Teal and Hayes. In November 2008, Teal made an offer to purchase the Contract for \$764,112.00. From this, I can conclude that Teal believes that there is significant value to it if the Contract cannot be performed by Hayes or if Teal can otherwise obtain the benefits of the Contract in order that they can be transferred to another operator. Teal has also provided an offer through 858 to purchase the Contract for \$1,400,000.00. This is further evidence of the value to Teal of stopping a transfer of the Contract to North View in the hope that the Contract will revert to it by virtue of the inability or unwillingness of Hayes to perform under the Contract.

What Should Be Made of the Offer of 858?

45 The offer of 858 was open for acceptance until August 11, 2009 and was directed to the attention of Hayes Forest Services Ltd. ("Offer"). It was a condition of the Offer that Horsman enter into a replaceable services sub-contract with 858 in the same form as the Horsman contract with North View. As at August 14, 2009, no confirmation had been received from Horsman that they were prepared to accept that stipulation. The purchase price under the Offer is \$1,400,000, with \$400,000 at the time of closing (being the amount that would be available to 858 under the Horsman contract) and with balance of the purchase price by a promissory note for \$1,000,000.

46 In response to the concern raised by Hayes that Teal would be in a position to control the amount of work that would be available to 858 so that 858 would not be in a position to pay the balance due and owing under the Promissory Note quickly or at all, the following provision was inserted after the first draft of the Offer was forwarded to Hayes:

2.11 **Amount of Work Dispute.** Teal and the Purchaser agree that if, at any time before the Purchaser pays the Contract Purchase Price in full, the Vendor reasonably believes that Teal has failed to meet its obligation under Paragraph 2.05 of the Teal Contract, the Vendor may give notice (the "**Dispute Notice**") to Teal and the Purchaser

specifying in reasonable detail the particulars of the default, in which case a dispute is deemed to exist between the Vendor and Teal under this Agreement, which dispute, despite the reference in Paragraph 2.05 of the Teal Contract to resolving amount of work disputes in accordance with the Contract Regulation (as defined in the Teal Contract), will be resolved as follows:

- (a) as soon as reasonably practicable after the notice is given, the Vendor and Teal will:
 - (i) cause their respective appropriate personnel with decision making authority to meet in an attempt to resolve the dispute through amicable negotiations; and
 - (ii) provide frank, candid and timely disclosure of all relevant facts, information and documents to facilitate those negotiations;
- (b) if the dispute is not resolved by such negotiations within 15 days of the Vendor having given the Dispute Notice, either the Vendor or Teal may, within 30 days after the Dispute Notice was given, deliver a Notice (a "Mediation Notice") to the other party requiring the dispute to go to mediation, in which case the Vendor and Teal will attempt to resolve the dispute by structured negotiation with a mediator administered under the Commercial Mediation Rules of the British Columbia International Commercial Arbitration Centre before a mediator agreed upon by the Vendor and Teal or, failing agreement, appointed by the Centre;
- (c) if:
 - (i) the dispute is not resolved within 14 days after the mediator has been agreed upon or appointed under Section 2.11(b); or
 - (ii) the mediation is terminated earlier as a result of a written notice by the mediator to the Vendor and Teal that the dispute is not likely to be resolved through mediation, either the Vendor or Teal may, not more than 14 days after the conclusion of the period referred to in Section 2.1 1(c)(i) or the receipt of the notice referred to in Section 2.11(c)(ii), as the case may be, commence arbitration proceedings by giving a notice of arbitration to the other party, in which case the dispute will be referred to and finally resolved by arbitration administered under the British Columbia International Commercial Arbitration Centre's Shorter Rules for Domestic Commercial Arbitration before an arbitrator agreed upon by the Vendor and Teal or, failing agreement, appointed by the Centre, and the decision of the arbitrator will be final and binding on the Vendor, the Purchaser and Teal, but will not be a precedent in any subsequent arbitration under this Section;
- (d) pending resolution or other determination of the dispute under this Section, the Purchaser will continue to perform its obligations under the Teal Contract; and
- (e) if, as a result of the resolution or other determination of the dispute under this Section, Teal allocates an additional amount of work to the Purchaser, the Purchaser will perform that additional amount of work in accordance with the terms of the Teal Contract.

47 Some of the objections to the Offer are summarized in the August 10, 2009 letter from counsel for Hayes to counsel for Teal:

As you are aware our client has entered into a contract with North View Logging Ltd. to sell that contract to North View. Having done so Hayes is not in a position to enter into a second contract to sell the same contract.

Apart from that problem, there are a number of other issues that make this offer problematic from Hayes' perspective, these include:

1. The proposed purchase price is substantially less than the North View offer, some \$250,000. In addition, to obtain an extension of the closing of the transaction to North View, Hayes has had to agree to a break fee of \$50,000 payable to North View if Hayes sells the contract to Teal. A copy of that agreement is enclosed;
2. The rate of payment on the Promissory Note is only \$2 per M3 as opposed to the \$3 per M3 to be paid by North View;
3. The Purchaser is a shell company incorporated on August 6, 2009 that appears to have no assets. It is proposed that the sale proceeds derived from the Horsman Trucking subcontract be used to fund the cash component of the transaction, with the balance to be paid by the \$2 per M3 payable under the Promissory Note. The Purchaser will not have any of its assets invested in this contract and is not at any financial risk. There is no consequence to the Purchaser simply walking away from its obligations and allowing Teal to cancel the underlying Bill 13 contract for non performance;
4. The only security proposed is from what appears to be a shell company and even that is limited to the underlying Bill 13 contract itself. If the Purchaser, a Teal nominee, defaults in performance, Teal will cancel the Bill 13 contract, and the "security" held by Hayes would vanish;
5. Payment under the promissory note is wholly dependent upon Teal allocating the amount of work that the holder of the Bill 13 contract is entitled to. An arm's length purchaser, such as North View, has a strong economic interest in enforcing its rights as against Teal to ensure that it receives the volume of work it is entitled to. The Purchaser proposed by Teal is a Teal nominee and will have no such economic interest. Teal has taken every step it can in the course of the CCAA proceedings to terminate the Bill 13 contract. We see no reason to expect that this attitude will change once both sides of the Bill 13 contract are in the control of Teal;
6. Teal can arbitrarily reduce and or delay the amount payable under the Promissory Note by allocating work that could or should be done by Hayes to other contractors working for Teal on TFL 46. It is doing so now;
7. There is no evidence of the ability of the Purchaser to do the work required under the contract, its finances, equipment or personnel.

48 Many of the objections raised by Hayes regarding the Offer parallel many of the objections raised by Teal regarding the North View offer. While Teal and 858 have common shareholders, none of the information that Teal required of North View is available to Hayes or the Court regarding the Offer of 858. If it is the position of Teal that the Court should approve the offer of 858 because it is reasonable to do so and is in the best interests of the creditors of Hayes to do so, then I conclude that Teal has not met the burden of showing that it is. In the context of whether withholding consent has been reasonable or not, a number of factors apply. If those factors are applied to the application of Teal, it is clear that a reasonable person would withhold consent and it is clear that approval of the offer of 858 would not be ordered. It is difficult for Teal to argue on one hand that a reasonable person would withhold consent for the proposed assignment to North View but, at the same time, the Court should approve the proposed transfer to 858, even though there is even less information available to allow the Court to reasonably assess the future contractual partner recommended by Teal. There is no information regarding the financial capability of 858. There is nothing which would allow the Court to satisfy itself as to the financial ability of 858 to meet its prospective obligations. As well, the Court is not in a position to approve offers where the offer continues to contain conditions precedent that have not been met. In this regard, the approval of Horsman to "transfer" its contract with Hayes to 858 so that 858 receives \$400,000.00 remains an unfulfilled condition.

49 There are also significant economic advantages to the creditors of Hayes to accept the North View offer and for the Court to make a finding that the consent of Teal has been unreasonably withheld so that the assignment of the Contract to North View should be approved. First, the offer of North View is \$214,266.00 better. Second, the balance of the purchase price is paid off more quickly as the payment will be based on \$3.00 per cubic metre, whereas the payment of the balance of the purchase price contemplated by 858 will be based on a payment of \$2.00 per cubic metre. Third, if

there is default, it is clear that the creditors of Hayes will benefit if there is a reversion of the Contract to Hayes. I cannot conclude that is the case with the Offer. Fourth, it may well be that Hayes will have to pay a \$50,000.00 cancellation fee to Horsman if the Offer is approved by the Court.

50 It also should be noted that 858 is bringing none of its own money "to the table". Rather, all of the \$400,000.00 that will be due on closing comes from the funds that would be available from Horsman if Horsman is prepared to enter into a similar subcontract with 858. As well, all payments of the \$2.00 per cubic metre contemplated under the Offer are wholly dependent upon Teal allocating the amount of work that is contemplated under the Contract. North View has a stronger economic interest to enforce its rights against Teal to ensure that it receives the volume of work it is entitled to under the Contract whereas 858 has no such economic interest. As well, what is proposed under the Offer provides ample opportunity for the arbitration process and appeals therefrom to delay the question of the allocation of work to 858.

51 I am satisfied that Teal has unreasonably withheld its consent for the assignment of the Contract from Hayes to North View. Even if I had not reached that conclusion, I am satisfied that the advantages to the creditors of Hayes far outweigh any disadvantages so that I should exercise the discretion available to me under the *CCAA* to approve the assignment of the Contract despite the consent of Teal being reasonably withheld. The sale to North View Timber Ltd. of the replaceable stump to dump logging contract between Hayes Forest Services Limited and Teal Cedar Products Ltd. is approved. The application by Teal Cedar Products Ltd. to approve a sale of that contract to 858434 BC Ltd. is dismissed.

52 The parties will be at liberty to speak to the question of costs.

Application for approval of sale granted; application to lift stay of proceedings dismissed.

APPENDIX "A"

Schedule "D"

Dispute Resolution Cause Timber Harvesting Contracts

Dispute Resolution

Where the Work performed by the Contractor under an agreement with the Company is carried out on lands managed by the Company under a Tree Farm Licence or Forest Licence, and where a dispute arises over a term, condition or obligation under the agreement which cannot be resolved amicably between the parties within 30 days of the dispute arising, the Company and the Contractor mutually agree that either party may invoke the following dispute resolution provisions:

(a) The parties may by agreement first attempt to resolve their dispute with the assistance of a single professionally qualified mediator. The mediator shall be chosen by agreement between the parties. In the event that the parties fail to agree on the choice of a mediator, then a mediator shall be chosen by a mutually agreed upon third party unrelated to the parties to this agreement.

(b) In the event that the mediator is unsuccessful in assisting the parties to resolve their dispute within 5 days of the commencement of the mediation, or either party wishes the dispute to proceed directly to arbitration, then either party may require by notice in writing that the matter be referred to arbitration as provided for by the provisions of the Dispute Resolution Clause.

Where either party to the agreement has commenced an action in a court of competent jurisdiction regarding a term, condition or obligation under the agreement, and the action is in good standing, then the parties to the agreement shall not invoke or continue with the dispute resolution provisions of the agreement until such time as the court action has been finally concluded. Where a court issues a judgement in an action regarding a term, condition or obligation under the agreement and the judgement becomes final, then that judgement shall constitute the final resolution of the dispute between the parties.

Arbitration

The Company and the Contractor mutually agree that where a dispute is to be resolved by arbitration (the "Arbitration Proceeding"), it shall be so resolved by a single arbitrator to be agreed on by the parties. If the parties are unable to agree on the choice of arbitrator then a single arbitrator shall be selected pursuant to the Commercial Arbitration Act, S.B.C. 1996, c. 3 as amended.

The Arbitration Proceeding shall be conducted in Vancouver British Columbia or such other place as the parties may agree in writing. The rules of procedure for the Arbitration Proceeding shall be those provided for in the Commercial Arbitration Act for domestic commercial arbitrations. as amended by the provisions of the Dispute Resolution Clause.

Each party shall only be entitled to two days to complete their submissions to the arbitrator. Each party shall have the right of reply to the submission of the other for one hour only.

The arbitrator shall hand down the arbitral award within 7 days of the completion of the submissions and reply of the parties.

Discovery

Each party shall be entitled to the following pre-arbitration "examination for discovery" rights, as that term is defined in the Rules of Court of the Supreme Court of British Columbia:

- (a) discovery of all relevant documents pertaining directly to the issue or issues in dispute between the parties;
- (b) discovery of one officer or representative of the other party;
- (c) each party shall be allowed to discover the officer or representative of the other for no more than one day for each \$50,000.00 in dispute to a maximum of three days, and where no amount has been specified, then each party shall only be allowed a maximum of two days of discovery of the officer or representative of the other.

Costs of the Dispute Resolution

Where a provision in the agreement has been referred to mediation or arbitration by the Company or the Contractor, then any funds actually in dispute shall be deposited in an interest bearing trust account. Upon the resolution of the dispute, the funds and interest thereon shall be paid to the Company and the Contractor proportionately as agreed between the parties, or as directed by the arbitration award.

The Company and the Contractor shall pay all costs associated with the provision of mediation or arbitration services forthwith upon an invoice for these services being rendered, equally, except as provided for below.

The Company and the Contractor shall each bear their own costs in resolving the dispute between them, with the following exceptions:

- (a) Where one party is found, on a balance of probabilities
 - (i) not to have pursued its various rights and responsibilities under this agreement in good faith,
 - (ii) not to have used all reasonable effort to resolve its dispute with the other through mediation with a minimum of delay and expense, or
 - (iii) not to have used all reasonable effort to resolve its dispute with the other by the Arbitration Proceeding with a minimum of delay and expense,

then the offending party shall pay the disbursements and one half of all other direct expense incurred by the other;

(b) Where both parties are found, on a balance of probabilities, to have acted in bad faith or made less than all reasonable effort to resolve their dispute, then each party shall bear its own direct costs and disbursements and shall share equally all costs associated with the conduct of the mediation and/or the Arbitration Proceeding; and

(c) For the purposes of sub-paragraphs (a) and (b) of this paragraph, the costs associated with the provision of mediation and arbitration services and the Conduct of the Arbitration Proceeding shall be considered a disbursement.

Any award or division of costs referred to herein shall constitute a liquidated debt immediately due and payable by the one party to the other, and shall be satisfied to the extent possible by the indebted party to the other from the funds held in trust and referred to above.

Failure of Arbitration

Where the Contractor and the Company agree in writing, or where the arbitrator is unable to resolve the dispute, then the dispute shall be resubmitted for arbitration in accordance with the provisions of the Dispute Resolution Clause of the agreement.

Where the inability of the arbitrator to resolve the dispute arises out of the misconduct of one of the parties in the dispute or a party affiliated with one of the parties in the dispute, then the dispute shall be deemed to be settled in favour of the other party with that other party entitled to their full costs arising out of the dispute as a liquidated debt.

TAB 6

2009 BCSC 1552
British Columbia Supreme Court

Pope & Talbot Ltd., Re

2009 CarswellBC 3060, 2009 BCSC 1552, [2010] 6 W.W.R. 449, [2010] I.L.R.
I-4922, [2010] B.C.W.L.D. 1, [2010] B.C.W.L.D. 34, [2010] B.C.W.L.D. 36, 182
A.C.W.S. (3d) 589, 2 B.C.L.R. (5th) 132, 61 C.B.R. (5th) 16, 66 B.L.R. (4th) 58

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

AND IN THE MATTER OF THE RECEIVERSHIP OF POPE & TALBOT LTD. and others

Paul Walker J.

Heard: October 14-15, 2009
Judgment: November 12, 2009
Docket: Vancouver S077839

Counsel: K.D. Kraft, H.D. Edinger for Federal Insurance Company
G.M. Nijman for National Union Fire Insurance Company of Pittsburgh, PA
D. Harris, Q.C., J.D. Hughes for XL Specialty Insurance Company
D.B. Kirkham, Q.C. for former Directors & Officers of Pope & Talbot
R.J.H. Berrow, K. Jackson for PricewaterhouseCoopers Inc.
P. Rubin for Ableco Finance LLC

Subject: Insolvency; International; Contracts; Civil Practice and Procedure; Corporate and Commercial; Public

Headnote

Conflict of laws --- Bankruptcy — General principles

Pulp and paper business in British Columbia entered protection under Companies' Creditors Arrangement Act — Charge existed for amounts for wage claims against directors, and directors also had insurance from insurers NUFI Co., FI Co. and XLSI Co. — Insurers sought order that law of policies was state of Oregon in United States of America, and NUFI Co. sought stay of proceedings pending resolution of issue regarding arbitration clause — Law of policies was BC, no stay of proceedings issued — Parties anticipated depechage — Parties had chance to select one law and did not — Parties intended proper law to be determined by substance of claim made — BC had closest and most substantial connection with policies — Policies not made in Oregon, despite fact that broker was located there and FI Co. had office in Oregon — Section 5 of Insurance Act, which created presumption that location of contract was BC, was not rebutted — Forms of policy did not derive from any particular jurisdiction, and factor was neutral — Location of parties favoured BC — Insurer's head offices were in America although no insurer except FI Co. had office in BC — Business was incorporated in Delaware, where bankruptcy proceedings were initiated, and employees and operations located there — Subject matter was worldwide liability insurance, and favoured BC when nature of operations considered — Most claims would be expected to arise in Canada — Policies were not ambiguous regarding proper law.

Conflict of laws --- Contracts — Choice of law — Where contract specifying law

Pulp and paper business in British Columbia entered protection under Companies' Creditors Arrangement Act — Charge existed for amounts for wage claims against directors, and directors also had insurance from insurers NUFI Co., FI Co. and XLSI Co. — Insurers sought order that law of policies was state of Oregon in United States of

America, and NUFI Co. sought stay of proceedings pending resolution of issue regarding arbitration clause — Law of policies was BC, no stay of proceedings issued — Parties anticipated depechage — Parties had chance to select one law and did not — Parties intended proper law to be determined by substance of claim made — FI Co. policy specified law of certain area as applicable in certain situations, yet choice of law overall not included in contracts — NUFI policy's only reference to law governing policy was in portion of agreement dealing with arbitration — XLSI Co. policy made specific reference to different governing law in different situations.

Alternative dispute resolution --- Relation of arbitration to court proceedings — Stay of court proceedings — Discretion of court to grant stay

Pulp and paper business in British Columbia entered protection under Companies' Creditors Arrangement Act — Charge existed for amounts for wage claims against directors, and directors also had insurance from insurers NUFI Co., FI Co. and XLSI Co. — Insurers sought order that law of policies was state of Oregon in United States of America, and NUFI Co. sought stay of proceedings pending resolution of issue regarding arbitration clause — Law of policies was BC, no stay of proceedings issued — Arbitration clause in NUFI's policy was stayed to permit orderly resolution of insolvency — Court entitled to use discretion to ignore arbitration provision — NUFI Co. had not confirmed or denied coverage despite demanding mediation — NUFI Co. attempted to wait on value of claim before taking position on coverage.

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s. 119 — considered

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Generally — referred to

Insurance Act, R.S.B.C. 1996, c. 226

s. 5 — considered

Insurance Act, R.S.O. 1990, c. I.8

s. 123 — considered

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Generally — referred to

HEARING regarding proper jurisdiction for dispute regarding insurance liability for wage claims against directors of corporation under protection of *Companies' Creditors Arrangement Act*.

Paul Walker J.:

Introduction

1 Three insurers who issued Directors and Officers liability ("D&O") policies in favour of directors and officers of Pope and Talbot Inc. ("P&T Inc.") and its subsidiaries, including Pope and Talbot Ltd. ("P&T Ltd."), seek a declaration that the proper law of those policies is the law of the State of Oregon.

2 In addition, one insurer, National Union Fire Insurance Co. of Pittsburgh, Pennsylvania, maintains that a mediation and arbitration ("ADR") clause contained in its policy, which is an excess policy, is a condition precedent to any determination of coverage by this Court. As a result, it seeks a stay of proceedings of the upcoming hearing regarding the insurers' purported coverage obligations, insofar as its coverage obligations are concerned.

3 The present application follows my decision concerning territorial competence and *forum conveniens* issued on July 27, 2009 and reported as *Pope & Talbot Ltd., Re*, 2009 BCSC 1014, 76 C.C.L.I. (4th) 212 (B.C. S.C.). The history of the insolvency proceedings, brought initially in Canada pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), is also set out in those reasons for judgment.

4 P&T Ltd. is currently in receivership. PricewaterhouseCoopers Inc. ("PWC") is the receiver. Proceedings under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") are stayed. Previously, P&T Ltd. applied for and received protection from its creditors pursuant to the CCAA. The Directors Charge established by the Order of Chief Justice Brenner on November 21, 2007 (during the CCAA proceedings), to respond to certain types of claims that may be brought against the directors and officers of, *inter alia*, P&T Ltd. and its parent company, P&T Inc., remains to be drawn upon. Insolvency proceedings brought in Delaware on behalf of P&T Inc. have been deferred to the current Canadian insolvency proceedings by the US Bankruptcy Court for the District of Delaware. That insolvency is akin to Canadian CCAA proceedings as opposed to proceedings under the BIA.

5 The Directors Charge may only be drawn upon "to the extent that they [directors and officers] do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified" by, *inter alia*, P&T Inc. and P&T Ltd.

6 PWC has asked for a determination of whether any of the policies cover certain wage claims made by former employees of P&T Ltd. pursuant to s. 119 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA"). That determination will be made at a subsequent hearing. The submissions made on behalf of P&T Inc. and P&T Ltd. on this application were made by PWC.

7 The insurers assert that the proper law of the policies is the law of Oregon. The insureds, which in this case are P&T Inc., P&T Ltd., and the directors and officers of those companies, argue that the proper law of the policies is the law of British Columbia. They say that this is a case where the language of the policies calls for the application of *dépeçage* (a principle which recognizes more than one proper law of a contract), or alternatively, if there is only one proper law of these policies, it is the law of British Columbia.

Background Facts

8 The insurers are Federal Insurance Company, National Union, and XL Specialty Insurance Company. They carry on business in the United States. They are not registered in BC as they do not directly carry on business in this province or elsewhere in Canada.

9 Federal is incorporated in the State of Indiana, and has its head office in New Jersey. National Union is incorporated in the State of Pennsylvania; its principal place of business, as well as its head office for underwriting purposes, is located in New York City. XL is incorporated in the State of Connecticut; its head office is located in Stamford.

10 The decision to underwrite the Federal policy was made by its underwriters who were, at the time, located in Portland and Los Angeles. As well, persons in Federal's legal department (located in New Jersey) were consulted. Confirmation of coverage was sent by Federal out of its Portland office. Although the evidence does not disclose where its policy was actually issued, the Declarations page states the following address in its header:

Chubb Group of Insurance Companies

15 Mountain View Road

Warren, New Jersey 07059

11 The National Union policy was underwritten in New York City and its policy was issued out of that office. XL's underwriting was done at its head office in Stamford; its policy was issued from there as well.

12 Federal's D&O policy is primary. National Union's policy is follow form and sits as the first excess layer in a multi-layered tower. XL issued a form of drop down policy known as a "Cornerstone Policy", which drops down to respond if other underlying insurance does not cover or pay. Even where it does not drop down, that policy also acts as an excess policy.

13 In addition, XL issued a follow form excess policy that sits in the coverage tower two levels above National Union's. That policy was not put in issue on this application.

14 The premiums charged for each policy were in US dollars. The policies do not contain a choice of forum clause or a clause stipulating the proper law of the contract. They are all claims made policies, which means that coverage is provided for claims made during the policy term for a "wrongful act" (a defined term in each policy). This is in contrast to a comprehensive general liability policy, which usually provides coverage for fortuitous events that occur during the policy period as opposed to when the claim is made.

15 The three policies were issued to be in force for one year, effective July 30, 2007. CCAA proceedings were first brought almost three months later, on October 29, 2007.

16 Federal had provided coverage to P&T Inc. and its global operations (collectively, "Pope & Talbot Group") for some 22 years. Although its policy was issued as a renewal, it was not a simple renewal as it resulted from considerable negotiations. In fact, Federal (on the letterhead of its parent company Chubb Insurance) sent a notice of non-renewal to P&T Inc.'s risk manager on April 24, 2007. Ultimately, following negotiations, which included policy terms and endorsements, Federal went on risk again for a further one year period, although policy limits were reduced in half (to \$5 million) and the premium charged doubled (from \$17,500 to \$35,000 per million).

17 P&T Inc. is a North American forest products company that sells wood products and pulp. It was founded in 1849. It was incorporated in the State of Delaware, and has its corporate headquarters in Portland, Oregon. It also has an office in Delaware.

18 The majority of head office functions for both its wood products and pulp operations take place in Portland, Oregon. P&T Inc. is a public company that was, until July 2007, traded on the New York Stock Exchange.

19 At the time the policies were made (which in this case means when they were issued), the bulk of P&T Inc.'s operations were located in BC, and were owned and operated by its subsidiary P&T Ltd. P&T Ltd. is a federally

incorporated Canadian company. It maintains its registered and records office in Toronto, Ontario. Although P&T Inc. owned other subsidiaries, P&T Ltd. was the primary operating company for P&T Inc. at that time.

20 The revenue stream for the Pope & Talbot Group was derived mainly from its pulp and wood products operations in BC. P&T Ltd. owned seven mills in BC and the US, for both its wood products and pulp operations. In respect of its pulp operations, P&T Ltd. operated three mills: two in BC (in Mackenzie and near Nanaimo) and one in Oregon (in Halsey). In respect of its wood products operations, it operated four mills: three in BC (in Fort St. James, Castlegar, and Grand Forks) and one in South Dakota (in Spearfish). The bulk of the employees (the broker identified a total of 2,373 prior to the policies being issued) working for the Pope & Talbot Group did so for P&T Ltd. Federal's underwriters had this information available to them prior to issuing its policy in July 2007.

21 In addition, and as a result of meetings and communications with representatives of P&T Inc. (that included the broker), underwriters were aware, at the time the insurers went on risk on July 30, 2007, of P&T Inc.'s Canadian subsidiary, P&T Ltd., including its various operations. The evidence shows that of the insurers, at least Federal's underwriters were also aware of:

- (a) the revenue and income of the Pope & Talbot Group, including the Canadian operations; and
- (b) the deteriorating financial condition suffered by the Pope & Talbot Group, particularly the revenue stream and indebtedness of the various Canadian operations, including:
 - (i) rapidly diminishing liquidity;
 - (ii) significant outstanding bond debt;
 - (iii) plunging stock price when it was announced that covenants relating to long term debt had been breached;
 - (iv) efforts made to sell assets to satisfy debt;
 - (v) the significant detrimental effect caused by a then strong Canadian dollar;
 - (vi) increasing inventory levels over the previous four years;
 - (vii) the costs of goods were \$1.13 for every \$1 collected;
 - (viii) gross and operating margins were at a five year low;
 - (ix) the interest coverage ratio was negative for the first time since 2003;
 - (x) debt/equity ratios were at a four year high; and
 - (xi) bankruptcy had been considered (although it was reported to be "the last option").

22 As part of the application for coverage submitted by the broker (on behalf of the insureds) along with a formal request to renew the Federal policy, Federal's underwriters were also advised of the nature of the business of the Pope & Talbot Group at that time:

Business Summary: Based in Portland, Or, Pope & Talbot is focused in two lines of business, market pulp and softwood lumber, and has industry leading earning leverage to price changes in both commodities. Pope & Talbot, Inc. operates in North America. The Pulp segment manufactures and sells northern bleached softwood kraft chip and sawdust pulp used in various end products, including newsprint, tissue, and coated and uncoated paper, as well as in specialty products, such as fiber cement siding for residential applications and non-woven fabric for surgical gowns. The Wood Products segment manufactures and sells specialty lumber for residential and light construction,

and residential repair and remodeling; and produces machine stress rated, long-length, wide-width or premium pine appearance grade lumber. This segment also sells residual wood chips and other by-products from its lumber mill operations. The company sells its products to wholesalers, distributors, remanufacturers, and builders in the United States, Canada, Italy, northern Europe, China, and Japan.

23 Federal asked some very pointed questions before deciding to go on risk again. The evidence discloses that in respect of one "D&O Underwriting Meeting" that was scheduled to take place on June 20, 2007 and postponed to July 3, 2007, Federal asked the following questions:

Please provide a business and financial overview for the pulp and wood products segment. What is the outlook for each business?

Please provide an overview of your discussions with your lenders. What changes, if any, will be made to the credit agreement? Have you talked to any outside lenders about the potential of opening a new credit facility?

Please give an overview of any discussion with the rating agencies.

Do you expect any changes to your weighted average cost of capital?

Has the board had any discussions about asset sales/ voluntarily going into bankruptcy?

What factors will keep the company from going into bankruptcy over the next 12 months. What does the company view as its risk of default over the same time period?

Have you entertained any offers to be purchased?

Please discuss the effects of the Canadian dollar on your business.

.

Please discuss the senior management and board changes that have occurred over the past 18 months. Are there any more expected changes in the next 12 months? What adjustments has the company gone through as a result of the management changes?

24 Federal's underwriting analysis, prepared as part of its underwriters' analysis when considering whether to renew the policy (and if so, on what terms and price), reveals that Federal well anticipated the possibility of insolvency for the Pope & Talbot Group:

Pope and Talbot is a troubled company that is going through a very difficult time. There is significant concern that the company may go bankrupt [sic] in the next year. The company is seeking alternatives including the sale of a division and the taking on of a private equity interest. I view the private equity buy as the most likely (only because I think that is what management really wants) and the sale of the division as the second most likely outcome (because they have an offer on the table). Bankruptcy will only happen if/when the company makes a mistake and does not enter into one of the two above transactions quickly enough. Regardless, I feel that our risk has increased dramatically as a result of that we must reduce our capacity from 10 M to 5 M and increase [sic] the rate from \$17,500 per million to \$35,000 per million.

25 As well, and prior to binding the risk, one of Federal's underwriters advised the broker that it was aware of the prospect of Canadian environmental claims and bankruptcy in the United States. With that knowledge, Federal was prepared to provide coverage to the directors and officers of the Pope & Talbot Group on a worldwide basis that included defence costs cover for Canadian claims and derivative securities coverage that was described by Federal's underwriter as "including the US". Materials presented on behalf of P&T Inc. to Federal's underwriters on July 3, 2007, disclose that

there were seven directors of P&T Inc. Evidence tendered by Federal and National Union show that two of them lived in BC. There were six directors of P&T Ltd., four of whom lived in BC.

26 Following negotiations, Federal submitted an insurance proposal to P&T Inc. and the broker for the policy renewal. The premium to be charged by Federal was \$150,000.

27 Coverage was ultimately provided on a worldwide basis to the directors and officers of the Pope & Talbot Group as well as to those companies in circumstances where they are required to indemnify the directors and officers.

28 The evidence does not make clear the extent to which National Union and XL were aware of all of the information that Federal possessed concerning the risk. Those insurers did not argue that there was a disparity in knowledge or that the issue even mattered to them.

Determining the Proper Law of a Contract

29 The starting point is to determine the intentions of the parties by examining the contract as a whole: *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49 (S.C.C.); and *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2009 BCCA 129, 90 B.C.L.R. (4th) 297 (B.C. C.A.).

30 In *Progressive Homes*, at para. 45, the Court of Appeal adopted the approach to interpretation of insurance policies (which are, of course, contracts) described by Professor Denis Boivin in his text, *Insurance Law* (Toronto: Irwin Law, 2004), at p. 191:

The main rules of interpretation were established by the Supreme Court of Canada in *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.* First, the words used in the contract must be given their ordinary meaning, with the exception of expressions that have acquired a technical meaning within the industry. ... Second, the contract must be interpreted contextually, having regard to all sections of the agreement. Third, the objective of interpreting the contract is to give effect to the parties' true intentions. Hence, courts should avoid using a literal approach when the result would frustrate the reasonable expectations of either the insurer or the insured. Finally, any ambiguity must be resolved against the interests of the party that wrote the agreement - *contra proferentem*. In other words, ambiguities must be resolved in favour of the insured.

31 Resort to the doctrine of "reasonable expectations" is made when there is an ambiguity in an insurance policy: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551 (S.C.C.) at para. 71; *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252, 99 D.L.R. (4th) 741 (S.C.C.); and *Progressive Homes*, at paras. 44 to 51. Where there is no ambiguity, courts should give effect to the clear language in the contract when reading it as a whole. In *Scalera*, Mr. Justice Iacobucci wrote, at para. 71:

Where a contract is unambiguous, a court should give effect to the clear language, reading the contract as a whole [citations omitted]. Where there is ambiguity, this Court has noted "the desirability...of giving effect to the reasonable expectations of the parties" [citations omitted].

32 One way of considering the reasonable expectations of the parties is to take "industry practise" into account: *Progressive Homes*, at para. 51. No such evidence was adduced in this case.

33 The proper law of the contract is determined by the expressed intention of the parties. When no express choice is made, courts determine whether the proper law of a contract can be inferred from the circumstances, or failing this, determine the system of law which has the closest and most substantial connection with the subject matter: *Herman v. Alberta (Public Trustee)*, 2002 ABQB 255, 2 Alta. L.R. (4th) 132 (Alta. Q.B.), at para. 6; *Cansulex Ltd. v. Reed Stenhouse Ltd.* (1986), 70 B.C.L.R. 273, 18 C.C.L.I. 24 (B.C. S.C.); and J.-G. Castel, *Canadian Conflict of Laws*, 4th ed. (Toronto: Butterworths, 1997) at p. 593.

34 The proper law of a contract is "the law that the parties intended to apply": *Vita Food Products Inc. v. Unus Shipping Co.*, [1939] 1 All E.R. 513, [1939] A.C. 277 (Nova Scotia P.C.). According to Lord Wright, at p. 521, that intention "is objectively ascertained".

35 The proper law of a contract is determined as at the time the contract is made. Circumstances not existing at the time the contract is formed are not relevant to determining proper law: *Armar Shipping Co. v. Caisse Algerienne d'Assurance et de Reassurance (The Armar)* (1980), [1981] 1 All E.R. 498, [1981] 1 W.L.R. 207 (Eng. C.A.); *Amin Rasheed Shipping Corp. v. Kuwait Insurance Co.*, [1983] 2 All E.R. 884, [1984] A.C. 50 (U.K. H.L.); and *Herman v. Alberta (Public Trustee)*.

36 As Lord Diplock explained in *Amin Rasheed*, at p. 891, contracts do not exist in a "legal vacuum":

My Lords, contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies enforceable in a court of justice for failure to perform any of those obligations; and this must be so however widespread geographically the use of a contract employing a particular form of words to express the obligations assumed by the parties may be.

37 Where the choice of law is expressly made in the contract, courts may not interfere, unless that choice is unlawful or contrary to public policy. In *Vita Food*, Lord Wright explained, at p. 521:

That intention is objectively ascertained, and, if not expressed, will be presumed from the terms of the contract and the relevant surrounding circumstances ...but, where the English rule that intention is the test applies and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy.

38 In *Imperial Life Assurance Co. of Canada v. Colmenares*, [1967] S.C.R. 443, 62 D.L.R. (2d) 138 (S.C.C.), Ritchie J. stated, at p. 448:

[T]he problem of determining the proper law of a contract is to be solved by considering the contract as a whole in light of all the circumstances which surround it and applying the law with which it appears to have the closest and most substantial connection.

39 Determining the circumstances which constitute the closest and most substantial connection is an inherently fact-specific exercise. Ritchie J. outlined a number of factors that may assist a court in making this determination, citing *Cheshire on Private International Law*, 7th ed., at p. 448:

[T]he domicile and even the residence of the parties; the national character of a corporation and the place where its principal place of business is situated; the place where the contract is made and the place where it is to be performed; the style in which the contract is drafted, as, for instance, whether the language is appropriate to one system of law, but inappropriate to another; the fact that a certain stipulation is valid under one law but void under another; the economic connexion of the contract with some other transaction; the nature of the subject matter or its *situs*; the head office of an insurance company, whose activities range over many countries; and, in short, any other fact which serves to localize the contract.

40 In *Cansulex*, however, McEachern C.J.S.C. placed less emphasis on the location where the insurance contract was made in determining the applicable law. In that case, the insurance policy was made in the United States on an American policy form, yet BC law applied, due primarily to the fact that the shipping operation was based in Vancouver. McEachern C.J.S.C. noted, at p. 18, that while older case law placed much weight on where the contract was formed, "modern law seems to focus more on other matters... What seems to be most important is the subject of the contract" (at p.

289). He concluded at p. 290 that the factors to be considered in determining the closest and most substantial connection are, in ascending order of importance:

- (a) the policy is deemed to be made in BC as a result of s. 5 of the *Insurance Act*, R.S.B.C. 1996, c. 226;
- (b) Aetna underwrote the risk on an American form;
- (c) both parties operate worldwide from their respective countries;
- (d) the subject matter of the contract is liability insurance; and
- (e) claims might be expected to arise for which coverage might be furnished by the policy in Alberta, BC, or worldwide, but not in the United States.

In that case, only factor (b) favoured the application of US law; the other factors were either equal or favoured BC law, particularly (d) and (e). Thus, BC was found to have a much closer connection with the contract than the US (or Alberta, which also was argued).

41 Thus, the analysis prescribed in *Cansulex* is highly-fact specific and contextual. It will by necessity involve the weighing of unique factors in order to determine which system of law has the closest and most substantial connection to the contract in dispute.

42 Section 5 of the *Insurance Act* deems a contract to be made in this province, and says that it must be construed accordingly where it insures a person domiciled or resident in BC at the date of it, or has as its subject matter, property, or an interest in property located in BC.

43 Section 5 is not conclusive: *Cansulex*, at p. 288. It only provides that a policy insuring a person domiciled or resident in the province shall be deemed to be made in the province and shall be construed accordingly; that is to say, it shall be construed in accordance with the proper law of the contract, which may be the law of another jurisdiction. The place where a contract is made is but one of the factors to be considered in determining the proper law of the contract.

44 Section 5 differs from its counterparts in some other provincial statutes. For example, in Ontario, s. 123 of its *Insurance Act*, R.S.O. 1990, c. I.8, makes application of Ontario law mandatory:

Where the subject-matter of a contract of insurance is property in Ontario or an insurable interest of a person resident in Ontario, the contract of insurance, if signed, countersigned, issued or delivered in Ontario or committed to the post office or to any carrier, messenger or agent to be delivered or handed over to the insured or the insured's assign or agent in Ontario shall be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof, and all money payable under the contract shall be paid at the office of the chief officer or agent in Ontario of the insurer in lawful money of Canada.

According to Janet Walker, *Canadian Conflict of Laws*, 6th ed., looseleaf (Markham, Ont.: LexisNexis, 2005) at 31.8.b, unlike s. 5 of the BC *Insurance Act*, this section "indicate[s] that the law of [Ontario] is the proper law a contract of insurance made or deemed to be made in that province, and in such a case the parties are not free to oust the application of that law by an express choice of law clause".

45 Normally, the obligations of parties to a contract will be governed by the same proper law. There are circumstances, however, where the proper law of a contract may be different for different contractual matters or issues. According to J.-G. Castel, at 607:

While most contractual issues are governed by the proper law, the parties can agree that different contractual issues may be governed by different laws. This is called *dépeçage*. There is no authority to prevent the court from deciding

that the objectively ascertained proper law varies according to the contractual issues involved. However, the court will not do this readily or without good reason.

Apart from express or implied agreement to the contrary, the obligations of both parties will be governed by the same proper law.

46 The insurers urge upon me the *obiter dicta* of Davies J. in *Lloyd's Underwriters v. Cominco Ltd.*, 2006 BCSC 1276, 60 B.C.L.R. (4th) 261 (B.C. S.C.), aff'd, 2007 BCCA 249, 67 B.C.L.R. (4th) 101 (B.C. C.A.), aff'd 2009 SCC 11, [2009] 1 S.C.R. 321 (S.C.C.), where he said, at para. 215, that the policy must expressly provide for application of more than one system of law:

... I agree with the submission of counsel for Lloyd's that it would not be efficient to have contracts of insurance that may have application in more than one jurisdiction interpreted in accordance with more than one system of law unless the particular policy under consideration expressly provides otherwise.

47 As I read these remarks, they come at the end of the decision and follow a detailed analysis of the issues before him, i.e., territorial competence and *forum conveniens*. It is noteworthy that the remarks of J.-G. Castel - that the agreement of the parties as to the proper law may also be implied - were not put before Davies J. nor were the decisions reached by other courts consistent with that approach.

48 In *Gerling Global General Insurance Co. v. Canadian Occidental Petroleum Ltd.*, 1998 ABQB 714, 64 Alta. L.R. (3d) 174 (Alta. Q.B.), the court looked at the policy "as a whole". Romaine J. concluded that the policy did not disclose an intention that more than one law govern:

[68] ...Although there may be exceptional circumstances where it may be inferred that a contract is to be governed by the law of more than one jurisdiction, the courts in Canada are reluctant to split the proper law of a contract without good and compelling reason. Even in situations where the contract may be performed in more than one place, the more usual determination is that the substance of the contract is to be determined by one law only, although the method and manner of performance may be regulated by the law of the place of performance (*Montreal Trust Co. (supra)*, *Kenton Natural Resources Co. v. Burkinshaw* (1983), 47 A.R. 321 (Q.B.))...

[69] The Policy does not disclose an intention that more than one law govern the substantive obligations under it, although it anticipates in some clauses the effect of local government action. Nor does it disclose an intention that more than one law govern by providing for payment of premiums in different currencies or in expressing deposit premiums in Canada or U.S. funds. On the contrary, the Policy provides that all deductibles and liability limits are expressed in Canadian funds, regardless of the location of the risk. The mere fact that the locations of the insured properties are in different countries is no indication of an intention to split the proper law of the Policy.

49 In *Commonwealth Insurance Co. v. Canadian Imperial Bank of Commerce* (2005), 21 C.C.L.I. (4th) 226, [2005] O.J. No. 1167 (Ont. S.C.J.), aff'd (2005), 142 A.C.W.S. (3d) 72, [2005] O.J. No. 3656 (Ont. C.A.), at para. 68, Wilton-Siegel J. looked for and did not find an "indication in the Policy of an intention to split the proper law of the Policy" (at para. 68), and then proceeded to adopt the approach taken in *Gerling Global*.

50 This same approach to determining if the parties intended more than one proper law, albeit in a banking as opposed to an insurance context, has been taken by the Queen's Bench Division (Commercial Court) in England. In *Libyan Arab Foreign Bank v. Manufacturers Hanover Trust (No.2)*, [1989] 1 Lloyd's Rep. 608 (Eng. Q.B.), Hirst J. viewed the matter as a "question of mixed fact and law". At p. 619, he said:

Since, however, this is a question of mixed fact and law, it is necessary for me to consider the proper law on the alternate hypothesis that there was one single contract. The legal position is well established that an English Court will not split the proper law of a contract readily and without good reason, but that it is open for the parties to agree that one aspect be governed by the law of one country and another aspect by the law of another country (Dicey and

Morris Conflict of Laws 11th ed., p. 1163). This is based on a very well-known passage in the dissenting judgment of Lord MacDermott in *Kahler v. Midland Bank Ltd.*, [1950] A.C. 24 at p. 42, as follows:

Though there is no authority binding your Lordships to the view that there can be but one proper law in respect of any given contract, it is doubtless true to say that the courts of this country will not split the contract in the sense readily and without good reason. In my opinion, however, there is a good ground for so doing in the somewhat unusual and, as I think compelling circumstances of the present case.

51 In that case, the court implied the intention to split proper law, and distinguished between the law to be applied to a London bank account from the law to be applied to a bank account in New York, in determining the parties' obligations. Hirst J. then determined the proper law, which was not expressly stated, based upon a "substantial connection" test by application of factors similar to some applied in *Cansulex*.

52 One English case has recognized that the proper law of a contract may be split even in the absence of express or implied intention, where a severable part has a closer connection with one jurisdiction than another. PWC cited the decision of the English Court of Queen's Bench in *Libyan Arab Foreign Bank v. Bankers Trust Co.* (1987), [1989] Q.B. 728 (Eng. Q.B.). There, Staughton J. recognized, at p. 747, that, "It is possible, although unusual, for a contract to have a split proper law...: see *Dicey & Morris The Conflict of Laws*, 11th ed. (1987), p. 1163 and *Chitty on Contracts*, 25th ed. (1983), para. 2081", and went on to accept a European Economic Union Convention on the Law Applicable to Contractual Obligations:

Article 4 of the E.E.C. Convention of 19 June 1980 on the Law Applicable to Contractual Obligations (Official Journal 1980 No. L266, p. 1) (as I write not yet in force) provides:

"1. To the extent that the law applicable to the contract has not been chosen in accordance with article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country."

That such a solution is not necessarily unacceptable to businessmen is shown by one of the Australian printed forms of charterparty, which adopts it.

Mr. Sumpton argues that difficulty and uncertainty would arise if one part of the contract was governed by English law and another by New York law. I do not see that this would be so, or that any difficulty which arose would be insuperable.

In essence, Staughton J. concluded that an English court may sever a portion of a contract and apply a different proper law to it than that which it found applies to the rest of the contract, on the basis that such portion has a "closer connection" to a different legal regime (as opposed to first trying to determine the contractual intent).

53 Determination of proper law in the case at bar, however, may be made on a construction of the terms of the policies. Policy language contained in the instant policies shows that the parties intended the application of *dépeçage*.

Analysis and Disposition - Proper Law

Dépeçage

54 This is not a case where previous insurance policies were simply renewed. The policies issued effective July 30, 2007 resulted from specific negotiations between the parties. The evidence also shows that in Federal's case, significant adjustment was made to the premium and policy limits in view of the poor financial circumstances of the Pope and Talbot Group. In this case, the proper law of the insurance contracts must be determined based on the intention of the parties at the time the subject policies were issued and not in relation to pre-existing policies. Even if I were inclined to consider prior policies in determining proper law, I am not able to do so as none of them are in evidence.

55 A careful review of each of the policies as a whole demonstrates that the parties allowed for the insurers' various coverage obligations to be determined by different legal regimes. The contractual language makes it clear that the principle of *dépeçage* applies to the proper law issue. Each of the three insurance policies expressly provides for the application of different legal regimes to different matters and issues. In fact, Federal and XL acknowledged as much at the conclusion of their oral submissions when they conceded that their policies split the proper law insofar as punitive and exemplary damages are concerned.

Federal's policy

56 Federal's policy contains two separate "coverage sections":

- (a) "Executive Protection Portfolio Executive Liability and Entity Securities Liability Coverage Section"; and
- (b) "Executive Protection Portfolio Outside Directorship Liability Coverage Section".

Specific endorsements were added to both sections; some were included in one coverage section but not in the other.

57 Federal's coverage is liability coverage in favour of the directors and officers of the Pope & Talbot Group on a worldwide basis for claims for "wrongful acts" (a defined term) made within the policy period.

58 Federal's policy contains choice of law language in a number of places.

59 The first place it is found is in the definition of "Loss". Federal's obligation to pay punitive and exemplary damages is drafted in such a way as to favour the insureds. Further, Federal did not limit the proper law to that of one jurisdiction. It defined proper law in relation to the jurisdiction most favourable to the insurability of such damages that, at the same time, "has a substantial relationship" to "relevant insureds". The use of the plural is significant since there are multiple insureds residing or domiciled in different jurisdictions having their own legal regimes.

60 The definition of "Loss" in the first coverage section provides, *inter alia*:

Loss means:

- (a) the amount that any **Insured Person** (for the purposes of Insuring Clauses 1 and 2) or the **Organization** (for purposes of Insuring Clause 3) becomes legally obligated to pay on account of any covered **Claim**, including but not limited to damages (including punitive or exemplary damages, if and to the extent that such punitive and exemplary damages are insurable under the law of the jurisdiction most favourable to the insurability of such damages provided such jurisdiction has a substantial relationship to the relevant **Insureds**, to the Company, or to the **Claim** giving rise to the damages), judgments, settlements, pre-judgment and post-judgment interest and **Defense Costs**;

[Bold emphasis in original; underline emphasis added]

61 In the first coverage section, an "Insured Person" is defined to mean a director, officer, manager, or in-house general counsel to any "Organization" that is "chartered in the United States of America" or "equivalent to any [such] position ... that is chartered in any jurisdiction other than the United States of America". The definition in the second coverage section is somewhat broader as it includes an employee of an "Organization".

62 Contractual intent is clear - the parties intended a multi-faceted approach to the law applicable to Federal's obligation to pay punitive and exemplary damages, one that permits various legal regimes to apply depending on the nature of the claim and the relationship of a jurisdiction to an "Insured Person", as well as the law applicable to such damages in that jurisdiction.

63 Federal's policy language also acknowledges the potential for a different proper law to apply to each coverage section. Federal excluded from the definition of "Loss", which is covered, any amount not insurable under the law pursuant to which the particular coverage section of the policy, *as opposed to the policy itself*, is construed:

Loss does not include:

... any amount not insurable under the law pursuant to which this coverage section is construed, except as provided above with respect to punitive or exemplary damages;

[Bold emphasis in original; underline emphasis added]

The definition of "Loss" in the second coverage section is the same in substance; notably, though, it does not provide coverage for "Organizations".

64 Thus, Federal's policy recognizes that more than one legal regime may govern the interpretation of the coverage sections therein.

65 That Federal intended to distinguish between coverage sections and the whole of the policy is also demonstrated in the language contained in Endorsement no. 2 to the "General Terms and Conditions" (which are stated to apply to the entire policy). That endorsement concerns termination of the policy and purports to limit Federal's right to terminate the policy or either or both coverage sections for non-payment of premium. There, Federal wrote:

In consideration of the premium charged, it is agreed that, notwithstanding any provision to the contrary in this policy or any endorsement thereto, the Company [Federal] shall only have the right to terminate this policy or any coverage section for non-payment of premium; accordingly, any reference to paragraph (a) of Subsection 11, Termination of Policy or Coverage Section, in this policy or any endorsement thereto, is deleted.

[Emphasis added]

66 Federal added four endorsements to its General Terms and Conditions, as well as sixteen and three to its first and second coverage sections, respectively. They cover a wide range of subjects including waiver of subrogation, termination of policy or coverage section, compliance with applicable trade laws, whistleblowers, exclusion for non-common law countries, reporting, securities claims, public offerings, representations, changes in exposure, non-entity employment practices, bankruptcy, claims for bodily injury and mental anguish, other insurance, severability, and pollution.

67 Federal specifically referred to the law of Oregon in three endorsements.

68 The first one is Endorsement no. 3 to the General Terms and Conditions (which concerns termination of the policy or coverage sections). It states that it supersedes and takes precedence over other policy provisions unless they comply with applicable insurance laws of Oregon. The wording is not clear inasmuch as the endorsement could be interpreted to apply to policy provisions added by endorsement, or, to the policy as a whole:

OREGON AMENDATORY ENDORSEMENT TO THE GENERAL TERMS AND CONDITIONS SECTION

.....

The regulatory requirements set forth in this Amendatory Endorsement shall supersede and take precedence over any provisions of the policy of any endorsement to the policy, whenever added, that are inconsistent with or contrary to the provisions of this Amendatory Endorsement, unless such policy or endorsement provisions comply with the applicable insurance laws of the state of Oregon.

[Bold emphasis in original; underline emphasis added]

I have underlined the words that create confusion.

69 The heading to the endorsement offers no assistance by virtue of clause 14 of the General Terms and Conditions:

14. The descriptions in the headings and sub-headings of this policy are solely for convenience, and form no part of the terms and conditions of coverage.

70 In addition, clause 2 of the General Terms and Conditions stipulates that where any provision in the General Terms and Conditions is inconsistent or in conflict with the terms and conditions of any coverage section, then the terms and conditions of "such coverage section shall control for the purpose of that coverage section".

71 The lack of clarity is amplified because Endorsement no. 3 immediately follows Endorsement no. 2. Endorsement no. 3 sets out a list of seven bases upon which Federal may terminate the policy or any coverage section. Yet, Endorsement no. 2, which does not mention Oregon law, confines the insurer's right to termination ("notwithstanding any provision to the contrary in this policy or any endorsement thereto") for non-payment of premium.

72 Even though I was not, on the application, directed to or asked to resolve the possible inconsistency between the two endorsements, or the drafting issues arising from Endorsement no. 3, I point them out as instances where Federal turned its mind to the prospect of stipulating Oregon law as the proper law for the entire policy. If Endorsement no. 2 supersedes no. 3, which I think it does (especially given that the language of no. 3 is so unclear), then Federal's right to terminate is limited to non-payment of premium and Oregon law does not apply.

73 The second endorsement referring to Oregon law is no. 7 to the first coverage section. It is titled:

OREGON AMENDATORY ENDORSEMENT TO THE EXECUTIVE LIABILITY AND ENTITY SECURITIES LIABILITY COVERAGE SECTION

This endorsement concerns, *inter alia*, the effect of misrepresentations contained in the application for insurance. Unlike Endorsement no. 3 to the General Terms and Conditions, Federal made it clear that Oregon law applied to matters dealt with by this specific endorsement:

The regulatory requirements of this Amendatory Endorsement shall supersede and take precedence over any provisions of the policy or any endorsement to the policy, whenever added, that are inconsistent with or contrary to the provisions of this Amendatory Endorsement, unless such policy or endorsement provisions comply with the applicable insurance laws of the state of Oregon.

74 The third endorsement referring to Oregon law is no. 2 to the second coverage section, which also deals with the effect of misrepresentations in the application, and contains the same reference to Oregon law as in Endorsement no. 7.

75 Federal's policy also shows that Federal contemplated different types of claims being made against directors and officers as well as "Organizations" (their companies) in various jurisdictions (including non-common law jurisdictions). For example, in the first coverage section:

(a) the definition of "Insured Person" shows that Federal contemplated claims against directors, officers, or managers of an "Organization" "chartered in any jurisdiction other than the United State of America";

(b) the definition of "Securities Claim" includes a claim that "alleges that an *Organization* or any of its *Insured Persons*...violated a federal, state, local or foreign securities law" [Emphasis in original];

(c) Federal excluded coverage for violations of certain statutes such as the Employee Retirement Income Security Act of 1974, claims made for an account of profits from the purchase or sale of securities within the meaning of "Section 16(b) of the Securities Exchange Act of 1934 or...any similar provision of any federal,

state, or local statutory law or common law anywhere in the world", and the "Sarbanes-Oxley Act of 2002, or any similar 'whistleblower' protection provision of an applicable federal, state, local or foreign securities law";

(d) in Endorsement no. 6, Federal agreed not to seek allocation of defence costs arising from a "Securities Claim" attributable to alleged violations of ss. 11 or 12 of the Securities Act of 1933; and

(e) separate treatment is given, in Endorsement no. 2 (concerning "non-common law countries") to claims "not venued in the United States of America, Canada, Australia or any other common law jurisdiction".

76 In summary, contemplating claims made in jurisdictions beyond the US and Canada, Federal turned its mind to the proper law governing different provisions and coverage sections of its policy, including those added by endorsement. It specifically added three endorsements referring to Oregon law, yet chose not to include a choice of law clause to govern the entire policy. Instead, Federal used contractual language that demonstrates the parties' intention that the laws from various jurisdictions could govern their rights and obligations under the policy.

77 In my opinion, Federal's submission that its Oregon Amendatory Endorsements show contractual intent that Oregon law is the proper law of the policy is undermined by Federal's specific treatment of punitive damages, the definition of "Loss" in its policy, the effect of Endorsement no. 2 of the General Terms and Conditions, the lack of clarity in Endorsement no. 3 to the General Terms and Conditions, clause 2 of the General Terms and Conditions, and the specific language set out in Endorsements no. 7 and no. 2 to the first and second coverage sections, respectively.

National Union's policy

78 National Union's policy is follow form to Federal's, which means that the provisions contained in Federal's policy are also contained in National Union's policy. As a result, my determination of the proper law issue for Federal's policy applies to National Union's policy unless National Union has specifically added language that expressly or impliedly stipulates a different result.

79 Even though National Union added specific endorsements that identify a legal regime, it did not add a choice of law clause.

80 National Union added nine endorsements dealing with cancellation of the policy, reliance on representations contained in the application for underlying insurance, exhaustion of limits and erosion, notice of change in circumstances (e.g., receivership or sale), when underlying coverage is no longer in effect, and payments. Of those, only two refer to specific jurisdictions.

81 The first, Endorsement no. 1, contains a reference to a jurisdiction, and only in its heading, which reads:

OREGON CANCELLATION/NON-RENEWAL AMENDATORY ENDORSEMENT

There is no reference to choice of law, nor does that endorsement include the type of language used by Federal in its two endorsements (nos. 7 and 2 to the first and second coverage sections, respectively).

82 The second endorsement, no. 8, stipulates that performance of one of its obligations, i.e., payment of loss, "shall only be made in full compliance with all United States of America economic or trade sanction laws or regulations, including, but not limited to, sanctions, laws and regulations administered and enforced by the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC")".

83 The drafters of the National Union policy intended the application of a specific legal regime - the rules of the American Arbitration Association - to apply to the performance of mediations and arbitrations of disputes under the ADR clause. As well, National Union turned its mind to and added a choice of forum clause stipulating that mediation or arbitration may be held in any one of several jurisdictions.

84 In its ADR clause, National Union's policy stipulates that non-binding mediation is to be administered by the American Arbitration Association, and that arbitration conducted pursuant to the policy is also to be submitted to that Association and conducted in accordance with its "then-prevailing commercial arbitration rules".

85 With the exception of the ADR clause contained in its policy, National Union's policy is silent as to the choice of any legal regime governing the contract or performance of its obligations.

86 National Union relies upon the ADR clause to stay determination of its coverage obligations. The clause is lengthy. In it, National Union sets out the law to be considered by the mediator or arbitrator when construing or interpreting the policy. As well, the ADR clause contains a choice of forum in respect of mediation or arbitration. It provides, *inter alia*:

It is hereby understood and agreed that all disputes or differences which may arise under this policy, whether arising before or after termination of this policy, including any determination of the amount of Loss, shall be subject to the dispute resolution process ("ADR") set forth in this clause.

Either the Insurer and the Insureds may elect the type of ADR discussed below; provided, however, that the Insureds shall have the right to reject the Insurer's choice of ADR at any time prior to its commencement, in which case the Insured's choice of ADR shall control.

The Insurer and Insureds agree that there shall be two choices of ADR: (1) non-binding mediation administered by the American Arbitration Association, in which the Insurer and Insureds shall try in good faith to settle the dispute by mediation under or in accordance with its then-prevailing Commercial Mediation Rules; or (2) arbitration submitted to the American Arbitration Association under or in accordance with its then-prevailing commercial arbitration rules, in which the arbitration panel shall be composed of three disinterested individuals. In either mediation or arbitration, the mediator(s) or arbitrators shall have knowledge of the legal, corporate management, or insurance issues relevant to the matters in dispute.

The mediator(s) or arbitrators shall also give due consideration to the general principles of the law of the state where the Named Insured is incorporated in the construction or interpretation of the provisions of this policy; provided however, that the terms, conditions, provisions and exclusions of this policy are to be construed in an even-handed fashion in the manner most consistent with the relevant terms, conditions, provisions or exclusions of the policy. In the event of arbitration, the decision of the arbitrators shall be final and binding and provided to both parties... In the event of mediation, either party shall have the right to commence a judicial proceeding; provided, however, that no such judicial proceeding shall be commenced until the mediation shall have been terminated and at least 120 days shall have elapsed from the date of the termination of the mediation...

Either choice of ADR may be commenced in either New York, New York; Atlanta, Georgia; Chicago, Illinois; Denver, Colorado; or in the state indicated in Item 1 of the Declarations page as the mailing address for the Named Insured [P&T Inc].

[Emphasis added]

87 That clause means, therefore, that a mediator or arbitrator involved with or hearing a dispute pursuant to the ADR clause would have to, when considering the construction of the insurance policy, give "due consideration" to the law of the State of Delaware since that is where P&T Inc. was incorporated, unless the laws of that State were not even-handed or consistent with the relevant terms of the policy.

XL's policy

88 XL's Cornerstone Policy expressly provides for the application of different legal regimes to determine its coverage obligations.

89 The starting point is the definition of "Loss", which is one of the bases for XL's obligation to pay claims. XL's obligation is to pay for "Loss resulting from a Claim" made during the policy period "for a Wrongful Act". The obligation to pay the various items comprising "Loss" is determined on the basis of their insurability.

90 XL's definition of "Loss" is more expansive than Federal's: it speaks of awards that include pre- and post judgment interest and multiplied damage awards as well as punitive and exemplary damages. The awards set out in the parenthetical expression below are included in the definition of "Loss" where "insurable by law":

"**Loss**" means damages, judgments, settlements or other amounts (including pre- & post-judgment interest, punitive or exemplary damages, or the multiplied portion of any damage award, where insurable by law) and **Defense Expenses** that the **Insured Persons** are obligated to pay.

[Bold emphasis in original; underline emphasis added]

91 XL makes it clear, in a "Note" contained within the definition of "Loss", that the law governing its obligation to pay punitive, exemplary, or multiplied damages, fines, penalties, or taxes, but not pre- and post judgment interest, is the law of the jurisdiction most favourable to insurability (it "shall control"):

Note

With respect to coverage for punitive, exemplary or multiplied damages or fines, penalties or taxes, the law of the applicable jurisdiction most favourable to the insurability of such amounts shall control.

92 There is also a category excluded from the definition of "Loss" - "matters" uninsurable by the law "pursuant to which the policy is construed":

Loss will not include:

(1) matters which are uninsurable under the law pursuant to which this Policy is construed;

[Bold emphasis in original; underline emphasis added]

93 "Matters" is not defined in the policy. Dictionary definitions show that this word has a broad meaning. *Black's Law Dictionary*, 8th ed. (2004) defines "matter" as follows:

matter, n. 1. A subject under consideration, esp. involving a dispute or litigation; ... **2.** Something that is to be tried or proved; an allegation forming the basis of a claim or defense.

The *Shorter Oxford Dictionary*, 6th ed. (2007) defines the word to mean, *inter alia*:

matter, noun, ... 14 a An event, circumstance, question, etc., which is or may be an object of consideration or practical concern; in *pl.*, events, circumstances, etc., generally... **15** A thing or things collectively of a particular kind or related to a particular thing, *Usu. foll. by for or of*, or with specifying word. ... **16** Material cause; elements of which something consists or out of which it arises.

94 A third category relates to fines, penalties, or taxes imposed by law. They are not covered, as they are specifically excluded by the definition of "Loss", except where they are *insurable by law* and imposed in connection with an "Insured Person's" service to an entity that is financially solvent:

Loss will not include:

.....

(2) fines, penalties or taxes imposed by law; provided, that this DEFINITION (K)(2) will not apply to fines, penalties or taxes that an **Insured Person** is obligated to pay if such fines, penalties or taxes are insurable by law and are imposed in connection with such **Insured Person's** service to an entity included within the definition of **Company** that is financially solvent.

[Bold emphasis in original; underline emphasis added]

95 XL's policy also shows that the insurer contemplated different types of claims being made against the insureds in various jurisdictions. In fact, with the exception of coverage for "Defence Expenses" (a defined term), XL's policy excludes coverage for "Loss" in connection with any claim, *inter alia*, "brought and maintained in a non-common law jurisdiction outside the United States of America or its territories or possessions".

96 Comparing all of the language contained in the definition of "Loss" makes it clear that the parties intended that while one legal regime would apply to the policy, other legal regimes may apply to XL's obligations to pay interest, punitive and exemplary damages, the multiplied portion of any damage award, and fines, penalties, and taxes.

97 XL's policy also contains a term described as a "no action" clause, which purports to operate as a condition precedent to an "Insured Person" bringing an action against XL. Although XL previously relied on this clause as a basis to stay a coverage determination by this Court, during the hearing XL abandoned its reliance on that clause in this case for practical reasons. XL prefers to participate in the looming coverage determination hearing rather than sit on the sidelines; if it won its stay application, XL could be faced with allegations of *res judicata* and issue estoppel from its insureds.

Disposition

98 A careful review of the insurance policies shows that the parties anticipated *dépeçage*. The parties had ample opportunity to select one proper law, especially the law of Oregon. They chose not to do so. This fact alone, however, does not lead to the conclusion that the proper law of the policies is BC law.

99 From examining each policy as a whole, and in particular, contractual language allowing for different policy sections, claims, and "matters" to be interpreted according to different legal regimes, it is clear that the parties intended the proper law to be determined in connection with the substance of the claim made (including relief sought) or matter at issue.

100 The instant case is an exceptional one, created by the parties' contractual intent, which is expressed through the use of specific language drafted by underwriters following lengthy negotiations.

101 For example, in the Federal policy, the parties agreed that voidance of the policy for misrepresentation on the application for insurance is governed by the "applicable insurance laws" of Oregon.

102 Another example is Federal's obligation to provide coverage for punitive and exemplary damages is to be construed in accordance with a legal regime that may be different than the law which governs the coverage section within which that obligation is found.

103 XL's policy, for example, incorporates a definition of "Loss" that states its obligation to provide coverage for "matters" and certain specified claims (set out in the definition of "Loss") is determined on the basis of their insurability by law. The drafters of its policy contemplated, at least for certain specific claims, that a legal regime (most favourable to insurability) may apply that is different than the legal regime by which the rest of the policy is construed.

104 My determination regarding the parties' intent does not mean that the policies exist in a vacuum. This is not a case, as was posited in *Armar Shipping* (at p. 505) where the proper law "float[s] until the carrier, unilaterally, makes a decision". Nor is this a situation like that in *Amin Rasheed* (at p. 895), where the court was being asked to determine, based on the use of a Lloyd's form much used on an international scale, that the contract is "an internationalised, or

floating, contract, unattached to any system of law". The policies in this case are, in fact, connected to more than one jurisdiction and legal regime, e.g., British Columbia, Ontario, Delaware, Oregon, Indiana, New Jersey, Pennsylvania, New York, and Connecticut. In my opinion, this is an extraordinary case, one where the parties intended that a court having taken jurisdiction over the claim or matter in dispute would determine the proper law according to its own laws.

105 The facts in this case are more compelling than those in *Libyan Arab Foreign Bank (No. 2)*: here, the parties' intention to apply *dépeçage*, and to which subject matters, is manifest. Except for the application of Oregon insurance law to deal with misrepresentations contained in the application submitted to Federal, the parties did not specifically set out the laws from a specific jurisdiction(s) to govern their obligations. Proper law is left to be determined by the court hearing the dispute to find based on application of its own laws, taking into account directing language in the policies (e.g., concerning punitive and exemplary damages in Federal's policy and those same damages along with multiplied damage awards, fines, penalties, and taxes in XL's policy).

106 Simply because a court takes jurisdiction, it does not necessarily follow that such jurisdiction's legal regime will be applied as the proper law. Nor does the prospect that more than one court can or does take jurisdiction to determine coverage obligations in the policies affect the analysis. Principles of conflict of laws are flexible enough to deal with fact patterns where more than one forum can take jurisdiction. In *Amin Rasheed*, at p. 888, Lord Diplock said:

One final comment on what under English conflict rules is meant by "proper law" of a contract may be appropriate. It is the substantive law of the country which the parties have chosen as that by which their mutual legally enforceable rights are to be ascertained, but excluding any renvoi, whether of remission or transmission, that the courts of that country might themselves apply if the matter were litigated before them. For example, if a contract made in England were expressed to be governed by French law, the English court would apply French substantive law to it notwithstanding that a French court applying its own conflict rule might accept a renvoi to English law as the *lex loci contractus* if the matter were litigated before it.

Thus, proper law may always be ascertained. Moreover, application of repugnant laws from a legal regime arguably connected to the policies may be avoided on the ground of public policy: *Vita Food*, p. 521.

107 That the parties in the instant case intended a multi-faceted approach to the proper law of the contract at the time the policies were issued, tied to the substance of the claims, matters, or coverage sections in issue, is demonstrated by the circumstances existing at the time.

108 D&O liability coverage was being provided on a worldwide basis at a time when the bulk of P&T Inc.'s revenue (and debt) was generated by its Canadian operations, through its subsidiary P&T Ltd. Although the majority of claims could thus be expected to arise from the Canadian operations, underwriters also expressed concern over possible bankruptcy proceedings in the US. Financial insolvency loomed large. An approach to proper law that is claim or matter dependent allowed the insurers to provide worldwide D&O and "Organization" liability coverage in a manner that made commercial sense to the parties having regard to the particular circumstances existing at the time the policies were issued. This does not mean that the policies exist in a legal vacuum until a claim is made against any or all of the insureds. For example, a dispute between Federal or National Union, on the one hand, and any or all of their insureds, on the other, concerning avoidance for misrepresentation in the application will be determined by Oregon law (as per Endorsements no. 7 and no. 2). For the XL policy, the definition of "Loss" mandates that such a dispute would be determined according the law to which the entire policy is construed.

109 Having taken jurisdiction, I must now determine the proper law to be applied. In BC, the approach to determining the proper law of a contract is set out in *Cansulex*. I propose to review the factors outlined by Chief Justice McEachern, in ascending order of importance, to determine the proper law to be applied to the policies:

(a) Where the policy was made

The insurers did not suggest that each policy was made in a different jurisdiction, and instead asserted Oregon was the place where the policies were made. For the reasons set out in (c) below, I cannot find that the policies were made in Oregon. The mere fact that the head office of P&T Inc. and the broker's office were located in Portland and that Federal had an office in Oregon, does not mean that the contracts were made in Oregon. Section 5 of the *Insurance Act* deems them to have been made in BC, a presumption that I find the insurers have not rebutted. This factor favours BC law.

(b) The form of the policy

No evidence was tendered to show that the insurance forms, all written in English, are American, or for that matter, unique to or derived from any particular jurisdiction. The liability concepts expressed in the policies are well known and widely used in D&O and organization claims made insurance policies issued in Canada.

The premium amounts and payment obligations of the insurers are expressed in US dollars, although the latter is expressed in terms of a conversion from foreign currency to US currency. It is not unheard of for non-American companies to do business in US currency.

In my opinion, this factor is neutral.

(c) Where the parties' operations are located

The insurers' head offices and principal places of business are located in States other than Oregon (New York, New Jersey, Indiana, Pennsylvania, and Connecticut). Apart from Federal, there is no evidence to show that the other insurers had offices in Oregon. Federal's decision to accept the risk was made in several jurisdictions: Los Angeles, Portland, and New Jersey. National Union's decision to go on risk was made in New York City. All of XL's underwriting was carried out in Stamford, Connecticut. National Union's policy was issued out of its office in New York City; XL's policy was issued out of its office in Connecticut.

The bulk of the operations of the Pope & Talbot Group were located in British Columbia. Most of its employees were located, and I infer worked, in this jurisdiction. The head office of the parent, P&T Inc., was located in Portland. It was incorporated in Delaware, where its insolvency proceedings were commenced.

In its application for insurance, the strength of the Canadian dollar was cited as a significant reason for its adverse financial position. The remarks made by Federal's underwriters in their underwriting analysis demonstrate that the insurer was aware that the proportion of P&T Inc.'s operations in BC (through its Canadian subsidiary) were significant enough to result in considerable loss to the company when the high Canadian dollar made its products from BC less competitive.

The facts surrounding this factor favour British Columbia law. Nothing other than the location of an office for Federal, some aspect of underwriting by Federal, the location of P&T Inc.'s head office in Oregon, and a mill operated by P&T Ltd. in Halsey favours Oregon law. Having turned their minds to proper law, none of the parties chose Oregon law as the law of their contracts. This omission is telling.

(d) The subject matter of the contract

The subject matter of the contract is worldwide liability insurance for the directors and officers of the Pope & Talbot Group as well as direct coverage for the "Organizations" comprising that Group. Without considering the nature and location of the operations of the Pope & Talbot Group, this factor is neutral. Once they are considered, the law of BC is favoured as the proper law since the majority of the operations of the Pope & Talbot Group, including its employees, were located in BC at the time the policies were made.

(e) Where claims might be expected to arise

The nature and location of the operations of the Pope & Talbot Group at the time the policies were issued shows that, with the possible exception of bankruptcy proceedings in the US, most of the claims could be expected to arise from Canadian operations. This factor favours BC law.

110 In the circumstances, I find that the policies have the closest and most substantial connection with BC.

111 In my respectful view, it would be a facile approach to conclude there is only one proper law governing each policy, given the extraordinary language used in the policies. If I had to, then upon the application of the *Cansulex* factors, I would find the proper law of the policies to be BC law at the time they were made.

112 As McEachern C.J.S.C. said in *Cansulex*, at p. 290: "This is not really a case like *Imperial Life Assurance Co. of Canada v. Colmenares* because it was a reasonable inference in that case that a person applying in Toronto to an Ontario corporation for a policy on a Canadian form would be governed by Canadian law". The facts of this case are more complex than in *Colmaneres*, where a standard form life insurance policy issued by a Canadian insurer was in issue.

113 In this case, the *CBCA* s. 119 claims, which have no equivalent in Oregon, are unique to the Canadian operations of the Canadian subsidiary of P&T Inc. They are brought pursuant to a Canadian statute. The proper law of the policies to determine the insurers' coverage obligations for those claims is BC law.

114 During submissions, the parties referred to the doctrine of reasonable expectations of the parties to support their position on the proper law. I have determined that the policies are not ambiguous in terms of proper law. PWC argued that the policies were ambiguous insofar as the proper law issue is concerned. Even if it could be said that they are ambiguous - with the exception that in the Federal policy Oregon law is stipulated as the proper law for Endorsements nos. 7 and 2, which govern the consequences of misrepresentation - application of the doctrine of reasonable expectations of the parties leads to the same result in respect of the s. 119 claims.

115 In terms of reasonable expectations, the circumstances extant at the time the policies were issued (which I have set out in these reasons for judgment) leads me to conclude that the parties expected BC law to apply to claims flowing out of the operations of P&T Ltd. For claims arising from operations of P&T Inc., the parties expected the proper law would be determined by the State in the United States taking jurisdiction. Federal and National Union are each part of a different group of companies having at least one other insurance company that carries on business in Canada. XL also has a related company that carries on business in this country. In my respectful view, the insurers, having chosen to underwrite coverage for P&T Ltd. and its directors and officers, must be taken to have been aware of s. 5 of the *BC Insurance Act* and other like provisions in other provincial insurance statutes, including Ontario (where P&T Ltd.'s registered and records office is located).

116 The s.119 claims are unique to Canada and arise solely out of the BC operations. The parties would reasonably have expected BC law to apply to determine the insurers' coverage obligations under the policies.

Analysis and Disposition - ADR Clause

117 National Union seeks to stay these proceedings until mediation takes place pursuant to the ADR clause. During submissions, National Union conceded that the clause was procedural and did not affect substantive rights, so that its application can be determined by the *lex fori*.

118 In my previous decision (2009 BCSC 1014, 76 C.C.L.I. (4th) 212 (B.C. S.C.), at paras. 147 to 150), I referred to several decisions holding that the *BIA* confers jurisdiction on Canadian Superior Courts to disrupt private contractual rights: e.g. *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 (S.C.C.), rev'g in part (2004), 71 O.R. (3d) 54, 238 D.L.R. (4th) 677 (Ont. C.A.); and *Eagle River International Ltd., Re*, 2001 SCC 92, [2001] 3 S.C.R. 978 (S.C.C.).

119 The rationale underlying that point is well set out in the decision of Topolniski J., whose reasoning was affirmed by the Alberta Court of Appeal in *Residential Warranty Co. of Canada Inc., Re*, 2006 ABQB 236, 62 Alta. L.R. (4th) 168 (Alta. Q.B.), aff'd 2006 ABCA 293, 65 Alta. L.R. (4th) 32 (Alta. C.A.):

[25] A significant objective of the *BIA* is to ensure that all of the property owned by the bankrupt or in which the bankrupt has a beneficial interest at the date of the bankruptcy will, with limited exceptions, vest in the trustee for realization and ratable distribution to creditors. To further this objective, the *BIA* provides for practical, efficient and relatively inexpensive mechanisms for asset recovery, determination of the validity of creditor claims, and distribution of the estate. A fundamental tenet of *BIA* proceedings is that fairness should govern.

120 Resort to inherent jurisdiction may be made to further the objects of the *BIA* where the *Act* does not provide a specific mechanism. In essence, failing specific provision in the statute, the "gap" may be filled by statutory construction, or failing that, then by resort to inherent jurisdiction. According to Topolniski J., the *BIA* expressly preserves the Bankruptcy Court's equitable and ancillary powers. Resort to inherent jurisdiction is "maintained and available as an important but sparingly used tool". At para. 26, he wrote:

The *BIA* expressly preserves the Bankruptcy Court's equitable and ancillary powers. Accordingly, inherent jurisdiction is maintained and available as an important but sparingly used tool. There are two preconditions to the Court exercising its inherent jurisdiction: (1) the *BIA* must be silent on a point or not have dealt with a matter exhaustively; and (2) after balancing competing interests, the benefit of granting the relief must outweigh the relative prejudice to those affected by it. Inherent jurisdiction is available to ensure fairness in the bankruptcy process and fulfilment of the substantive objectives of the *BIA*, including the proper administration and protection of the bankrupt's estate.

121 Topolniski J. also remarked that solutions to *BIA* issues will require judges to consider the realities of commerce and business efficacy:

[27] Solutions to *BIA* concerns require consideration of the realities of commerce and business efficacy. A strictly legalistic approach is unhelpful in that regard. What is called for is a pragmatic problem-solving approach which is flexible enough to deal with unanticipated problems, often on a case-by-case basis.

122 The same point was made by Farley J. in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176, 27 C.B.R. (3d) 148 (Ont. Gen. Div. [Commercial List]) at p. 185:

While the *BIA* is generally a very fleshed-out piece of legislation when one compares it to the *CCAA*, it should be observed that s. 47(2)(c): "The court may direct an interim receiver ... to ... (c) take such other action as the court considers advisable" is not in itself a detailed code. It would appear to me that Parliament did not take away any inherent jurisdiction from the court but in fact provided, with these general words, that the court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands". It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organised and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

123 Section 183(1) of the *BIA* invests Bankruptcy Courts with equitable jurisdiction:

The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxillary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers: ...

.....

(c) in the Provinc[e] of...British Columbia, the Supreme Court[.]

124 Although the *BIA* permits Bankruptcy Courts to interfere with leases and creditor agreements in some circumstances, it makes no specific mention of interference with conditions precedent to an insurer's coverage obligations. Nor does the *Act* define what is meant by "auxiliary" or "ancillary" jurisdiction.

125 Dictionary definitions offer little guidance. *Black's Law Dictionary* defines "auxiliary" to mean: "The incidental aid by an equity court to a court of law when justice requires both legal and equitable processes and remedies". The *Shorter Oxford Dictionary* defines it as: "Helpful: giving support or succour; ...subsidiary, additional, ancillary." The word "ancillary" is defined in *Black's Law Dictionary* to mean: "A court's jurisdiction to adjudicate claims and proceedings related to a claim that is properly before the court". The definition contained in the *Shorter Oxford Dictionary* reads: "Subservient, subordinate; auxiliary, providing support".

126 I view the question, in the circumstances of this case, in terms of the Court's inherent jurisdiction to control its own process in order to promote the objects of the *BIA* rather than gap filling through statutory interpretation.

127 The Alberta Court of Appeal, in *Residential Warranty*, added its own remarks concerning the scope of the Bankruptcy Court's reliance on inherent jurisdiction:

[20] Inherent jurisdiction is not without limits, however. It cannot be used to negate the unambiguous expression of legislative will and moreover, because it is a special and extraordinary power, should be exercised only sparingly and in a clear case. ...

[21] Further limitations are based on the nature of the *BIA* - it is a detailed and specific statute providing a comprehensive scheme aimed at ensuring the certainty of equitable distribution of a bankrupt's assets among creditors. ... However, inherent jurisdiction has been used where it is necessary to promote the objects of the *BIA*: [citations omitted]. It has also been used where there is no other alternative available: [citations omitted] and to accomplish what justice and practicality require: [citation omitted].

.....

[37] Generally, inherent jurisdiction should only be exercised where it is necessary to further fairness and efficiency in legal process and to prevent abuse.

128 In deciding whether inherent jurisdiction should be exercised, the Court of Appeal in *Residential Warranty* considered a number of factors at para. 37, including:

- (a) the stage of the proceedings and the effect of such an order on them - "for example, the ability of the trustee to make distributions and their amount may depend on the determination of the issue";
- (b) the need to maintain the integrity of the bankruptcy process - "[t]he equitable distribution of the bankrupt estate must remain at the forefront";
- (c) the realistic alternatives in the circumstances;
- (d) the impact on the trust claimants and the trust property as well as on other creditors; and
- (e) the anticipated time and costs involved.

129 Since my previous decision was handed down, Burnyeat J. of this Court has issued reasons for judgment in *Hayes Forest Services Ltd., Re*, 2009 BCSC 1169, [2009] B.C.J. No. 1725 (B.C. S.C.) where, at para. 22, he confirmed the broad jurisdiction of the Court in *CCAA* proceedings to "decide a dispute...under a [c]ontract...despite the provincial statutory authority and the terms of the [c]ontract". Burnyeat J. also reviewed other decisions from this Court, the Court of Appeal, and various provincial Superior Courts, all of which are to the same effect - a very broad discretion is afforded

to courts dealing with *CCAA* proceedings to interfere with private contractual or statutory rights: *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 175 D.L.R. (4th) 703 (Alta. C.A.); *Landawn Shopping Centres Ltd. v. Harzena Holdings Ltd.* (1997), 44 O.T.C. 288, [1997] O.J. No. 4457 (Ont. Gen. Div. [Commercial List]); *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293, [1997] O.J. No. 6411 (Ont. Gen. Div.); *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106, [1995] O.J. No. 595 (Ont. Gen. Div. [Commercial List]); *Philip's Manufacturing Ltd., Re* (1991), 60 B.C.L.R. (2d) 311, 9 C.B.R. (3d) 1 (B.C. S.C.); *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302, 18 B.L.R. (3d) 298 (Ont. S.C.J. [Commercial List]), add'l reasons at (2001), 31 C.B.R. (4th) 309, [2001] O.T.C. 828 (Ont. S.C.J. [Commercial List]); *Armbro Enterprises Inc., Re* (1993), 22 C.B.R. (3d) 80, [1993] O.J. No. 4482 (Ont. Bkcty.); *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.); *Gauntlet Energy Corp., Re*, 2003 ABQB 718, 336 A.R. 302 (Alta. Q.B.); *Doman Industries Ltd., Re*, 2003 BCSC 376, 14 B.C.L.R. (4th) 153 (B.C. S.C. [In Chambers]); and *Backbay Retailing Corp., Re*, 2008 BCSC 1876, [2008] B.C.J. No. 2784 (B.C. S.C. [In Chambers]).

130 In *Skeena*, the Court of Appeal noted, at para. 37, that in the "exercise of their 'broad discretion' under the *CCAA*, it has become common for courts to sanction the indefinite, or even permanent, affecting of contractual rights".

131 The approach taken by Burnyeat J. in *Hayes Forest Services*, and in the other cases he reviewed, is not confined to *CCAA* proceedings. Courts have interfered with private contractual rights in insolvency cases involving the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11: *Canada (Attorney General) v. Reliance Insurance Co.* (2007), 87 O.R. (3d) 42, 36 C.B.R. (5th) 273 (Ont. S.C.J. [Commercial List]); and *GMAC*. The rationale is explained in the text *Commercial Insolvency in Canada* by Kevin P. McElcheran (Markham, Ont.: LexisNexis Canada Inc., 2005) at p. 4:

The primary statutory and judicial tool used to preserve value and promote order in the insolvency process is the stay of proceedings to suspend the exercise of individual creditor rights. Stays of proceedings are necessary to achieve many of the objectives of commercial insolvency law. Even in the context of a liquidation of the debtor's assets for distribution to its unsecured creditors under the *BIA* or *WURA*, the statutory stay of proceedings permits the orderly and efficient realization of the debtor's assets, the judicial determination of creditor claims and priorities and the fair distribution of proceeds to creditors by reference to their legal rights.

132 National Union has neither denied nor confirmed coverage despite a demand being made in July 2008, yet wishes to pursue its contractual right to mediate. At one point in the proceeding, National Union submitted that because the claim value does not encroach upon its policy layer, is not necessary for it to provide its coverage position. At another point in the proceeding, National Union submitted that it wished to mediate with its insureds as it was concerned that the claim value might well exceed Federal's limits and encroach into its policy. In a brief written submission provided later, National Union said if there are s. 119 claims the value of which exceed Federal's layer (which, it said, "does not appear certain"), it would deny coverage "for the same reasons as stated by Federal".

133 National Union has been provided with information concerning the underlying claims. Its decision to wait upon the value of the claims made against its insureds before taking a position on cover, especially in view of its potential obligation to advance defence costs in the event Federal's layer is exhausted, should not, in my respectful view, allow it to rely on its ADR clause which would, in effect, stand in the way of the resolution of the Pope & Talbot insolvency.

134 Given National Union's position concerning coverage, there is no good reason for the ADR clause to stand in the way of an orderly and expeditious resolution of the insolvency proceedings.

135 National Union's position is that it is not bound by this Court's determination of the coverage obligations of the other two insurers. PWC and the directors and officers disagree; they submit that National Union would be bound by the doctrine of issue estoppel. If National Union's position is correct, then forcing the parties to mediate will only add to the costs of the proceedings and cause delay. If the Federal and XL policies are found to respond to the s. 119 claims, then an additional hearing will be required to determine National Union's coverage obligations.

136 If there is no coverage afforded by National Union's policy, then to adopt the words of Campbell J. at para. 39 of *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 192, [2005] O.J. No. 3899 (Ont. S.C.J.), leave to appeal to Ont. C.A. granted (2005), 10 C.B.R. (5th) 201, 139 A.C.W.S. (3d) 10 (Ont. C.A. [In Chambers]), appeal abandoned August 5, 2005, the resolution of the Pope & Talbot insolvency is "held hostage" by purported rights where there is no economic benefit to the party asserting them:

For the purposes of this case, it is not in my view an extension of the concept of inherent jurisdiction, but rather the prevention of one shareholder, with no economic value of his equity, holding all the stakeholders hostages. In this respect, I conclude that the considerations expressed for the exercise of the Court's inherent jurisdiction under the CCAA are applicable under the BIA to the facts of this case. See *Algoma Steel Inc., Re* (2001), [2002] O.J. 66 (ont. S.C.J. [Commercial List]) at paragraph 5; *Doman Industries Ltd., Re.*, [2004] B.C.J. No. 1402

137 At this stage of the proceedings, all of the parties and participants involved in the Pope & Talbot insolvency need to know whether D&O insurance coverage is available, and if so to what extent, in order to determine what amounts may be paid to claimants from the Directors' Charge (since that Charge is drawn upon only after claims are paid by existing insurance coverage). The integrity of the bankruptcy process is maintained through a stay order.

138 National Union submits that its policy is with the directors and officers, who are not insolvent, so that there is no basis to interfere with private contractual rights. With respect, that submission overlooks the fact that coverage is also afforded to P&T Inc. and P&T Ltd. in circumstances where they indemnify directors and officers (and are permitted by law to do so). It also overlooks the fact that the s. 119 claims made against the directors and officers of P&T Ltd. arise from the insolvency of P&T Ltd., which is an insured under National Union's policy.

139 I was told, during submissions, that National Union wishes to mediate its dispute with its insureds even though the value of the s.119 claims may not exceed Federal's or XL's policy limits. This presumes it will make an offer to its insureds. There is nothing to prevent National Union from doing that or from engaging in settlement discussions with its insureds at any time.

140 In the circumstances, the operation of the ADR clause is stayed.

Summary

141 The parties expressly intended the proper law of their policies to be determined in relation to the substance of the claims or matters in dispute, by the court that has taken jurisdiction doing so in accordance with its own laws. The insurers have drafted their policies in such a way as to incorporate the principle of *dépeçage*. Here, application of the *Cansulex* factors shows that BC law is the proper law to be applied to determine the insurers' coverage obligations in relation to the *CBCA* s. 119 claims.

142 National Union's ADR clause is stayed in order to permit the orderly, expedient, and effective resolution of the insolvency surrounding the Pope & Talbot Group.

143 The parties may speak to the issue of costs.

Order accordingly.

TAB 7

§31.5 SPECIFIC ISSUES**a. Scope of the Issues Governed by the Proper Law**

The proper law of the contract governs the great majority of the substantive issues relating to the validity, interpretation, performance and discharge of the contract, as well as its effect on third parties. Legislation can create exceptions by requiring a particular jurisdiction's rule—usually that of the forum—to be applied even to contracts governed in other respects by another system of law. These will be discussed below.¹

The common law choice of law rules include certain issues that may be governed by a system of law that is not the proper law of the contract. There are two principal reasons for these exceptions. One is that the issue goes to the existence of the agreement, as distinct from the validity of the agreement once made. Such an issue cannot be referred to the proper law because the determination of the proper law itself may depend on the terms the parties agreed to. Hence, the issue must be decided by a system of law, the selection of which does not depend on the parties' agreement. Issues of this type include the capacity of the contracting parties (see §31.5.b) and the formation of the contract (see §31.5.c).

The other reason is that applying the law in question, although it is not the proper law, serves the convenience of the parties or helps to ensure their agreement is effective. Issues in this category include formalities of entering into a contract (see §31.5.d) and the mode of performance of the contract (see §31.5.h).

Statutes of limitation, no matter whether they are worded in terms of barring the remedy or extinguishing the right, are characterized as substantive.² Hence, subject to any statutory modification of this rule,³ the proper law of the contract determines the limitation period for actions on the contract.⁴ Whether, and how, a limitation period can be waived are issues referable to the same law.⁵

b. Capacity

The question of the legal capacity of a contracting party is logically antecedent to the question of the proper law, since a party that lacks capacity to contract also lacks capacity to agree on a proper law. There is no logical objection, however, to applying the objectively determined proper law to determine whether a party lacked capacity, and the relatively few cases on the point generally adopt this solution.⁶ There is some room to argue that a person's capacity should be determined by the law that governs personal status, namely the law of the domicile, but the common law concept of domicile is remote from the circumstances on which contracting parties would usually base their expectations and so has little support in the cases.⁷

In Québec, where the concept of domicile is closer to the notion of ordinary or habitual residence, the law of the domicile is the general rule for determining capacity.⁸ However, a party may not invoke an incapacity under the law of his or her domicile if no such incapacity exists under the law of the other party's domicile, the contract is made there, and the other party had no reason to know of the incapacity.⁹

TAB 8

2003 CarswellOnt 1761
Ontario Superior Court of Justice

1455202 Ontario Inc. v. Welbow Holdings Ltd.

2003 CarswellOnt 1761, [2003] O.J. No. 1785, [2003] O.T.C. 396,
122 A.C.W.S. (3d) 932, 33 B.L.R. (3d) 163, 9 R.P.R. (4th) 103

**1455202 Ontario Inc. (Applicant) and Welbow Holdings
Ltd. and Bowdek Holdings Ltd. (Respondents)**

Cullity J.

Heard: April 14, 2003
Judgment: May 8, 2003
Docket: 03-CV-245995CM3

Counsel: Christopher E. Reed for Applicant
Sharon M. Addison for Respondents

Subject: Property

Headnote

Landlord and tenant --- Assignment of lease — Covenant restricting assignment — Reasonableness of withholding consent

Tenant operated cafe and bar in leased premises — Tenant received offer to purchase business and sought landlord's consent to assignment of lease to purchasers — After long negotiations, landlord withheld consent on grounds that proposed assignee did not have history of successful business operation and insufficient evidence had been provided to determine assignee's net worth — Landlord also gave as grounds that there was material risk that assignee would not be able to successfully carry on business and, generally, that insufficient information had been provided to permit it to make determination concerning any of these matters — Tenant applied for determination that landlord had unreasonably withheld consent to assignment — Application dismissed — Landlord based reasons for withholding consent on conditions in three clauses in lease — Ability of proposed assignee to carry on business successfully was inferentially addressed in two of conditions and ability to provide financial backing for its obligations was addressed in third condition — These three conditions should be considered as defining and delimiting grounds on which landlord could reasonably withhold consent to assignment in so far as these attributes of assignee were concerned — Court should be slow to substitute its judgment for business judgment of landlord — Sufficiency of assignee's business experience was recurring theme throughout negotiations and there was nothing to suggest that landlord did not conduct negotiations in good faith — Information provided by tenant as to assignee's business experience was extremely cursory — Landlord was entitled to seek such information and when it was not forthcoming, to base its decision on totality of information it did receive — In circumstances, tenant had not discharged its burden of proving that withholding of consent was unreasonable.

Table of Authorities

Cases considered by Cullity J.:

Ashworth Frazer Ltd. v. Gloucester City Council (2001), [2002] 1 All E.R. 377, [2001] W.L.R. 2180 (U.K. H.L.)
— referred to

Bickel v. Duke of Westminster, [1976] 3 All E.R. 801, [1976] 3 W.L.R. 805, [1977] Q.B. 517 (Eng. C.A.) — referred to

Bromley Park Garden Estates v. Moss, [1982] 2 All E.R. 890, [1982] 1 W.L.R. 1019 (Eng. C.A.) — referred to

Dominion Stores Ltd. v. Bramalea Ltd., 38 R.P.R. 12, 1985 CarswellOnt 736 (Ont. Dist. Ct.) — referred to

Federal Business Development Bank v. Starr, 41 R.P.R. 151, 55 O.R. (2d) 65, 28 D.L.R. (4th) 582, 1986 CarswellOnt 685 (Ont. H.C.) — referred to

Jo-Emma Restaurants Ltd. v. A. Merkur & Sons Ltd., 7 R.P.R. (2d) 298, 1989 CarswellOnt 612 (Ont. Dist. Ct.) — referred to

Pimms Ltd. v. Tallow Chandlers in London (City), [1964] 2 All E.R. 145, [1964] 2 Q.B. 547 (Eng. C.A.) — referred to

Shields v. Dickler, [1948] 1 D.L.R. 809, [1948] O.W.N. 145, 1948 CarswellOnt 134 (Ont. C.A.) — referred to

Slanly v. Ward (1913), 29 T.L.R. 714 (Eng. C.A.) — referred to

Sundance Investment Corp. v. Richfield Properties Ltd., [1983] 2 W.W.R. 493, 24 Alta. L.R. (2d) 1, 27 R.P.R. 93, 41 A.R. 231, 1983 CarswellAlta 4 (Alta. C.A.) — referred to

Town Investments Underlease, Re, [1954] Ch. 301, 18 Conv. & Prop. Law. 201 (Eng. Ch. Div.) — referred to

Welch Foods Inc. v. Cadbury Beverages Canada Inc., 2001 CarswellOnt 747, 140 O.A.C. 320 (Ont. C.A.) — referred to

Whitminster Estates v. Hodges Menswear (1974), 232 E.G. 715 — referred to

Zellers Inc. v. Brad-Jay Investments Ltd., 2002 CarswellOnt 3128 (Ont. S.C.J.) — referred to

Statutes considered:

Commercial Tenancies Act, R.S.O. 1990, c. L.7
s. 23 — considered

APPLICATION by tenant for determination that landlord had unreasonably withheld consent to assignment of lease.

Cullity J.:

1 The sole issue in this application is whether the Landlord has unreasonably withheld its consent to an assignment by the Applicant (the "Tenant") of its lease of space (the "Premises") at 56 Wellesley Street West, Toronto. The lease expires on August 31, 2005. The Tenant has an option to renew it for a further period of 10 years at a current market rent for similar premises in the vicinity at the time notice of the exercise of the option is given to the Landlord.

2 Under section 5.01 of the lease, the Premises are to be used and operated " . . . in a reputable and first class manner solely for the business and purpose of a licensed restaurant and serving food and beverages for consumption both on and off the Premises....".

3 The Tenant has been operating a café and bar on the Premises pursuant to an assignment, dated April 1, 2001, from a previous Tenant.

4 By letter dated November 15, 2002, the solicitor for the Tenant advised the Landlord's manager ("Dundee") that the Tenant had accepted an offer from 1547224 Ontario Inc (the "Purchaser") to purchase the Tenant's business operated in the Premises. The Landlord's consent to the assignment of the lease was requested. After negotiations among the parties, and solicitors for the Landlord and the Tenant, Dundee ultimately notified the Tenant on February 27, 2003 that the Landlord declined to provide its consent to the assignment.

5 The application to the court was made pursuant to section 23 of the *Commercial Tenancies Act* RSO 1990, Chapter L.7:

"23. (1) In every lease made after the 1st day of September, 1911, containing a covenant, condition or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that such licence or consent is not to be unreasonably withheld.

(2) Where the Landlord refuses or neglects to give a licence or consent to an assignment or sub-lease, a judge of the Ontario court (General Division), upon the application of the tenant or of the assignee or sub-tenant, made according to the rules of court, may make an order determining whether or not the licence or consent is unreasonably withheld and, where the judge is of opinion that the licence or consent is unreasonably withheld, permitting the assignment or sublease to be made, and such order is the equivalent of the licence or consent of the Landlord within the meaning of any covenant or condition requiring the same and such assignment or sublease is not a breach thereof."

6 Specific provisions with respect to assignments and subleases are contained in Article XI of the lease. These provide, in part, as follows:

"11.01 CONSENT NEEDED: The Tenant will not, during the said Term or any renewals thereof:

(a) assign this Lease in whole or in part

. . .

to or in any favour of any person . . . without the prior written consent of the Landlord, such consent not to be unreasonably withheld. . . . In deciding whether to give its consent to an assignment or subletting, the Landlord may refuse to give its consent if:

(i) the proposed assignee or subtenant:

(A) does not have a history of successful business operation in the business to be conducted in the Premises;

(B) does not have a good credit rating and a substantial net worth; or

(C) is not able to finance its acquisition of its interest in the Premises and its operations in the Premises without a material risk of defaulting under this Lease and in a manner that will enable the proposed assignee or subtenant to carry on business successfully in the Premises throughout the term;

....

(iii) the Landlord does not receive sufficient information from the Tenant or the proposed assignee or subtenant to enable it to make a determination concerning the matters set out above.

11.02 HOW CONSENT OBTAINED: In requesting the Landlord's consent pursuant to Section 11.01 herein, the Tenant shall provide the Landlord with all information that it may reasonably require, as set out above, including a true copy of any agreement to assign, or agreement to sublease. Such information may pertain to the identity to the proposed assignee, . . . the nature of its business, and information pertaining to the financial strength of its covenant, and such other information as the Landlord shall, from time to time, acting reasonably, require. The Landlord shall maintain confidentiality in respect of all such information received. The Landlord will, within thirty (30) days after having received such notice and all such necessary information, notify the Tenant in writing either that:

- (a) it consents to the Transfer;
- (b) it does not consent to the Transfer; or
- (c) it elects to cancel this Lease in preference to giving consent.

... "

7 On December 6, 2002, at an early stage in the negotiations between the parties, a representative of Dundee, on behalf of the Landlord, indicated that consent to the assignment would be given if a number of conditions were satisfied. In the course of the negotiations, the great majority of these conditions - some of which would have involved additions or alterations to the terms of the lease - were either abandoned or resolved to the satisfaction of the parties. At different times, at the request of Dundee, credit references, information with respect to the net worth of the principals, Mr. and Mrs. Harish and Rajni Verma, who would guarantee performance of the Purchaser's obligations and who would be involved in the operation of the business, and a very brief description, without details, of their previous experience in operating similar businesses, were provided. At the insistence of Dundee they also submitted a business plan that outlined their goals, the opportunities they saw for increasing sales and cash flow projections.

8 In the letter of February 27, 2003, when notifying the solicitor for the Tenant that the Landlord was withholding its consent, an officer of Dundee stated:

"The Landlord is unable to provide its consent to the tenant for the following reasons:

- (1) the tenant is presently in default of the lease for failure to perform certain conditions;
- (2) the proposed assignee does not have a history of successful business operation in the business to be conducted in the Premises;
- (3) insufficient information has been provided to determine if the proposed assignee has a substantial net worth;
- (4) there is a material risk that the proposed assignee will not be able to successfully carry on the business;

Insufficient information has been provided to permit the Landlord to make a determination concerning the matters set out above."

9 In determining whether the Landlord has unreasonably withheld consent, I believe the following propositions are supported by the authorities cited by counsel and are of assistance:

1. The burden is on the Tenant to satisfy the court that the refusal to consent was unreasonable: *Shields v. Dickler*, [1948] O.W.N. 145 (Ont. C.A.), at pages 149 - 50; *Sundance Investment Corp. v. Richfield Properties Ltd.*, [1983] 2

[W.W.R. 493](#) (Alta. C.A.), at page 500; cf. *Welch Foods Inc. v. Cadbury Beverages Canada Inc.* (2001), 140 O.A.C. 320 (Ont. C.A.), at page 331. In deciding whether the burden has been discharged, the question is not whether the court would have reached the same conclusion as the Landlord or even whether a reasonable person might have given consent; it is whether a reasonable person could have withheld consent: *Whiteminster Estates v. Hodges Menswear* (1974), 232 E.G. 715, at pages 715 - 6; *Zellers Inc. v. Brad-Jay Investments Ltd.* (Ont. S.C.J.), at para 35.

2. In determining the reasonableness of a refusal to consent, it is the information available to - and the reasons given by - the Landlord at the time of the refusal - and not any additional, or different, facts or reasons provided subsequently to the court - that is material: *Bromley Park Garden Estates v. Moss*, [1982] 2 All E.R. 890 (Eng. C.A.), at page 901 - 2 *per* Slade L.J.. Further, it is not necessary for the Landlord to prove that the conclusions which led it to refuse consent were justified, if they were conclusions that might have been reached by a reasonable person in the circumstances: *Pimms Ltd. v. Tallow Chandlers in London (City)*, [1964] 2 All E.R. 145 (Eng. C.A.), at page 151.

3. The question must be considered in the light of the existing provisions of the lease that define and delimit the subject matter of the assignment as well as the right of the Tenant to assign and that of the Landlord to withhold consent. The Landlord is not entitled to require amendments to the terms of lease that will provide it with more advantageous terms: *Jo-Emma Restaurants Ltd. v. A. Merkur & Sons Ltd.* (1989), 7 R.P.R. (2d) 298 (Ont. Dist. Ct.); *Town Investments Underlease, Re*, [1954] Ch. 301 (Eng. Ch. Div.) - but, as a general rule, it may reasonably withhold consent if the assignment will diminish the value of its rights under it, or of its reversion: *Federal Business Development Bank v. Starr* (1986), 55 O.R. (2d) 65 (Ont. H.C.), at page 72. A refusal will, however, be unreasonable if it was designed to achieve a collateral purpose, or benefit to the Landlord, that was wholly unconnected with the bargain between the Landlord and the Tenant reflected in the terms of the lease: *Bromley Park Garden Estates v. Moss*, above, at page 901 *per* Dunn L.J.)

4. A probability that the proposed assignee will default in its obligations under the lease may, depending upon the circumstances, be a reasonable ground for withholding consent. A refusal to consent will not necessarily be unreasonable simply because the Landlord will have the same legal rights in the event of default by the assignee as it has against the assignor: *Ashworth Frazer Ltd. v. Gloucester City Council*, [2001] H.L.J. No. 57 (U.K. H.L.).

5. The financial position of the assignee may be a relevant consideration. This was encompassed by the references to the "personality" of an assignee in the older cases see, for example, *Slanly v. Ward* (1913), 29 T.L.R. 714 (Eng. C.A.); *Dominion Stores Ltd. v. Bramalea Ltd.*, [1985] O.J. No. 1874 (Ont. Dist. Ct.)

6. The question of reasonableness is essentially one of fact that must be determined on the circumstances of the particular case, including the commercial realities of the market place and the economic impact of an assignment on the Landlord. Decisions in other cases that consent was reasonably, or unreasonably, withheld are not precedents that will dictate the result in the case before the court: *Bickel v. Duke of Westminster*, [1976] 3 All E.R. 801 (Eng. C.A.), at pages 804-5; *Ashworth Frazer Ltd. v. Gloucester City Council*, above, at para 67; *Dominion Stores Ltd. v. Bramalea Ltd.*, above, at para 25.

10 Here, I believe, the starting point should be the terms of Article XI of the lease and, in particular, those of clauses (A), (B) and (C). It is clear that the Landlord purported to rely on these clauses - and subparagraph (iii) - as the bases for its refusal set out in the letter of February 27, 2003. In my opinion, the additional reason provided by the Landlord in the letter - that the Tenant was in default of an obligation to perform certain renovations to the Premises - would not, in the circumstances, be sufficient in itself to justify the Landlord's refusal to consent. Nor, do I believe that, in view of the substantial measure of agreement that had been reached on this question, it would have been a crucial consideration.

11 The other three reasons set out in the letter followed quite closely the words of clauses (A), (B) and (C). The letter states, in the first place, that each of the three conditions had not been satisfied. It is then said that the Landlord had not been provided with sufficient information to enable it to make a determination with respect to them. I understand this to mean that the Landlord did not believe that the conditions had been satisfied and that, in any event, the information

provided was inadequate to establish the contrary. This is consistent with the affidavits sworn on behalf of the Landlord in which it was said that, having reviewed the material and information provided by the Tenant, Dundee was not satisfied that the Purchaser had the necessary experience to operate the business successfully or would be able to do so without a material risk of a default under the lease.

12 Although in Mr. Reed's submission, the Landlord's conclusion could not be considered to be reasonable on the basis of the information that had been provided to it, he also challenged the relevance, and the legitimacy, of the Landlord's consideration of the ability of the Tenant to carry on the business successfully.

13 From the commencement of the negotiations, the Landlord had required the Tenant to provide a detailed business plan. In a letter of December 18, 2002, the Tenant's solicitors took the position that there was no requirement "in the lease or otherwise" for the provision of such a plan and that, in any event, that the Landlord's indication that it would consent on certain conditions was binding on it notwithstanding the conditions. They characterized the Landlord's request as an attempt to interfere with the sale of the business. The Landlord's solicitors responded on January 17, 2003 that its consent was conditional and that the conditions had not been met. Their letter continued:

"You make various references in your letter to the landlord attempting to "interfere with the sale of the business". This accusation is inaccurate and unwarranted. The landlord does not object to the sale of the business per se. However, your clients' business is the only food use in the building. The Landlord is therefore naturally concerned that the assignee be able to demonstrate that it has the financial ability and business experience and acumen to carry on the business "in a reputable and first class manner", as required by the lease. To date, it has not done so. Virtually all the conditions in the landlord's letter are directed to this point."

14 After further requests were made for a business plan, a document purporting to be such was provided to the Landlord in January, 2003. In a letter of January 24, 2003, after the statement of affairs and financial information had been provided to the Landlord, and after at least one of the meetings between the parties and their representatives, the vice-president of Dundee referred to an agreement that the Tenant would provide further information relating, among other things, to the financial capability of the Purchaser to support the operation of the restaurant and pay the rent, the business knowledge and capability of the Purchaser to operate the restaurant in a first class manner and a complete business plan. The letter stated that the previous application was refused as the information it provided was disorganized and incomplete. In response, the solicitor for the Tenant asserted that sufficient detail had been provided.

15 On February 6, 2003 a vice-president of Dundee replied that, based on the information provided, the business experience of Mr. and Mrs. Verma was, in the judgment of the Landlord, inadequate to enable them to operate the business successfully. Further information was, again, requested. The letter also stated that the business plan that had been provided had many flaws and that it ignored the fact that another tenant - a design school - that generated a large amount of custom for the cafe would be leaving the building in August, 2003. The letter continued:

"For the business plan to ignore this important fact makes the financial forecast presented unachievable. As it is, the plan shows negative earnings for the first year with sales slowly building to create profitability in the future. With sales actually likely to drop off significantly, it would appear that there would be no profit through the balance of the term of the current lease. As a landlord, it is very difficult to accept an assignment of a lease to what appears to be a business that has a high probability of failure, irrespective of the fact that there are personal guarantees of the principals of the business. In order to approve the assignment we will require a plausible business plan that shows how the assignee plans to deal with the departure of the design school and increase sales in order to reach a level of profitability within a reasonable period."

The letter stated, further, that, in view of the inadequacy of the information relating to the business experience of the principals, more evidence was needed in order to assure the Landlord that the business could be operated successfully by the Purchaser.

16 The Tenant's solicitor replied in letter of February 14, 2003 which, among other things, stated:

"A business plan was and is not a requirement in order to obtain the Landlord's consent. It was provided only as an accommodation and your opinion regarding the future viability of the business has no bearing on the provision of a consent."

17 In response to the request for further evidence of the business experience of Mr. and Mrs. Verma, the solicitor's letter merely communicated his belief that the Purchaser met the requirements of clause 11.01 (a) (i) (A) of the lease and stated that, if the Landlord did not consent to the assignment, a court application would be commenced. No further information was provided prior to the Landlord's final refusal letter of February 27, 2003.

18 In Mr. Reed's submission, the position taken by the Tenant's solicitor with respect to the Landlord's entitlement to a business plan was correct. Although section 5.01 required the Tenant to use and operate the premises in a first class manner, there was no covenant by the tenant to operate the business profitably. While, in determining whether to grant a lease to the original tenant, the Landlord could, no doubt, have treated this as a material consideration, it was not, in the absence of a provision to this effect in the lease, part of the bargain between them that burdened the rights that the tenant was entitled to assign, subject to the Landlord's reasonable withholding of consent. Mr. Reed submitted, further, that, independently of the conditions in clauses (A), (B) and (C), it would not have been reasonable for the Landlord to withhold consent on this ground and that, properly construed, the clauses did not authorize this to be done.

19 In counsel's submission, the three clauses were carefully drafted to set out exhaustively the considerations relating to the operation of the business and the financial position of the proposed assignee that might justify the Landlord's refusal to consent. These considerations were limited to the specific factual questions in each of the clauses. Clause (A) was concerned with the previous business experience of the proposed assignee, clause (B) with its credit rating and net worth and clause (C) with its ability to finance the acquisition of the business and its operations.

20 On the basis of this interpretation, it would not be permissible for the Landlord to consider the likely profitability of the business other than by reference to the three specific factual questions.

21 I have found this to be a difficult question but, on balance, I believe that Mr. Reed's submission that the conditions in the three clauses were intended to be exhaustive is correct. If this was not the intention - so that the Landlord could reasonably withhold consent if, for any reason, it was not satisfied that the proposed assignee would carry on the business profitably - it would have been a relatively simple matter for this to be stated. Such a provision would, however, have permitted the Landlord to refuse consent if, for reasons unconnected with the express conditions in the three clauses, it reasonably considered that the business was no longer viable. This would not have entitled the Landlord to terminate the lease and I do not believe it was authorized to withhold its consent to an assignment on this ground. The ability of the proposed assignee to carry on the business successfully was inferentially addressed in conditions (A) and (C) and its ability to provide financial backing for its obligations in conditions (B) and (C). I believe these conditions should be considered as defining and delimiting the grounds on which the Landlord can reasonably withhold consent to the assignment in so far as these attributes of the assignee are concerned.

22 However, it does not follow that the ability of the Purchaser to carry on the business successfully is irrelevant. The contrary is implicit in clauses (A) and (C). The conditions in the three clauses are, I believe interconnected and each does not have to be considered separately from the others. In particular, in considering whether the condition in clause (A) was satisfied, I believe the Landlord was entitled to measure the sufficiency of the business experience of Mr. and Mrs. Verma with reference to their ability to operate the business successfully. Similarly, in deciding under clause (C) whether the Purchaser was "able to finance . . . its operations in the Premises without a material risk of defaulting under this Lease and in a manner that will enable the proposed assignee . . . to carry on business successfully in the Premises throughout the term", I believe the Landlord was entitled to take into consideration the information it received with respect to the conditions in clauses (A) and (B) and to make its decision on the basis of such information.

23 In determining whether the Landlord could not reasonably arrive at the conclusions set out in its final letter of February 27, 2003, I believe the court should be slow to substitute its judgment for the business judgment of the Landlord. Although, in my opinion, the conditions contained in Dundee's early letter of December 6, 2003, extended beyond the limits of reasonableness, I am satisfied that, subsequently, when deciding to withhold consent, the Landlord had regard to the conditions in section 11.01 and weighed the information it had previously received with respect to each of them. If the question was simply whether Mr. and Mrs. Verma had sufficient assets to enable them to acquire and operate the business without a material risk of defaulting in the payment of rent, the reasonableness of the Landlord's decision might well have been more difficult to justify. However, the sufficiency of their business experience was a recurring theme in virtually all of the correspondence from Dundee and I am satisfied that ultimately, as stated in the responding affidavit sworn on behalf of the Landlord, it was a decisive factor.

24 The negotiations between the parties had been quite extensive and there is nothing in the evidence to suggest that the Landlord did not conduct them in good faith. Its valid concerns about the adequacy of Mr. and Mrs. Verma's business experience were repeatedly communicated to the Tenant's solicitors but, to a large extent, they fell upon deaf ears, when their legitimacy was not rejected. The information relating to the principals' business experience was extremely cursory. That with respect to the experience of Mr. Verma outside Canada was impossible for the Landlord to verify without more details and no response was received to its request for further information in the letter of February 6, 2003. The Landlord was entitled to seek such information and, when it was not forthcoming, to base its decision on the totality of the information it had received. For the reasons already given, additional facts provided to the court in an affidavit sworn by Mrs. Verma are not relevant to the issue I have to determine - namely, the reasonableness of the Landlord's decision at the time it withheld consent. In the circumstances, I do not believe the court should characterize the decision to withhold consent to be one that could not have been reached by a reasonable person.

25 For these reasons, I find that the Tenant has not discharged the burden of proving that the Landlord's refusal to consent to the assignment was unreasonable. In consequence, the application is dismissed.

26 Costs may be spoken to, or if counsel would prefer to make submissions in writing, I will receive the submissions of counsel for the Landlord within 14 days of the release of this endorsement and those of counsel for the Tenant within a further seven days.

Application dismissed.

TAB 9

2002 ABQB 455
Alberta Court of Queen's Bench

Exxonmobil Canada Energy v. Novagas Canada Ltd.

2002 CarswellAlta 739, 2002 ABQB 455, [2002] A.J. No. 775, [2003] 3 W.W.R.
657, 10 Alta. L.R. (4th) 80, 122 A.C.W.S. (3d) 1125, 30 B.L.R. (3d) 262, 318 A.R. 99

**Exxonmobil Canada Energy, Plaintiff and Novagas Canada Ltd., Novagas
Canada Limited Partnership and Solex Gas Processing Corp., Defendants**

Park J.

Heard: April 4, 2002
Judgment: May 9, 2002
Docket: Calgary 0201-03570

Counsel: *Douglas G. Mills*, for Plaintiff

C.J. Shaw, Q.C., for Defendant, Solex Gas Processing Corp.

W.J. Kenny, Q.C., for Defendants, Novagas Canada Ltd., Novagas Canada Limited Partnership

Subject: Civil Practice and Procedure

Headnote

Injunctions — Availability of injunctions — Prohibitive injunctions — Interim and interlocutory injunctions — Threshold test — General

Plaintiff and defendant limited partnership N entered into agreement whereby N would manage interest of plaintiff and process plaintiff's gas in certain area plant — Agreement provided that neither party could assign its interest in agreement without consent of other party, such consent not being unreasonably withheld — N entered into agreement to sell all of its interest in agreement to defendant S Corp. — Plaintiff's request for various information of S Corp. in order to assess its position with respect to granting consent to proposed assignment was not met — Although plaintiff had not consented, N intended to proceed with assignment — Application by plaintiff for interim interlocutory injunction enjoining defendants from proceeding further with implementation of assignment was granted on basis that clear breach of covenant not to assign without consent existed — Defendants brought application for order vacating order of applications judge — Application dismissed — Evidence was not sufficient to show that plaintiff unreasonably withheld its consent — Reasonable person in circumstances would have refused to consent to assignment — Plaintiff did not withhold its consent for improper reasons — As clear breach of clear negative covenant existed, tripartite test for interlocutory injunction was not strictly applied — Plaintiffs could not show that irreparable harm would result, but balance of convenience favoured plaintiff — Insufficient evidence existed to show that court should not grant injunction on de nova basis or that court should vacate or vary injunction granted by applications judge.

Injunctions --- Form and operation of order — Continuance of interim or interlocutory injunctions — Balance of convenience — Status quo

Plaintiff and defendant limited partnership N entered into agreement whereby N would manage interest of plaintiff and process plaintiff's gas in certain area plant — Agreement provided that neither party could assign its interest in agreement without consent of other party, such consent not being unreasonably withheld — N entered into agreement to sell all of its interest in agreement to defendant S Corp. — Plaintiff's request for various information of S Corp. in order to assess its position with respect to granting consent to proposed assignment was not met

— Although plaintiff had not consented, N intended to proceed with assignment — Application by plaintiff for interim interlocutory injunction enjoining defendants from proceeding further with implementation of assignment was granted on basis that clear breach of covenant not to assign without consent existed — Defendants brought application for order vacating order of applications judge — Application dismissed — Evidence was not sufficient to show that plaintiff unreasonably withheld its consent — Reasonable person in circumstances would have refused to consent to assignment — Plaintiff did not withhold its consent for improper reasons — As clear breach of clear negative covenant existed, tripartite test for interlocutory injunction was not strictly applied — Plaintiffs could not show that irreparable harm would result, but balance of convenience favoured plaintiff — Insufficient evidence existed to show that court should not grant injunction on de nova basis or that court should vacate or vary injunction granted by applications judge.

Table of Authorities

Cases considered by *Park J.*:

Amoco Canada Petroleum Co. v. Alberta & Southern Gas Co., 3 Alta. L.R. (3d) 247, [1992] 5 W.W.R. 431, 130 A.R. 252, 1992 CarswellAlta 89 (Alta. Q.B.) — considered

Biologische Heilmittel Heel GmbH v. Acti-Form Ltd., 110 F.T.R. 194, 67 C.P.R. (3d) 61, 1996 CarswellNat 396 (Fed. T.D.) — considered

Canada Safeway Ltd. v. Excelsior Life Insurance Co., 55 Alta. L.R. (2d) 120, 82 A.R. 316, 1987 CarswellAlta 213 (Alta. C.A.) — considered

Canadian Imperial Bank of Commerce Corporation v. 7241233 Alberta Ltd. (October 14, 1999) (Alta. Q.B.) — considered

Debra's Hotels Inc. v. Lee, 24 Alta. L.R. (3d) 199, 159 A.R. 268, 58 C.P.R. (3d) 468, 1994 CarswellAlta 244 (Alta. Q.B.) — followed

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RJR-Macdonald Inc. c. Canada (Procureur général), (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) 127 D.L.R. (4th) 1, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) [1995] 3 S.C.R. 199, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) 100 C.C.C. (3d) 449, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) 62 C.P.R. (3d) 417, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) 31 C.R.R. (2d) 189, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 187 N.R. 1, 1995 CarswellQue 119, 1995 CarswellQue 119F (S.C.C.) — followed

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W-K Trucking Inc. v. Bidulock Oilfield Service Ltd., 1998 CarswellAlta 1058, 26 C.P.C. (4th) 400, 234 A.R. 363 (Alta. Q.B.) — considered

APPLICATION by defendants for order vacating order granted to plaintiff for interim interlocutory injunction.

Park J.:

1 The Order granted by Mr. Justice Wilkins on February 28, 2002 and entered on March 12, 2002 provided the Plaintiff, Exxonmobil Canada Energy ("EMC") with an interim interlocutory injunction as against the Defendants and each of them. The Defendants, Novagas Canada Limited Partnership ("NCLP"), Novagas Canada Limited ("NCL") and Solex Gas Processing Corp. ("Solex") were enjoined from proceeding further with the implementation of the assignment of the interest of NCLP in the Representation, Management and Processing Agreement made between NCLP and Mobil Oil Canada and dated October 17, 1997 ("the Agreement") to Solex ("the Assignment"). The Defendants asked me to provide an Order vacating the order of Wilkins J. and accordingly permit NCLP to proceed with the further implementation of the assignment of the interest of NCLP in the Agreement to Solex. The Defendants maintain that the effect of the injunction restrains the implementation of the sale.

2 The application was brought before Wilkins J. by EMC on approximately 3 hours' notice to NCLP and NCL. NCLP and NCL were in attendance at the application with counsel, Mr. Douglas I.D. McLean. He appeared on short notice as a courtesy and to try and place NCL and NCLPs' position to the Court. He presented a very brief affidavit indicating that with the Assignment to Solex, there was no release of NCL's original covenant to EMC. Mr. McLean did not have the opportunity to conduct cross-examination on the affidavit of Merle Browne, sworn on behalf of EMC. Solex was not served by the Burnet, Duckworth & Palmer law firm representing EMC with the Notice of Motion requesting an abridgment of time for service and the interim interlocutory injunction. Instead EMC itself on 3 hours' notice faxed a copy of the Notice of Motion to Solex. Solex was not present nor did it have counsel before Wilkins J. In that scenario Wilkins J. granted the injunction on the evidence before him. Mr. McLean requested a Stay of Proceedings after the injunction was granted but that was denied. However, Wilkins, J. gave the parties liberty to re-attend on application to vary that Order following cross-examinations on the affidavits then filed or upon filing of further evidence. The Defendants now so apply before me. The additional evidence now before me, which was not before Wilkins J. (given the time constraints) includes the following:

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(a) Affidavit of Kevin Orrin Jabusch sworn March 8, 2002 on behalf of the Defendant, Solex Gas Processing Corp.;

(b) Supplemental Affidavit of Kevin Orrin Jabusch sworn March 11, 2002;

(c) Supplemental Affidavit of Richard N. Gateman sworn March 11, 2002; and

(d) Cross-examination transcripts from the cross-examination of each of the three affiants, Merle W. Brown, Kevin Jabusch and Richard N. Gateman.

3 Given the speedy resolution in the initial application before Wilkins J., NCLP and NCL's courteous and expeditious attendance, Solex's inability to participate due to its non-attendance, and in spirit with the request, which was granted, of NCL and NCLP to cross-examine on the affidavits and to place further evidence before the Court, I intend to proceed in the following manner. I did not intend on reversing Wilkins J. in any form or fashion based upon only the evidence before him. However, if there is new evidence placed before me, on which I rely, and that new evidence indicates that I should come to a different view than that afforded by Wilkins J., then I am prepared to do that and vary or vacate his order. I might add that such further evidence must be of sufficient relevance and weight to demonstrate a different ruling should occur. Wilkins J. and the parties contemplated such a procedure and result due to the time and notice constraints involved in the initial application. If the further evidence only replicates the evidence before Wilkins J. then I will not disturb, vary or vacate his order. But if that further evidence reveals that EMC has not established before me a foundation for the granting of an injunction, then I will rule on the basis of that further and better evidence. In proceeding on that further and better evidence I will in effect be treating the Chambers application as a *de nova* hearing before me. In such an instance I will be at liberty to vary or vacate the original order.

4 The facts as put before Wilkins J. were based upon the affidavit of Merle Brown, an employee of EMC. It indicated as follows:

1. The Plaintiff is a partnership registered and carrying on business in Alberta. The Defendant, NCLP, is a limited partnership registered and carrying on business in Alberta. The Defendant NCL is the current general partner of NCLP. The Defendant, Solex, is a body corporate in Alberta.

2. By the terms of a Representation, Management and Processing Agreement dated October 17, 1997 and accepted October 22, 1997 between NCLP and EMC, by its predecessor Mobil Oil Canada (the Agreement), the parties agreed on the terms by which NCLP would manage the interest of EMC in the Harmattan Area Plant and the terms by which NCLP would process EMC's gas at the Harmattan Area Plant. EMC holds a 56% ownership interest in the Harmattan Area Plant.

3. By the terms of the Agreement EMC delegated to NCLP the management, operations and control of EMC's interest in the Harmattan Area Plant and appointed NCLP its sole and exclusive agent with respect to EMC's ownership interest in and rights to the Harmattan Area Plant including:

(a) EMC's right to vote under the Harmattan Area Plant Construction and Operation Agreement;

(b) EMC's right to initiate or conduct any operations at the Harmattan Area Plant; and

(c) EMC's representation rights on the Harmattan Area Plant operating committee.

4. Under the terms of the Agreement, in particular in clause 2.2 thereof, NCLP was entitled to exercise all of these rights and powers without consultation with or approval or ratification by EMC and NCLP was entitled to bind EMC to decisions taken by NCLP.

5. EMC agreed to delegate all these rights, powers and obligations to NCLP based upon NCLP's financial strength and upon NCLP's operational expertise. In addition, EMC relied upon clause 4.2 of the Agreement whereby NCLP agreed to indemnify EMC for all losses, costs, damages and expenses suffered by EMC by reason of any acts or omissions of NCLP in its operations at the Harmattan Area Plant. EMC relied upon the strength of NCLP's indemnities in making its decision to execute the Agreement.

6. The Agreement provided in clause 7.1(a) that neither party can assign its interest in the Agreement without the consent of the other party, such consent not to be unreasonably withheld. The party hereto assigning such interest shall not be released from any of its obligations hereunder unless or until the Assignee has been novated into the Agreement.

7. By letter dated January 17, 2002, NCLP advised EMC that it had entered into a binding Purchase and Sale Agreement to sell all of its interest in the Agreement to the Defendant Solex. NCLP requested that EMC consent to the assignment of NCLP's interest in the Agreement to Solex. NCLP further advised that Solex was intending to exercise certain of NCLP's rights under the Agreement following the assignment, specifically, NCLP's right to purchase EMC's interest in the Harmattan Area Plant for \$1.00 Canadian.

8. In response to NCLP's request for EMC's consent, EMC requested various information of Solex in order that EMC could assess its position with respect to granting consent to the proposed assignment. To date, EMC has not received sufficient information from Solex or NCLP in order to allow it to properly assess its position with respect to consent to the proposed assignment and EMC has so advised the Defendants. In particular, EMC has, to date, been unable to satisfy itself as to Solex's financial or operational capability to satisfy the covenants of NCLP to EMC, as provided for in the Agreement.

9. Notwithstanding EMC's advice that it did not consent to the proposed assignment, NCLP advised EMC as late as February 25, 2002 that it intended to proceed with the assignment of NCLP's interest in the Agreement to Solex, with closing scheduled for March 1, 2002.

10. EMC is concerned that the Defendants not take steps directly contrary to the non-assignment covenant at clause 7.1(a) of the Agreement and is concerned that EMC could be irreparably harmed by the proposed assignment. In particular, any actions taken by Solex with respect to the Harmattan Area Plant operations may result in damages to the interests of EMC which cannot be reasonably or adequately compensated for by Solex or by NCLP. Until such time as EMC can assess the financial and operational capabilities of the proposed assignee Solex, EMC is put to a risk it did not agree to assume under the Agreement.

5 EMC advised the Defendants that if NCLP is found to be a defaulting party under the terms of the Agreement by virtue of an improper assignment of its interests, then EMC might choose to terminate the Agreement under clause 2.12. EMC would accordingly be entitled to resume control of the operations of the Harmattan Area Plant.

6 EMC submitted that if Solex were allowed to take control of the Harmattan Plant before relief is granted to EMC, there is no way to ensure that Solex will conduct proper operations or that Solex could be held financially accountable for any damages occasioned by their operations.

7 In opposition to the facts as alleged in the affidavit of Merle Brown, the Defendants, NCLP and NCL, put forth to Wilkins J. the affidavit of Richard Gateman, an employee of TransCanada PipeLines Limited ("TransCanada"), which is the direct or indirect parent company of NCL. Gateman deposed that, since advising EMC of the proposed sale to Solex, there were a number of discussions with EMC. In none of those discussions did EMC ever express to NCL or NCLP that EMC felt it might suffer irreparable harm as a consequence of the proposed sale and disposition of the NCL and/or NCLP interest in the Agreement to Solex. Gateman further believed that NCL and NCLP provided all information that was reasonably required by EMC in order to enable it to determine the appropriateness of granting its consent to the NCL/NCLP transaction with Solex. Gateman believed that EMC's neglect or refusal to give consent to the transaction constituted and unreasonable withholding of consent. He believed that as a consequence of EMC's unreasonable withholding of consent, NCL and NCLP are entitled to proceed without such consent. Gateman deposed EMC knew that the proposed transaction with Solex was to close at the end of February and it was not until February 27, at the earliest, that NCL/NCLP was given any indication that EMC might initiate any legal action in relation to this matter. No documents were served or provided to NCL/NCLP until approximately noon on February 28, 2002 (which is the same date as the application before Wilkins J.). Gateman further deposed that as long as Solex is not novated into the Agreement, NCLP remains in the Agreement and remains liable to EMC. EMC would continue to have the same rights against NCLP as it did prior to any transaction between NCL/NCLP and Solex. Thus he did not believe EMC would be disadvantaged or put in a position where it would have any less recourse than it currently enjoys.

8 Finally, Gateman advised that NCL and NCLP had closed the transaction with Solex at the date of February 28, 2002.

9 I note that the closing took place despite the absence of consent of EMC and on the same day the application was heard by Wilkins J.

10 Wilkins J., in granting the injunction, found there was a clear breach of the covenant not to assign without the consent of EMC. NCL did not obtain the consent of EMC before the assignment. He rejected the Defendants' submission that EMC had received sufficient information to provide a consent. Rather, he held that EMC did not have sufficient information on which to base a consent. Wilkins J. noted that EMC conceded it could probably not show irreparable harm in accordance with the tripartite test as set out in the case of *Ominayak v. Norcen Energy Resources Ltd.*, [1985] A.J. No. 650 (Alta. C.A.) [hereinafter *Lubicon Lake Indian Band v. Norcen Energy Resources Ltd.*]. But he found that it was a clear unequivocal breach. He recognized the judgment of Madam Justice Hunt [as she then was] in *Debra's Hotels*

Inc. v. Lee, [1994] A.J. No. 748 (Alta. Q.B.) and her recognition that the issue of damages or balance of convenience are not excluded in the case of a clear unequivocal breach. But his reasons held that, until full disclosure was made to determine whether or not the consent of EMC was unreasonably withheld, the status quo ought to be maintained. Thus he granted the order.

11 The Defendants filed their additional affidavits and cross-examination were completed. The real issue now becomes: Does this additional evidence demonstrate that EMC has unreasonably withheld its consent?

12 In looking at this evidence it becomes apparent that Solex did provide certain information to EMC at a meeting held on February 22, 2002 including a written response to EMC's February 11, 2002 letter request. That information included the corporate structure, the principals and directors, the management structure, undisclosed debt financing, past equity financing, undisclosed future equity financing, business references, operational capability and experience, safety, health and environmental plans, a historical performance of Solex and its parent company, Solex Development Corp. and the Solex Group of companies. A corporate summary of Solex Development Corp. dated February, 2002 had been provided to EMC on February 8, 2002.

13 At an earlier meeting on January 23, 2002 Solex representatives met with EMC representatives. EMC presented a Powerpoint presentation titled, "Discussion with Solex Gas Processing Corporation Proposed Acquisition of Harmattan Plant". Under the heading of 'EMC Expectations'. EMC wrote:

Key business terms & conditions captured in formal agreements prior to providing consent.

Closure of outstanding business issues with TCM prior to transaction closing date

14 In this meeting of January 23, 2002, Kevin Jabusch, a Vice-President with Solex, advised various employees of EMC that the corporate structure and shareholders of Solex would be made known to EMC at a later date, due to confidentiality.

15 As well, Jabusch, swore in his affidavit of March 8, 2002 that:

12. In late January 2002, I received a telephone call from an EMC representative in EMC's Treasury Department requesting Solex's financial statements. I informed him financial statements for Solex were not available but offered to review with EMC corporate information about the Solex Group, including Solex.

13. Solex can now provide that corporate information regarding the Solex Group, including Solex, which is as follows: Solex Development Corp. ("SDC") and its financial partner, 960345 Alberta Ltd. ("960345") have established Solex Gas Processing Corp ("SGPC") to acquire and operate the Harmattan Plant and to develop the gas processing business in the Harmattan Area. The shareholders of SGPC will include, directly and indirectly, the management of SDC and 960345 which is indirectly controlled by N. Murray Edwards ("Edwards"). Edwards is a director and/or officer of three of the largest independent oil and gas resource companies based in Calgary, Alberta, namely Canadian Natural Resources Limited, Rio Alto Exploration Ltd. and Penn West Petroleum Ltd. I believe the shareholders and management of SGPC will have the capability and expertise to raise all reasonably expected required funding to operate the Harmattan Plant and to develop the gas processing business in the Harmattan Area.

16 Jabusch as well deposed to the Solex's group business and operational experience in the oil and gas industry and in gas processing plants in particular. He provided information regarding the Solex's group past financial experience.

17 As a result of the information provided by Solex, EMC took the position before me that it had no objection or problems with the operational capabilities of the Defendant, Solex. In fact, Solex has been performing management and supervisory functions at the Harmattan Area Plant since February 1, 2002. EMC is satisfied that Solex does have the management capability to manage the day-to-day operations of the plant.

18 Kevin Jabusch swore a supplemental affidavit on March 11, 2002 wherein he deposed that Solex expects revenues generated from the Harmattan Area Plant to cover Solex's obligations to EMC under the Agreement. He further deposed that prior to completion of planned Solex "initiatives" to lower costs and increase the Harmattan Area Plant throughput and revenues, the net cash flow for the month of February 2002 was materially positive.

19 Richard Gateman swore two supplemental affidavits on behalf of the Defendants, NCL and NCLP, dated March 11, 2002 and April 2, 2002 respectively. In the affidavit of March 11, 2002 he deposed to the fact that the Harmattan Plant has been publicly for sale for more than two years. On a proposed sale to Duke Energy Midstream Services Canada Ltd. (Duke), NCL and NCLP advised EMC by letter of October 18, 2001 that EMC's consent was sought to the assignment of NCLP's right, title and interest in the Harmattan Plant under the Representation Agreement. On October 18, 2001 EMC responded as follows by letter:

In summary, the transfer of NCLP's interest in the Harmattan Plant to a midstream company interested in ensuring longer term commercial viability of the Harmattan facilities through the creation of infrastructure to transport additional gas volumes to the plant is likely in the best interest of the producers. As such, EMC is prepared to work aggressively with NCLP and if necessary, any viable successor to resolve the few remaining issues required to conclude the Rep Agreement, key supporting agreements to the Rep Agreement, the BEAA and the NGGS agreement. Once these outstanding agreements have been executed, or alternative means are provided to ensure EMC has comparable levels of certainty that outstanding matters will be resolved to our satisfaction, EMC will be prepared to address NCLP's request in a timely manner.

20 The sale to Duke did not take place.

21 Instead, NCLP entered into its Purchase and Sale Agreement with Solex and requested EMC's consent in its letter of January 16, 2002 to EMC. Again, EMC requested in meetings and correspondence that it needed outstanding issues between itself and NCLP resolved under the Agreement before the closing of the sale. These outstanding issues had been the subject of prior discussions and some historical dispute between EMC and NCLP during NCLP's operation of the Harmattan Plant.

22 On January 24, 2002 a meeting was held between employees of NCLP and EMC to discuss the outstanding issues. NCLP's position was, that while it was prepared to do what it could to resolve the issues prior to closing, that might not be possible. EMC's position was that the outstanding issues needed to be resolved prior to closing. EMC further took the position, as brought out under cross examination of Merle Brown, that it did not tie those outstanding issues to the question of consent as is alleged by NCL and NCLP in this application before me.

23 In respect to the allegation of the Defendants that EMC needed to have the outstanding issues resolved before deciding whether to consent, I note in Exhibit 'D' to the affidavit of Gateman of March 11, 2002, the notes of Kim Foore of TransCanada and which notes were made at the meeting of January 24, 2002. Ms. Foore placed the following entry in the second paragraph:

Rob — ExMo sees things differently with regard to resolving these outstanding issues prior to closing. ExxonMobil's JV partners may be impacted by decisions made by EMC therefore some decisions may be subject to partner approval. As Glen and Dennis have requested, we want this business relationship to end on a positive note. ExxonMobil is now in the process of doing their due diligence on Solex wrt to consent.

24 This would indicate to me on the Defendants' own notes that, despite the need to resolve the outstanding issues, EMC was not attaching the need to resolve those issues to the issue of consent. Ms. Foore's notation indicates that EMC was in a separate and distinct process of conducting its due diligence on Solex with respect to consent. I find that EMC was trying to resolve its outstanding issues with NCLP on the one hand. On the other hand, EMC was trying to conduct its separate due diligence on Solex, a new and distinct company from NCLP or NCL, with respect to the issue of consent. The due diligence centred on EMC's need in January 2002 to assess Solex's operational and financial

liability and/or capability to meet the substantial obligations set out in the Agreement. EMC, by its letter of January 21, 2002 to NCLP (Exhibit 'C' of Brown's affidavit of February 28, 2002), indicated it had preliminary discussions with Solex to determine Solex's capability to meet the obligations in the agreement. EMC complained that Solex had not provided enough factual information to allow EMC to make a proper determination. Again, in its letter of February 5, 2002 to NCLP (Exhibit 'D' in Brown's affidavit of February 28, 2002) EMC advised that Solex had failed to produce the requested financial information. It is apparent that EMC had commenced its due diligence but was not receiving any co-operation from Solex.

25 EMC continued in its correspondence of February 7, 2002, and in a meeting of that same date, to demand that it needed the outstanding issues resolved, and in addition that it needed to receive the necessary financial information concerning Solex's ability to fulfill NCLP's obligations under the agreement.

26 On February 11, 2002 EMC advised NCLP that until EMC became reasonably satisfied that Solex could meet all the obligations of NCLP under the agreement, it would withhold its consent. Amongst other things, EMC now wanted a corporate guarantee of Solex if Solex was a newly incorporated company.

27 On February 21, 2002, Solex met with EMC and presented and reviewed with EMC a document entitled Solex Information Request related to the Harmattan Acquisition. Additionally, at that meeting Solex outlined to EMC, Solex's future plans and what Solex saw as the opportunities to develop the Harmattan Plant.

28 EMC's focus with NCLP continued through the middle and latter part of February, 2002, to be exclusively on the resolution of the outstanding issues.

29 On February 27, 2002, there was a further meeting between Solex and EMC to deal with the agreements EMC had identified as wanting to have executed before transfer of operatorship. EMC wanted to get all the agreements in place that it had identified as crucial. For the agreements to be executed, required the resolution of outstanding issues. No agreements were signed and there remained outstanding issues following the meeting.

30 NCLP was somewhat surprised to learn on February 27, 2002, that EMC contended it had received very little information on Solex, despite NCLP's efforts to assist that process and to have EMC and Solex engage in meetings to deal directly with EMC's need to obtain the information and assurances it wanted.

31 Solex, NCLP and NCL took the position on this application before me that EMC was presenting a subterfuge in its position that it required more information on Solex before providing its consent to the assignment. The Defendants alleged that EMC's true position was this request for consent of the assignment allowed EMC to force NCL and NCLP to execute agreements and to resolve the outstanding issues. They maintained that EMC's consent was linked to the resolve of the outstanding issues.

32 NCLP has 21 Representation, Management and Processing Agreements with various co-owners of the Harmattan Plant. Twelve minority owners have expressly consented to the assignment of the Agreement to Solex. Five minority owners, have not responded, and are deemed by NCLP and NCL to have provided an implied consent by their non-response. Four owners, including EMC, have refused to consent. However, those four non-consenting owners represent 85 % to 88 % of the aggregate interest in the Harmattan Plant.

33 The Defendants advanced the position before me that, while Solex may not have provided some corporate information prior to February 28, 2002 relating to some of its shareholders and investors, that information as set out in Kevin Jabusch's affidavit, now reveals that Solex is linked to the established Solex Development Corp. Further, Solex shareholders will include the management of Solex Development Corp. and 960345 Alberta Ltd., which is indirectly controlled by the well-respected N. Murray Edwards of Calgary.

34 The Defendants directed my attention to the fact that the assignment of NCLP's interest in the Representation Agreement to Solex does not relieve NCLP of its obligations to EMC under that Agreement to EMC. EMC's consent

to NCLP's assignment to Solex would not relieve NCLP of any obligations under that Agreement to EMC. Absent a novation by EMC, NCLP is, and will remain, contractually obligated for all matters that have arisen under the Representation Agreement to date and on into the future, irrespective of the assignment to Solex and to any consent given by EMC to the assignment.

35 The Defendants further pointed out that NCLP's understanding of the operation of Representation Agreement is that if, and only if, EMC executes a novation of Solex into the Representation Agreement, would NCLP be relieved of obligations under the Representation Agreement which would arise after the effective date of the novation. Even in the event of such a novation, NCLP would continue to remain liable for the obligations under the Representation Agreement that arose prior to the effective date of any such novation. Under these circumstances, Solex's financial ability should not be a major issue as NCLP, the party with whom EMC contracted, remains obligated under the Representation Agreement for so long as EMC wishes, irrespective of Solex being assigned into the Agreement. In effect, Solex has enhanced EMC's position by voluntarily assuming the obligations of the Representation Agreement.

36 The Defendants also brought to my attention the fact that EMC has acknowledged that it understood NCLP was only requesting a consent to the assignment of NCLP's interest in the Agreement to Solex and that NCLP was not requesting a novation.

37 Finally, the Defendants pointed the Court's attention to the fact that EMC also acknowledges that until a novation agreement is entered into, NCLP would not be released from any of its obligations under the Agreement and, that if Solex receives an assignment of the Agreement, it agrees to take on the obligations under the Agreement, so that if consent were given but absent a novation, EMC would have both NCLP and Solex responsible for the obligations under the Agreement.

38 An applicant for an interlocutory injunction must satisfy the tripartite sequential test as set out in *RJR-Macdonald Inc. v. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.). Namely, an applicant must demonstrate that:

- (a) There is a serious issue to be tried;
- (b) Irreparable harm would be occasioned if it is not readily compensable in damages; and
- (c) The balance of convenience favours the granting of the injunction.

39 In order to be successful, the applicants must tender evidence of irreparable harm that is clear and not speculative. Evidence showing that the applicant was "likely" to suffer irreparable harm is not sufficient.

Biologische Heilmittel Heel GmbH v. Acti-Form Ltd., [1996] F.C.J. No. 419 (Fed. T.D.), as quoted in *Thermo Star Products Ltd. v. Tomlinson*, [1997] A.J. No. 224 (Alta. Q.B.) at paragraph 22.

40 Irreparable harm does not mean that the injury is beyond the possibility of monetary compensation, but that it is of such a nature that no fair and reasonable redress may be had in a Court of law and that it would be a denial of justice to refuse the injunction.

Lubicon Lake Indian Band v. Norcen Energy Resources Ltd., [1985] A.J. No. 650 (Alta. C.A.) at page 145.

41 If damages would be an adequate remedy and the defendant would be financially able to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's case appeared to be.

Amoco Canada Petroleum Co. v. Alberta & Southern Gas Co., [1992] A.J. No. 509 (Alta. Q.B.)

42 EMC conceded before Wilkins J. and me that it could not demonstrate irreparable harm. Hence the tripartite sequential test cannot be met.

43 Instead EMC has alleged that in assigning NCLP's interest under the Agreement to Solex, there has been "a clear breach of a clear negative covenant" and, accordingly, EMC does not need to show irreparable harm.

44 The primary authority in Alberta is *Canada Safeway Ltd. v. Excelsior Life Insurance Co.*, [1987] A.J. No. 647 (Alta. C.A.). There, the Court reviewed and considered whether it should summarily grant an injunction without regard to irreparable harm. The Court of Appeal held that the defences, which included the unreasonable withholding of consent by one party, could not be summarily dismissed as frivolous. There, it was not a case of an "undisputed and indisputable" breach of a negative covenant, and the Court was obligated to apply the usual tripartite sequential test.

45 I look as well to the decision of Mr. Justice Sanderman in *Canadian Imperial Bank of Commerce Corporation v. 7241233 Alberta Ltd.*, [1999] A.J. No. 1656 (Alta. Q.B.) and in particular paragraph 18.

None of the cases from this Court have altered the strong caution from Megarry, J. The relaxation of the application of the tripartite test can only come out where there is a plain and uncontested breach. Where the Respondent disputes that there is such a breach and the evidence of it is not compelling, then a full examination of the entire tripartite test must be carried out.

46 The Defendants relied on two other cases which were placed in argument before me. The Defendants cited the case of *Debra's Hotels Inc. v. Lee*. [supra] and the case of *W-K Trucking Inc. v. Bidulock Oilfield Service Ltd.*, [1998] A.J. No. 1268 (Alta. Q.B.), a decision of Mr. Justice Clarke, who recognized the relaxation of the tripartite test should only be used where the applicant's case is strong and there is little doubt on the merits.

47 The Defendants cannot merely raise in argument the words in their Statement of Defence to the extent, that the consent was unreasonably withheld by EMC, and hence there is not an undisputed and indisputable breach of a clear covenant. A mere pleading is not sufficient. The Defendants must present some evidence on the application to substantiate that pleading.

48 It will be necessary to look at that evidence. Otherwise a defendant could prevent the use of the relaxed tripartite type test by merely pleading a defence (such as a unreasonable withholding of consent) and arguing that defence is not a frivolous defence but one that presents a serious issue to be tried. On the face of such a defence that might initially appear to be so but defendants need to present some evidence supporting that defence. On reviewing that evidence it can be determined whether the evidence tends to support the Statement of Defence. The Defendants have presented evidence to me to support their position that EMC's consent was unreasonably withheld. I must examine that evidence to determine if it is sufficiently compelling to demonstrate some degree of proof that EMC unreasonably withheld its consent. If such evidence is present, then there cannot be a clear breach of a clear negative covenant and the relaxed tripartite test will not be applied. Instead the entire tripartite test must be applied. In the latter event EMC concedes that it cannot meet the test of irreparable harm, and the injunction cannot be granted.

Is there some evidence that EMC has unreasonably withheld its consent?

49 All of the factual circumstances must be examined in order to determine that question.

50 However before determining that issue, I need to determine whether on the facts before me there has been a clear breach of a clear negative covenant.

51 EMC has alleged that in assigning the Representation Agreement to Solex there has been a clear breach of a clear negative covenant. I agree. The covenant expressly prohibits NCLP from assigning its interest in the Agreement without the consent of EMC, provided the consent of EMC is not being unreasonably withheld.

52 But NCLP submitted that EMC has unreasonably withheld its consent to the Assignment and in doing so, has breached the Agreement. However, I find on a review of the evidence on an objective basis, that in the circumstances a reasonable person would have refused to consent to the Assignment.

53 EMC's conduct throughout its dealings and negotiations with the Defendants has been consistent and ethical. It approaches this application with clean hands. It has consistently asked the Defendants for more financial information on Solex in order to complete its due diligence. EMC's demand for resolution of outstanding issues and execution of new agreements was a separate issue from its position demanding adequate financial information regarding Solex. Its demands for the resolution of the outstanding issues were with NCL and NCLP. Its demands for adequate and satisfactory financial information were to be met by Solex. Solex was the only party which could provide such information. On an objective basis it is understandable that EMC in the course of considering its possible future plans for the Harmattan plant, would like to clear up many of the historical issues in dispute with NCLP. Similarly, on an objective assessment, EMC did not tie its consent to the assignment with its position desiring to resolve the outstanding historical issues. These two positions are stand alone positions and they are not inter-related.

54 In the financial sense EMC does have real and reasonable issues to consider in its assessment of Solex as a possible assignee of NCLP's interest under the Agreement. These financial issues were expressly communicated to all of the Defendants in EMC's correspondence and in the various meetings with the Defendants. It is entirely reasonable in the context of EMC's due diligence review of Solex as ECM's proposed new representative, manager and gas processor at the Harmattan plant, that EMC be apprised of Solex's plans for operation and future development of the plant and secondly whether Solex is financially capable of carrying out any such plans. These considerations by EMC are, on the evidence of Merle Brown, the same considerations EMC considered in its decision to enter the Agreement with the financially solvent NCL and NCLP in 1997. The reasons for including a consent requirement in the assignment was to allow each party the opportunity of reasonably assessing any future contractual partners. If a proposed assignee did not meet the criteria reasonably required by the other party, the assignment should not proceed.

55 EMC's concern is over the larger, go-forward plans of Solex for developing and maintaining the plant and the financial capability of Solex to do so. If Solex commences development programs at the plant, which it cannot carry through, EMC may be in a worse position in those future surrounding circumstances. EMC is entitled to receive adequate financial information on Solex in order that it can assess the commercial realities of the gas plant, both now and in the future. EMC deserves to be able to assess the economic impact of the assignment both, now and in the future, without having it foisted upon it by the respective unilateral actions of the Defendants and each of them.

56 Since the application before Wilkins, J. Solex has provided very little significant additional information with respect to its financial background, capability or proposed financing for developing and maintaining the Harmattan plant. Solex disclosed in Jabusch's affidavit, the heretofore unknown financial partner was a numbered company (960345 Alberta Ltd.) which is indirectly controlled by N. Murray Edwards. The affidavit does not disclose any definitive committal by any person or entity to finance the proposed plans of Solex. EMC is asked to accept the bare unproven covenant of Solex for financing. Solex is a newly incorporated company with no track record of past financial transactions, no financial records revealed or definitive financial backing. It has some connection to a group of companies which have demonstrated they have been major players in the oil and gas industry in Canada. Solex was incorporated solely for the purpose of acquiring the Harmattan plant which will be its only producing asset. There are no supporting parent or other corporate guarantees to support the Solex covenant.

57 There was no evidence provided with respect to the strength of either the financial covenants of Solex or NCLP to date. In fact NCLP objected to providing evidence as to the relative strength of NCLP's financial covenant today compared to the strength of its financial covenant in 1997. The strength of the latter financial covenant of NCLP in 1997 was a comfort to EMC in its decision to enter into the Agreement. NCLP and Solex argued that in the absence of Solex being novated into the Agreement, NCLP continues to be bound into the Agreement. Accordingly, any financial obligations under the Agreement would continue to be NCLP's financial obligations. As a result, NCLP submitted that EMC is in a better position than it would have been prior to the assignment, as EMC can look for indemnity under the Agreement from both Solex and NCLP. However, in the face of the objections to providing evidence on the strength of NCLP's financial covenant today and in the face of the uncontroverted evidence that NCLP is divesting itself of some of its assets, I can only infer that the strength of NCLP's financial covenant is at best, unknown, and at worst,

diminishing. Thus EMC is left with little or no information regarding the financial strength of Solex and an unknown financial covenant of NCLP, which is divesting itself of assets.

58 On an objective basis it is entirely reasonable to enquire into the financial capability of a proposed business partner in determining whether to accept that party as a business partner. There must be adequate information provided to EMC regarding the strength of the Solex financial covenant. Further, if NCLP and Solex wish to argue (as they did) that EMC would be in a better position with the financial covenant of each of Solex and NCLP, in the absence of Solex being novated into the Agreement, then it would be reasonable for Solex and NCLP to provide adequate information on the strengths of those financial covenants rather than leaving EMC to surmise.

59 However, it is not the final strength or weakness of Solex's financial covenant which prevents consent. Rather it is the failure of Solex to provide relevant and material financial information which will enable EMC to assess the financial strength of Solex on a go forward basis. The absence of financial information provided by Solex means that EMC has reasonably withheld its consent. EMC in the circumstances cannot satisfy itself as to the financial ability of Solex to meet its prospective obligations as the proposed assignee under the Agreement.

60 Finally, I note that EMC has not withheld its consent for improper reasons. As I noted previously, the desire of EMC to resolve outstanding issues between itself and NCLP is a separate issue, and is not tied to EMC's desire to receive proper and adequate financial information from Solex as a separate entity. EMC did not withhold its consent in order to secure additional benefits as argued by Solex and NCLP.

61 The Defendants have raised the defence that the consent was unreasonably withheld by EMC and as a result there is not an undisputed and indisputable breach of a clear covenant. However, the evidence adduced by the Defendants on this application falls short of substantiating that pleading. Accordingly, there has been a clear breach of a clear negative covenant.

62 The tripartite test is not strictly applied. I follow the decision of Hunt J. for the appropriate test for interim injunction relief as she set out at paragraph 20 in her decision in the *Debra's Hotels Inc. v. Lee* case (supra):

From this review of the authorities I am satisfied that in this jurisdiction, at the least, irreparable harm need not be shown if there is a clear breach of a clear covenant. I am not satisfied, however, that in such a case the Court of Appeal has gone so far as to dispense altogether with an examination of damages or balance of convenience. I note, however, its observations in *Ominayak v. Norcen* (supra), at 202 that a consideration of balance of convenience necessarily engages the matter of harm. This suggests to me that, from a practical point of view, the balance of convenience test would indeed be softened were a restrictive covenant breach at issue.

63 Hunt J. continued at paragraph 37 in her judgment as follows:

Even if these were real losses, I would have to measure them against the damages being suffered by Debra's and examine the context within which Debra's losses have occurred. The evidence is that Debra's raised the restrictive covenant with Lee's managers almost immediately upon learning of the proposed cappuccino bar. Lee's managers apparently took the position with Biscotti that the covenant was unenforceable; the leasehold improvements proceeded notwithstanding the protest of Debra's. How can it be said, in such a case, that the balance of convenience favours the party that is in breach of the covenant? Accepting such an argument would encourage other covenantors to breach their agreements in the confidence that a court would allow them to continue to do so, simply because they say they would otherwise suffer a financial loss. It seems to me that if such an approach were taken, the courts would be shirking their duties to contracting parties.

64 If the assignment is allowed, and Solex does not have the financial ability to continue to operate the plant or to complete the financing of a development of the plant, EMC could be harmed. It will have a potential lawsuit and damages instead of a solid business partner as NCLP purports to be today.

65 I agree with the analysis of Hunt J., that it cannot be said that the balance of convenience favours the party that is in breach of the covenant. To allow a party to breach a covenant would render the consent provisions of the Agreement meaningless. In this connection, I note further the evidence of Jabusch given on cross examination on his affidavit, that Solex and NCLP discussed the thought that Solex and NCLP could pre-empt the Court's injunction by closing the sale before the injunction. To allow this assignment to proceed on all of the commercial circumstances would be to ignore the contractual rights which EMC has under its Agreement.

66 Finally, I am not convinced that Solex's go forward plans for the Harmattan Plant would be jeopardized because of the injunction. Cross examination of Jabusch and Gateman demonstrated that there would be other means for either Solex or NCLP to deal with what they contended were serious adverse consequences.

67 The balance of convenience test favours EMC and the maintenance of the status quo. There has been insufficient additional evidence placed before me to demonstrate that I should not grant the injunction on a *de nova* basis. Finally, there is insufficient evidence before me to suggest I should vacate or vary the injunction granted by Wilkins J. It remains in effect.

68 Counsel may make an appointment with me to speak to the matter of costs.

Application dismissed.

TAB 10

2001 CarswellOnt 3893
Ontario Superior Court of Justice [Commercial List]

Playdium Entertainment Corp., Re

2001 CarswellOnt 3893, [2001] O.J. No. 4252, 109 A.C.W.S. (3d) 207, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302

**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 Playdium Entertainment Corporation et al.

Spence J.

Heard: October 29 and 30, 2001

Judgment: November 2, 2001 *

Docket: 01-CL-4037

[Proceedings: additional reasons at \[2001\] CarswellOnt 4109](#) (Ont. S.C.J. [Commercial List])

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Craig J. Hill, for Pricewaterhouse Coopers Inc.

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Gavin J. Tighe, for Toronto-Dominion Bank

Michael B. Rosztain, for Canadian Imperial Bank of Commerce

Geoff R. Hall, for Ontario Municipal Employees Retirement Board

David B. Bish, for Playdium Entertainment Corporation

Julian Binavince, for Cambridge Shopping Centres Limited

Subject: Corporate and Commercial; Insolvency

Headnote

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

Group of corporations which operated chain of cinemas attempted restructuring under Companies' Creditors Arrangement Act, but no viable plan was arrived at — Corporations proposed that all their assets be transferred to new corporation, to be indirectly controlled by corporations' two primary secured creditors — Transaction would involve assignment of all material contracts of business, including agreement with film distribution company — Corporations were not in compliance with agreement, but proposed that new corporation would take steps to achieve compliance — Corporations brought application for court approval of proposed transfer — Application granted — Interim receiver appointed — Corporations did not have right to make assignment pursuant to s. 35 of agreement, because transfer was not to "affiliate" and film distribution company's consent to transfer was not unreasonably withheld — Film distribution company was entitled to look for better deal elsewhere in view of corporations' ongoing non-compliance with agreement — Court had jurisdiction to approve transfer, however, by reason of Companies' Creditors Arrangement Act — Appropriate to approve transfer in circumstances — Corporations had made sufficient effort to obtain best price and had not acted improvidently — Proposal took into account interests of trade creditors, employees and members of public — There had been no unfairness in process by which offer was obtained — Right of film production company to seek relief for default under agreement adequately addressed risk of new corporation's continuing non-compliance — Fact that film production company

could obtain better deal with another entity did not furnish reason to refuse to approve transfer, especially since propriety of alternate transaction was in dispute — If transfer were not approved, likely that corporations would go into bankruptcy.

Table of Authorities

Cases considered by *Spence J.*:

Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc. (1994), 27 C.B.R. (3d) 148, 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]) — considered

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

Dominion Stores Ltd. v. Bramalea Ltd. (1985), 38 R.P.R. 12 (Ont. Dist. Ct.) — considered

GATX Corp. v. Hawker Siddeley Canada Inc. (1996), 1 O.T.C. 322, 27 B.L.R. (2d) 251 (Ont. Gen. Div. [Commercial List]) — referred to

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

T. Eaton Co., Re (1999), 14 C.B.R. (4th) 298 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — considered

APPLICATION by corporations for approval of proposed transfer of assets.

Spence J.:

- 1 These reasons are provided in brief form to accommodate the exigencies of this matter.
- 2 The Playdium corporations and entities (the "Playdium Group") have been engaged in restructuring efforts under the *Companies' Creditors Arrangement Act* (the "CCAA"). These efforts have been unsuccessful. It is now proposed that substantially all the Playdium assets will be transferred to a new corporation ("New Playdium") which will be indirectly controlled by Covington Fund I Inc. and Toronto-Dominion Bank. This transfer would be made in satisfaction of the claims of those two creditors and Canadian Imperial Bank of Commerce, the primary secured creditors and the only creditors with an economic interest in the Playdium Group.
- 3 The primary secured creditors intend that the Playdium Group's business will continue to be operated as a going concern. If successful, this would potentially save 300 jobs as well as various existing trade contracts and leases.
- 4 This transaction is considered to be the only viable alternative to a liquidation of Playdium Group and the adverse consequences that would flow from a liquidation. Interests of members of the public also stand to be affected, in respect of prepaid game cards and discount coupons, which are to be honoured by the new entity.

5 The proposed transaction would involve assignment to the new entity of the material contracts of the business, including the Techtown Agreement with Famous Players.

6 Playdium Group is not currently in compliance with the equipment supply provisions of s.9(e) of the Techtown Agreement. The new entity is to take steps, as soon as reasonably practicable, that are intended to achieve compliance with s.9(e). Famous Players disputes that the proposed steps will have that effect and opposes approval of the proposed assignment of the Techtown Agreement to the new entity.

7 Covington says that the assignment of the Techtown Agreement is a critical condition of the proposed transaction: without the assignment, the transaction cannot proceed.

8 Covington says that the structure of the proposed transaction is such that it does not require the consent of Famous Players. This is disputed by Famous Players, based on s.35 of the Agreement and the fact that the assignee is to be controlled by Covington and TD Bank.

9 Covington submits that it is in the best interests of all the shareholders that the proposed transaction, including the assignment of the Techtown Agreement, be implemented. Covington and TD Bank seek an order authorising the assignment and precluding termination of the Techtown Agreement by reason only of the assignment or certain defaults. Famous Players has not given any notice of default to date. The prohibition against termination for default is not to apply to a continuing default under para.9(e) of the Agreement.

10 The primary secured creditors also seek an extension of the existing stay until November 29, 2001 to finalize these transactions. To facilitate the transactions, Covington and TD Bank seek the appointment of Pricewaterhouse Coopers as Interim Receiver.

11 Based on the cases cited, including *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), and *T. Eaton Co., Re* (1999), 14 C.B.R. (4th) 298 (Ont. S.C.J. [Commercial List]), and the statutory provisions and text commentary cited, the court has the jurisdiction to grant the orders that are sought, and may do so over the objections of creditors or other affected parties. Also, the decision in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]), supports the appointment of an interim receiver to do what "justice dictates" and "practicality demands".

12 Famous Players says that no reason has been shown to expect the proposed course of action will bring the Techtown Agreement into compliance and make it properly operational; Covington has not shown it has expertise to bring to the business operations; the operations are grossly in default at present, and the indicated plans are inadequate to cure the default, which has serious adverse consequences to Famous Players.

The Relief Sought

13 The applicants revised the form of order that they seek, to provide (in paragraph 15) that a counterparty to a Material Agreement is not to be prevented from exercising a contractual right to terminate such an agreement as a result of a default that arises or continues to arise after the filing of the Interim Receiver's transfer certificate following completion of the contemplated transactions.

14 Famous Players moved for certain relief that was apparently formulated before the applicants' revisions to their draft order. From the submissions made at the hearing, I understand the position of Famous Players to be that it opposes the order sought by the applicants, at least insofar as it would approve the assignment of the Techtown Agreement, but the submissions of Famous Players did not address specifically the relief sought in their notice of motion, presumably because of the revision to the applicants' draft order as regards continuing defaults.

Section 35 of the Techtown Agreement

15 Section 35 permits an assignment to a Playdium affiliate. The proposed assignee is to be a new company, "New Playdium", to be incorporated on behalf of the Playdium Group, and to be owned by it at the precise time when the assignment occurs. The assignment will occur, it may be presumed, if and only if the contemplated transactions of transfer are completed. On completion of the contemplated transactions, New Playdium will be owned by a corporation controlled by Covington and TD Bank. That outcome reflects the purpose of the assignment, which is to transfer the benefit of the Techtown Agreement to the new owners. Accordingly the assignment, viewed in terms of its substance and not simply its momentary constituent formalities, is not a transfer to a Playdium affiliate. This view is in keeping with the decision in *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. Gen. Div. [Commercial List]).

16 Under s.35, the Agreement therefore may not be assigned without the consent of Famous Players, which consent may not be unreasonably withheld. Famous Players says that it has not been properly requested to consent and it has not received adequate financial information and assurances as to the provision of satisfactory management expertise and as to how the Agreement is to be brought into good standing.

17 The submission to the contrary is that the Agreement is really in the nature of a lease, not a joint venture involving the requirement for the provision to the venture of management services. This submission has some merit. Playdium seems principally to be required to supply game equipment. Section 26 of the Agreement disclaims any partnership or joint venture. If the business is to be sold to the new owners as a going concern, it would be likely to have the same competence as before, unless the contrary is shown, which is not so. Covington says that financial information was offered and not accepted and (although this is either disputed or not accepted) that no further request was made for it.

18 Reference was made to the decision in *Dominion Stores Ltd. v. Bramalea Ltd.* (1985), 38 R.P.R. 12 (Ont. Dist. Ct.) that an assignment clause of this kind is to be construed strictly, as a restraint upon alienation, and its purpose is to protect the landlord as to the type of business carried on. The case also says that a refusal for a collateral purpose or unconnected with the lease is unreasonable.

19 On the material filed, Famous Players has the prospect of a better deal with Starburst and this must be considered a factor in their withholding of consent. It is also relevant that Playdium is not in compliance with the Agreement and it is not clear how soon compliance is intended to be achieved under the Covington proposal. It is not clearly unreasonable for a party in the position of Famous Players to look for a better deal when the counterparty is in a condition of continuing non-compliance.

20 The propriety of the proposed Starburst deal is disputed on the basis of a possible breach of the Non-Disclosure Agreement between Starburst and Playdium. The relevance of this dispute is considered below.

Whether Court should approve the Assignment of the Techtown Agreement

21 This is the pivotal issue in respect of the motion.

22 Famous Players objects to the assignment. Famous Players refuses its consent. With regard to s.35 of the Agreement, and without reference to considerations relating to *CCAA* (which are dealt with below), I cannot conclude that the withholding of consent is unreasonable. So s.35 does not provide any right of assignment.

23 If there were no *CCAA* order in place and Playdium wished to assign to the proposed assignees, it would not be able to do so, in view of Famous Players' withholding of its consent. The *CCAA* order affords a context in which the court has the jurisdiction to make the order. For the order to be appropriate, it must be in keeping with the purposes and spirit of the regime created by *CCAA*: see the *Red Cross* decision.

The factors to be considered

24 The applicants submit that it is clear from the Monitor's reports that a viable plan cannot be developed under CCAA and the present proposal is the only viable alternative to a liquidation in bankruptcy. The applicants say that the present proposal has the potential to save jobs and to benefit the interests of other stakeholders.

25 Famous Players submits that, on the basis of the *Red Cross* decision, the court should approve the appointment of an interim receiver with power to vest assets, in a CCAA situation, where there is no plan, only where certain appropriate circumstances exist as set out in *Red Cross*, and those circumstances do not exist here.

26 In this regard, the first factor mentioned in *Red Cross* is whether the debtor has made a sufficient effort to obtain the best price and has not acted unprovindently. Famous Players says that there has been no substantial effort to develop a plan to sell the business components (such as the LBE's) as going concerns, no tender process, no marketing effort and no expert analysis. From the reports of the monitor it appears efforts were made to find prospects to purchase debt or equity or assets and there was no indication of viable deals. Whether or not the best price has been obtained, on the material it appears the value of the assets would not satisfy the claims of the principal secured creditors. There is nothing to suggest that a better deal could be done without including the Techtown Agreement; according to the monitor it would have been a key part of any viable plan. Famous Players is not in the position of a creditor looking to be paid out, so its submissions as to the need to get the best price do not seem to be well addressed to its proper interest in this case, and the others who have appeared who are creditors are not objecting to the process and the result.

27 The second factor mentioned in the *Red Cross* decision is that the proposal should take into consideration the interests of the parties. The proposal has potential benefits for trade creditors, employees and members of the public which would flow from continuing the business operations as proposed.

28 The other two criteria in *Red Cross* are that the court is to consider the efficacy and integrity of the process by which the offers were obtained and whether there has been unfairness in the working out of the process. Famous Players says that, as regards its interests, there has been no participation afforded to it in designing the proposal, although the Techtown Agreement is said to be critical to the proposal, and nothing to show how or when the s.9(e) requirements will be brought into compliance. There were discussions between the parties in August but they did not lead to any productive result. It is true that it is not clear how or when compliance will be brought about. This point is considered below.

The effect on Famous Players

29 Famous Players says that if the applicants are given the relief they seek, the proposed transactions will close and the CCAA stay will be lifted — which would happen at the end of November, on the present proposal — and the prospect would be that Famous Players would then issue notices of default in respect of s.9(e), notice of termination would follow and the entire matter would end up in litigation within two months. That is possible. It is also possible that the parties would work out a deal. Covington is to invest about \$3 million in the new entity so there will be an incentive for it to find ways to make the new business work.

30 If the parties cannot resolve their differences, then litigation might well result. Famous Players would be saved that prospect if the assignment were not to be approved and the companies instead were liquidated in bankruptcy. The delay occasioned by a further stay and subsequent litigation would also presumably result in increased losses of revenue to Famous Players compared to a full compliance situation or an immediate termination. There is nothing before the court to suggest that, if Famous Players has to resort to litigation and succeeds, it would not be able to recover from the new company. On this basis, the right of Famous Players to seek relief for a default seems to address adequately the risk of continuing non-compliance with s.9(e). Accordingly, the provision preserving that right is a key consideration in favour of the motion.

31 The other reason Famous Players evidently has for opposing the applicants' motion is that it could do a better deal with Starburst. If that were the only reason it had for withholding consent to an assignment of the Agreement, it would not be a reasonable basis for withholding consent under s.35 of the Agreement. It can be inferred from that consideration

that it should also not be regarded as, by itself, a proper reason to allow the objection to stand in the way of the proposed assignment as part of the proposal to enable the business to continue.

32 Moreover, as noted above, the propriety of the Starburst transaction is disputed, on the basis of a possible breach of the Non-Disclosure Agreement between Starburst and Playdium. Based on the submissions before the court, the dispute could not be said to be without substance. If the proposed transactions are allowed to proceed and litigation ensues between Famous Players and New Playdium, there would presumably also be an opportunity for the dispute about the possible breach, and its implications for the propriety of the proposed deal between Starburst and Famous Players, to be pursued in litigation.

33 If instead the proposed transactions are precluded by a denial of the requested order, Playdium would go into bankruptcy and it would lose any opportunity to obtain the benefit of any rights it would otherwise have to oppose the proposed deal between Starburst and Famous Players. Allowing the Playdium transactions to proceed would effectively preserve those rights.

Conclusion

34 For the above reasons the motion of the applicants is granted. The initial order of this court made February 22, 2001 shall be continued to November 29, 2001, and the stay period provided for therein shall be extended to November 29, 2001. The parties may consult me about the other terms of the order, and costs.

Application granted.

Footnotes

- * Additional reasons at [2001 CarswellOnt 4109](#), 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]).

TAB 11

Oct. 27, 2016

Court File No: CV-16-11527-00CL

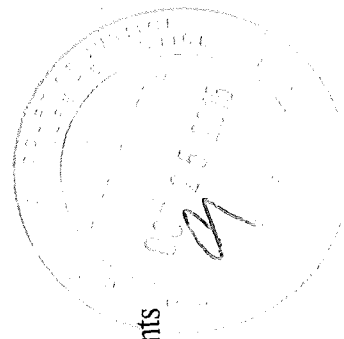
IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985,
c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GOLF
TOWN CANADA HOLDINGS INC., GOLF TOWN CANADA INC. AND GOLF TOWN GP
II INC.

Applicants

October 27, 2016

The issue is the language of paragraph 7 of the order. I am satisfied that as drafted it strikes a fair balance & protects the interests of the purchasers and the landlords of the properties represented by Mrs. Sallanave. There is no evidence that there is any real issue, ie part-breed, on the debt for that requires perfection. The debtor has searched its file & has found none. The landlords in question have not searched their files at all. To some

ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST) Proceeding commenced at Toronto
MOTION RECORD OF THE APPLICANTS (Motion for Assignment Order)
GOODMANS LLP Barristers & Solicitors 333 Bay Street, Suite 3400 Toronto, Canada M5H 2S7 Robert J. Chadwick LSUC#: 35165K rchadwick@goodmans.ca Melaney Wagner LSUC#: 44063B mwagner@goodmans.ca Bradley Wiffen LSUC#: 64279L bwiffen@goodmans.ca Tel: (416) 979-2211 Fax: (416) 979-1234 Lawyers for the Applicants



spend this appears to be a trap in a forest.
 However I understand that the purchaser, who
 is far better off for the land than the debtors,
 understandably does not want to close & then
 for some unexpected time that has been
 lying in the weeds. I accept the order
 as drafted.

Fred I.

TAB 12

Innovation, Science and Economic Development Canada

[Home](#) → [Bankruptcy](#) → [Office of the Superintendent of Bankruptcy Canada](#)

Office of the Superintendent of Bankruptcy Canada

Summary of Legislative Changes

Summary of Key Legislative Changes in Chapter 47 of the *Statutes of Canada*, 2005, and Chapter 36 of the *Statutes of Canada*, 2007

Both the *Bankruptcy and Insolvency Act* (BIA (Bankruptcy and Insolvency Act)) and the *Companies' Creditors Arrangement Act* (CCAA (Companies' Creditors Arrangement Act)) are amended by Chapter 47 of the *Statutes of Canada*, 2005, and Chapter 36 of the *Statutes of Canada*, 2007 (c. (chapter)47 and c. (chapter)36 respectively). The legislative amendments are broad ranging and significant, and are intended to achieve the following main goals:

1. To encourage restructuring of viable businesses as an alternative to bankruptcy. In this regard, the *CCAA (Companies' Creditors Arrangement Act)* has been significantly modified to provide increased predictability and consistency while preserving its flexibility.
2. To improve protection for workers in bankruptcy. The amendments also create the legislative framework for the Wage Earner Protection Program (WEPP), which ensures that workers whose employers are bankrupt or subject to a receivership receive compensation for their claims in a timely manner.
3. To make the insolvency system fairer and to reduce the potential for abuse. Inequities in the treatment of personal bankruptcies are addressed and the scope for abuse is curbed, while respecting the fundamental objective of providing a fresh start to the honest, but unfortunate, debtor.

On July 7, 2008, the *Wage Earner Protection Program Act*, along with a few amendments to the *Bankruptcy and Insolvency Act*, came into force. These amendments to the BIA (Bankruptcy and Insolvency Act) include, but are not limited, to the following: (1) the creation of super-priorities (enhanced or higher ranking priorities) for wages and unremitted pension contributions; (2) changes to the definition of "date of the initial bankruptcy event"; (3) a reduction in the student loan debt discharge period; (4) protection of Registered Retirement Savings Plans (RRSPs); (5) the treatment of pre- and post-bankruptcy income tax refunds as part of the property of the estate; (6) the ability for creditors to realize against the property of the bankrupt without leave of the court once the Licensed Insolvency Trustee (LIT) is discharged; and (7) the treatment of leased aircraft objects consistent with the *Convention on International Interests in Mobile Equipment (Aircraft Equipment)*.

The balance of the legislative changes in c. (chapter) 47 and c. (chapter) 36 came into force on September 18, 2009.

A. Summary of Key Legislative Changes in Force as of July 7, 2008

Wage Earner Protection Program Act

The *Wage Earner Protection Program Act* (WEPPA) creates the Wage Earner Protection Program (WEPP), a program run by the Department of Human Resources and Skills Development Canada. The WEPP (Wage Earner Protection Program) provides for payment of outstanding wages (up to the greater of \$3000 or four times the maximum weekly insurable earnings under the *Employment Insurance Act*) to individuals whose employment is terminated as a result of the bankruptcy or placement into receivership of their employer. The term "wages" is defined to include salary, commissions, compensation for service rendered and vacation pay. The definition of "wages" under the *WEPPA (Wage Earner Protection Program Act)* was expanded effective January 26, 2009, to include severance pay and termination pay. Employee claims are reduced by any amount paid to them by the receiver or the LIT.

LITs and receivers are required to perform numerous duties to support the operation of the program. *WEPPA (Wage Earner Protection Program Act)* provisions allow the program to cover insolvency professionals' fees in certain cases and under certain conditions where there are insufficient assets to cover the costs of carrying out those duties related to the operation of the WEPP (Wage Earner Protection Program). A due diligence defence is available to LITs and receivers.

Wage Claims

In bankruptcies and receiverships, the claims of workers are secured against current assets (cash, accounts receivable and inventory) to the extent of \$2000 per employee under the BIA (Bankruptcy and Insolvency Act). This limited super-priority secures unpaid wages, salaries, commissions and compensation for services rendered during the period of six months before the date of the initial bankruptcy event to the date of bankruptcy or during the six months before the receivership. Compensation includes vacation pay, but not severance pay or termination pay.

The limited super-priority over current assets ranks above secured creditors but below the rights of unpaid suppliers to repossess goods (s. (section) 81.1 of the BIA (Bankruptcy and Insolvency Act)) and the claims of farmers, fishermen and aquaculturists in respect of unpaid products supplied to the bankrupt or insolvent employer (s. (section) 81.2 of the BIA (Bankruptcy and Insolvency Act)). The limited super-priority also ranks behind unremitted income tax, Employment Insurance and Canada Pension Plan deductions deemed to be held in trust.

Under the WEPPA (Wage Earner Protection Program Act), the Government of Canada is, to the extent of the amount paid, subrogated to the rights the individual has in respect of unpaid wages. The limited super-priority of \$2000 applies against current assets. Where current assets are insufficient to cover the amount owing up to \$2000, the creditor has a preferred claim for the outstanding amount under section 136(1)(d) of the BIA (Bankruptcy and Insolvency Act).

Officers and directors are precluded from having a secured claim for wages. They will, however, continue to have a preferred claim under section 136(1)(d).

New provisions also preclude persons who were not dealing at arm's length with the bankrupt from having a secured claim for wages unless the LIT/receiver determines it is appropriate in the circumstances.

BIA s. (Bankruptcy and Insolvency Act section) 2, s. (section) 4(5), s. (section) 81.3 and s. (section) 81.4 and Form 31

Pension Protection

Provisions have been added to provide a priority over all assets of the debtor for the payment of normal pre-filing pension contributions, not including any unfunded pension liabilities, in bankruptcies and receiverships. Normal pre-filing contributions are amounts deducted from employees' remuneration for contribution to the pension plan and all unpaid employer's contributions. This priority does not apply to special payments ordered by a pension regulator to liquidate an unfunded liability and to claims related to such unfunded liability.

The limited super-priority ranks below the rights of unpaid suppliers to repossess goods (s. (section) 81.1 of the BIA (Bankruptcy and Insolvency Act)) and the claims of farmers, fishermen and aquaculturists in respect of unpaid products supplied to the bankrupt or insolvent employer (s. (section) 81.2 of the BIA (Bankruptcy and Insolvency Act)), deemed trusts for source deductions and the wage claim priority.

BIA s. (Bankruptcy and Insolvency Act section) 81.5 and s. (section) 81.6 and Bankruptcy and Insolvency General Rules s. (section) 59.1 and Form 31

Date of the Initial Bankruptcy Event

The definition of "date of the initial bankruptcy event" has been amended to include the commencement of proceedings under the CCAA (Companies' Creditors Arrangement Act).

BIA s. (Bankruptcy and Insolvency Act section) 2

Student Loans

The waiting period before which a student loan under the *Canada Student Loans Act*, the *Student Financial Assistance Act* and provincial enactments that provide for student loans may be discharged is reduced from 10 years to 7 years after the bankrupt ceases to be a full- or part-time student. The period before which an application may be made to the court to request a discharge on the basis of hardship is reduced from 10 years to 5 years.

The new time frame of seven years applies to all those who filed for bankruptcy on or after July 7, 2008, and to undischarged bankrupts on that date, i.e. (id est (That is)), student-loan borrowers who were bankrupt but not yet discharged as of that date.

Relief under section 178(1.1) ("the hardship provision") is available to all bankrupts, including those who were discharged prior to July 7, 2008.

BIA s. (Bankruptcy and Insolvency Act section) 178

RRSP (Registered Retirement Savings Plans) Exemptions

Amounts held in RRSP (Registered Retirement Savings Plans)s are exempt from seizure in bankruptcy, subject to a possible clawback for contributions made in the 12 months preceding bankruptcy. Where provincial legislation exempts RRSP (Registered Retirement Savings Plans)s from execution, the provincial legislation applies. Where provincial legislation does not provide for the exemption of RRSP (Registered Retirement Savings Plans)s, the exemption in the BIA (Bankruptcy and Insolvency Act) applies, subject to the possible clawback referred to above.

BIA s. (Bankruptcy and Insolvency Act section) 67(1)(b.3) and Bankruptcy and Insolvency General Rules s. (section) 59.2

Income Tax Refunds

Income tax refunds for both the pre- and post-bankruptcy period form part of the estate of the bankrupt. Where the bankrupt is a judgment debtor under the *Family Orders and Agreement Enforcement Assistance Act*, a carve out exists for the portion of the income tax refund that is garnishable money under a summons for child and/or spousal support.

BIA s. (Bankruptcy and Insolvency Act section) 67(1)(c)

Action against Undischarged Bankrupts

Creditors may realize on the property of the bankrupt without leave of the court once the LIT has been discharged — even if the bankrupt remains undischarged.

BIA s. (Bankruptcy and Insolvency Act section) 69.3(1.1)

Aircraft Objects

Provisions have been added regarding the treatment of aircraft objects in Division I proposals and CCAA (Companies' Creditors Arrangement Act) cases.

BIA s. (Bankruptcy and Insolvency Act section) 65.1(4), s. (section) 69(2)(d), s. (section) 69.1(2)(d) and s. (section) 69.3(3); CCAA s. (Companies' Creditors Arrangement Act section) 11.07 and s. (section) 34

B. Summary of Key Legislative Amendments in Force as of September 18, 2009

Commercial issues

Wage Claims

Division I proposals under the BIA (Bankruptcy and Insolvency Act) and plans of compromise or arrangement under the CCAA (Companies' Creditors Arrangement Act) must provide for payment immediately after court approval/sanction of the proposal/plan to employees (and former employees) of at least what they would be qualified to receive if the employer had become bankrupt.

BIA s. (Bankruptcy and Insolvency Act section) 60(1.3); CCAA s. (Companies' Creditors Arrangement Act section) 6(5)

Pension Protection

Division I proposals and CCAA (Companies' Creditors Arrangement Act) plans that do not provide for the payments of unpaid pension contributions are not to be approved by the court unless the parties to the pension plan have entered into an agreement approved by the relevant pension regulator respecting payment of those amounts.

BIA (Bankruptcy and Insolvency Act)s. 60(1.5), s. (section) 60(1.6); CCAA s. (Companies' Creditors Arrangement Act section) 6 and Companies' Creditors Arrangement Regulations s. (section) 3

Collective Agreements

Any collective agreement between an employer and a union shall remain in force on its terms unless the agreement is amended by agreement of the parties. Upon application by an insolvent person, the court may make an order authorizing the insolvent person to serve a notice to bargain on the union pursuant to the labour legislation of the relevant jurisdiction. If the court-ordered bargaining fails, there is no provision for the court to disclaim, terminate or revise the collective agreement. If the collective agreement is amended by agreement of the parties, the union has a claim as an unsecured creditor for the value of concessions granted.

BIA s. (Bankruptcy and Insolvency Act section) 65.12; CCAA s. (Companies' Creditors Arrangement Act section) 33

Liability of Licensed Insolvency Trustees

LITs, interim receivers, receivers and monitors who carry on the business of the debtor will not be personally liable for claims that existed or are calculated by reference to a period before their appointment, explicitly including liability as a "successor employer."

BIA s. (Bankruptcy and Insolvency Act section) 14.06(1.2) and s. (section) 14.06(1.3); CCAA s. (Companies' Creditors Arrangement Act section) 11.8

Monitors

Monitors under the CCAA (Companies' Creditors Arrangement Act) must be an LIT and the company's auditor may not be the monitor except with permission of the court.

CCAA s. (Companies' Creditors Arrangement Act section) 11.7

Interim Receivers

Time limits regarding the duration of interim receiverships have been established and restrictions have been introduced relating to the powers that may be granted to interim receivers.

The powers that may be granted to the interim receiver are as follows:

- a. to take possession of all or part of the debtor's property mentioned in the appointment;
- b. to exercise such control over that property, and over the debtor's business, as the court considers advisable;
- c. to take conservatory measures;
- d. to summarily dispose of property that is perishable or likely to depreciate rapidly in value.

Interim receivers appointed under section 47.1 of the BIA (Bankruptcy and Insolvency Act) may be granted the same powers listed above with the addition of the power to carry out the duties set out in subsections 50(10) or 50.4(7) of the BIA (Bankruptcy and Insolvency Act), in substitution for the LIT referred to in those subsections.

The application for the appointment of an interim receiver is to be filed in the "locality of the debtor."

The interim receiver's appointment ends on the earliest of the following:

- a. the taking possession by a receiver under section 243(2) of the BIA (Bankruptcy and Insolvency Act) of the property over which the interim receiver was appointed;
- b. the taking possession by an LIT of the property over which the interim receiver was appointed;
- c. the expiry of 30 days after the day on which the interim receiver was appointed, or of any period specified by the court (in the case of an appointment under section 47 of the BIA (Bankruptcy and Insolvency Act)); or the date of court approval of the proposal (in the case of an appointment under section 47.1 of the BIA (Bankruptcy and Insolvency Act)).

BIA s. (Bankruptcy and Insolvency Act section) 46(4), s. (section) 47(1), s. (section) 47(4) and s. (section) 47.1(4)

National Receivers

Judges exercising their powers under the BIA (Bankruptcy and Insolvency Act) may, on application of a secured creditor, appoint a "national" receiver under section 243 of the BIA (Bankruptcy and Insolvency Act) if it is "just or convenient to do so". A receiver appointed under section 243 of the BIA (Bankruptcy and Insolvency Act) will have the authority to act throughout Canada. Such an appointment eliminates the need to obtain separate appointments in every province/territory where the debtor has assets.

Receivers so appointed must be LITs, and they have the same protections as LITs against personal liability for pre-appointment environmental damage and other claims. The application for the appointment of a receiver is to be filed in the "locality of the debtor".

If a notice to enforce security is to be sent under section 244(1) of the BIA (Bankruptcy and Insolvency Act), the court may not appoint a receiver until the 10-day notice period has expired unless the debtor consents to an earlier enforcement or the court considers it appropriate to appoint a receiver before then.

The court may also grant a charge over the debtor's assets to secure the fees and disbursements of a receiver appointed under section 243 of the BIA (Bankruptcy and Insolvency Act) and such charge may rank in priority to secured creditors. Secured creditors must be given notice and the opportunity to make representations before the court makes such an order.

BIA s. (Bankruptcy and Insolvency Act section) 243

Stay of Proceedings — Regulatory Body

The new provisions define what is to be considered a "regulatory body." Essentially, any body charged with enforcing or administering an Act of Parliament or the legislation of a province is considered to be such a body. In addition, there is the ability to prescribe by regulation other bodies that can obtain the same benefits provided by the section. For example, the Investment Industry Regulatory Organization of Canada and the Mutual Fund Dealers Association of Canada are prescribed regulatory bodies.

Under the new provisions, the automatic stay of proceedings initiated on filing a proposal or notice of intention does not affect regulatory bodies that are acting strictly in their role as regulators. A regulatory body is entitled to continue to investigate or prosecute a debtor company for failings under the relevant regulations. A regulatory body is, however, stayed (precluded) from attempting to enforce a debt or monetary obligation owing to it in its capacity as a creditor, for example, in respect of a fine previously imposed.

BIA s. (Bankruptcy and Insolvency Act section) 69.6 and Bankruptcy and Insolvency General Rules s. (section) 103.1; CCAA s. (Companies' Creditors Arrangement Act section) 11.1 and Companies' Creditors Arrangement Regulations s. (section) 5

Interim Financing

The court has the power to order that all or part of the debtor's property is subject to a security or charge in favour of a person lending money to the debtor. Notice is required to be given to secured creditors who are likely to be affected by the order.

The court may grant the lender a priority over existing security, but the order may not secure pre-existing debts.

The provisions specify the factors for the court to consider on an application for interim financing.

BIA s. (Bankruptcy and Insolvency Act section) 50.6; CCAA s. (Companies' Creditors Arrangement Act section) 11.2

Disclaimer and Assignment of Agreements

Disclaimers

Agreements (commonly referred to as "executory contracts"), other than certain specified agreements, may be disclaimed in a Division I proposal or under a CCAA (Companies' Creditors Arrangement Act) filing. If the LIT or monitor does not approve the proposed disclaimer, the reorganizing debtor must apply to the court in order to disclaim the agreement.

The co-party to the agreement may seek a declaration that the agreement not be disclaimed. In deciding whether to make an order disclaiming the agreement, the court must consider a list of factors. If the disclaimer is not opposed or is approved by the court, the co-party may file a proof of claim in the reorganization as an unsecured creditor for any damages suffered.

Where the agreement relates to intellectual property, the disclaimer does not affect the co-party's right to use the intellectual property, nor the right to enforce an exclusive right to use the intellectual property, as long as the co-party continues to perform its obligations under the agreement.

The disclaimer provisions do not apply to eligible financial contracts, collective agreements, financing agreements if the company is the borrower, and leases of real property where the debtor is the lessor. Disclaimers of real property leases where the debtor is the lessee are already dealt with in section 65.2 of the BIA (Bankruptcy and Insolvency Act).

Assignments

A debtor may apply to court for an order assigning rights and obligations under an agreement to another person.

Agreements may be assigned, subject to the proposed assignee meeting certain requirements and provided any financial defaults under the agreement are remedied. Factors for the court to consider in determining whether to make an order assigning an agreement are specified and include whether the LIT/monitor approved the proposed assignment.

The following is a list of the types of agreements that cannot be assigned: commercial leases, eligible financial contracts, collective agreements and agreements that are not assignable by reason of their nature (e.g. (example given), personal service contract).

BIA s. (Bankruptcy and Insolvency Act section) 65.11, s. (section) 66(1.1), s. (section) 84.1 and s. (section) 146 and Bankruptcy and Insolvency General Rules s. (section) 94.1 and s. (section) 95 and Form 44.1; CCAA s. (Companies' Creditors Arrangement Act section) 11.3 and s. (section) 32 and Companies' Creditors Arrangement Regulations s. (section) 13 and Form 4

Asset Sales

Summary and Ordinary Administration Bankruptcy

The sale of assets in an ordinary administration bankruptcy to "related parties" requires court approval. The court must consider factors set out in the legislation before granting an order to sell the property.

In summary administration bankruptcies, court authorization of the sale of assets to a "related party" is only required if the creditors request it.

Proposals and the CCAA (Companies' Creditors Arrangement Act)

In Division I proposals and CCAA (Companies' Creditors Arrangement Act) cases, assets may not be sold outside of the ordinary course of business unless the sale is approved by the court on notice to all secured creditors likely to be affected by the sale. Factors for the court to consider are specified. Where the proposed sale is to a "related party," the court must be satisfied that additional conditions are met.

BIA s. (Bankruptcy and Insolvency Act section) 30(4), s. (section) 65.13 and s. (section) 155(k); CCAA s. (Companies' Creditors Arrangement Act section) 36

Ipsso Facto Clauses

The protection afforded to debtors under consumer proposals and Division I proposals against the impact of "ipso facto" clauses (clauses purporting to entitle a party to terminate an agreement on the basis of another party filing a proposal even if the other party is not otherwise in default of the terms of the agreement) is extended to bankruptcies and CCAA (Companies' Creditors Arrangement Act) filings.

Eligible financial contracts are excluded from the application of these provisions.

BIA s. (Bankruptcy and Insolvency Act section) 65.1 and s. (section) 84.2; CCAA s. (Companies' Creditors Arrangement Act section) 34

Transfers at Undervalue and Preferences

Transfers at Undervalue

Settlements and reviewable transactions have been replaced with a single cause of action — "transfer at undervalue" or "TUV." It is a question of fact for the court to determine (1) whether the transfer was at undervalue, and (2) whether the parties were or were not dealing with each other at arm's length. Persons who are related to each other are deemed not to deal at arm's length unless there is evidence to the contrary.

TUV (transfer at undervalue) to Non-Arm's Length Party

If the court finds that the transaction was a transfer at undervalue and that the other party was not at arm's length, the court may grant judgment for the difference between the actual consideration and the fair market value if (1) the transfer took place within one year before the date of the initial bankruptcy event or (2) the transfer took place within one to five years before the date of the initial bankruptcy event and the debtor was insolvent at the time of the transfer or intended to defeat the interests of creditors.

TUV (transfer at undervalue) to Arm's Length Party

If the court finds that the transaction was a transfer at undervalue and that the parties were dealing with each other at arm's length, the court may grant judgment for the difference between the actual consideration and the fair market value if the transfer took place within one year before the date of the initial bankruptcy event and the debtor was insolvent at the time of the transfer and the debtor intended to defeat the interests of creditors.

Preferences

Preference to Non-Arm's Length Creditor

If the preference was made to a non-arm's length creditor within one year, no intention test is required. The LIT only needs to show the transaction had the effect of preferring the creditor.

Preference to Arm's Length Creditor

If the preference was made to an arm's length creditor within three months, the LIT must establish that there was an intention to prefer that creditor over another. Where the transaction had the effect of preferring the arm's length creditor, a rebuttable presumption arises of an intention to prefer.

The BIA (Bankruptcy and Insolvency Act)'s transfer at undervalue and preference provisions are incorporated into the CCAA (Companies' Creditors Arrangement Act) by reference. LITs and monitors will now have to report on the reasonableness of a decision to exclude the application of the TUV (transfer at undervalue) and preference provisions from a proposal or a compromise or arrangement (i.e. *id est* (That is)), not to go after the preference or the TUV (transfer at undervalue) transaction).

BIA s. (Bankruptcy and Insolvency Act section) 2, s. (section) 4(5), s. (section) 50(10)(b), s. (section) 95, s. (section) 96 and s. (section) 101.1; CCAA s. (Companies' Creditors Arrangement Act section) 23(1)(d.1) and s. (section) 36.1

Directors

The court may order that the director or person acting in such capacity be removed if the court is satisfied that the director may unreasonably impair the insolvent person's ability to complete a viable proposal/plan. The court is also authorized to fill any vacancy that is created. The court may grant a priority charge against the assets of the insolvent person in favour of the directors for an amount reasonably necessary to indemnify them against obligations and liabilities they may incur following the date of the filing and ending at the completion of the proceeding. The charge may be given priority over existing security. Notice is required to be given to secured creditors who are likely to be affected by the order granting the charge.

BIA s. (Bankruptcy and Insolvency Act section) 64 and s. (section) 64.1; CCAA s. (Companies' Creditors Arrangement Act section) 11.5 and s. (section) 11.51

Payment of Professional Costs

In Division I proposals and CCAA (Companies' Creditors Arrangement Act) cases, the court may make an order providing that the property of the debtor is subject to a charge to pay the expenses of professional advisers of any interested party if the court is satisfied that the order is necessary for the effective participation of the interested party. The charge may be given priority over existing security. Notice is required to be given to secured creditors who are likely to be affected by the order.

BIA s. (Bankruptcy and Insolvency Act section) 64.2; CCAA s. (Companies' Creditors Arrangement Act section) 11.52

Critical Suppliers

In CCAA (Companies' Creditors Arrangement Act) filings only, the court may make an order declaring a person to be a critical supplier and may make an order requiring continued supply on terms and conditions consistent with the supply relationship or on any basis the court considers appropriate. Critical suppliers must be given security by the court over the property of the debtor and such security may be given priority over any existing security. Notice is required to be given to secured creditors who are likely to be affected by the order.

CCAA s. (Companies' Creditors Arrangement Act section) 11.4

Unpaid Suppliers' Rights

Unpaid suppliers have 15 days after the date of bankruptcy or the appointment of a receiver to submit a written demand for goods delivered to the purchaser or the purchaser's agent (e.g. (example given), third-party warehouse) within 30 days before the bankruptcy or appointment of the receiver.

BIA s. (Bankruptcy and Insolvency Act section) 81.1

Shareholder Approval

The court may authorize, as part of a proposal or a compromise or arrangement, a change to the debtor's constating documents (e.g. (example given), articles of incorporation for a corporation or trust documents for an income trust) that would otherwise require approval of the shareholders or unitholders, as the case may be.

The court may also order the sale of assets outside of the ordinary course of business even if shareholder approval was not obtained.

BIA s. (Bankruptcy and Insolvency Act section) 59(4) and s. (section) 65.13(1); CCAA s. (Companies' Creditors Arrangement Act section) 6(2) and s. (section) 36(1)

Plan Approval

The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

CCAA s. (Companies' Creditors Arrangement Act section) 12

Treatment of Equity Claims

Claims arising from the purchase or sale of equity of the bankrupt or debtor company are subordinated to all other claims. The class of creditors having equity claims may not vote at any meeting unless the court orders otherwise. Creditors with equity claims are not entitled to a dividend until all other claims are satisfied. No proposal or compromise or arrangement that provides for payment of an equity claim is to be approved/sanctioned by the court unless all other claims are to be paid in full.

BIA s. (Bankruptcy and Insolvency Act section) 2, s. (section) 54(2)(d), s. (section) 54.1, s. (section) 60(1.7) and s. (section) 140.1; CCAA s. (Companies' Creditors Arrangement Act section) 2, s. (section) 6(1), s. (section) 6(8) and s. (section) 22.1

Income Trusts

Provisions have been added to deal with the insolvency of an income trust.

BIA s. (Bankruptcy and Insolvency Act section) 2 and Bankruptcy and Insolvency General Rules s. (section) 1.1 and s. (section) 103.1; CCAA s. (Companies' Creditors Arrangement Act section) 2 and Companies' Creditors Arrangement Regulations s. (section) 2 and s. (section) 5

Eligible Financial Contracts

The following changes were effected by the *Budget Implementation Act, 2007* (S.C. (Superior Court) 2007, c. (chapter)29): (a) the definition of "EFC (eligible financial contract)" (EFC) was updated and moved to regulations to provide greater flexibility with respect to future updates; (b) the carve out for EFC (eligible financial contract)s from the application of the stay provisions was clarified; and (c) the ability of parties to terminate EFC (eligible financial contract)s post-insolvency filing (i.e. (id est (That is))), impact of the ipso facto provision) does not apply to EFC (eligible financial contract)s.

BIA s. (Bankruptcy and Insolvency Act section) 65.1 and s. (section) 84.2; CCAA s. (Companies' Creditors Arrangement Act section) 11.05(1); Budget Implementation Act, 2007 (S.C. 2007, c. (chapter) 29) Part 9.

UNCITRAL (United Nations Commission on International Trade Law)

The principles of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency have been adopted.

BIA s. (Bankruptcy and Insolvency Act section) 267–284 and Bankruptcy and Insolvency General Rules s. (section) 138; CCAA s. (Companies' Creditors Arrangement Act section) 44–61 and Companies' Creditors Arrangement Regulations s. (section) 14

CCAA (Companies' Creditors Arrangement Act) Oversight

The Office of the Superintendent of Bankruptcy will maintain a public registry of CCAA (Companies' Creditors Arrangement Act) filings, will receive and keep a record of all complaints regarding the conduct of monitors, and will have supervisory powers in relation to the conduct of monitors under the CCAA (Companies' Creditors Arrangement Act).

CCAA s. (Companies' Creditors Arrangement Act section) 26–31 and Companies' Creditors Arrangement Regulations s. (section) 11–12

CCAA (Companies' Creditors Arrangement Act) Process

Provisions have been introduced with a view to making the process under the CCAA (Companies' Creditors Arrangement Act) more transparent (e.g. (example given), notice provisions, cash-flow statements on a weekly basis, etc. (et cetera)).

CCAA s. (Companies' Creditors Arrangement Act section) 23 and Companies' Creditors Arrangement Regulations s. (section) 6–10 and Forms 1, 2 and 3

Consumer Issues

Bankrupts with High Income Tax Debt

Bankrupts with personal income tax debt in an amount exceeding \$200,000, representing 75 percent or more of their total unsecured proven claims, are not eligible for an automatic discharge.

"Personal income tax debt" includes interest, penalties or fines imposed under the *Income Tax Act* or equivalent provincial legislation, but does not include an amount payable by the individual in their capacity as a director of a corporation.

BIA s. (Bankruptcy and Insolvency Act section) 172.1

Surplus Income

First-time bankrupts who have surplus income are required to contribute a portion of the surplus to their estate for the benefit of their creditors for 21 months, and second-time bankrupts are required to contribute for 36 months, subject in both cases to a change in circumstances that impacts on the obligation to pay surplus income.

BIA s. (Bankruptcy and Insolvency Act section) 168.1 and Forms 65, 82 and 84 and Directive No. (Number) 11R2

Definition of Income

The definition of "total income" has been amended to include amounts received by the bankrupt between the date of bankruptcy and the date of discharge, including amounts for wrongful dismissal, pay-equity settlements or workers' compensation, but not including amounts received during the same time period as a gift, inheritance or other windfall.

A requirement to pay surplus income is enforceable against income that would otherwise be exempt, and income earned but not yet received is included in the definition of "total income."

BIA s. (Bankruptcy and Insolvency Act section) 68

Post-Discharge Payment Agreements

Agreements regarding the payment of LIT's fees and expenses are permissible and enforceable after the bankrupt's discharge, provided (1) the bankrupt's income is below the level where a surplus income obligation would arise, (2) the amount to be paid under the terms of the agreement does not exceed a prescribed amount (currently set at \$1,800), and (3) the payments do not extend beyond 12 months following discharge.

BIA s. (Bankruptcy and Insolvency Act section) 156.1 and Bankruptcy and Insolvency General Rules s. (section) 58.1

Definition of Consumer Debtor

A consumer proposal may be filed by someone with up to \$250,000 in debts, excluding debts secured by their principal residence.

BIA s. (Bankruptcy and Insolvency Act section) 66.11

Discharge of Second-Time Bankrupts

Second-time bankrupts without surplus income are eligible for an automatic discharge after 24 months.

Second-time bankrupts with surplus income are eligible for an automatic discharge after 36 months.

BIA s. (Bankruptcy and Insolvency Act section) 168.1(b)

Consumer Proposal Default

Administrators of consumer proposals have discretion to "revive" a consumer proposal that would otherwise be deemed annulled. Creditors retain the right to object to the revival of the consumer proposal. Courts have the power to make an order reviving the consumer proposal on any terms the court considers appropriate. An application to court for an order reviving a consumer proposal that has been deemed annulled may be made at any time.

BIA s. (Bankruptcy and Insolvency Act section) 66.31 and Forms 54.2, 55.1, 56 and 93-96

Avoiding the Inadvertent Discharge of Otherwise Undischargeable Debts

Debts set out in section 178 of the BIA (Bankruptcy and Insolvency Act) or section 18(2) of the CCAA (Companies' Creditors Arrangement Act) are not discharged in a proposal or in a plan of compromise or arrangement except if the proposal/plan explicitly provides for the compromise of those claims and the creditors vote in favour of the proposal/plan.

BIA s. (Bankruptcy and Insolvency Act section) 62(2.1); CCAA s. (Companies' Creditors Arrangement Act section) 19(2)

Debts Not Released by Order of Discharge

Debts for services obtained through false pretenses or fraudulent misrepresentations, together with debts for property obtained in such circumstances, are included as undischargeable debts.

BIA s. (Bankruptcy and Insolvency Act section) 178(1)(e); CCAA s. (Companies' Creditors Arrangement Act section) 19(2)(d)

Mandatory Counselling

Debtors making a consumer proposal must undergo mandatory counselling in order to receive a certificate of full performance. Bankrupts who have refused to attend mandatory counselling are not eligible for an automatic discharge.

BIA s. (Bankruptcy and Insolvency Act section) 66.38(2) and s. (section) 157.1(3)

Statement of Affairs in Proposals

A statement of affairs is required to be completed in all proposals.

BIA s. (Bankruptcy and Insolvency Act section) 50(2) and s. (section) 62(1) and Forms 78 and 79

Section 170 Report

The amendment to subsection 170(1) of the BIA (Bankruptcy and Insolvency Act) limits the circumstances in which a report ("section 170 report") must be prepared. The section 170 report is required where the bankrupt has surplus income, when an opposition to the bankrupt's discharge has been filed, when the bankrupt has been bankrupt on a previous occasion, or when there is any reason that would require a court hearing of the discharge. Rule 121.1 also sets out the timelines regarding the preparation of the section 170 report.

BIA s. (Bankruptcy and Insolvency Act section) 170(1) and Bankruptcy and Insolvency General Rules s. (section) 121.1 and Form 82

Asset Limit for Summary Administration Bankruptcy

The asset limit for summary administration bankruptcy estates has been raised from \$10,000 to \$15,000.

BIA s. (Bankruptcy and Insolvency Act section) 49(6) and s. (section) 49(8) and Bankruptcy and Insolvency General Rules s. (section) 130

Costs and Taxation

The cap on the amount that LITs may pay for legal services without first having to be taxed is increased from \$1,000 to \$2,500.

Bankruptcy and Insolvency General Rules s. (section) 18(2)

Undischarged Bankrupt — Credit

Undischarged bankrupts must disclose their status when they obtain credit of \$1,000 or more from any person. The threshold amount is increased from \$500 to \$1,000.

BIA s. (Bankruptcy and Insolvency Act section) 199(2)

Disposal of Unrealizable Assets

Any property of a bankrupt that is listed in the statement of affairs or otherwise disclosed to the LIT before the bankrupt's discharge and that is found incapable of realization must be returned to the bankrupt before the LIT's application for discharge. If inspectors have been appointed, the LIT may do so only with their permission.

BIA s. (Bankruptcy and Insolvency Act section) 40(1)

Other Issues**Voting Issues / Non-Arm's Length Voting Rights**

If the outcome of a vote at a meeting of creditors is determined by the vote of one or more persons who did not deal with the debtor at arm's length within the one-year period before bankruptcy, the chair re-determines the outcome not taking the vote of those creditors into account. This then becomes the outcome of the vote unless an application is made to court within 10 days and the court determines another outcome. In an application to revoke or vary a decision regarding the outcome of a vote, the court may suspend the effect of the vote.

BIA s. (Bankruptcy and Insolvency Act section) 109(6) and s. (section) 115.1

Professional Conduct Provisions

Amendments were made to the professional conduct provisions that add clarity to issues that have arisen in various court proceedings.

BIA s. (Bankruptcy and Insolvency Act section) 14.01

Legal Opinion

In order for an LIT of an estate to act for a secured creditor in realizing on its security, the LIT must obtain a written opinion from independent legal counsel that the security is valid and enforceable against the estate.

BIA s. (Bankruptcy and Insolvency Act section) 13.4

Orderly Payment of Debts

Provinces that have chosen to "opt in" to the Orderly Payment of Debts (OPD) provisions may also "opt out." This amendment ensures that the legislation provides explicit authority for provinces to "opt out" of operating the OPD program.

BIA s. (Bankruptcy and Insolvency Act section) 242

Date modified:

2015-03-24

TAB 13

1986 CarswellBC 131
British Columbia Court of Appeal

Fredrikson v. Insurance Corp. of British Columbia

1986 CarswellBC 131, [1986] 4 W.W.R. 504, [1986] I.L.R. 1-2100, [1986] B.C.J. No.
366, 17 C.C.L.I. 194, 28 D.L.R. (4th) 414, 38 A.C.W.S. (2d) 440, 3 B.C.L.R. (2d) 145

FREDRICKSON v. INSURANCE CORPORATION OF BRITISH COLUMBIA

Seaton, Anderson and McLachlin JJ.A.

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

Counsel: *R. B. Harvey, Q.C.* for appellant.
J. E. Murphy, for respondent.

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

Headnote

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

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

Insurance --- Claims --- Settlement and release --- General

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

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

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

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

of the regulations because the assignment interfered with I.C.B.C.'s ability to negotiate and settle the claim. The application was dismissed and I.C.B.C. appealed.

Held:

Appeal dismissed.

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

Table of Authorities

Cases considered:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Statutes considered:

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

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

Regulations considered:

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

Authorities considered:

Chitty on Contracts, 25th ed. (1983), pp. 293, 709-15.

Fleming, The Law of Torts, 6th ed. (1983), p. 593.

Fridman, The Law of Contract in Canada (1976), pp. 442-45.

Treitel, The Law of Contract, 5th ed. (1979), pp. 519-23.

Waddams, Law of Contracts, 2nd ed. (1984), pp. 197-98.

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

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

1. Introduction

1 The issue argued on this appeal [from judgment reported at [64 B.C.L.R. 301, \[1985\] 5 W.W.R. 342, 15 C.C.L.I. 249, \[1986\] I.L.R. 1-1991](#)] is whether an insured person may validly assign to the person claiming against him a cause of action against his insurer for failure to properly defend and negotiate settlement of the action on his behalf.

2 The facts may be summarized as follows.

3 On 28th May 1977 Linda Nielsen was seriously injured while driving Fredrickson's automobile with his consent. In 1982 a jury found Mr. Fredrickson 80 per cent liable for Nielsen's injuries. Mr. Fredrickson held a certificate of insurance from I.C.B.C. with a \$500,000 limit for third party liability.

4 Following the trial but prior to appeal, Mr. Fredrickson gave I.C.B.C. notice that if I.C.B.C. chose not to settle the Nielsen claim within the limits of the policy, then Mr. Fredrickson expected I.C.B.C. to indemnify him fully. On 26th October 1982 Berger J. approved a settlement as to quantum put forward by counsel for Nielsen, counsel for I.C.B.C. and counsel for Mr. Fredrickson subject to a pending appeal on the issue of liability. The quantum approved was approximately \$1.2 million. Mr. Fredrickson was personally responsible for all amounts in excess of \$500,000. On 14th October 1983 Mr. Fredrickson's appeal was dismissed [[\[1984\] B.C.W.L.D. 2088](#)].

5 Mr. Fredrickson had no assets of significance other than cause of action against I.C.B.C. for failure to properly defend Miss Nielsen's action against him. At the suggestion of counsel for Miss Nielsen, an assignment agreement was executed between Mr. Fredrickson and the Public Trustee as committee of the estate of Miss Nielsen, purporting to assign to her this right of action. Pursuant to the assignment the Public Trustee commenced this action in the name of Fredrickson for a declaration that Mr. Fredrickson is entitled to indemnification for any money owed to Nielsen not payable under the policy, for an order that I.C.B.C. indemnify him for those moneys owed to Miss Nielsen and for a judgment in the amount owed to Miss Nielsen not payable under the policy, i.e., the difference between the amount of the judgment and Mr. Fredrickson's policy limits.

6 On 6th February 1984 I.C.B.C.'s counsel on behalf of Mr. Fredrickson applied for leave to appeal the personal injury action to the Supreme Court of Canada. That application was refused.

7 Mr. Fredrickson's action against I.C.B.C. is set down for trial in June 1986. It is being pursued by the Public Trustee on Miss Nielsen's behalf. I.C.B.C. in its pleadings (para. 8) stated that the action must fail because Mr. Fredrickson has suffered no loss as a result of I.C.B.C.'s conduct because he has assigned his interest in the action to Miss Nielsen. I.C.B.C. also said (para. 9) that the action is ill-founded because the assignment is invalid. Based on these two contentions and the admissions of Mr. Fredrickson, it sought an order striking out Mr. Fredrickson's claim. The chambers judge held that the assignment constituted a valid equitable assignment and that it did not contravene the regulations of the Insurance (Motor Vehicle) Act. I.C.B.C. now appeals that decision.

8 Notwithstanding that Miss Nielsen has not been joined as party, both parties have addressed the motion below and on this appeal on the basis that the real claimant is not Mr. Fredrickson, but Miss Nielsen. I am prepared to deal with the matter on that basis. I note, however, that it may be necessary to formally add Miss Nielsen as a plaintiff before the matter proceeds to trial. It appears that both the assignor and assignee of an equitable assignment of a legal chose in action must be made parties to the proceedings: Chitty on Contracts, 25th ed. (1983), p. 293, citing *Walter & Sullivan Ltd. v. J. Murphy & Sons Ltd.*, [1955] 2 Q.B. 584, [1955] 2 W.L.R. 919, [1955] 1 All E.R. 843 (C.A.). Were this to be done, then the first defence which I.C.B.C. cited in support of its motion — Mr. Fredrickson's lack of a person interest in the litigation — could properly be raised against him, while the other defence cited — the alleged invalidity of the assignment — could properly be raised against the assignee, Miss Nielsen.

9 With this reservation, I turn to the issue argued on appeal, the validity of the assignment. This issue raises two subsidiary questions:

1. Whether the assignment violates Regulations, s. 6.33(a) and (b), of the Insurance (Motor Vehicle) Act;
2. Whether the assignment was valid at law or equity.

I will consider each in turn.

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

10 Section 6.33(a) and (b) provides:

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

- (a) voluntarily assume any liability or settle any claim, except at his own cost; or
- (b) interfere with the corporation in any negotiation, settlement, or in any legal proceedings; but whenever requested by the corporation, the insured shall: ...

11 This ground of appeal raises three issues: (1) whether Mr. Fredrickson's assignment constitutes a "settlement"; (2) if so, whether the settlement was at Mr. Fredrickson's "own cost" within s. 6.33(a); or, alternatively, (3) whether the assignment amounted to interference under s. 6.33(b). The chambers judge did not decide the first issue, having determined the second and third issues in Mr. Fredrickson's favour. I propose to approach the matter in the same way.

12 I turn first to s. 6.33(a) and the question of whether the assignment, if it constituted a settlement, was at Mr. Fredrickson's "own cost". I am of the view that the chambers judge was correct in concluding that it was.

13 It is conceded that, where doubt exists, the regulations should be interpreted in favour of the insured. This consideration leads me to conclude that the phrase "except at his own expense" was intended to permit the accused to settle claims, provided that the settlement does not involve cost to I.C.B.C. I do not think the section was intended

to impose on the insured the obligation of showing that the settlement costs him something. That fact is irrelevant to I.C.B.C.'s concerns.

14 In this case, the assignment cannot prejudice I.C.B.C. in the sense that it would be required to pay more money because of the assignment. The only difference it might make to I.C.B.C. is that, instead of paying the money to Mr. Fredrickson, its assured, upon proof that he had satisfied Miss Nielsen's judgment, it would pay it to Miss Nielsen directly.

15 The next question is whether, assuming the assignment constituted a settlement, it amounts to an interference with I.C.B.C. in any negotiations, settlements or legal proceedings. I.C.B.C. does not allege specific interference but argues that to permit such assignments creates a disincentive to injured claimants to settle for less than the policy limits and removes the interest of the insured in having his defence succeed in whole or in part.

16 I do not accept the contention of I.C.B.C. that the assignment interfered with its ability to negotiate, settle and defend this action. The action had been concluded before the assignment took place, save for an unsuccessful application for leave to appeal to the Supreme Court of Canada. Moreover, it cannot be contended on the facts of this case that the assignment or the prospect of an assignment provided any disincentive to Miss Nielsen settling the action. The Public Trustee on her behalf made seven offers to settle the case. I.C.B.C. rejected them all and made no offers of its own, except for one offer made after the appeal was dismissed.

17 In support of its contention that the assignment violates s. 6.33(a) and (b) of the Regulations, I.C.B.C. conjures up the spectre of such assignments being given early in the litigation, allying the plaintiff and the defendant against the insurer in the litigation. In general, as Duff J. pointed out in *Fidelity & Casualty Co. v. Marchand*, [1924] S.C.R. 86, [1924] 4 D.L.R. 157 [Que.], the purpose of provisions such as s. 6.33(a) and (b) is to protect the insurer against the risk of collusion between the insured and the persons claiming damages for alleged torts. The assignment here in question does not violate this principle. Mr. Fredrickson cooperated fully with I.C.B.C. throughout the litigation. The agreement was entered into only after Miss Nielsen had made demands on him for payment of the balance of her judgment in excess of the policy limits and after the appeal had been dismissed and the litigation concluded for all practical purposes. In short, the assignment did not prejudice I.C.B.C.'s position and did not constitute collusion between the claimant and the assured.

18 For these reasons, I conclude that the chambers judge was correct in concluding that I.C.B.C. had failed to establish that the assignment violated s. 6.33 of the regulations. Having so decided, I need not consider the contention of Mr. Fredrickson that I.C.B.C. is estopped from objecting to the alleged breach of the regulations.

III. Whether the Assignment was Valid in Law or Equity

19 By the agreement of assignment, Mr. Fredrickson conferred on Miss Nielsen "any and all rights of action or actions he possesse[d] arising out of the defence by I.C.B.C." of Miss Nielsen's suit against him, and appointed her his attorney "with full power and authority ... to sue for, recover and receive, the proceeds of the action or actions ... assigned. ..." In return, Miss Nielsen agreed not to take execution proceedings against Mr. Fredrickson. The assignment was an equitable assignment, I.C.B.C. not being party to it. It is not disputed that I.C.B.C. has received notice of the assignment.

20 The causes of actions purporting to be assigned are pleaded alternatively in contract and tort. Paragraph 55 of the statement of claim alleges that I.C.B.C. was in breach of the express and implied terms of its contract of insurance with Mr. Fredrickson in that it failed to act reasonably and properly in the adjustment and defence of Miss Nielsen's action against him. Paragraph 56 alleges that in the alternative I.C.B.C. was negligent in adjusting and defending the action and sets out detailed particulars of the negligence alleged. Since the plaintiff intends to proceed with both claims at trial, it is necessary to consider the assignability of both the cause of action in contract and the cause of action in tort.

A. Assignability of the Cause of Action in Tort

21 It is frequently said that a bare cause of action in tort is not assignable. This rule is based mainly on strictures of the common law against maintenance and champerty. Anglo-Canadian jurisprudence has never countenanced trafficking in litigation.

22 The exact ambit of the rule is elusive. Some of the cases commonly cited as authority for the rule prove, on analysis, not to have dealt with it except in obiter, if at all: *Simpson v. Thomson* (1877), 3 App. Cas. 279 (H.L.) (where the issue was subrogation, not assignment); *Dawson v. Great Northern & City Ry. Co.*, [1905] 1 K.B. 260 (C.A.) (where the cause of action lay in contract or administrative law); *Defries v. Milne*, [1913] 1 Ch. 98 (C.A.) (where the cause of action lay in contract law). Other cases speak only of the non-assignability of personal torts, as opposed to torts involving property: *Glegg v. Bromley*, [1912] 3 K.B. 474 (C.A.); see also *Union Gas Co. v. Brown*, [1968] 1 O.R. 524, 67 D.L.R. (2d) 44 at 51 (H.C.), reversed on other grounds [1970] 1 O.R. 715, 9 D.L.R. (3d) 337 (C.A.). None of the authorities offer a comprehensive discussion of the ambit of the rule.

23 On the assumption that, as a general rule, causes of action in tort are not assignable, it is clear that that rule is subject to a number of exceptions. In dealing with those exceptions it must be borne in mind that the categories of exceptions are not closed. In each case the court must ask itself whether the assignment can fairly be seen as prompted by a desire to advance the cause of justice rather than as intermeddling for some collateral reason: Fleming, *The Law of Torts*, 6th ed. (1983), p. 593.

24 First, it is clear that the fruits of an action, as opposed to the action itself, are assignable. In *Glegg v. Bromley*, supra, the issue was the validity of an assignment by a wife to her husband of the damages of a slander action. The court accepted that an assignment of a tort action based on a "personal wrong" would be invalid. It held, however, that if there were words in the assignment which purported to convey the cause of action as opposed to the fruits of the action, those words would be inoperative, leaving intact the portion of the assignment conveying the right to the fruits of the action.

25 The assignment in the case at bar purports to convey both the cause of action and the fruits of the action. If Miss Nielsen's only interest were in obtaining any damages which Mr. Fredrickson might obtain as a result of the suit, then the matter could be disposed of on the basis of this exception. However, it appears that she is desirous of prosecuting the action as well, through her agent, the Public Trustee. Her right to do so cannot be resolved on the basis of this exception.

26 A second exception concerns cases where the assignee has either a pre-existing property interest or a legitimate commercial interest in the enforcement of the claim. An assignment where the assignee possesses such an interest will be valid, provided the action in tort is not based on a personal wrong, such as assault, libel or personal injury. The reason for the latter stricture appears to be that in cases of personal torts, the assignee can have no legitimate property or commercial interest in recovery: *Trendtex Trading Corp. v. Crédit Suisse*, [1980] Q.B. 629 at 656-57, [1980] 3 W.L.R. 367, [1980] 3 All E.R. 721, per Denning M.R., affirmed [1982] A.C. 679, [1981] 3 W.L.R. 766, [1981] 3 All E.R. 520 at 530 (H.L.).

27 This raises the question of what constitutes a sufficient interest to support an assignment of a cause of action in tort. Certainly a property interest to which the cause of action is ancillary is sufficient: *Ellis v. Torrington*, [1920] 1 K.B. 399 (C.A.). However, a property interest is not essential. The nature of the interest required to support an assignment is perhaps best ascertained by considering some of the cases which have upheld assignments of actions in tort on the basis of the assignee's interest in pursuing the action.

28 Assignments of causes of action in tort by the owners of damaged property to their insurers have been upheld on this ground: *King v. Victoria Ins. Co.*, [1896] A.C. 250, 65 L.J.P.C. 38, 74 L.T. 206, 12 T.L.R. 285, 44 W.R. 592 (P.C.); *Compania Colombiana de Seguros v. Pac. Steam Navigation Co.*, [1965] 1 Q.B. 101, [1964] 2 W.L.R. 484, [1964] 1 All E.R. 216. In these cases the insurer may be viewed as possessing a right by way of subrogation, of which the assignment is an extension: per Lord Roskill in *Trendtex*, supra.

29 In *Kapoor Lumber Co. v. Can. Nor. Pac. Ry. Co.*, 45 B.C.R. 213, [1932] 2 W.W.R. 417, [1932] 3 D.L.R. 487, this court considered whether an assignment of a cause of action in tort by an insured to his insurer was valid,

entitling the defendants to pre-trial remedies against the insurance companies as true plaintiffs. Macdonald C.J.B.C., at p. 489, and Macdonald J.A. held that the assignment must fail because it assigned only part of the cause of action. Macdonald C.J.B.C., following *King*, supra, was of the view that otherwise the action would have been assignable, notwithstanding that it was an action in tort. McPhillips J.A. expressed the contrary view, stating [at p. 500] that it was "utterly impossible ... to assign a [cause of] action [in] tort". Martin J.A. held the assignment assigned the whole cause of action and was valid. In the upshot, while the case was decided on other grounds, two of the four justices would have upheld the assignment of the tort action. In my opinion, this is the better view.

30 Other cases illustrate that a cause of action may be assigned even where the assignee has no ancillary property interest. Assignment of the right to sue for infringement of copyright to a society formed to protect the interests of its members was upheld in *Performing Rights Soc. v. Thompson* (1918), 34 T.L.R. 351 (K.B.). In an action for infringement, the defendants alleged the assignment violated the rules against champerty and maintenance and that the business of the society was that of "breedbates" and "trafficking in litigation" [p. 352]. Atkin J. rejected that contention. He found at p. 352 that the assignment constituted a "bona fide business arrangement" for "legitimate business reasons". The society and its members, he said, both had a "real and bona fide interest in the result of the litigation".

31 Similarly, in *Martell v. Consett Iron Co.*, [1955] Ch. 363, [1955] 2 W.L.R. 463, [1955] 1 All E.R. 481 (C.A.), Danckwerts J. followed a "genuine interest in the litigation" test, in upholding maintenance by an association for the prevention of pollution to rivers of an action brought by owners and occupiers of fisheries.

32 *Martell* was approved in the House of Lords in *Trendtex*, supra. In the latter case, Lord Wilberforce at p. 524, held that, apart from subsequent dealings, an assignment of a cause of action would have been valid, because it did not offend the law of maintenance or champerty. This was so because the assignee had a "genuine and substantial interest" in the success of the litigation.

33 Lord Roskill expressed the view at p. 531 that the assignment would be valid "If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee had a genuine commercial interest in taking the assignment and enforcing it for his own benefit ..." The other law lords agreed with both Lord Wilberforce and Lord Roskill. (It is immaterial that the cause of action assigned in *Trendtex* was in contract since the law on this point is the same for tort and contract.)

34 Two Canadian cases subsequent to *Trendtex* must be considered. In *Ellis-Don Ltd. v. Norton* (1982), 5 C.L.R. 281 (Ont. H.C.), an assignment of lien claims by subcontractors to a general contractor was struck down on the ground that the contractor-assignee in taking the assignment was not protecting a legitimate commercial interest. It was noted that he had ample machinery under the Ontario Mechanics Lien Act to vacate the liens and protect his position apart from the assignment. (Liens may be assigned under the British Columbia Builders' Lien Act: *Henfrey & Co. v. Poplar Properties Ltd.*, No. CA002767 [now reported at 70 B.C.L.R. 23, 24 D.L.R. (4th) 313].

35 A case closer to the facts of this case is 453416 Ont. Inc. v. White (1984), 42 C.P.C. 209 (Ont. H.C.), leave to appeal granted (1984), 42 C.P.C. 215, per Reid J., appeal dismissed 27th June 1985 (Ont. Div. Ct.), where the court upheld an assignment by an insured to a party who had recovered judgment against him on account of an accident for which the insured successfully denied coverage. The subject of the assignment was the insured's cause of action against its insurance agent for breach of fiduciary obligation and negligent misrepresentation in failing to obtain proper insurance. Smith J. concluded at p. 214 that the interest of the assignee was real, genuine and legitimate. He was also of the view that it constituted a commercial interest even though it did not arise from financing arrangements as in *Trendtex*.

36 Most recently, in *Bourne v. Colodense Ltd.*, [1985] I.C.R. 291, the English Court of Appeal upheld the assignability of a cause of action of a union member for indemnification from his union for court costs to a receiver by way of equitable execution. The court found that the successful party in the litigation that gave rise to the costs had a commercial interest sufficient to negate any taint of champerty and thus to support the assignment. Lawton L.J. emphasized the fact that the assignee was not seeking to profit by the assignment, but was rather seeking only to obtain what it was entitled to

under its order for costs. While the cause of action assigned was contractual, *Bourne* supports the view taken in other cases of the nature of the interest required to support an assignment.

37 I would summarize the effect of these cases as follows. An assignment of a cause of action for non-personal tort is generally valid if the assignee has a sufficient pre-existing interest in the litigation to negate any taint of champerty or maintenance. In determining if this test is met, the court should look at the totality of the transaction: *Trendtex*, per Lord Roskill at p. 531. A property interest ancillary to the cause of action assigned is sufficient to support an assignment, but not essential. A genuine pre-existing commercial interest will suffice. The term "commercial interest" is used in the sense of financial interest; it need not arise from commercial dealings in the narrow sense. Assignment of a cause of action to a stranger will not be permitted, nor will the court uphold an assignment made for the purpose of obtaining more than what the assignee is legally entitled to. The conditions necessary to support the assignment of a cause of action in tort will be held to have been met where one party to litigation assigns to the other a cause of action arising out of the conduct of that litigation, with a view to enabling the assignee to recover the judgment which the court has previously pronounced in his favour.

38 The latter proposition flows from *453416 Ont. Inc. v. White* and finds support in *Bourne v. Colodense* both supra. Those cases, like the case at bar, involved assignments by a person liable on a court order of a cause of action against a third party related to indemnification by the third party. Neither case involved a personal tort. There is only one significant difference between these cases and the case at bar, insofar as they touch on the question of the assignability of a cause of action. In *453416 Ont. Inc. v. White*, if White had procured the proper insurance, the assignee would have benefited, for there would have been funds from the insurance to satisfy his judgment. Similarly, in *Bourne*, if the union had indemnified its employee, there would have been funds available to pay the applicant's costs. In the case at bar, however, if I.C.B.C. had acted as Mr. Fredrickson suggests it should have, the result would have been a settlement which would have given the assignee judgment for an amount substantially less than the judgment she now holds. In other words, there was no common interest between the assignee and assignor in the case at bar until shortly before the assignment, when it was clear that no compromise could be reached.

39 In my opinion, this difference between the case at bar and *453416 Ont. Inc.* and *Bourne* cases does not justify departing from the conclusion in those cases that the assignee possessed a sufficient interest in the action assigned to support the assignment. First, the fact the assignor's and assignee's interests were previously opposed does not make the assignment champertous. While the entire transaction must be looked to, the essential question to be considered in determining whether the assignment smacks of maintenance or champerty is whether the assignee possessed the requisite financial interest at the time of the assignment. In my view, the fact that at some earlier date the interests of the assignee and the assignor were opposed does not negate the fact that when the assignment here in question was made, Miss Nielsen had a very real financial interest in obtaining it. She had a judgment. The cause of action of which she took an assignment represented her only means of obtaining satisfaction of that judgment. Her interest in the cause of action assigned is not created by the assignment, in which case it might well be champertous, but antedated and existed independently of the assignment. The assignee, in pursuing the assigned cause of action, does not seek to make a profit but only to recover the amount of her judgment. Moreover, she is not a stranger to the action assigned. She was involved in the proceedings which give rise to it. She has a direct relationship under our legislation with I.C.B.C., as Mr. Fredrickson's insurer, in her own right. In these circumstances I cannot conclude that assignment of Mr. Fredrickson's cause of action against I.C.B.C. to Miss Nielsen renders her an officious intermeddler guilty of the improper maintenance of the litigation.

40 In my view, if the fact that Miss Nielsen's and Mr. Fredrickson's interests were once opposed has any relevance, it must be on the ground that to permit a defendant to assign a cause of action against his insurer to a plaintiff whose interests are opposed to his is to promote improper collusion between the plaintiff and the defendant to the detriment of the insurer. If this assignment had taken place while the interests of the parties were opposed, it might be attacked as invalid on the ground that it violates the duty of the assured to cooperate with his insurer. I need not decide whether such an attack would succeed, since those are not the circumstances in the case at bar. Here the assignee had a judgment and was entitled to pursue Mr. Fredrickson in execution proceedings and all realistic prospect of compromise had vanished.

The insured's duty to cooperate with his insurer had effectively been discharged. His interest at that point lay not with his insurer, but rather with the assignee; it was in their common interest to secure satisfaction of the judgment which had been rendered by the court and confirmed on appeal.

41 In summary, I see no valid reason for declaring the assignment in the case at bar to be invalid on the ground that at one point in time, the interests of the assignor and the assignee were opposed.

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

B. Assignability of the Cause of Action in Contract

43 The Courts of Common Law did not permit the assignment of choses in action generally speaking. Two reasons are usually given for this. The first is that contracts created obligations which were strictly personal, that is, intangible to the immediate parties, so their transfer was not understandable to the earlier Common Law lawyers. Once our law grew more sophisticated, the reason was attributed to a fear of maintenance and champerty: *Di Guilo v. Boland*, [1958] O.R. 384, 13 D.L.R. (2d) 510 at 513 (C.A.), per Morden J.A.

44 However, the Courts of Equity generally speaking did recognize and enforce such assignments. This recognition was adopted in 1873 in the Judicature Act and today our courts uphold assignments which the Court of Equity would have previously enforced. Today there are six categories of contracts which are considered to be unassignable. They are:

- 45 1. Contracts which expressly by their terms exclude assignment;
- 46 2. Mere rights of action (assignments savouring of maintenance and champerty);
- 47 3. Contracts which by their assignment throw unanticipated burdens on the debtor;
- 48 4. Personal contracts;
- 49 5. Assignments void by public policy (public officers' wages or salary and alimony or maintenance agreements); and
- 50 6. Assignments prohibited by statutory provisions. (Chitty on Contracts, 25th ed. (1983), pp. 709-15; Treitel, The Law of Contract, 5th ed. (1979), at pp. 519-23; Fridman, The Law of Contract in Canada (1976), pp. 442-45; and Waddams, Law of Contracts, 2nd ed. (1984), pp. 197-98.)

51 For purposes of this case, I need concern myself with only two of these categories: No. 2 (mere rights of action), and No. 4 (personal contracts).

52 The rule precluding the assignment of mere rights of action in contract is based on the rule against maintenance and champerty. As in the case of causes of action in tort, where the assignee possesses a sufficient pre-existing interest in the cause of action assigned, the suggestion of maintenance is negated and the assignment is valid: *Trendtex Trading Co. v. Crédit Suisse*, supra. In considering the assignability of the cause of action in tort, I have concluded that the assignee

in this case had a genuine pre-existing financial interest in the cause of action assigned and that the assignment did not savour of maintenance or champerty. The same conclusion applies to the cause of action in contract.

53 I turn then to the rule against the assignment of personal contracts. As a general rule contracts for personal services cannot be assigned. The right to assign contractual rights without consent is confined to those cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it: *Tolhurst v. Assoc. Portland Cement Mfr. (1900) Ltd.*, [1902] 2 K.B. 660 (C.A.); *Paterson Timber Co. v. Can. Pac. Lumber Co. (1909)*, 15 B.C.R. 225, 14 W.L.R. 598, affirmed (1910), 47 S.C.R. 398. Motor vehicle insurance policies are regarded as personal contracts and hence as non-assignable, because it makes a difference to the insurer who the insured is: *Peters v. Gen. Accident & Life Assur. Corp.*, [1938] 2 All E.R. 267 (C.A.). Thus, for example, had Mr. Fredrickson sold his car prior to the accident, he could not have assigned his policy of insurance to the purchaser.

54 A distinction may be drawn, however, between the assignment of a contract and the assignment of a cause of action for damages arising out of an executed contract. Some cases suggest that if a contract is not assignable, a cause of action arising out of it is similarly not assignable: *Cohen v. Webber* (1911), 24 O.L.R. 171 at 173 (C.A.); *Brown v. Hall*, [1957] O.W.N. 15, 6 D.L.R. (2d) 460 at 464 (C.A.). However, the rationale which supports the non-assignability of personal contracts does not apply to causes of action for damages, when all that remains is the payment of money, since the assignment of a cause of action does not confer on the assignee the right to have services performed by the party who contracted with the assignor. This suggests that the fact that a personal contract cannot be assigned should not preclude assignment of a cause of action for damages based on a breach of that contract.

55 This view has been taken in the United States. In *Groce v. Fidelity Gen. Ins. Co.*, supra, Goodwin J. held at p. 559, in a case quite similar to this:

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

56 The authorities in England and Canada offer little assistance on the question of whether a cause of action for damages for breach of contract can be assigned. Clearly a cause of action in debt can be assigned, even though the debtor denies liability: *Fitzroy v. Cave*, [1905] 2 K.B. 364 (C.A.); *County Hotel & Wine Co. v. London & North West. Ry. Co.*, [1918] 2 K.B. 251 at 258. However, the assignability of unliquidated claims admits of more doubt. Treitel, *The Law of Contracts*, 5th ed., after noting the different views on the question, concludes at p. 523 that "The best approach is to avoid generalisation and to ask in each case whether *this* assignment savours of maintenance".

57 Adopting that approach, it is my conclusion for the reasons stated earlier that the assignment of the cause of action for breach of contract here at issue does not savour of maintenance. Nor, as already noted, can it make any difference to I.C.B.C., to whom it pays damages awarded in any judgment which may be entered against it.

58 In these circumstances, I conclude that Mr. Fredrickson's cause of action in contract is assignable.

C. Public Policy

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

IV. Conclusion

60 The appeal is dismissed.

Appeal dismissed.

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TAB 14

2002 MBCA 51
Manitoba Court of Appeal

Black Hawk Mining Inc. v. Manitoba (Provincial Assessor)

2002 CarswellMan 213, 2002 MBCA 51, [2002] 7 W.W.R. 104, 113 A.C.W.S.
(3d) 207, 163 Man. R. (2d) 215, 269 W.A.C. 215, 29 M.P.L.R. (3d) 163

**Black Hawk Mining Inc. (Applicant / Appellant) and The Provincial
Assessor for the Province of Manitoba, The Town of Lynn Lake
and The Government of Manitoba (Respondents / Respondents)**

The Town of Lynn Lake (Applicant / Respondent) and Black Hawk Mining Inc. (Respondent / Appellant) and The
Provincial Assessor for the Province of Manitoba and The Government of Manitoba (Respondents / Respondents)

Scott C.J.M., Monnin, Steel J.J.A.

Heard: January 23, 30, 2002

Judgment: April 23, 2002

Docket: AI 01-30-05027

[Proceedings: affirming \(2001\), 152 Man. R. \(2d\) 176 \(Man. Q.B.\)](#)

Counsel: *D.G. Douglas*, for Appellant

R.A. Mayer, Q.C., for Respondent, Town of Lynn Lake

J.L. Kapac, for Respondents, Provincial Assessor for the Province of Manitoba and Government of Manitoba

Subject: Public; Corporate and Commercial; Natural Resources; Tax — Miscellaneous; Civil Practice and Procedure;
Municipal

Headnote

Municipal law --- Municipal tax assessment — Liability for assessment — Miscellaneous persons

District formed townsite agreement with predecessors of mining company — Agreement provided for payment of provincial grants in lieu of taxes — In 1989, mine was shut down due to financial difficulties — Secured creditors paid \$2 million to district to reinstate mining leases but no mention of tax arrears was made — Mining company agreed to acquire secured creditor's interest in joint venture agreement which included property on which predecessor's mine and mill was located and debenture of other secured creditor — Upon passing of Municipal Act, district became urban municipality and no longer able to accept grants in lieu of taxes from private industry — Property was assessed in 1997 and demand for taxes was issued to mining company — Mining company brought unsuccessful application challenging authority of provincial assessor to issue demand for taxes — Town brought successful cross-application for order declaring townsite agreement no longer in force — Motions judge held townsite agreement was terminated by predecessor's bankruptcy — Motions judge held that mining operation was not permanently closed or abandoned, which would have terminated agreement, according to its provisions — Motions judge found settlement by which secured creditors paid \$2 million to reinstate mining leases did not include district and did not cancel tax arrears — Mining company appealed and province cross-appealed — Appeal and cross-appeal dismissed — Section 437 of Municipal Act continued existing contracts but was insufficient to continue tax exemption without specific reference — Townsite agreement ended when district became municipality, pursuant to provisions of agreement itself — Municipal Act, S.M. 1996, c. 58, s. 437.

Choses in action --- Assignability — Personal contract

District formed townsite agreement with predecessors of mining company — Agreement provided for payment of provincial grants in lieu of taxes — In 1989, mine was shut down due to financial difficulties — Secured creditors paid \$2 million to district to reinstate mining leases but no mention of tax arrears was made — Mining company agreed to acquire secured creditor's interest in joint venture agreement which included property on which predecessor's mine and mill was located and debenture of other secured creditor — Upon passing of Municipal Act, district became urban municipality and no longer able to accept grants in lieu of taxes from private industry — Property was assessed in 1997 and demand for taxes was issued to mining company — Mining company brought unsuccessful application challenging authority of provincial assessor to issue demand for taxes — Town brought successful cross-application for order declaring townsite agreement no longer in force — Motions judge held mining company did not become beneficiary of rights conferred on predecessor by townsite agreement as no order in council was passed to authorize assignment of rights — Mining company appealed — Appeal dismissed — Case involved equitable assignment of legal chose in action, without notice or consent — Although assignment of townsite agreement was permissible in law, consent of all parties was required due to personal nature of relationship between contractual parties — Townsite agreement ended when district became municipality, pursuant to provisions of agreement itself — Municipal Act, S.M. 1996, c. 58.

Mines and minerals --- Practice and procedure — Appeals — Miscellaneous issues

District formed townsite agreement with predecessors of mining company — Agreement provided for payment of provincial grants in lieu of taxes — In 1989, mine was shut down due to financial difficulties — Secured creditors paid \$2 million to district to reinstate mining leases but no mention of tax arrears was made — Mining company agreed to acquire secured creditor's interest in joint venture agreement which included property on which predecessor's mine and mill was located and debenture of other secured creditor — Upon passing of Municipal Act, district became urban municipality and no longer able to accept grants in lieu of taxes from private industry — Property was assessed in 1997 and demand for taxes was issued to mining company — Mining company brought unsuccessful application challenging authority of provincial assessor to issue demand for taxes — Town brought successful cross-application for order declaring townsite agreement no longer in force — Motions judge held townsite agreement was terminated by predecessor's bankruptcy — Motions judge held that mining operation was not permanently closed or abandoned, which would have terminated agreement, according to its provisions — Motions judge found settlement by which secured creditors paid \$2 million to reinstate mining leases did not include district and did not cancel tax arrears — Mining company appealed and province cross-appealed — Appeal and cross-appeal dismissed — Section 437 of Municipal Act continued existing contracts but was insufficient to continue tax exemption without specific reference — Townsite agreement ended when district became municipality, pursuant to provisions of agreement itself — Municipal Act, S.M. 1996, c. 58, s. 437.

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Beaver River Community Futures Development Corp. v. Hansen, 11 P.P.S.A.C. (2d) 165, 144 Sask. R. 148, 124 W.A.C. 148, [1996] 7 W.W.R. 397, 50 C.P.C. (3d) 199, 1996 CarswellSask 371 (Sask. C.A.) — referred to

Blanchette Neon Ltd. v. Jim, 17 W.W.R. 404, 1 D.L.R. (2d) 493, 1956 CarswellAlta 7 (Alta. C.A.) — referred to

Boulter-Waugh & Co. v. Phillips, (sub nom. *Union Bank v. Boulter-Waugh Ltd.*) [1919] 1 W.W.R. 1046, 58 Can. S.C.R. 385, 46 D.L.R. 41, 1919 CarswellSask 57 (S.C.C.) — distinguished

Campbell v. Morrison, (sub nom. *Maloney v. Campbell*) 28 S.C.R. 228, 1897 CarswellOnt 18 (S.C.C.) — considered

Canadian Imperial Bank of Commerce v. Crawford's Ltd., (sub nom. *Crawford's Ltd. v. Wanhil Line*) 73 W.W.R. 385, (sub nom. *Crawford's Ltd. v. Wanhil Line Construction Co.*) 10 D.L.R. (3d) 497, 1970 CarswellSask 85 (Sask. C.A.) — referred to

Canning v. Avigdor, [1961] O.W.N. 59 (Ont. C.A.) — considered

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

Cooper v. Micklefield Coal & Lime Co. (1912), 107 L.T. 457, 56 Sol. Jo. 706 (Eng. K.B.) — referred to

Czerwonka v. Paslawski, 8 R.P.R. (2d) 73 at 74, 77 Sask. R. 206, 1989 CarswellSask 554, [1989] S.J. No. 353 (Sask. Q.B.) — distinguished

Di Giulo v. Boland, (sub nom. *DiGuilo v. Boland*) [1958] O.R. 384, 13 D.L.R. (2d) 510 (Ont. C.A.) — considered

Durham Brothers v. Robertson, [1898] 1 Q.B. 765 (Eng. C.A.) — considered

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

Fredrickson v. Insurance Corp. of British Columbia, 3 B.C.L.R. (2d) 145, 28 D.L.R. (4th) 414, 17 C.C.L.I. 194, [1986] 4 W.W.R. 504, [1986] I.L.R. 1-2100, 1986 CarswellBC 131, [1986] B.C.J. No. 366 (B.C. C.A.) — considered

Gaumont v. Luz, [1980] 5 W.W.R. 533, 111 D.L.R. (3d) 609, 24 A.R. 609, 1980 CarswellAlta 255 (Alta. C.A.) — referred to

Green v. Bank of Montreal, 1999 CarswellOnt 695, 2 M.P.L.R. (3d) 178, 15 P.P.S.A.C. (2d) 143, [1999] O.J. No. 712 (Ont. Gen. Div.) — referred to

Hume v. Monro (No.2) (1943), 67 C.L.R. 461, 17 A.L.J. 25 (Australia H.C.) — referred to

Johnson v. Collings (1800), 102 E.R. 40, 1 East 98 (Eng. K.B.) — referred to

Merasty v. Saskatchewan (Department of Finance), 1999 CarswellSask 591, 1999 SKQB 22, (sub nom. *Merasty v. Saskatchewan (Minister of Finance)*) 184 Sask. R. 316, [1999] S.J. No. 576 (Sask. Q.B.) — referred to

National Trust Co. v. Miller (1976), [1977] 1 W.W.R. 481, 1976 CarswellMan 82 (Man. Q.B.) — referred to

Positive Seal Dampers Inc. v. M & I Heat Transfer Products Ltd., 33 C.P.R. (3d) 417, 2 O.R. (3d) 225, 1991 CarswellOnt 1048 (Ont. Gen. Div.) — referred to

Ross v. Fox, 13 Gr. 683, 1867 CarswellOnt 124 (Ont. Ch.) — considered

Silver Butte Resources Ltd. v. Esso Resources Canada Ltd., 19 B.L.R. (2d) 299, 1994 CarswellBC 603 (B.C. S.C.) — considered

Sullivan v. Gray, [1942] O.W.N. 329, [1942] 3 D.L.R. 269, 1942 CarswellOnt 247 (Ont. H.C.) — referred to

Tessier c. Meunerie Camirand Inc., [1986] R.L. 59 (Que. C.A.) — referred to

Tolhurst v. Associated Portland Cement Manufacturers (1900) Ltd., [1903] A.C. 414, [1900-03] All E.R. Rep. 386, 52 W.R. 143 (U.K. H.L.) — considered

Toronto Dominion Bank v. Spiller (1982), 141 D.L.R. (3d) 568 (B.C. S.C.) — referred to

University Health Network v. Ontario (Minister of Finance), 2001 CarswellOnt 4072, 151 O.A.C. 286, 2002 D.T.C. 6817, 208 D.L.R. (4th) 459, [2001] O.J. No. 4485 (Ont. C.A.) — considered

Wagstaffe v. Cook (1921), 20 O.W.N. 303 (Ont. H.C.) — referred to

Wagstaffe v. Cook (1921), 21 O.W.N. 82 (Ont. C.A.) — referred to

William Brandt's Sons & Co. v. Dunlop Rubber Co., [1905] A.C. 454 (U.K. H.L.) — considered

Statutes considered:

Conveyancing and Law of Property Act, R.S.O. 1950, c. 68

Generally — referred to

s. 53 — referred to

Law of Property Act, R.S.M. 1987, c. L90

s. 31(1) — considered

Local Government Districts Act, S.M. 1944, c. 59

Generally — referred to

Local Government Districts Act, R.S.M. 1987, c. L190

Generally — referred to

Sched. [am. 1996, c. 58, s. 459(13)] — referred to

Municipal Act, R.S.M. 1988, c. M225

Generally — considered

s. 1(1) "municipality" — considered

Municipal Act, S.M. 1996, c. 58

Generally — considered

s. 428(1) — referred to

s. 437 — considered

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

Generally — referred to

s. 25(6) — considered

APPEAL by mining company and CROSS-APPEAL by province from judgment reported at [2001 MBQB 5](#), [2001 CarswellMan 20](#), [152 Man. R. \(2d\) 176](#) (Man. Q.B.), dismissing mining company's application and granting town's cross-application.

Scott C.J.M.:

Facts

1 On March 31, 1951, Sherritt Gordon Mines Limited (Sherritt Gordon) entered into an industrial townsite agreement (the townsite agreement) with the Province of Manitoba (Manitoba) and the Local Government District of Lynn Lake (Lynn Lake) in northern Manitoba. Lynn Lake was incorporated under *The Local Government Districts Act*, S.M. 1944, c. 59, which provided for the establishment of local government districts in the unorganized territory of the province. An order in council authorized Lynn Lake's administrator, and Manitoba, to enter into the agreement.

2 The purpose of the townsite agreement was to permit the creation and construction by Sherritt Gordon of a mining enterprise at Lynn Lake, including the creation of a townsite with infrastructure.

3 The townsite agreement provided that no property or right of any kind of Sherritt Gordon, except houses used for private residence in the townsite, was to be included in any tax assessment by Lynn Lake; instead, Sherritt Gordon was to pay to Lynn Lake a sum arrived at by use of a formula "in lieu of all taxes of every nature and kind whatsoever."

4 Paragraph 23 of the townsite agreement stated that the townsite agreement was to remain in force "until such time as the Mining Company may determine to close down and permanently discontinue and abandon its mining operations." It also contemplated that when the time arrived for Lynn Lake to be incorporated "as a municipal district, town or village," subject to certain conditions, "no property, mines or minerals of the Mining Company in or under the area within the boundaries of such municipality . . . shall at any time be subject to tax." Mining company was defined under the agreement to include not only Sherritt Gordon, but also any of its subsidiary corporations.

5 Paragraph 30 of the townsite agreement provided that it was to "enure to the benefit of and be binding upon the respective parties hereto and their respective successors and assigns."

6 In December 1972, an order in council authorized Lynn Lake's resident administrator and the Minister of Municipal Affairs to enter into an agreement with Sherritt Gordon modifying the townsite agreement, which resulted in a obligation to pay larger grants in lieu of taxes.

7 In October 1985, SherrGold Inc. (SherrGold), a subsidiary of Sherritt Gordon, took over the operation of the mine pursuant to a consent to sublease executed by Manitoba.

8 In February 1988, Sherritt Gordon transferred its controlling interest in SherrGold to Hayes Resources Inc. (Hayes), another Canadian mining company.

9 In June 1988, Hayes caused SherrGold to change its name to LynnGold.

10 Also in June 1988, LynnGold issued a debenture in favour of Barclays Bank of Canada (Barclays) and pledged certain of its assets to secure an indebtedness of \$20 million. The debenture specifically mortgaged and charged, *inter alia*, all material agreements with third parties as well as any other property rights or assets owned by LynnGold.

11 In September 1988, an order in council was passed at the request of LynnGold authorizing Lynn Lake and the Minister of Municipal Affairs to enter into an agreement, the effect of which was to transfer the obligations under the townsite agreement as amended to LynnGold, the new owner.

12 The new agreement (the LynnGold agreement), as approved by order in council, provided for an end date of December 31, 2001.

13 In September 1989, LynnGold acknowledged itself to be indebted in the sum of \$350,000 to each of DCC Equities Limited (DCC) and American Barrick Resources Corporation (Barrick). There is evidence that Barclays subsequently assigned its interest in its debenture to DCC and Barrick, but the assignments themselves were not filed.

14 In July 1989, LynnGold announced that it was experiencing financial difficulties and had decided to discontinue operations at the mine as of November. In November, LynnGold commenced a systematic shut-down of the mine. In December, it filed an assignment in bankruptcy. Touche Ross Limited was appointed as trustee. The trustee was authorized to maintain and protect the mine site by LynnGold's secured creditors. In its statement of affairs filed in the bankruptcy proceedings, LynnGold characterized the grants payable under the townsite agreement as a liability, and a debt owing to Lynn Lake.

15 As of November 1989, LynnGold owed Lynn Lake the sum of \$243,055.38 on account of grants in lieu of taxes pursuant to the townsite agreement. On November 15, 1989, an order in council authorized the Minister of Finance to make payment to Lynn Lake in the amount of \$243,000 to off-set the shortfall.

16 In early 1990, Manitoba cancelled certain mineral dispositions and leases that had been held by LynnGold.

17 Intensive discussions then ensued between Manitoba and the solicitors for DCC and Barrick which eventually resulted in payment of \$2 million to Manitoba on behalf of the lenders in return for which the mineral dispositions were reinstated. It was also agreed that the government would approve the acquisition of some or all of the assets of LynnGold "by either or both of the Lenders or their nominee as purchaser or assignee from either the Trustee or from any agent, Receiver or Receiver and Manager of the property and assets of LynnGold." Most of the proceeds of the \$2 million payment were used to satisfy claims for unpaid wages.

18 In July 1990, a further operating grant was paid to Lynn Lake by the government, this time in the amount of \$160,000.

19 In July 1990, the debenture holders appointed their own receiver and manager.

20 In December 1990, the mayor of Lynn Lake requested payment of \$1,432 (not \$243,000) pursuant to the provisions of the townsite agreement claiming the mining company had not "abandoned the operation."

21 On February 20, 1991, the receiver proposed, and the town subsequently accepted, a cash grant of \$15,000 in lieu of taxes for 1990. In a related exchange of correspondence, the receiver expressed the view that "D.C.C. Equities Ltd. is not the successor company" to LynnGold, and while there were activities on the site related to "security maintenance, misc. clean-up and asset disposal . . . [t]he mine is not in operation."

22 For the year 1991, Manitoba again provided Lynn Lake with an operating grant in the amount of \$80,000.

23 In July 1991, LynnGold's business registration was cancelled by the Corporations Branch of Manitoba.

24 In October 1991, Barrick assigned to DCC all of the indebtedness owed to it and security held from LynnGold. The agreement referred to the fact that Barclays had previously assigned its rights to Barrick and DCC. As noted earlier, this latter document is not in evidence.

25 In early 1992, Lynn Lake requested that a municipal tax assessment of the mine take place. Counsel for LynnGold took the position in response that the townsite agreement as amended was still in effect.

26 In 1993, the government initiated a comprehensive review of municipal legislation, which included examination of the distinction between municipalities and local government districts. In the meantime, an operating grant was again provided to Lynn Lake for the year 1992 in the amount of \$108,900.

27 By an agreement dated September 30, 1993, DCC assigned to Black Hawk Mining Inc. (Black Hawk) the indebtedness owed and security held by DCC from LynnGold. Although the record is not entirely clear, it appears that Granduc Mining Corporation (Granduc) was for a time an operating partner with Black Hawk and that subsequent to October 1993, perhaps as late as 1996, Granduc became a wholly owned subsidiary of Black Hawk.

28 In December 1993, Granduc entered into an arrangement with Lynn Lake's resident administrator to "mutually honour the terms and conditions" of the townsite agreement. Manitoba was not a party to this arrangement, nor was an order in council requested. In 1993, Manitoba made a further operating grant to Lynn Lake in the amount of \$137,600. Similar arrangements were entered into between Granduc and Lynn Lake in 1994, and further payments made by the government to maintain essential services thereafter.

29 In June 1995, it was recommended to Manitoba that all local government districts, including Lynn Lake, be converted to municipalities under *The Municipal Act*, C.C.S.M., c. M225. Subsequently, the government concluded internally that there was no impediment to changing Lynn Lake's status from an industrial townsite governed by *The Local Government Districts Act* to an urban municipality. In the result, pursuant to subsec. 459(13) of *The Municipal and Various Acts Amendment Act*, S.M. 1996, c. 58, Lynn Lake was deleted from the schedule of industrial townsites contained in *The Local Government Districts Act* and, by virtue of subsec. 428(1) of the new *Municipal Act*, became an urban municipality. Shortly after its conversion to a municipality, Lynn Lake requested the provincial assessor to assess the mine.

30 By notice dated January 1998, Lynn Lake advised Black Hawk that the mill had been assessed and that taxes of \$1,604,850 were payable. In April 1998, Black Hawk filed a notice of application to quash the assessment claiming that the townsite agreement was still in effect and, as the assignee of the agreement, it was entitled to the benefit of the exemption from assessment which had been granted to LynnGold.

31 The application to quash was subsequently heard by Oliphant A.C.J.Q.B. and reasons for decision delivered on January 12, 2001. The principal issue before him was whether the townsite agreement was still in effect and, in any event, whether arrears owing under the agreement had been extinguished by subsequent events.

The Decision At Trial

32 In a lengthy decision, Oliphant A.C.J.Q.B. determined that the following issues were properly before him (at para. 50):

- a) When Black Hawk became the assignee of the indebtedness of LynnGold to the secured creditors, DCC, Barrick and Barclay's [sic] Bank, did Black Hawk become the assignee of the benefits conferred upon LynnGold in the Townsite Agreement?
- b) Was the Townsite Agreement terminated by the permanent closure or abandonment of the mining operation at Lynn Lake by LynnGold?

c) Was the Townsite Agreement terminated by the bankruptcy of LynnGold?

d) Did the amendments to the **Municipal Act** enacted in 1996 result in termination of the Townsite Agreement?

e) Did the grant of \$243,000.00 paid from the Mining Community Reserve to Lynn Lake on November 15, 1989 extinguish the tax arrears that were owing by LynnGold for the year 1989?

f) Did the 1990 settlement between DCC and Barrick on the one hand[,] the Director of Employment Standards and the Minister of Labour (Manitoba) on the other hand, compromise or extinguish tax arrears owed to Lynn Lake under the Townsite Agreement?

33 He concluded that Black Hawk did not become the assignee of the townsite agreement as amended. This is because (at para. 55):

There is no evidence before me of any assignment by LynnGold to any of DCC, Barrick or Barclay's [*sic*] Bank of the Townsite Agreement or any benefits enjoyed by LynnGold pursuant to that agreement. No notice of any assignment of the Townsite Agreement was ever given by anyone to either the Local Government District of Lynn Lake or the Province of Manitoba nor did the Province of Manitoba ever consent to any such assignment.

34 He decided that any assignment of rights conferred upon LynnGold by the townsite agreement required the authority of an order in council.

35 He determined that "the evidence does not demonstrate, even on the balance of probabilities, that LynnGold either intended to close the mining operation at Lynn Lake permanently or that it abandoned the mining operation there" (at para. 60).

36 He concluded that Lynn Lake was entitled to treat the townsite agreement as terminated by virtue of the bankruptcy of LynnGold and the failure of the trustee to "approve" the agreement.

37 He found it unnecessary to deal with the argument whether the amendments to *The Municipal Act* enacted in 1996 had the effect of terminating the townsite agreement.

38 As to the payment in 1989 by Manitoba to Lynn Lake, he was of the view that it did not "extinguish or reduce the indebtedness of LynnGold to Lynn Lake for tax arrears or for outstanding grants in lieu of taxes" (at para. 69); nor did the 1990 settlement between DCC and Barrick on the one hand and the government on the other extinguish the tax arrears owed to Lynn Lake.

39 Black Hawk appeals all issues decided against it. The province cross-appeals from the one unfavourable determination against Manitoba, namely, that the mining operation was not permanently closed or abandoned.

The Assignability of the 1951 Townsite Agreement

40 While there are, as we have seen, a number of issues on this appeal, the fundamental question is: Were the benefits and burdens of the townsite agreement validly assigned when DCC transferred to Black Hawk all security given by LynnGold, including the Barclays debenture?

41 In the Barclays debenture, LynnGold *inter alia*,

2.

(a) grants, assigns, pledges, transfers, mortgages and charges as and by way of a fixed and specific mortgage, assignment, pledge and charge to and in favour of the Holder, its successors and assigns, all right, title, interest and benefit of the Borrower in, to, under or in respect of:

.....

(vii) all material agreements in effect from time to time between the Borrower and third parties relating to the business of the Borrower . . . ;

(viii) any other property, rights or assets now owned or hereafter acquired, of whatsoever kind, nature or description or wherever situate, which may at any time or from time to time be mortgaged, assigned, pledged or charged by the Borrower to the Holder as and by way of a fixed and specific mortgage, assignment, pledge and charge; and

(b) mortgages and charges as and by way of a floating charge to and in favour of the Holder, its successors and assigns, all its undertaking, property and assets, both real and personal, both present and future, of every nature and kind and wherever situate . . . including, without limiting the generality of the foregoing, its franchises, . . . goodwill, . . . contracts . . . and agreements.

42 Black Hawk says that the townsite agreement was a material agreement that was part of the undertaking property and assets of LynnGold and properly charged by the debenture, and that the debenture(s) given by LynnGold constituted a valid assignment of the benefit of the townsite agreement to the debenture holders, which rights were ultimately acquired by Black Hawk.

43 Paragraph 30 of the townsite agreement in its entirety reads as follows: "This agreement shall enure to the benefit of and be binding upon the respective parties hereto and their respective successors and assigns," which, Black Hawk says, contemplates the series of assignments that took place in this case.

44 There is no dispute that, historically, contractual rights were unassignable at common law; in the result, the assignee could not sue in his or her own name. (G. H. L. Fridman, Q.C., *The Law of Contract in Canada*, 4th ed. (Toronto: Carswell, 1999) at p. 713; S. M. Waddams, *The Law of Contracts*, 4th ed. (Toronto: Canada Law Book Inc., 1999) at para. 270). But equity took a very different approach (Fridman at p. 714):

From the early seventeenth century, equity assisted assignees. Where the chose in action arose at law, that is, was legal, for example, a debt or other contractual right, equity relieved the assignee in one of three ways. Where the contract was expressly or impliedly for the benefit of "the promisee and his assigns," equity permitted the assignee to sue in his own name.

45 In equity, no special form was required, and while "[a]s between the assignor and the assignee, no notice to the debtor is required" (at p. 717), as Fridman observes, it is still for practical reasons highly desirable.

46 As well, if Manitoba law applies, the assignment to Black Hawk, Mr. Douglas argues, complies with sec. 31(1) of *The Law of Property Act*, R.S.M. 1987, c. L90, which provides:

Debts and choses in action arising out of contract assignable at law

Every debt and any chose in action is assignable at law by any form of writing that contains apt words in that behalf, but subject to such conditions or restrictions in respect of the right of transfer as may appertain to the original debt or as may be connected with or be contained in the original contract; and the assignee thereof may bring an action thereon in his own name, as the party might to whom the debt was originally owing, or in whom the right of action originally arose; or he may proceed in respect thereof as though this Act had not been passed.

47 This provision permits a written assignment to be in any form, whether it be absolute or not, and allows the assignee to sue in its own name. Even if, as appears to be the case from the terms of the Barclays debenture, the laws of Ontario and not Manitoba govern, a valid equitable assignment, it is submitted, has taken place.

48 Counsel for Black Hawk asserts that the trial judge erred in concluding that the townsite agreement was not assignable, even as collateral for loans, without the approval of Manitoba. The fact that the government was a party to the original townsite agreement, and passed a number of orders in council over the years to expedite changes to the agreement, does not make the government an essential party to such an assignment.

49 Mr. Douglas also argues that the trial judge erred in finding that the townsite agreement was based on a personal relationship between the mining corporation, the government, and the town. There is nothing to suggest, he says, that the townsite agreement created a "personal tie," (see *National Trust Co. v. Miller* (1976), [1977] 1 W.W.R. 481 (Man. Q.B.)) or that the identity of the mining company was of any real importance to either Manitoba or Lynn Lake.

50 The *Boulter-Waugh & Co. v. Phillips* (1919), 58 Can. S.C.R. 385 (S.C.C.) [a.k.a. *Union Bank of Canada v. Phillips*], case and the more recent case of *Czerwonka v. Paslawski* (1989), 77 Sask. R. 206 (Sask. Q.B.), relied on by the trial judge, are distinguishable because the courts in those cases were dealing with rights created by statute. It is conceded that "[a] privilege of any kind created by statute must be enforced in the way that statute provides" (*Union Bank* at p. 393). Similarly, there is no quarrel with the holding in *Czerwonka* that a right of first refusal which was part of a statutory creditor's relief scheme for farmers was not assignable, because it was a "personal benefit of the farmer whose land was foreclosed" (at para. 12) and "[a] third party stranger should not profit from this extraordinary debt moratorium legislation absent a clear intention or direction in the legislation to provide such a benefit" (at para. 15). But here the townsite agreement is not, Black Hawk says, a "right" created by statute. The order in council authorizing its execution is simply an enabling device to permit the mining company, Lynn Lake, and Manitoba to enter into an agreement. The rights of the parties are derived from the agreement and not the statute.

51 Manitoba's position is that the townsite agreement is not assignable. This is because the "assignment" occurred under the terms of the debenture rather than through the direct act of LynnGold as contemplated by the agreement; indeed, the evidence is not entirely clear that the assignment from Barclays to Barrick and DCC was ever properly documented.

52 The ability of Sherritt Gordon and its legitimate successors to enter into or benefit from the townsite agreement derived, it is argued, from statutory authority; therefore, absent approval by order in council (and no notice was given of the assignments to either Manitoba or Lynn Lake), there is no legal ability to contract out of the taxation provisions of *The Local Government Districts Act*. Absent approval of the Lieutenant Governor in Council, LynnGold was incapable of assigning its right to pay grants in lieu of taxes to a third party.

53 Statutory rights cases such as *Union Bank* and *Czerwonka* (and others to like effect) confirm that such rights are not assignable in the same way as common law rights.

54 In addition, for there to be a valid statutory assignment, it must be absolute. As noted by Fridman (at pp. 721-22):

. . . a valid statutory assignment involves: that the assignment be absolute; that it be written; and that written notice be given to the debtor. What is meant by an "absolute" assignment has been considered earlier. It must be an assignment of the whole debt or chose in action. As explained, this excludes from the ambit of the statutory provisions an assignment by way of charge. But a mortgage of a debt may be an absolute assignment. The assignment must be in writing signed by the assignor. It is essential under the statute that the assignee prove that express notice of the assignment, in writing, has been given to the debtor.

In this case, we are not dealing with an absolute assignment, but one by charge only.

55 An even more fundamental question is: Are the benefits and obligations under the townsite agreement of a kind that are capable of being assigned? Fridman's answer, relied on by Manitoba, is (at pp. 723-24):

Whether an assignment is statutory or equitable, it will not be valid unless the interest, that is, the chose in action, which has been assigned is one that is assignable under the law. The statutes have made no change in this requirement.

The assignment must not destroy a personal tie. Nor may it throw un contemplated burdens on the debtor, to his prejudice. Thus, it has been held that the assignee of the benefit of a contract under which the defendant agreed to pay money to the assignor could not obtain specific performance of the contract; to have done so would have meant that too harsh a burden was put upon the debtor. In this context, a question which has arisen several times in the courts of England and Canada is whether the benefit of a contract, under which A agrees to supply B with certain goods, may be assigned by B. In the leading English case of *Tolhurst v. Associated Portland Cement Co.* [[1903] A.C. 414 (H.L.)], the House of Lords upheld the assignment, made by a small company to a large one, of a contract to supply chalk as required by the assignor's cement works. This was on the basis that the smaller company could have enlarged itself, thereby increasing its requirements of chalk, and an intention to benefit assigns was manifest in the original contract.

Some choses in action are simply not capable of being assigned, such as those involving personal relations or personal skills, or because of public policy. For example, contracts involving matrimonial support and salaries paid out of public funds to public officials. See Waddams, *ibid.*, at para. 277.

56 Here, it is argued, the townsite agreement was a contractual arrangement between three parties where the personal and continuing relationship between them was of the essence to the undertaking. The townsite agreement was not the mining corporation's personal or private asset. The tax benefits (and burdens) conferred ultimately on LynnGold as the successor to the townsite agreement could not be unilaterally transferred by LynnGold to a secured creditor, and thereafter by the creditor to another mining company, since the continued existence of the tripartite arrangement depended on a variety of personal factors that were of no relevance to a secured creditor.

The Decision

57 The trial judge held that the townsite agreement had not been validly assigned to Black Hawk.

58 As we have seen, at common law choses in action were effectively unassignable without the consent of the contracting parties; in the result, if an "assignment" had taken place, the assignor would be required to sue for the benefit of the assignee. See *Johnson v. Collings* (1800), 102 E.R. 40, 1 East 98 (Eng. K.B.), and *Fitzroy v. Cave*, [1905] 2 K.B. 364 (Eng. C.A.).

59 Equity, on the other hand, took the view that legal choses in action should be, in the interest of commercial necessity, transferable. Even then, however, equity would not simply allow the assignee of a legal chose to sue the debtor. See G. H. Treitel, *The Law of Contract*, 6th ed. (London: Stevens & Sons, 1983). Instead, the assignee was permitted to sue the debtor in the name of the assignor.

60 All this changed in England with the introduction of the *Supreme Court of Judicature Act, 1873*, 36 & 37 Vict., c. 66, when the equitable and common law jurisdictions were combined in a single court. Section 25(6) of the *Act* provided as follows:

Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, . . . shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice

61 Thus, an assignee could sue alone if, but only if, the assignment was absolute. Assignments by way of charge (as is the case here) and other non-absolute assignments remained excluded from the purview of the legislation. However, and this is a crucial distinction, the validity of assignments by way of charge were not affected. It simply meant that the assignee could not sue alone and was still obliged to include the assignor in any action.

62 This important distinction between an absolute charge and a charge by way of assignment has been emphasized in any number of leading authorities. *Durham Brothers v. Robertson*, [1898] 1 Q.B. 765 (Eng. C.A.), for example, dealt with an assignment which, on its face, was not absolute. Chitty L.J. had no difficulty in concluding that the validity of the equitable assignment was not called into question by the enactment of the *Judicature Act, 1873*. In other words, sec. 25(6) of the *Judicature Act, 1873* did not apply to every case of an equitable assignment of a debt or chose in action; only in circumstances where there was an absolute assignment was the transferred legal right vested in the assignee.

63 The *Judicature Act, 1873* and the corresponding provision modeled after it in the Ontario *Act* do not prohibit or invalidate traditional equitable assignments (where, for example, an assignment is not absolute). This point is made abundantly clear in *William Brandt's Sons & Co. v. Dunlop Rubber Co.*, [1905] A.C. 454 (U.K. H.L.), where Lord Macnaghten declared (at p. 461):

Why that which would have been a good equitable assignment before the statute should now be invalid and inoperative because it fails to come up to the requirements of the statute, I confess I do not understand. The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree. Where the rules of equity and the rules of the common law conflict, the rules of equity are to prevail. Before the statute there was a conflict as regards assignments of debts and other choses in action. At law it was considered necessary that the debtor should enter into some engagement with the assignee. That was never the rule in equity.

64 Canadian authorities have also embraced this principle. In *Di Giulo v. Boland*, [1958] O.R. 384 (Ont. C.A.), a purchaser under an agreement of purchase and sale assigned his right under the agreement to his wife who in turn reassigned it to her husband without notice to the debtor. In concluding that the assignment was invalid pursuant to sec. 53 of the Ontario *Conveyancing & Law of Property Act*, R.S.O. 1950 c. 68 (modeled as noted earlier on sec. 25(6) of the *Judicature Act, 1873*), Morden J.A. concluded (at p. 397):

A legal assignment is not effective or complete until the debtor is given notice: *Holt v. Heatherfield Trust Ltd.*, [1942] 2 K.B. 1. After it becomes effective, the assignor ceases, *vis à vis* the debtor, to have any interest in the chose. An assignment which fails to comply with the statute because it is oral or partial or for any other reason may be a valid equitable assignment: *Cheshire & Fifoot, Contracts*, 4th ed. at p. 417.

See as well *Gaumont v. Luz* (1980), 24 A.R. 609 (Alta. C.A.).

65 Thus, if Ontario law applies to the assignment by way of charge to Barclays and from Barclays (eventually) to Black Hawk - as contended by Black Hawk - and the requirements of the Ontario *Act* are not met (*inter alia*, because it is not an absolute charge), it may still be a valid equitable assignment.

66 The Manitoba legislation, earlier referred to (see para. 46) dealing with assignments (sec. 31(1) of *The Law of Property Act*), is somewhat wider than the Ontario and English legislation.

67 But even if Manitoba law applies, contrary to the express provision of the Barclays debenture, the facts before us support the conclusion that the Barclays debenture also constituted an equitable assignment of a legal chose in action.

68 What then of the failure to provide Manitoba with express notice in writing of the purported assignment of the LynnGold agreement? In such circumstances, unless the Manitoba legislation applies, the old rule in equity requires that the assignor be joined in the action.

69 But there are exceptions. In *Tolhurst* [[1903] A.C. 414 (U.K. H.L.)], a case dealing with an equitable assignment, Lord Macnaghten noted (at pp. 420-21):

The assignor ought in ordinary circumstances to be made a party. But I cannot think that this is necessary when the assignor is a mere name, as the Imperial Company is in the present case, without any means and without any executive or board of directors, if indeed it has now any corporate existence at all.

70 In *Di Giulo*, the court concluded (at pp. 397-98):

In some cases the assignee has recovered in the absence of the assignor, for example, where the defendant does not raise the point as a matter of defence as in *William Brandt's Sons v. Dunlop Rubber Co.*, *supra*, or where it is clear that the assignor, a company, had no interest in the *chose* and had ceased to exist: *Tolhurst v. Associated Portland Cement*,

See, too, *Hume v. Monro (No.2)* (1943), 67 C.L.R. 461 (Australia H.C.).

71 There is another reason why the failure to give notice to Manitoba or Lynn Lake is not by itself fatal to the purported assignment.

72 *Tolhurst* was cited with approval in *Canning v. Avigdor*, [1961] O.W.N. 59 (Ont. C.A.), a case that also dealt with an equitable assignment of a legal chose in action. Chief Justice Porter, writing for the court, held that there was no legal assignment because the requirements of the statute (calling for notice) had not been met. In so concluding, he cited with approval *Anson's Law of Contract* (21st ed. 1959) in support of the proposition that notice to the debtor, while advisable for well-known reasons, nonetheless "[n]o notice to the debtor is necessary; the assignment is effective as between assignor and assignee from the moment it is made" (*Anson's* at p. 373). Porter C.J.O. concluded (at p. 63):

. . . the main purpose of joining the assignor as a party was to bind the assignor, thus to save the debtor from the possibility of being sued twice for the same debt. The purpose of giving the debtor notice of the assignment was to bind him and also give priority over any assignments, notice of which might subsequently be given to the debtor. In cases where it is obvious upon the evidence that the assignor has made an absolute assignment of the *chose* and that there are no notices of other assignments, and the assignor, if a company, no longer exists, the assignee, having the sole interest in the *chose in action*, is not to be denied his right to payment because of the failure to join the assignor.

73 In other words, while notice is important for the purpose of establishing priorities, it is not essential to the question of the inherent validity of an equitable assignment of a legal chose in action. See as well Megarry and Baker, *Snell's Principles of Equity*, 27th ed. (London: Sweet & Maxwell, 1973), *Chitty on Contracts*, vol. 1, 26th ed. (London: Sweet & Maxwell, 1989) at para. 1425.

74 To summarize:

- 1) The instant case involves an equitable assignment of a legal chose in action, without notice or consent.
- 2) If Ontario law applies, the Ontario statute is not applicable as this is not a legal assignment. If Manitoba law applies, then the assignment complies with the provisions of sec. 31(1) of *The Law of Property Act*.
- 3) Notice to the notional "debtor" (be it Manitoba or Lynn Lake) though certainly advisable, was not required.
- 4) The fact that Sherritt Gordon is no longer in existence is not a determinative impediment to Black Hawk's application.

75 But these conclusions do not end the matter. There are other factors that may operate to make an otherwise proper assignment invalid.

Were the Rights in Question Assignable?

76 It is not surprising that the parties have been unable to find a case on all fours with the facts before us, in which a debenture holder claims an assignment of the right to pay grants in lieu of taxes. It is necessary therefore to revert to general principles. An excellent starting point is the decision of *Fredrickson v. Insurance Corp. of British Columbia* (1986), 28 D.L.R. (4th) 414 (B.C. C.A.), where McLachlin J.A., as she then was, set forth six categories of contracts which are considered to be unassignable (at pp. 426-27):

1. Contracts which expressly by their terms exclude assignment;
2. Mere rights of action (assignments savouring of maintenance and champerty);
3. Contracts which by their assignment throw unanticipated burdens on the debtor;
4. Personal contracts;
5. Assignments void by public policy (public officers' wages or salary and alimony or maintenance agreements); and
6. Assignments prohibited by statutory provisions.

77 Noteworthy from a historical perspective is that there is no reference in the above list to contracts involving governments or government agencies. The earlier view that a claim against the Crown was simply not assignable has now been authoritatively overruled. See *Canadian Imperial Bank of Commerce v. Crawford's Ltd.* (1970), 73 W.W.R. 385 (Sask. C.A.), and *Green v. Bank of Montreal*, [1999] O.J. No. 712 (Ont. Gen. Div.). Thus, the fact that Manitoba and Lynn Lake are parties to these proceedings is not in and of itself an impediment to the creation of a binding and valid equitable assignment. In fact, a number of cases have recognized that the transfer of the benefit of a government fund or benefit is permissible. See, for example, *Toronto Dominion Bank v. Spiller* (1982), 141 D.L.R. (3d) 568 (B.C. S.C.); *Tessier c. Meunerie Camirand Inc.*, [1986] R.L. 59 (Que. C.A.), so long as the benefit or statutory exemption is not personal to the individual. See *Merasty v. Saskatchewan (Department of Finance)* (1999), 184 Sask. R. 316 (Sask. Q.B.), and *Beaver River Community Futures Development Corp. v. Hansen* (1996), 144 Sask. R. 148 (Sask. C.A.).

78 It is, of course, the fourth category of unassignable contracts in *Fredrickson* (personal contracts) that is of relevance for us.

79 A convenient summary of the general principle can be found in *Chitty on Contracts* (*ibid.*, at para. 1416):

Personal Contracts. The benefit of a contract is only assignable in "cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it." It is to be noted that the question whether an assignment makes any difference to the debtor must be decided by the court on objective grounds, having regard to the nature of the contract and of the subject-matter of the rights assigned. It may in some circumstances make a great deal of difference to a debtor whether his creditor is of an indulgent character, or whether he is likely to enforce his legal rights ruthlessly, but considerations of this kind are ignored by the courts in determining whether a right is assignable or not.

80 To use an example given by *Chitty* - a right to be indemnified against personal liability may in some circumstances be assignable but a benefit under a motor vehicle insurance policy is not. *Chitty* also notes that in commercial contracts it is often difficult to decide whether the benefit of the contract is assignable or not.

81 The leading case, already referred to, is *Tolhurst v. Associated Portland Cement*. In holding that a contract for the sale and delivery of chalk was assignable, Lord Macnaghten wrote (at p. 417):

There may be an element of personal skill or an element of personal confidence to which, for the purposes of the contract, a stranger cannot make any pretensions. But no one, I suppose, would seriously argue that a contract for delivery of chalk from particular quarries for the use of particular cement works cannot be performed by any person for the time being possessed of the quarries, or that it can make the slightest difference to anybody who the proprietors of the cement works or the actual manufacturers may be, provided they are in a position to carry out the terms of the original contract.

82 In *Campbell v. Morrison* (1897), 28 S.C.R. 228 (S.C.C.) [a.k.a. *Maloney v. Campbell*], a case dealing with the assignment of a mortgage debt, King J. succinctly summarized the principle (at p. 233):

Agreements are said to be personal in this sense when they are based on confidences, or considerations applicable to special personal characteristics, and so cannot be usefully performed to or by another.

83 There are any number of cases, each involved with their own distinct facts, where contracts involving the personal skill or knowledge of a party have been held to be unassignable. See *Sullivan v. Gray*, [1942] 3 D.L.R. 269 (Ont. H.C.) (supply amusement devices at town fairs); *Cooper v. Micklefield Coal & Lime Co.* (1912), 107 L.T. 457 (Eng. K.B.) (contract to deliver coal in a certain neighbourhood); *Wagstaffe v. Cook* (1921), 20 O.W.N. 303 (Ont. H.C.), aff'd (1921), 21 O.W.N. 82 (Ont. C.A.) (contract for planting and cultivating fruit trees); *Cohen v. Webber* (1911), 24 O.L.R. 171 (Ont. C.A.) (contract to sing in a synagogue); *Air Transit Ltd. v. Innotech Aviation of Nfld. Ltd.* (1989), 78 Nfld. & P.E.I.R. 24 (Nfld. T.D.) (service facility for commercial air carriers). Conversely many other cases have found there to be no impediment to assignability. See, for example, *Blanchette Neon Ltd. v. Jim* (1956), 17 W.W.R. 404 (Alta. C.A.) (assignment of a rental agreement of a neon sign), and *Positive Seal Dampers Inc. v. M & I Heat Transfer Products Ltd.* (1991), 2 O.R. (3d) 225 (Ont. Gen. Div.) (assignment of a patent with the concomitant right to manufacture and sell the product).

84 Little is to be gained from a minute examination of these various authorities.

85 There are only two Canadian cases that I have been able to find that have considered the question of the assignability of mining contracts in terms of the personal nature of the contractual arrangement. In *Ross v. Fox* (1867), 13 Gr. 683 (Ont. Ch.), Spragge V.C. concluded that a contractual right to mine was not assignable because (at p. 691):

It is obvious that in an agreement of this nature [the right to mine] a great deal must depend upon the skill, industry, perseverance and means of the person who is to work the mine. In the hands of one worker, it might be profitable and satisfactory to the owner of the soil; in the hands of another, quite the reverse; and so it might be detrimental to him, and therefore, unjust, to force upon him, as a worker for minerals upon his land, a different person than the one with whom he had made his agreement. The law upon this point is well settled; it is clear that where the skill, knowledge, solvency, or other personal quality of a party with whom an agreement is made is a material ingredient in the contract, or, as put by Baron Alderson, in *Rayner v. Grote*, 15 M. and W. 365, may reasonably be considered as a material ingredient, there the contract can be performed by him alone; no assignee can claim the benefit of it. I incline to think that the case before me falls within this rule.

86 This statement has been accepted as authority by two Canadian textbook writers: A. Morine, *The Mining Law of Canada* (Toronto: Canada Law Book, 1909) and B. Barton, *Canadian Law of Mining* (Calgary: Canadian Institute of Resource Law, 1993), the latter commenting:

In many options and most joint ventures, there is likely to be a distinct element of reliance of one contracting party on the skill and reputation of the other. [Barton at p. 457]

87 The other Canadian authority, *Silver Butte Resources Ltd. v. Esso Resources Canada Ltd.* (1994), 19 B.L.R. (2d) 299 (B.C. S.C.), did not follow the decision in *Ross v. Fox*. In that case, the plaintiff owned mining rights and entered into a mining option agreement with Esso Resources. There was no specific provision in the agreement regarding assignment.

Esso assigned its interest and in doing so specifically acknowledged that it remained liable to the plaintiff pursuant to the original agreement. Spencer J. concluded that the plaintiff had not relied (at para. 20):

. . . upon the peculiar attributes of Esso for their performance. Moreover, even though Esso assigned the burden of those obligations to Tenajon and Tenajon assigned part of them to Westmin, Esso still remains liable under its covenants to the plaintiff for their performance.

88 In addition, he specifically declined to follow *Ross v. Fox* (which was not binding upon him in any event) (at para. 21):

With the greatest of respect for that authority, I decline to follow it in the closing decades of the twentieth century. . . . I do not think that general observation made about a mine in Upper Canada in 1867 should exercise any great weight in British Columbia in 1980, when this agreement was entered into.

89 With due deference to the court in *Silver Butte*, I do not regard that decision as having overruled the ratio of *Ross v. Fox*, nor the general proposition of law as set forth in *Tolhurst v. Associated Portland Cement*. Rather, the nature of the contract, and the relationship between the parties in *Silver Butte*, was markedly different than that in *Ross v. Fox*. Indeed, in *Silver Butte*, there was no evidence of reliance upon Esso as an experienced developer and miner, plus Esso remained liable under the original agreement.

90 In my opinion, the question this court must answer is whether, looking at the facts objectively, the relationship between the parties to the contract was such that reliance upon the personal skill and knowledge of the assignor was of such a nature as to prohibit the assignment of the contract.

91 Looking at the facts and circumstances before this court, in particular the role and place of the mine in the community and its economy, it obviously mattered a great deal to the Town of Lynn Lake and the province what mining company was (or was not) working the mine. The mine was the lifeblood of the town. It was the essential reason for the town's existence as evidenced by the provisions of the original townsite agreement itself. The agreement to make an annual payment in lieu of municipal taxes (in this case its local government district equivalent) if not unique, was certainly tailor made for this occasion. Given the payment formula (\$120 for each employee of the mining company for the operative year), the province and the town had a real stake in the mining activity and financial success of the mining company.

92 I can do no better than to adopt the following passage from Manitoba's factum:

The LynnGold Agreement involved a relationship of a personal nature and any unilateral assignment of said Agreement by LynnGold to a creditor would be apt to throw un contemplated burdens on both Manitoba and Lynn Lake. In this regard, it is self evident that it would matter a great deal to Manitoba whom it was dealing with when it entered into the Townsite Agreement (i.e., whether it was contracting with a reputable mining company that intended to work the Mine and to employ a good many residents to do so (the basis for calculating grants in lieu of taxes) or whether it was dealing with a creditor who intended to sit on the Mine until a suitable purchaser could be found and, in the interim, attempt to avoid any tax liabilities under the Townsite Agreement). The stability of Lynn Lake's tax base and the community's very viability depended almost exclusively on who was occupying the Mine and what it intended to do there. Similarly, Manitoba's exposure to financially support Lynn Lake depended upon who was occupying the Mine and what it intended to do there.

93 In the end, whether the government's or the town's formal consent to the assignment was needed or not (and as noted earlier it is my conclusion that it was not required to create a valid assignment), is beside the point. The nature of the relationship between the three parties to the townsite agreement was such that reliance was placed on the personal reputation, ability and solvency of the mining company. In such circumstances, the agreement was not assignable in law without the consent of the other parties to it.

94 In the result, I conclude that while assignment of the townsite agreement was permissible in law, consent of all parties was required due to the personal nature of the relationship between the contractual parties.

The Change in Lynn Lake's Status from a Local Government District to an Urban Municipality

95 On January 1, 1997, Lynn Lake became an urban municipality under sec. 428(1) of *The Municipal Act*, R.S.M. 1996, c. 58. Manitoba and Lynn Lake argue that the townsite agreement and amendments thereunder were superceded - and became impossible of performance - once Lynn Lake was converted from an industrial townsite to an urban municipality. Not so, says Black Hawk, since sec. 437 of *The Municipal Act*, as it then was, provided for the continuance of existing agreements.

96 My review of the relevant statutory provisions will be brief. This is because the answer to the question is found not by analysis of the complex statutory provisions, but in the terms of the townsite agreement itself.

97 Section 437 of *The Municipal Act* reads as follows:

The agreements and contracts of a municipality under the former Municipal Act or a special Act, or under a provision of another Act amended or repealed by this Act, that are in force immediately before the coming into force of this Act are continued as if they were made under this Act, subject to any provision of this Act that affects them.

98 Black Hawk's simple submission is that by virtue of this provision, the newly created urban municipality continued to be bound by the townsite agreement. There was nothing in the provincial legislation existing at the time to prohibit Lynn Lake and Manitoba from entering into or continuing the payment of grants in lieu of taxes as provided for in the townsite agreement.

99 It is clear that the conversion of Lynn Lake to a municipality was not done with the intention of "targeting" the arrangements made under the townsite agreement. As early as 1994, recommendations were made to government that all local government districts, including Lynn Lake, be converted to municipalities under *The Municipal Act*. When the conversion process began in earnest, the government determined that there was no impediment to changing Lynn Lake's status from an industrial townsite governed by *The Local Government Districts Act* to an urban municipality under *The Municipal Act*.

100 Manitoba and Lynn Lake argue that the provincial assessor and the Town of Lynn Lake are required to utilize an assessment-based taxation regime on the properties at the mine site in accordance with the principles clearly set forth in *The Municipal Act*. The taxation regime under *The Municipal Act*, which applies to all municipalities, renders the earlier contractual arrangement impossible of performance and no longer in effect. The transition provision in sec. 437 of *The Municipal Act* does not apply because the definition of "municipality" under the former *Act* expressly excluded local government districts and Lynn Lake was never a "municipality" under any other statute.

101 Whether the change in Lynn Lake's status to a municipality under *The Municipal Act* had the effect in law of abrogating the townsite agreement is an interesting question, but it is unnecessary to go into the matter any further, because the provisions of para. 23 of the townsite agreement and amendments are determinative of the issue.

102 Although it is fairly lengthy, it is important to refer to all of para. 23:

This agreement shall remain in force until the said Townsite shall be incorporated, as a municipal district, town or village, or until such time as the Mining Company may determine to close down and permanently discontinue and abandon its mining operations in the neighborhood of Lynn Lake, whichever event shall first occur. Whenever the time shall, in the opinion of the Mining Company or the residents of the said Townsite, have arrived when a municipal district, town or village should be incorporated to take the place of the Townsite, steps shall be taken by the Province, the Mining Company, the District and the Resident Administrator to have such municipality incorporated, and thereupon an agreement shall be entered into between all proper parties, including the Province,

the Mining Company, the Power Company, the School District, and such new municipality for the operation of such new municipality and School District, with the assistance of the Mining Company. Such municipality and School District shall always be co-terminus and no property of the Mining Company shall be included within the boundaries of any such municipality or School District (other than such mining claims as may now be within the area of the proposed Townsite), and no property, mines or minerals of the Mining Company in or under the area within the boundaries of such municipality and School District shall at any time be subject to tax, except as provided in The Mining Royalty and Tax Act and any amendments thereto, or any Act substituted therefor and, subject to the provisions of Section 20 hereof, the boundaries of such municipality or School District shall not be extended without the written consent of the Mining Company.

103 That the provision in totality is convoluted and difficult to follow is obvious. It is hard to discern a general purpose or intent for para. 23 beyond the fundamental point, made in the first sentence, that the townsite agreement remains in force "until the said Townsite shall be incorporated, as a municipal district" Interpretation is rendered all the more difficult by the fact that the original townsite agreement was entered into more than 50 years ago.

104 While the first sentence of para. 23 is reasonably clear, the second sentence is decidedly not so. It speaks of an agreement that "shall be entered into" between "all proper parties" referring to parties or persons not signatory to the townsite agreement. I know of no authority that would enable a provision that speaks of a contract that "shall be entered into" with new parties as being legally enforceable. In any event, the facts are quite clear - no further agreement was entered into.

105 As if this were not enough, the second sentence of para. 23 is unenforceably vague. It speaks of an agreement between all proper parties "for the operation of such new municipality and School District, with the assistance of the Mining Company." But there is no suggestion that either the mining company or the assignees have any experience in the operation of a town and/or its school district. Reference to "the assistance of the Mining Company" is simply too uncertain to be legally enforceable.

106 Then there is the reference again in the second sentence that "steps shall be taken by the Province, the Mining Company, the District and the Resident Administrator to have such municipality incorporated." This raises more unanswered questions, such as: What steps are to be taken and who are the proper parties to participate? Certainly the legislation in force in 1951 contemplated the involvement of the inhabitants of Lynn Lake in such a process. But the legislation has changed substantially by 1996.

107 The question then becomes whether, looking at para. 23 as a whole, it can be said that the paragraph has a legally ascertainable and enforceable meaning. I would answer this question in the affirmative. In my opinion, what can be said for para. 23 is that the parties to the townsite agreement undoubtedly recognized that in the event the townsite was incorporated as a municipality, something needed to be done to take into account the fundamental change in circumstances, otherwise the agreement was at an end, a point implicitly recognized by Mr. Douglas in his submissions. Strong support for this conclusion can be found in the two amending agreements made in 1972 and 1988. Both specifically contemplate the prospect of termination of the agreement "as provided in section 23." Clearly, it was recognized that if further agreement was not reached, termination would occur pursuant to para. 23.

108 In the result, when Lynn Lake became a municipality pursuant to sec. 428(1) of *The Municipal Act* the townsite agreement came to an end. Section 437 of *The Municipal Act*, relied on by Black Hawk, cannot be interpreted so as to reinvigorate an agreement that is spent pursuant to the parties' stated contractual agreement. Section 437 was enacted for the purpose of continuing existing contracts and not contracts which, by their express terms, terminated upon the establishment of a municipality. Once Lynn Lake was incorporated as a municipality, there was nothing to be continued.

109 Finally, even if sec. 437 did continue rights under the townsite agreement, there is recent appellate authority standing for the proposition that a tax exemption will not be continued unless there is specific reference to it in the enabling legislation. See *University Health Network v. Ontario (Minister of Finance)*, [2001] O.J. No. 4485 (Ont. C.A.).

In this decision, Laskin J.A., writing for the court, applied the principle of implied exclusion (see Professor R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Vancouver: Butterworths, 1994) at p. 5), and concluded that "a tax exemption cannot be read into legislation" (at p. 6). In other words, it was not enough for sec. 437 of *The Municipal Act* to continue contractual rights in general, there needed to be specific reference to the continuation of the special tax benefits obtained by the mining corporation. Standing by itself the general wording in sec. 437 was not sufficient to accomplish this purpose. Any continuing contractual benefit to Black Hawk simply did not include the right to continue to pay grants in lieu of municipal taxes.

110 For this reason as well, the appeal of Black Hawk must fail.

111 In light of the above conclusions, it is neither necessary nor desirable to deal with the other issues raised on these appeals.

112 The appeal and cross-appeal are accordingly dismissed with one set of costs to each of the respondents.

Appeal and cross-appeal dismissed.

TAB 15

1897 CarswellOnt 18
The Supreme Court of Canada

Maloney v. Campbell

1897 CarswellOnt 18, 28 S.C.R. 228

**John Maloney (Defendant), Appellant and Elizabeth
Prudence Campbell (Plaintiff), Respondent**

Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

Judgment: October 28, 1897

Judgment: December 9, 1897

Proceedings: On Appeal from the Court of Appeal for Ontario.

Counsel: *C.H. Ritchie Q.C. (Boland* with him) for the appellant.
McPherson and *Clark* for the respondent.

Subject: Corporate and Commercial

Headnote

Choses in Action --- Assignability — Cause of action — On guarantee or indemnity

Conveyance of property subject to mortgage — Implied obligation of purchaser to indemnify vendor — Whether vendor may assign benefit of obligation.

The obligation of the purchaser which is raised by the sale of property to him, subject to a mortgage, to indemnify the vendor against his personal obligation to pay the money due on the mortgage, is not a personal obligation, and the vendor may assign the benefit of this obligation to the person entitled to be paid under the mortgage.

Mortgages --- Change of ownership — Mortgaged land — Sale or transfer of interest in land — Obligations of purchaser or transferee to mortgagor — Implied covenants

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

1 Upon an agreement for exchange of properties, Morrison conveyed certain premises in Toronto to Maloney subject to a mortgage for \$2,500 given by Morrison to Campbell, the assumption of which mortgage was expressed in the deed from Morrison to Maloney to be in part consideration of the conveyance.

2 Subsequently Morrison assigned to Campbell all liability or obligation of Maloney to him in respect of the mortgage debt. And in the present suit for foreclosure Campbell seeks as well a personal judgment against Maloney as against Morrison for the amount due on the mortgage. This was allowed by Robertson J., and affirmed by the Court of Appeal for Ontario, per Osler and MacLennan JJ.A. Burton C.J.O., dissenting.

3 The main contention by the present appellant in the court of first instance was that there were circumstances connected with the carrying out of the contract of exchange which rendered it inequitable for Morrison (and also for Campbell his assignee) to seek to enforce the alleged obligation to indemnify Morrison against the payment of the mortgage debt.

4 This was found against Maloney both by Mr. Justice Robertson and by the Court of Appeal, and we see no reason for reversing the conclusion come to upon the point.

5 In the Court of Appeal a re-argument was, however, directed upon the question whether such an obligation on the part of Maloney to indemnify Morrison was assignable either at all or before suit had been brought by Campbell against him for recovery of the amount of the mortgage debt. Upon this point the court decided in the affirmative, per Osler and Maclellan JJ.A. Burton C.J.O. dissenting.

6 It is admitted by the learned counsel for the appellant that the decisions in Ontario have been uniformly to this effect. Chief Justice Burton refers also to his agreement therewith in *Ball v. Tennant*¹. But having occasion to dig around the foundations, he now finds them too weak to bear the superstructure.

7 The earliest expression of opinion noted on the point is that of Vice Chancellor Spragge in *Irving v. Boyd*², who says:

I have no doubt that the equity of the mortgagor to compel his assignee to pay would pass by express assignment to the mortgagee ** It would simplify the remedy for the recovery of the mortgage money, giving a direct right of suit between the party to receive and the proper party to pay. It would create a privity which alone was wanting to make such a suit sustainable.

8 In *British Canadian Loan Co. v. Tear*³ Mr. Chancellor Boyd says of this dictum:

It is intrinsically weighty and in my opinion correctly sets forth the law on this head.

9 And in *Ball v. Tennant*⁴ already referred to, the present learned Chief Justice of Ontario says:

It has always appeared to me that an assignment to any one but the person for whose benefit it could be enforced was an idle proceeding, but that the equity of the mortgagor to compel his assignee to pay would pass by express assignment to the mortgagee. It would, as in this case, simplify the remedy for the recovery of the mortgage money and create the privity which alone was wanting to make such an action maintainable.

10 The ground upon which the same learned judge now comes to an opposite conclusion, is that the obligation which is raised by the transaction to indemnify the vendor against his personal obligation to pay the money due upon the vendor's mortgage, is an obligation which is personal in its nature, and that until the vendor is himself damnified by payment, or at least by action brought against him for the amount, there is nothing assignable.

11 Agreements are said to be personal in this sense when they are based on confidences, or considerations applicable to special personal characteristics, and so cannot be usefully performed to or by another. An agreement to indemnify against payment of a possible money demand is no more personal in this sense than is one to indemnify against payment of a definite and matured liability or an agreement to pay a sum of money for another.

12 Then as to there being nothing to assign until the vendor is himself damnified by payment or action brought to recover payment; supposing it to be the case that there is nothing for the assignment to operate on until then, it would still leave the formal assignment good as an agreement to assign, which would become operative and effectual as an assignment immediately upon the circumstances arising which create the occasion for the indemnity being made. The assignability of the obligation and the existence of circumstances necessary to support an action upon it are distinct things. The cases cited in appellant's factum, *Eddowes v. The Argentine Loan and Mercantile Agency Co.*⁵, and *Hughes-Hallett v. The Indian Mammoth Gold Mines Co.*⁶, relate to the latter matter.

13 As to the suggested distinction between an assignment to the mortgagee and to one not interested in the payment of the mortgage debt, suppose the mortgagor to have paid such debt, it would be competent for him to assign to any one

his claim over against his vendee. And this being so, there would seem to be no good reason for any such distinction in case of assignment prior to his discharge of the mortgage debt, assuming such to be a good assignment if made to the mortgagee. An assignment to a stranger to the mortgage debt in such case could, however, scarcely be conceived because he would get but a barren title.

14 The vendee is entitled to have his obligation enure to the discharge of the mortgage debt, so as to free the land from the charge, and consequently the assignee, if not interested therein, could derive no benefit, and the case is therefore one that would be little likely to arise.

15 The authorities referred to by Mr. Justice Maclellan also show that the vendor, becoming, as between himself and his vendee, a surety for the payment of the mortgage debt, is entitled, upon the debt becoming due and payable, to call upon the vendee to appropriate the balance of the consideration money suffered to remain in his hands to the relief of the vendor as surety.

16 As to settling the several rights in the one action, this is a matter of procedure, and certainly (as already observed), it simplifies the remedy and avoids circuity of action, and at the same time appears consistent with legal principle.

17 The appeal should therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitors of record:

Solicitors for the appellant: *Macdonell & Bland*.

Solicitors for the respondent: *McPherson, Clark, Campbell & Jarvis*.

Footnotes

1 21 Ont. App. R. 602.

2 15 Gr. 157.

3 23 O.R. 664.

4 21 Ont. App. R. 602.

5 63 L.T. 364.

6 22 Ch. D. 561.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PERFORMANCE SPORTS GROUP LTD. ET AL	Court File No. CV-16-11582-00CL
ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST) Proceeding commenced at Toronto	
BRIEF OF AUTHORITIES OF Q30 SPORTS, LLC, Q30 SPORTS SCIENCE, LLC, BRUCE ANGUS AND THOMAS HOEY	
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