

**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 OLD
PSG WIND-DOWN LTD., OLD BHR WIND-DOWN CORP., OLD BPSU WIND-DOWN
CORP., OLD BPSDS WIND-DOWN CORP., OLD EBS WIND-DOWN CORP., OLD PLG
WIND-DOWN CORP., OLD PSGI WIND-DOWN CORP., OLD BHR INC., OLD BH INC.,
OLD BPSU INC., OLD BPSCI INC., OLD BPSUSH INC., OLD EBS INC., OLD PLG INC.,
AND OLD PSGI INC.

(Applicants)

BOOK OF AUTHORITIES

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TAB 1

1995 CarswellOnt 54
Ontario Court of Justice (General Division), Commercial List

Dylex Ltd., Re

1995 CarswellOnt 54, [1995] O.J. No. 595, 31 C.B.R. (3d) 106, 54 A.C.W.S. (3d) 504

Re Dylex Limited and Others

Re Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, for a compromise or arrangement with respect to Dylex Limited and all other companies set out in Schedule "A" hereto and a reorganization of share capital of Dylex Limited under the Canada Business Corporations Act, R.S.C. 1985, c. C-44

Re Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Farley J.

Judgment: February 16, 1995

Docket: Doc. B4/95

Counsel: *R.J. Arcand*, for Cambridge Western Leaseholds Limited, Bramalea Centres Limited, Burnac Corporation, Cambridge Leaseholds Limited, Laing Property Corporation, Markborough Properties Inc., Oxford Development Group Inc. and O & Y Properties Inc.

Charles F. Scott and Jennifer Aitken, for applicants Dylex Group. *T. O'Sullivan*, for Royal Bank of Canada.

Subject: Corporate and Commercial; Insolvency

Motions for determination of right of debtor to proceed with intended closure of stores.

Farley J.:

1 Cambridge Western Leaseholds Limited ("Cambridge") moved for a determination of the right of the applicants ("Dylex") to proceed with the intended closure of stores at Mill Woods Town Centre, Edmonton and at Lethbridge Centre, Lethbridge. It was indicated at the hearing that the request was to keep the stores open until the *Companies' Creditors Arrangement Act* ("CCAA") plan is voted on (i.e., for a couple of months). Cambridge is the owner-operator of the two shopping centres, both of which are acknowledged to have some operating difficulties re vacancies. Cambridge's position is that Dylex's announced closure of a Tip Top Tailor store on February 18th and a Bi-Way Store on April 8th (both Mill Woods) and a Tip Top tailor store on February 21st (Lethbridge) would materially affect each shopping centre. These three closures are part of a cross-Canada program of 200 closures including a previous Thrifty's closure on February 26th in Lethbridge.

2 Allow me to observe that Dylex is under the tight scrutiny of the Royal Bank of Canada ("Royal"), which is the special operating lender to Dylex, whose loan has, an an event of default, the failure to meet projected cash flows. Dylex has multiple stores in many of the shopping centres across Canada and in this respect has been a tenant of some magnitude. Cambridge is part of the Cambridge Leaseholds Limited group, which at the present time, has indicated an interest in making an investment in the Cadillac Fairview group of some hundreds of millions of dollars; thus it appears that Cambridge is financially secure at this time. However Dylex has demonstrated that it faces severe financial challenges.

3 In a January 23rd letter following the CCAA order (which allowed store closures) given by Houlden J.A. on January 11th, Dylex advised various landlords (including Cambridge):

Where any intended store closures or closure in a mall or project has a material effect on the viability of the mall or project, in the view of the applicable landlord, such applicable landlord shall have the right to apply to the court for a determination of the right of [Dylex] to proceed with the intended closure or closures.

Cambridge has availed itself of that opportunity. In essence it is an amplification of or a specific comeback clause. The CCAA order provided as well that landlords' claims for closures would be determined and form part of the claims compromised in the CCAA plan.

4 The Mill Woods Centre is 442,345 sq. ft. of which 193,701 sq. ft. is represented by 109 ancillary stores (including the subject stores). The present vacancy rate is 26 per cent of the ancillary stores; with the proposed closures this would increase to 34 per cent. The Lethbridge Centre has 338,130 sq. ft. of which the 83 ancillary stores represent 146,547 sq. ft. Presently 26 per cent of the ancillary space is vacant and the proposed closure would increase this to 31 per cent. Both centres apparently suffered from an extended recession in the retail business and competition from other centres in each city.

5 With restructuring Dylex will not have any Bi-Way stores west of Ontario after April; thus an isolated Bi-Way store may cause management and stocking problems. The Lethbridge Tip Top lease will expire August 31st; it would be inconceivable that Dylex would attempt to extend this lease beyond its expiry. The subject stores have been a financial drain on Dylex, at a time when it is in a tight financial squeeze. Their closure is projected to bring about variable cost saving and an amelioration of some fixed costs (i.e., the elimination of what would normally be regarded as fixed costs in terms of certain overheads).

6 The two subject centres are experiencing some difficulty; however they were experiencing this difficulty generally before the time of Dylex's troubles. Generally it appears that Cambridge is in a secure financial position although the health of the two centres is less than robust. Of course, vis-à-vis the subject closings, there is always the aspect of the straw which breaks the camel's back. However in many view a compelling case has not been made out by Cambridge in this regard. Rather what we have are some vague generalities such as the following from the Gordon Harris report:

Competitive regional malls are heavily reliant on anchor stores and high profile national tenants in order to establish the identity and traffic needed to generate sales in the centre. Dylex stores are viewed as highly desirable retail concepts that help shape consumers shopping patterns. The loss of Dylex tenants at Mill Woods Town Centre will alter, possibly on a permanent basis, shopping patterns away from Mill Woods Town Centre to other major malls in Edmonton.

The loss of BiWay and Tip Top at this time is a damaging blow to a centre which has had difficulty achieving the kind of occupancy and sales performance levels needed to achieve dominance in the local market. Recent sales increases point to a stabilization at Mill Woods Town Centre. The revenue lost as a result of the closures will effectively wipe out the gains in overall CRU sales increases achieved in the past two years.

It is therefore our opinion that the Dylex action will have a significant negative impact upon the ability of Mill Woods Town Centre to maintain its market share, to keep its other tenants, and to retain its customers. These factors will certainly affect the long-term economic viability of Mill Woods Town Centre.

7 I am therefore of the view that in weighing the balancing of interests in a CCAA context, the nod should continue to be given to Dylex which is in a precarious position as opposed to Cambridge which is in a sound financial condition although the two subject centres may be less than robust. However this pallor of the two centres is not caused by these three subject closings. I as well note that the one closure in Lethbridge will occur no matter what (barring a complete miracle) on the expiry of that lease on August 31st. Also the Bi-Way closing in Edmonton is not scheduled to take place for almost two months which is the anticipated plan vote time in any event. I am of the view that my discretion should be exercised in favour of Dylex in this situation: see *Meridian Developments Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), at pp. 113-114; *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.* (1988), 72

C.B.R. (N.S.) 1 (Alta. Q.B.), at pp. 12-13; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at p. 318; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.), at pp. 119-120; *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31.

8 It is clear that s. 11 of the CCAA gives the power to the court to sanction a plan which includes termination of leases as part of the debtor's plan of arrangement: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.), at p. 625; *Re Armbro Enterprises Inc.* (1993), 22 C.B.R. (3d) 80 (Ont. Bkcty.), at p. 84. In the interim between the filing and the approval of a plan, the court has the inherent jurisdiction to fill in gaps in legislation so as to give effect to the objects of the CCAA, including the survival program of a debtor until it can present a plan: see *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.S. S.C.), at pp. 93-94 and generally *Lehndorff*, supra, at pp. 35-38. While not specifically mentioned in *Re Triangle Drugs Inc.* (1993), 12 O.R. (3d) 219 (Bkcty.), it was inherent jurisdiction which I was relying on to fill the gap in that legislation, namely the [Bankruptcy and Insolvency Act], R.S.C. 1985, c. B-3 (as amended by S.C. 1992, c. 27) ("BIA").

9 Mr. Arcand freely and voluntarily acknowledged that if he had to meet the test of a mandatory order he would be in difficulty: see *Bramalea Ltd. v. Canada Safeway Ltd.* (1985), 37 R.P.R. 191 (Ont. H.C.); *Islington Village Inc. v. Citibank Canada* (1992), 27 R.P.R. (2d) 100 (Ont. Gen. Div.), affirmed (November 23, 1992), Doc. CA C13327 (Ont. C.A.); *Chatham Centre Mall Ltd. v. New Miracle Food Mart Inc.* (Farley J., released June 23, 1994) [reported at 40 R.P.R. (2d) 124 (Ont. Gen. Div. [Commercial List])]; and *566719 Ontario Ltd. v. New Miracle Food Mart Inc.* (Farley J., released August 11, 1994) [reported at 41 R.P.R. (2d) 22 (Ont. Gen. Div. [Commercial List])].

10 Lastly allow me to deal with Cambridge's point that I should import the principles of s. 65.2 BIA into the CCAA proceedings for the purpose of requiring Dylex to satisfy me that without these three closures it would not be able to make a viable proposal. The authority said for this proposition was *Triangle*, supra at p. 222 where in the Cambridge factum it was stated:

25. The philosophy of the CCAA in certain parts has been imported into the BIA. The procedure set out in s. 65.2 of the BIA should be imported into the CCAA.

Firstly let me observe that the 1992 amendments to the BIA regarding reorganizations in particular got into intricate detail, but as pointed out in *Triangle* had an obviously overlooked gap. However the CCAA since its inception has been a skeleton piece of legislation, almost pre-Victorian in style. The history of CCAA law has been an evolution of judicial interpretation. My observation about s. 66(2) BIA in *Triangle* was to the effect that a BIA proposal could be transferred to the CCAA and thus where the BIA was inappropriately silent in the reorganizational regime, it would be appropriate to measure the situation according to the philosophy in the parallel situation under the CCAA. However it should be noted that s. 66(2) BIA is a one way street; there is no similar provision for transferring from the CCAA to the BIA (although I do note that a bankrupt company would be eligible to file under the CCAA).

11 Secondly and just in passing I note that I would not think it would be appropriate to view these three stores in isolation vis-à-vis the question of the viability of Dylex (or its plan of reorganization). It appears that the three stores are part of a pre-plan restructuring program package.

12 I would also observe that given whom Mr. Arcand represents, I would think it more than likely that if Cambridge were successful in these motions, there would be a torrent of other applications.

13 The motions are dismissed. Cambridge is to pay Dylex \$3,500 costs forthwith. I note in this respect that Royal's legal fees would be added as a loan charge so that this award of costs may be regarded as joint Dylex/Royal since there is only one pocket.

Order accordingly.

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TAB 2

2001 SCC 92, 2001 CSC 92
Supreme Court of Canada

Eagle River International Ltd, Re

2001 CarswellQue 2725, 2001 CarswellQue 2726, 2001 SCC 92, 2001 CSC 92,
[2001] 3 S.C.R. 978, [2001] S.C.J. No. 90, 110 A.C.W.S. (3d) 596, 207 D.L.R.
(4th) 385, 280 N.R. 155, 30 C.B.R. (4th) 105, J.E. 2002-93, REJB 2001-27203

Azco Mining Inc., Appellant v. Sam Lévy & Associés Inc., Respondent

McLachlin C.J.C., L'Heureux-Dubé, Iacobucci, Major, Binnie, Arbour, LeBel JJ.

Heard: May 15, 2001
Judgment: December 20, 2001
Docket: 27876

Proceedings: affirming [2000] R.J.Q. 392 (C.A. Que.); affirming [1999] R.J.Q. 1497 (C.S. Que.)

Counsel: *Yves Martineau*, for Appellant
Jean-Philippe Gervais, for Respondent

Subject: Insolvency; International; Civil Practice and Procedure; Estates and Trusts

APPEAL by venture capital company from judgment reported at 2000 CarswellQue 127, [2000] R.J.Q. 392, [2000] Q.J. No. 417 (C.A. Que.) dismissing motion to transfer bankruptcy proceedings from Quebec to British Columbia.

POURVOI de la société à capital de risque à l'encontre de l'arrêt publié à 2000 CarswellQue 127, [2000] R.J.Q. 392, [2000] Q.J. No. 417 (C.A. Que.) qui a rejeté la requête demandant le renvoi en Colombie-Britannique des procédures engagées au Québec.

Binnie J.:

1 The long arm of the Quebec Superior Court sitting in Bankruptcy reached out to the appellant in Vancouver, British Columbia, in respect of a claim for shares and warrants and other debts allegedly due to the bankrupt which the trustee in bankruptcy values in excess of \$4.5 million. The appellant protested that the dispute, which involves the financing of an African gold mine, has nothing to do with Quebec. It argues that the claim of the respondent trustee in bankruptcy is an ordinary civil claim that rests entirely on agreements that are to be interpreted according to the laws of British Columbia. For this and other reasons of convenience and efficiency, the appellant says, the claim ought to proceed in British Columbia. The bankruptcy court and the Quebec Court of Appeal rejected these submissions and, in my view, the further appeal to this Court ought also to be dismissed.

I. Facts

2 The appellant Azco Mining Inc. ("Azco"), a company incorporated under the laws of Delaware, offered venture capital services from its office in Vancouver, British Columbia. In 1996 it was introduced to Eagle River International Limited and Eagle River Exchange and Financial Services Inc. (hereinafter collectively referred to as "Eagle"), with offices in Gatineau, Quebec. Eagle was in the process of trying to develop promising gold mining properties in a 500 square mile area of Mali, West Africa. A deal was struck whereby Eagle would continue to use its expertise to bring the mines to production through subsidiary companies in Mali, and Azco would provide the financing. The parties reduced

their agreement to a series of documents, each of which contained what the appellant contends is a choice of forum clause and the respondent argues is no more than a choice of law clause, as follows:

June 7, 1996 financing agreement

28. The agreement shall be governed by the law of British Columbia.

June 12, 1996 management agreement

13. **Arbitration:** The Parties hereto agree that all questions or matters in dispute with respect to this Agreement shall be submitted to arbitration pursuant to the terms hereof.

.....

20. **Applicable Law:** The situs of this Agreement is Vancouver, British Columbia, and, for all purposes this Agreement, will be governed exclusively by and construed and enforced in accordance with the laws prevailing in the Province of British Columbia.

3 In addition, Azco relies on the terms of the debenture entered into by Azco with Eagle's subsidiary company in Mali (called West African Gold & Exploration S.A.), as follows:

West African Gold & Exploration S.A. Debenture dated August 9, 1996

17. [The] situs of this Debenture is Vancouver, British Columbia, and for all purposes this Debenture will be governed exclusively by and construed and enforced in accordance with the laws prevailing in the Province of British Columbia. In addition, the Company hereby expressly acknowledges and agrees to forthwith execute any and all documentation which may be necessary in order to ensure both the enforceability of this Debenture and the valid registration thereof as against the Mortgaged Property under the laws prevailing in each of the Province of British Columbia and the Republic of Mali and, in addition, and without limiting the generality of the foregoing, to attorn, if required, to any courts of competent jurisdiction in the Province of British Columbia in order to either administer or interpret this Debenture in accordance with the laws prevailing in the Province of British Columbia.

4 It was envisaged that if the project were successful Azco would ultimately own a majority interest in what the trustee describes as a joint venture holding company, Sanou Mining Corporation ("Sanou"). Eagle was to be a minority partner.

5 During the period of May 16, 1996 and May 1, 1997, Azco paid Eagle a total of U.S.\$3,844,858. For each payment, Eagle executed a promissory note, undertaking to repay Azco if it failed to fulfill its contractual obligations.

6 On September 12, 1997, Eagle was adjudged bankrupt. The respondent firm was appointed trustee in bankruptcy. Despite Eagle's bankruptcy, the Mali project proceeded and, according to Azco, it is still underway. The trustee says that the appellant now controls the holding company Sanou and continues to withhold, wrongfully, the 3.5 million shares and 4 million warrants to which Eagle was (and is) entitled.

7 On January 18, 1999, the respondent trustee presented a petition to the Quebec Superior Court sitting in Bankruptcy ("the bankruptcy court") seeking to "recuperate the assets" of Eagle, including the monetary value of what it considers the wrongfully withheld property of the debtor, namely 125,000 shares in Azco itself and 3.5 million shares and 4 million warrants of Sanou. The respondent trustee values the Azco shares at CAN \$337,500 and the Sanou interest at U.S. \$1,875,000. In addition the trustee advances some monetary claims for a variety of alleged debts.

8 On February 24, 1999, the appellant brought a motion to transfer the petition "to the Supreme Court of British Columbia, Bankruptcy Division of Vancouver". In support of its motion, the appellant stated that "it is a certainty that Azco will file a counterclaim for an amount in excess of \$5,000,000 Cdn., principally" based on the financing agreements to recover about U.S. \$3.85 million in the payments to Eagle mentioned above which, as stated, were secured by promissory notes. The contractual arrangement, says Azco, was that if certain conditions in the agreements were not

met, the advances would be treated as a demand loan. Azco says the conditions were not met and that it is entitled to immediate repayment of all advances. Azco submitted that "[t]he Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco". Its position, as stated, was that the file should be transferred to the Bankruptcy Division of Vancouver.

9 Azco's Vice-President of Finance, Ryan Modesto, who lives in the United States, testified in support of the motion that Azco is a creditor in the bankruptcy:

Q. So is it Azco Mining's position that it is the creditor in that bankruptcy of Eagle River?

A. Yes, it is.

Q. For what amount?

A. For three million eight hundred forty-four thousand eight hundred and fifty-eight dollars (\$3,844,858) plus accrued interest.

Q. That's U.S. currency?

A. That is U.S. currency.

Q. And you refer to interest. Are you referring to the interest referred to in the promissory note?

A. Exactly.

10 Azco's motion was dismissed by Isabelle J. of the Quebec Superior Court on May 6, 1999. That decision was upheld by the Quebec Court of Appeal on February 21, 2000.

II. Judicial History

A. Quebec Superior Court, [1999] R.J.Q. 1497 (C.S. Que.)

11 Isabelle J. held that the Quebec Superior Court sitting in Bankruptcy had jurisdiction to deal with the respondent's petition. The relevant provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "Act"), were clear and there was no need to refer to the *Civil Code of Québec*, S.Q. 1991, c. 64, or the *Quebec Code of Civil Procedure*, R.S.Q., c. C-25.

12 Azco had not argued that the bankrupt's affairs could be more efficiently administered in British Columbia but rather that there were other "sufficient" reasons for transferring the proceeding to that province, including, in particular, certain clauses in the agreement (reproduced above) that Azco said required the dispute to be tried in British Columbia. Isabelle J. ruled that these clauses had to do with choice of law rather than choice of forum and in any event lacked an "imperative" character.

13 Isabelle J. accepted that he could transfer the proceeding to the Vancouver division of the Supreme Court of British Columbia sitting in Bankruptcy under s. 187(7) of the Act. There was no need to turn to the specific rules governing *forum non conveniens* set out in art. 3135 of the *Civil Code of Québec*. Having regard to all the circumstances, however, Isabelle J. did not think a transfer of proceedings would be justified. The legislator bestowed on the trustee the power to manage the affairs of the bankrupt in the most practical and economical manner possible. Vancouver may be convenient for the appellant, but the interests of all the creditors prevailed over the convenience of only one creditor. Accordingly, the appellant's motion was dismissed.

B. Quebec Court of Appeal, [2000] R.J.Q. 392 (C.A. Que.)

14 A unanimous Court of Appeal dismissed Azco's appeal. Robert J.A., concurred in by Proulx and Rousseau-Houle JJ.A., agreed that the Quebec Superior Court had jurisdiction over Eagle's bankruptcy, noting that the company was carrying on business in Quebec when the bankruptcy proceedings were initiated. The petition against Azco was authorized by s. 30(1)(d) of the Act which empowers a trustee to bring legal proceedings relating to the property of the bankrupt with the permission of the inspectors.

15 Robert J.A. agreed with the motions judge that it would be most efficient and equitable to have a single court oversee the administration of the bankrupt estate despite the fact that a centralized bankruptcy might present certain difficulties and inconveniences for parties residing in provinces far from the bankruptcy forum. However, like Isabelle J., he noted that the courts retain some discretion under s. 187(7) to transfer a case to another division where there is proof that the bankrupt's estate would be administered more economically or where some other sufficient reason exists. In the present case, Robert J.A. found that Azco had not demonstrated it would be more economical to proceed before the bankruptcy court in British Columbia. As to other circumstances, Robert J.A. ruled that the contractual terms that Azco characterized as choice of forum clauses did not bind the trustee in bankruptcy, who represented and acted for the benefit of all creditors. The clauses in question were not exclusive jurisdiction clauses but even if they were, the Act is a law of public order and its provisions must be rigorously applied given the consequences for the rights of both debtors and creditors.

III. Relevant Statutory Provisions

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

2. (1) In this Act

"locality of a debtor" means the principal place

(a) where the debtor has carried on business during the year immediately preceding his bankruptcy,

(b) where the debtor has resided during the year immediately preceding his bankruptcy, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated;

30. (1) The trustee may, with the permission of the inspectors, do all or any of the following things:

.....

(d) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

43. (5) The petition shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor.

72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

183. (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary 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:

.....

(b) in the Province of Quebec, the Superior Court;

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

187. (7) The court, on satisfactory proof that the affairs of the bankrupt can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may by order transfer any proceedings under this Act that are pending before it to another bankruptcy district or division.

188. (1) An order made by the court under this Act shall be enforced in the courts having jurisdiction in bankruptcy elsewhere in Canada in the same manner in all respects as if the order had been made by the court hereby required to enforce it.

(2) All courts and the officers of all courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of one court seeking aid, with a request to another court, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within its jurisdiction.

Bankruptcy and Insolvency General Rules, C.R.C., c. 368 (am. SOR/98-240)

3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

Civil Code of Québec, S.Q. 1991, c. 64

3135. Even though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.

.....

3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where

.....

(5) the defendant submits to its jurisdiction.

However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Quebec authority.

IV. Analysis

17 Parliament has conferred on the bankruptcy court the capacity and authority to exercise "original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act" (s. 183(1)). On the face of it, the intent of this provision is to confer on the bankruptcy court powers and duties co-extensive with Parliament's jurisdiction over "Bankruptcy" under s. 91(21) of the *Constitution Act, 1867* except insofar as that jurisdiction has been limited or specifically assigned elsewhere by Parliament itself.

18 While the appellant's motion simply asked that the dispute be transferred to the Vancouver Division of the Supreme Court of British Columbia sitting in Bankruptcy (thereby appearing to concede that the dispute is properly dealt with as a bankruptcy matter), its motion also contended that the trustee's claims are "exclusively contractual" (para. 6) and that the "Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco" (para. 20). Moreover, much of its oral argument suggested that the dispute ought to be tried in the ordinary civil courts. In addition the appellant takes the position that Quebec is not the convenient forum to deal with this dispute, and that the Quebec Superior Court sitting in Bankruptcy lacks a sufficiently long arm to require Azco to take its witnesses east to litigate. The proper forum, it says, is British Columbia because there is no substantial connection at all between this case and the Province of Quebec.

19 It is convenient to address the legal issues raised by the appellant in the following order:

1. Was the bankruptcy petition properly filed in the Hull Division of the Quebec Superior Court sitting in Bankruptcy?
2. If so, did that court thereby acquire jurisdiction to deal with matters affecting the bankrupt estate arising in British Columbia?
3. If so, are contract claims nevertheless excluded from federal bankruptcy jurisdiction?
4. If not, does this particular contract claim come within the bankruptcy court's jurisdiction?
5. Even if fully clothed with jurisdiction to hear this case, should the bankruptcy court in Hull nevertheless have transferred the file to the court exercising counterpart bankruptcy jurisdiction in Vancouver?

1. Was the Bankruptcy Petition Properly Filed in the Hull Division of the Quebec Superior Court Sitting in Bankruptcy?

20 Parliament decided to utilize the superior courts of the provinces and territories to exercise bankruptcy jurisdiction (s. 183). It has long been established that, with respect to matters coming within the enumerated heads of s. 91, "the Parliament of Canada may give jurisdiction to provincial courts and regulate proceedings in such courts to the fullest extent": *Atlas Lumber Co. v. Winstanley* (1940), [1941] S.C.R. 87 (S.C.C.), *per* Rinfret J., at p. 100. The courts mentioned in s. 183 retain their character as superior courts of inherent jurisdiction, but will be referred to here, perhaps with some imprecision of language, as the bankruptcy courts.

21 A creditor who wishes to obtain a receiving order against a debtor is required to file a bankruptcy petition "in the court having jurisdiction in the judicial district of the locality of the debtor" (s. 43(5)).

22 The "locality of the debtor" is defined under s. 2(1) as the "principal place"

- (a) where the debtor has carried on business during the year immediately preceding his bankruptcy,
- (b) where the debtor has resided during the year immediately preceding his bankruptcy, or
- (c) in cases not coming within paragraph (a) or (b) where the greater portion of the property of the debtor is situated;

23 Section 43(5) expresses a rule of jurisdiction that apportions among the courts named in s. 183(1) judicial power over the adjudication of bankruptcy petitions. The evidence was that Eagle carried on business in Quebec even though it had not obtained a licence to do so. The agreements between Azco and Eagle (and the promissory notes on which Azco's counterclaim is based) recite that Eagle has an office at 212 Labrosse Boulevard, Gatineau, Quebec. The same address appears on its corporate letterhead. Azco's Vice-President of Finance testified that his meetings with respect to the financing were held at that office. There is no suggestion that Eagle vacated the premises prior to its bankruptcy, or that it had any other offices in Canada.

24 It appears that Eagle's only connection to British Columbia is that the agreements mentioned above refer to the law of that province. It is clear that s. 43(5) would not have permitted the filing of the bankruptcy petition in British Columbia on such a ground. Nothing in the evidence, in my view, suggests that the bankruptcy court in Hull lacked subject matter jurisdiction over the petition and personal jurisdiction over Eagle when it made the receiving order on September 12, 1997.

2. Did the Bankruptcy Court Thereby Acquire Jurisdiction to Deal With Matters Affecting the Bankrupt Estate Arising in British Columbia?

25 The Act establishes a nationwide scheme for the adjudication of bankruptcy claims. As Rinfret J. pointed out in *Boily v. McNulty* (1927), [1928] S.C.R. 182 (S.C.C.), at p. 186: [translation] "This is a federal statute that concerns the whole country, and it considers territory from that point of view". The national implementation of bankruptcy decisions rendered by a court within a particular province is achieved through the cooperative network of superior courts of the provinces and territories under s. 188: *Mount Royal Lumber & Flooring Co., Re* (1926), 8 C.B.R. 240 (C.A. Que.), per Rivard J.A., at p. 246, [translation] "The *Bankruptcy Act* is federal and the orders of the Quebec Superior Court sitting as a bankruptcy court under that Act are enforceable in Ontario...". See also: *Associated Freezers of Canada Inc. (Trustee of) v. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311 (N.S. C.A.), at p. 314, and *Maska U.S. Inc. v. Alfieri (Liquidator of)*, [1998] R.J.Q. 1380 (C.A. Que.), at p. 1389.

26 The trustees will often (and perhaps increasingly) have to deal with debtors and creditors residing in different parts of the country. They cannot do that efficiently, to borrow the phrase of Idington J. in *Stewart v. LePage* (1916), 53 S.C.R. 337 (S.C.C.), at p. 345, "if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation". *Stewart* dealt with the winding up of a federally incorporated trust company in British Columbia. As a result of the winding up, a client in Prince Edward Island instituted a proceeding in the superior court of that province for a declaration that certain moneys held by the bankrupt trust company were held in trust and that the bankrupt trust company should be removed as trustee. This Court held that the dispute, despite its strong connection to Prince Edward Island, could not be brought before the court of that province without leave of the Supreme Court of British Columbia. Anglin J. commented at p. 349:

No doubt some inconvenience will be involved in such exceptional cases as this where the winding-up of the company is conducted in a province of the Dominion far distant from that in which persons interested as creditors or claimants may reside. But Parliament probably thought it necessary in the interest of prudent and economical winding-up that the court charged with that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be involved. The great balance of convenience is probably in favour of such single control though it may work hardship in some few cases.

27 *Stewart* was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse. Section 188(1) ensures that orders made by a bankruptcy court sitting in one province can and will be enforced across the country.

28 I have concluded that the jurisdiction of the Quebec Superior Court sitting in Bankruptcy was properly invoked by the petitioning creditors in this case but counsel for the appellant company says that his client, with its office in British Columbia, is not within its reach. The argument, in part, is that whatever the power of Parliament to confer national jurisdiction on a provincial superior court, that court is nevertheless provincially constituted, and for service of process its long arm statute must be complied with. The factual record does not show precisely how service of the trustee's petition was effected on the appellant, but if the appellant had any concerns regarding the proprieties of service of the petition to initiate proceedings against it, such concerns were waived when Azco did not raise them in its motion brought in Hull. A good deal of time was occupied on the appeal with arguments about how a Quebec court could acquire *in personam* jurisdiction over a corporation resident in British Columbia, and whether the Quebec rules for service *ex juris* applied. The argument that the Quebec Superior Court sitting in Bankruptcy cannot exercise *in personam* jurisdiction over creditors in another province under the Act is rejected for the reasons of national jurisdiction already mentioned. Any objections regarding service of process are answered by the fact that Azco not only appeared in Quebec but invoked the jurisdiction of the Quebec Superior Court sitting in Bankruptcy to transfer the proceedings pursuant to s. 187(7) of the Act to the bankruptcy court sitting in Vancouver. Any remaining issue with respect to *in personam* jurisdiction was thereby waived.

29 Azco did not, of course, waive its objection to jurisdiction over the subject matter of this particular dispute. That was a major point in its motion. I turn now to that issue.

3. Are Contract Claims Nevertheless Excluded From Federal Bankruptcy Jurisdiction?

30 The appellant's motion, as stated, argued that the trustee's claims against it are "exclusively contractual in nature" (para. 6) and that "[t]he Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco" (para. 20). The theory underlying these contentions seems to be that contract claims relate to "Property and Civil Rights" within the meaning of s. 92(13) of the *Constitution Act, 1867* and on that account lie outside the jurisdiction of the bankruptcy court. At para. 42 of its factum, for example, the appellant argues:

[TRANSLATION]

Contrary to what the Court of Appeal affirms, the trustee's claim is therefore purely contractual in nature, under the civil law. It is not a remedy specifically provided for under the *BIA* such as the application to have preferential payments declared void (see sections 91 to 100 *BIA*). The mere fact that the plaintiff is a trustee does not alter the nature of the claim and does not turn it into a bankruptcy dispute.

31 Most bankruptcy issues, of course, present a property and civil rights aspect. It is true, however, that some of the decided cases which deny jurisdiction to the bankruptcy court do so on grounds that have a constitutional flavour, e.g., *Lofsky, Re* (1947), 28 C.B.R. 164 (Ont. C.A.), per Roach J.A., at p. 167; *Sigurdson v. Fidelity Insurance Co. of Canada* (1980), 35 C.B.R. (N.S.) 75 (B.C. C.A.), at p. 102; *Holley v. Gifford Smith Ltd.* (1986), 54 O.R. (2d) 225 (Ont. C.A.); *Ireland, Re* (1962), 5 C.B.R. (N.S.) 91 (C.S. Que.), per Bernier J., at p. 94, and *Falvo Enterprises Ltd. v. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336 (Ont. H.C.).

32 It is therefore necessary to come to an understanding of what is included in the subject matter of "bankruptcy" within the meaning of s. 91(21) of the *Constitution Act, 1867*.

33 In *Saskatchewan Moratorium Legislation, Re* (1955), [1956] S.C.R. 31 (S.C.C.), it was stated by Rand J., at p. 46, that:

Bankruptcy is a well understood procedure by which an insolvent debtor's property is coercively brought under a judicial administration in the interests primarily of the creditors.

34 The core concept of coercive administration appeared early in our bankruptcy jurisprudence. In *L'Union St-Jacques de Montréal v. Bélisle* (1874), L.R. 6 P.C. 31 (Quebec P.C.), Lord Selborne L.C., speaking at p. 36 of general laws governing bankruptcy and insolvency, said: "The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation".

35 More helpful still was Lord Selborne's description of bankruptcy in the context of the English Act in *Ellis v. Silber* (1872), 8 Ch. App. 83 (Eng. Ch. Div.), at p. 86:

That which is to be done in bankruptcy is the administration in bankruptcy. The debtor and the creditors, as the parties to the administration in bankruptcy, are subject to that jurisdiction. The trustees or assignees, as the persons intrusted with that administration, are subject to that jurisdiction. The assets which come to their hands and the mode of administering them are subject to that jurisdiction; and there may be, and I believe are, some special classes of transactions which, under special clauses of the Acts of Parliament, may be specially dealt with as regards third parties. But the general proposition, that whenever the assignees or trustees in bankruptcy or the trustees under such deeds as these have a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy, appears to me to be a proposition entirely without the warrant of anything in the Acts of Parliament, and wholly unsupported by any trace or vestige whatever of authority. [Emphasis added.]

36 Despite the fact that England is a unitary state without the constitutional limitations imposed by our division of powers, the courts in Canada have generally hewn ever since 1874 to the basic dividing line between disputes related to the administration of the bankrupt estate and disputes with "strangers to the bankruptcy". The principle is that if the dispute relates to a matter that is outside even a generous interpretation of the administration of the bankruptcy, or the remedy is not one contemplated by the Act, the trustee must seek relief in the ordinary civil courts. Thus in the Quebec case of *Ireland, Re, supra*, the trustee brought proceedings to determine who had the right to proceeds of insurance policies taken out by the trustee on properties of the bankrupt estate. Bernier J. concluded that the Quebec Superior Court sitting in Bankruptcy lacked jurisdiction over the subject matter of the dispute. The controversy raised purely civil law questions and nothing in the Act conferred on the bankruptcy court a special jurisdiction to entertain these matters. Similar arguments prevailed in *Cry-O-Beef Ltd./Cri-O-Boeuf Ltée (Trustees of) v. Caisse populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19 (C.A. Que.); *Martin, Re* (1953), 33 C.B.R. 163 (Ont. S.C.), at p. 169; *Reynolds, Re* (1928), 10 C.B.R. 127 (Ont. S.C.), at p. 131; *Galaxy Interiors Ltd. (1971), Re* (1971), 15 C.B.R. (N.S.) 143 (Ont. S.C.); *Mancini (Trustee of) v. Falconi* (1987), 65 C.B.R. (N.S.) 246 (Ont. S.C.), and *Lofsky, Re, supra*, at p. 169.

37 The Quebec Court of Appeal has perhaps led the argument for a more expansive interpretation of what disputes properly come under the bankruptcy umbrella and can therefore properly be litigated in the bankruptcy court: *Geoffrion c. Barnett*, [1970] C.A. 273 (C.A. Que.); *Arctic Gardens Inc., Re* (1989), [1990] R.J.Q. 6 (C.A. Que.); *Excavations Sanoduc Inc. c. Morency*, [1991] R.D.J. 423 (C.A. Que.). See also the dissenting judgment of LeBel J.A., as he then was, in *Cry-O-Beef Ltd./Cri-O-Boeuf Ltée (Trustees of)*, *supra*, and *Atlas Lumber Co., Re* (1922), 3 C.B.R. 226 (Que. Bkcty.); but the push is not confined to Quebec: *Maple Leaf Fruit Co., Re* (1949), 30 C.B.R. 23 (N.S. C.A.); *Westam Development Ltd., Re* (1967), 10 C.B.R. (N.S.) 61 (B.C. C.A.), at p. 65; *M. B. Greer & Co., Re* (1953), 33 C.B.R. 69 (Ont. S.C.), at p. 70; *M.P. Industrial Mills Ltd. v. Manitoba Development Corp.* (1972), 17 C.B.R. (N.S.) 226 (Man. Q.B.).

38 It seems to me that the decided cases recognize that the word "Bankruptcy" in s. 91(21) of the *Constitution Act, 1867* must be given a broad scope if it is to accomplish its purpose. Anything less would unnecessarily complicate and undermine the economical and expeditious winding up of the bankrupt's affairs. Creation of a national jurisdiction in bankruptcy would be of little utility if its exercise were continually frustrated by a pinched and narrow construction of the constitutional head of power. The broad scope of authority conferred on Parliament has been passed along to the bankruptcy court in s. 183(1) of the Act, which confers a correspondingly broad jurisdiction.

39 There are limits, of course. If the trustee's claim is in relation to a stranger to the bankruptcy, i.e. "persons or matters outside of [the] Act" (*Reynolds, Re, supra*, at p. 129) or lacks the "complexion of a matter in bankruptcy" (*Lofsky, Re, supra*, at p. 169) it should be brought in the ordinary civil courts and not the bankruptcy court. However, claims for specific property may clearly be advanced in the bankruptcy courts (*Galaxy Interiors Ltd. (1971), Re, supra*, and *Sigurdson, supra*), as can claims for relief specifically granted by the Act (*Ireland, Re, supra*, and *Atlas Lumber Co., Re, supra*). That said, it is sometimes difficult to discern the particular "golden thread" running through the cases. L.W. Houlden and L.B. Morawetz observe:

There has been a great deal of litigation on this issue, and the cases are not always easy to reconcile. The difficulty flows from the division of constitutional powers in Canada, bankruptcy and insolvency being a federal power, and property and civil rights and the administration of justice being provincial powers.

Bankruptcy and Insolvency Law of Canada (3rd ed. (looseleaf)), at I§4.

40 The short answer to the "property and civil rights" argument, however, is that the appellant poses the wrong question. The issue is whether the contractual dispute between it and the respondent trustee properly relates to the bankruptcy. If so, the fact it also has a property and civil rights aspect does not in any way impair the bankruptcy court's jurisdiction.

4. Does this Particular Contract Claim Come Within the Bankruptcy Court's Jurisdiction?

41 In this case, the respondent trustee, with the permission of the inspectors, is instituting a "legal proceeding" in the bankruptcy court under s. 30(1)(d) "relating to the property of the bankrupt". In addition to the Azco and Sanou shares, the trustee says the definition of "property" in s. 2 includes "things in action" which, it is argued, includes the trustee's monetary claims.

42 As to the shares and warrants, the trustee alleges in para. 108 of its petition that Azco is "acknowledged to be the nominal owner of 100% of Sanou Mining Corporation" which owns Western African Gold and Exploration Ltd., which in turn runs the mining concessions in Mali. The allegation, in effect, is that Azco holds the Sanou shares and warrants that rightfully belong to the bankrupt estate and is in a position to transfer them to the trustee if required to do so by the bankruptcy court.

43 As discussed above, it cannot plausibly be argued that the bankruptcy court lacks subject-matter jurisdiction over the dispute because it is a contract case. The objection, more narrowly defined, is whether the bankruptcy court lacks jurisdiction because (i) the appellant is properly considered a "stranger to the bankruptcy", or (ii) the bankruptcy court cannot award the remedy which the trustee seeks.

(i) Is the Appellant a "Stranger to the Bankruptcy"?

44 If a potential defendant is a "stranger" to the bankruptcy, the bankruptcy court may have no subject matter jurisdiction over the dispute (because it is not part of the bankruptcy) even though the "stranger" resides within the territorial jurisdiction of the court.

45 At the time of the trustee's petition, the appellant had filed no proof of claim in the bankruptcy. It seems to have adopted a "come and get me approach", that is to say, it would file a claim only if claimed against by the trustee. Eventually the trustee *did* claim against it by way of the January 18, 1999 petition and the appellant *did* give notice of its counterclaim in its February 24, 1999 motion, including the fact it held promissory notes for \$3,844,858 signed by the bankrupt, payable on demand, constituting potential obligations now inherited by the trustee.

46 In a decision released concurrently, *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90 (S.C.C.), we uphold a decision of the Federal Court of Canada to dispose of the claims of maritime lienholders against a ship whose owner was adjudged bankrupt after the ship was arrested but before the *in rem* action had proceeded to judgment. We concluded that the Federal Court did not lose subject matter jurisdiction by virtue of the subsequent bankruptcy of the shipowner. We held that the Federal Court *could* have stayed its proceedings in deference to the bankruptcy court but was not, in the circumstances, obliged to do so.

47 The issue here is somewhat different. The appellant is resisting a claim by the trustee in bankruptcy and threatening to bring a counterclaim against the bankrupt estate based on the same set of commercial agreements. The appellant sought only to have the proceedings transferred to a different division of the bankruptcy court within Canada.

48 In *Lofsky, Re*, supra, the Ontario Court of Appeal dealt with a case where the trustee sought a declaration that the transfer of an automobile from the bankrupt to his wife was fraudulent and void as against the trustee and that it formed part of the property of the bankrupt. The wife resisted the claim on the ground that the automobile never belonged to the bankrupt (even though it was registered in his name). Roach J.A., at p. 169, found the wife was a stranger to the bankruptcy:

In my opinion, it must be concluded that the issue between the trustee and the appellant is not a matter in bankruptcy and that it is purely a matter of property and civil rights. It has none of the elements that would bring it within the former. No question as between debtor and creditor here arises in the distribution of a bankrupt estate. The appellant does not claim title to the automobile through the bankrupt. Indeed she says that the bankrupt never had title and that she was always the owner. I cannot think of any aspect of the issue that gives it the complexion of a matter in bankruptcy unless perhaps this, that the bankrupt pending the bankruptcy caused the new motor vehicle

permit to be issued in her name. That does not make the issue one in bankruptcy when the sole question is who, as between the bankrupt and the appellant, was always the true owner.

49 See also *Reynolds, Re*, supra, at p. 131.

50 On the record before us, however, the appellant takes the position that it is the largest creditor of the bankrupt estate and that it will "with certainty" counterclaim in answer to the trustee's petition. The trustee, for its part, regards the appellant as the biggest debtor of the bankrupt estate. Far from being a "stranger" to the bankruptcy, Azco is potentially the most significant player in the role of either creditor or debtor, as the case may be.

(ii) *Does the Bankruptcy Court Have Jurisdiction to Grant the Remedy Sought by the Trustee?*

51 It is well established that the bankruptcy court does not have the general jurisdiction of a civil court to award damages in breach of contract cases. It is restricted to the jurisdiction and remedies contemplated by the Act. *Sigurdson*, supra, the trustee in bankruptcy sued two former directors of the bankrupt for fraud in the Supreme Court of British Columbia. During the course of its reasons on another point, the Court of Appeal remarked that if the trustee had sued in the bankruptcy court "he would have been in the wrong court" as "[h]e must use the ordinary civil courts to sue for damages" (p. 102). See also *Ireland, Re*, supra.

52 In my view, however, the trustee's claim here is not properly characterized as a simple claim in damages, even though the trustee has attempted to place a monetary value on the shares which it says belong to the bankrupt estate but which the appellant, it says, wrongfully withholds. I do not think the bankruptcy court is precluded from considering an order that substitutes money for the claimed property in circumstances where the claimed property cannot be delivered up. The bulk of the trustee's claim, it will be recalled, is for 125,000 shares of Azco itself, plus 3.5 million shares of Sanou and 4 million warrants of Sanou, which the trustee says is wholly controlled by the appellant. The trustee's petition states in para. 65:

The Debtor/Company is also entitled to receive 3,500,000 shares of Sanou and 4,000,000 warrants of said Sanou, as per the terms of the Agreement, the whole as it has been acknowledged by the Respondent itself in their annual report to United States Securities and Exchange commission for the fiscal year ending June 30, 1997, filed as Exhibit R-24;

53 As to the Azco shares, the trustee states in para. 101 of its petition that it claims "125,000 shares of Azco Mining Corporation which had a value at 2.70\$ Cdn dollars per share".

54 Equally significantly, the appellant acknowledges that the gist of the action against it is the delivery up of the shares. It says at para. 25 of its factum:

[TRANSLATION]

It seems that the trustee's claim is a real action rather than a personal one since the trustee is primarily seeking the rights to 125,000 shares of Azco and 3,500,000 shares and 4,000,000 warrants of Sanou (see in particular paragraphs 95, 98, 99 and 102 of the trustee's petition).

55 The parties therefore seem to agree, despite some obfuscating language in the trustee's petition, that the bulk of the trustee's claim is properly characterized as a claim to specific property of the bankrupt which is being wrongfully withheld by the appellant. As such, the trustee is entitled to claim the shares and warrants (s. 17(1)) and, with the permission of the inspectors (which it obtained) to bring a legal proceeding in relation thereto in the bankruptcy court (s. 30(1)(d)). The trustee, relying on these statutory provisions and remedies, clearly brings its claim within the Act. See *Galaxy Interiors Ltd. (1971), Re*, supra, per Houlden J. at p. 144, *Mancini (Trustee of)*, supra, per Catzman J. at pp. 250-51, *Atlas Lumber Co., Re*, supra, per Rinfret J., at p. 234.

56 It will be for the bankruptcy court in Hull to scrutinize the petition when the facts are known and the parties' positions on the issues are clarified to determine whether any particular element of the trustee's multiple claims falls

outside its jurisdiction. For present purposes, it is sufficient to hold that the bulk of the trustee's claim is cognizable in bankruptcy for the reasons previously discussed. On the present state of the record (this being a preliminary motion), we can go no further.

5. Even if Fully Clothed with Jurisdiction to Hear this Case, Should the Bankruptcy Court in Hull Nevertheless Have Transferred the File to the Court Exercising Counterpart Bankruptcy Jurisdiction in Vancouver?

57 If persuaded that the affairs of the bankrupt could be (i) more economically administered in another bankruptcy district or division or (ii) for "other sufficient cause", the bankruptcy court is authorized to transfer "any proceedings" pending before it to the other bankruptcy district or division (s. 187(7)).

58 Section 187(7) provides a method for transferring proceedings between the various bankruptcy courts in Canada. As discussed below, it raises different issues than the specific international situation dealt with in *Holt Cargo Systems*, supra, released concurrently.

59 The motions judge exercised his discretion against making a transfer order in this case. The appellant must therefore show an error of law or principle or failure to take into consideration a major element in the determination of the case: *Harellkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.), at p. 588. The scope of this discretion in bankruptcy cases was recognized in *Lions d'Or Ltée, Re* (1965), 8 C.B.R. (N.S.) 171 (C.S. Que.), and *Pollack Ltée c. Giroux* (1979), 30 C.B.R. (N.S.) 256 (C.S. Que.).

60 The appellant says the courts below erred in both law and principle. They erred in law, it argues, because art. 3148 of the *Québec Civil Code* required the bankruptcy court to decline jurisdiction in light of the "choice of forum" clauses, and they erred in principle because there is no substantial connection between the dispute and the Province of Quebec. In this regard, it relies on *Bourque Consumer Electronics Inc. (Syndic de), Re* (May 14, 1991), Doc. Montreal 500-11-001899-901 (C.S. Que.) and *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (S.C.C.).

(i) Choice of Forum Clause

61 The appellant's point is that the applicable rules are found in the *Québec Civil Code*, and in particular art. 3148 which provides in part that:

... a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

62 The choice of forum objection fails, with respect, both on the facts and on the law. In terms of facts, the only relevant agreements are those to which Eagle was a party. Clause 28 in the June 7, 1996 financing agreement and clause 20 of the management agreement are both no more than choice of law provisions. The Quebec courts are perfectly able to apply the law of British Columbia. The import of clause 17 of the West African Gold and Exploration S.A. debenture of August 9, 1996 is more obscure, but as Azco is not a party to the debenture and therefore cannot be sued upon it, its terms are irrelevant.

63 As to the legal issue, the question is whether arts. 3148 or 3135 of the *Québec Civil Code* have any application to this proceeding at all. These provisions will only apply in bankruptcy court "in cases not provided for in the Act or these Rules" (*Bankruptcy and Insolvency General Rules*, s. 3). The fact is that s. 187(7) specifically provides that a transfer will be ordered only where there is satisfactory proof that a proceeding will be "more economically administered" in another division or district, which the appellant did not allege, or "for other sufficient cause". The appellant argues that such general words need to be "supplemented" by the more specific provisions of the *Québec Civil Code*. But this is incorrect. Resort is to be had to the provincial rules only "in cases not provided for". Here, provision has been made. The door is therefore not open to these particular provisions of the *Québec Civil Code*. This interpretation of s. 3 is not

only inevitable, it is desirable. The *Québec Civil Code* applies across a vast range of subjects. When s. 187(7) speaks of "sufficient cause", it does so in the specific context of bankruptcy.

64 Leaving aside, then, the inapplicable directives of the *Québec Civil Code*, the question is whether a choice of forum clause would amount to "sufficient cause" for the purpose of s. 187(7) to the extent that it would be an error of law for the motions judge to have declined to give it effect in the circumstances of this case. In my view a choice of forum clause (where there really is one) ought to be taken into careful consideration by a motions judge but it is not binding: J.-G. Castel, *Canadian Conflict of Laws*, (4th ed. 1997) pp. 262-63. See *Sarabia v. "Oceanic Mindoro" (The)* (1996), 26 B.C.L.R. (3d) 143 (B.C. C.A.), per Huddart J.A., at p. 153 (leave to appeal to S.C.C. refused [1997] 2 S.C.R. xiv (S.C.C.)); *Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd.* (1985), [1986] 1 W.W.R. 380 (Alta. C.A.), per Kerans J.A., at p. 381; *Ash v. Corp. of Lloyd's* (1991), 6 O.R. (3d) 235 (Ont. Gen. Div.); aff'd (1992), 9 O.R. (3d) 755 (Ont. C.A.), (leave to appeal to S.C.C. refused [1992] 3 S.C.R. v (S.C.C.)); *Maritime Telegraph & Telephone Co. v. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471 (N.S. C.A.).

(ii) *Public Policy Considerations*

65 It could be argued that the public policy favouring a "single control" of bankruptcy proceedings and opposition to their fragmentation demands that a choice of forum clause receive lesser effect in bankruptcy than in the context of ordinary commercial litigation: *Industrial Packaging Products Co. v. Fort Pitt International Inc.*, 161 A.2d 19 (U.S. Penn. S.C., 1960); *Treco, Re*, 239 B.R. 36 (U.S. Dist. Ct. S.D. N.Y., 1999), aff'd 240 F.3d 148 (U.S. C.A. 2nd Cir., 2001).

66 In *Saskatchewan Moratorium Legislation, Re*, supra, Rand J. discussed important "public policy" objectives of bankruptcy legislation, at p. 46:

To this proceeding, not only a personal stigma may attach but restrictions on freedom in future business activity may result. The relief to the debtor consists in the cancellation of debts which, otherwise, might effectually prevent him from rehabilitating himself economically and socially.

See also *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109 (S.C.C.), at p. 120.

67 In his treatise on bankruptcy, Professor Albert Bohémier states on the purpose of the Act:

[TRANSLATION]

The purpose of the *Bankruptcy Act* is to protect the debtor, his or her creditors and the public interest. These objectives have always been present but to varying degrees. It can be stated with certainty that the more a society promotes credit and therefore debt, the more the legislation will tend to give priority to alleviating the lot of honest and hapless debtors. A scheme based on debt must include a self-regulating system so that defaulting debtors may eventually be reintegrated into the system and become productive elements once again.

(A. Bohémier, *Faillite et Insolvabilité*, Montréal, Les Éditions Thémis, Vol. 1, 1992, at p. 48)

68 The implementation of these public policies might be expected to take priority over private "choice of forum" agreements where the two come into conflict, as indeed Robert J.A. concluded in the Quebec Court of Appeal. A similar position is expressed in Fletcher, I.F., *Insolvency in Private International Law* (Oxford: Clarendon Press 1999) at p. 47, fn. 73:

[P]rivate contractual arrangements between parties cannot prevail over the exercise of bankruptcy jurisdiction, which belongs to the realm of public policy, serving a wider spread of interests including, ultimately, those of society at large.

In the United States, however, there is a competing body of judicial opinion that a trustee in bankruptcy who sues on an agreement containing a forum selection clause should, as a general rule, be bound by that clause to the same extent

as the parties thereto: see *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (U.S. C.A. 3rd Cir., 1983); *Diaz Contracting Inc., Re*, 817 F.2d 1047 (U.S. C.A. 3rd Cir., 1987), and *Hays & Co. v. Merrill Lynch*, 885 F.2d 1149 (U.S. C.A. 3rd Cir., 1989).

69 In my view, for the reasons previously mentioned, the choice of forum clause would be a significant factor under s. 187(7) but not, in the context of the public policies expressed in the Act, a controlling factor.

70 In light of my conclusion that the appellant does not have the benefit of a "choice of forum" clause, I need not undertake the exercise of considering whether in this case there is any conflict between private choice and public interest, and if so, how "choice of forum" considerations should be balanced in this case against the *Amchem*, supra, and public interest factors within the framework of s. 187(7) of the Act.

71 The bottom line is that the appellant is unable to show that the motions judge committed any error of law in declining to transfer the proceeding to Vancouver.

(iii) *Error of Principle*

72 The appellant, relying on *Amchem*, supra, argues that this dispute has its most real and substantial connection to British Columbia, and that the motions judge erred in principle in ignoring relevant factors in coming to the opposite conclusion.

73 Again, with respect, I do not think this position is sustainable on the law or the facts.

74 In the first place, as stated, the *Amchem* approach has to be applied here with full regard to the context of Canadian bankruptcy legislation. This appeal involves the allocation of a particular bankruptcy matter within a single national bankruptcy scheme created by the Act. As shown in *Holt Cargo Systems*, supra, consideration of the allocation of a matter having different aspects (e.g. maritime law and bankruptcy law), as between Canadian courts and foreign courts operating under quite different legislative or other schemes, may raise different problems.

75 Secondly, *Amchem* and its progeny involved private litigation. Here, as explained in *Holt Cargo Systems*, supra, there is the important public interest aspect mentioned above. The Court looks not only at the *Amchem* factors, but must strive to give effect to Parliament's intent to create an economical and efficient national system for the administration of bankrupt estates, as evidenced in the Act.

76 It is in the public interest to facilitate the speedy resolution of the fallout from a financial collapse. This, as noted in *Holt Cargo Systems* was not present in the *Amchem* fact situation. In fact, there are stronger policy considerations here than in *Holt Cargo Systems*. That case dealt with a choice between a maritime law action in Halifax for the determination of claims of secured creditors that had already proceeded to default judgment and, as an alternative, the exercise of jurisdiction by the Quebec Superior Court sitting in Bankruptcy acting at the behest of the bankruptcy court in Belgium in a matter that was still in its early stages of organization. In those circumstances the Federal Court of Canada declined to stay the maritime law action, and its exercise of discretion was upheld by the Federal Court of Appeal and by this Court.

77 In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or "single control" (*Stewart*, supra, at p. 349) for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions. Parliament was of the view that a substantial connection sufficient to ground bankruptcy proceedings in a particular district or division is provided by proof of facts within the statutory definition of "locality of the debtor" in s. 2(1). The trustee in that locality is mandated to "recuperate" the assets, and related proceedings are to be controlled by the bankruptcy court of that jurisdiction. The Act is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors.

78 The "balancing test" advocated by the appellant based on the *Amchem* factors and general principles of private international law fails to take these important public policies into account. The Quebec Superior Court sitting in Bankruptcy is, in a very real sense, sitting as a national court.

79 Finally, in point of fact, even if the principles of private international law did apply without modification for the bankruptcy context, it is difficult to discern any connection at all between the dispute and Vancouver except that Eagle signed some agreements with a choice of law clause directed to the laws of that jurisdiction. The links between the appellant and Vancouver are not particularly strong. It has, amongst other offices, a Vancouver address, but the bulk of the activities at issue here occurred outside British Columbia. Its key employee, Mr. Ryan Modesto, resides in the United States. The management services agreement of June 12, 1996 recites that Azco's corporate office is in Arizona. Azco's press release of September 17, 1996, announcing this project to the world, was issued in Arizona. Moreover there is no juridical advantage to the appellant in proceeding under the same bankruptcy regime in Vancouver as in Hull. In either case, the law of British Columbia may be applied. Vancouver may be marginally more convenient for the appellant and some of its witnesses, but that is all that can be said for it. The trustee, for its part, complains that if the appeal succeeds, it would, on the same reasoning, be required to bring other actions (unrelated to Azco) in Chicoutimi, Toronto, Halifax, Winnipeg, Charlottetown and Calgary. The trial judge has much factual support for his decision to retain the case in Hull.

80 I do not wish to be taken, however, as squeezing the life out of s. 187(7). While the facts in this case do not show "sufficient cause" to make the transfer to British Columbia, other cases may arise of course where the transfer is justifiable. Even in *Stewart*, supra, which established the "single control" paradigm, Anglin J. went out of his way to say that the case probably should have been heard in P.E.I. The claimants' problem in that case is that they failed to seek leave from the court in British Columbia before launching their case in P.E.I. Just before the "single control" passage previously cited, Anglin J. says (at p. 349):

I decline to assume that upon its being shewn to the Supreme Court of British Columbia that the questions as to the existence of the trust alleged by the plaintiffs and the earmarking of certain property held by the liquidator as trust assets can be best inquired into in Prince Edward Island — as from what is now before us would seem to be the case — an order of transfer will not be made, preceded or accompanied by the necessary leave under s. 22.

And Brodeur J. said this (at p. 352):

In this case it looks to me as if the ends of justice would be better served by having the question raised in this proceeding disposed of by the courts of Prince Edward Island. However, it was the duty of the respondents to have the leave of the court of British Columbia which they did not secure.

81 The point is that it was up to Azco to demonstrate "sufficient cause" on the facts of *this* case, and it failed to do so.

V. Conclusion

82 I would dismiss the appeal with costs.

Appeal dismissed.

Pourvoi rejeté.

TAB 3

2016 ONSC 595
Ontario Superior Court of Justice [Commercial List]

Essar Steel Algoma Inc., Re

2016 CarswellOnt 1040, 2016 ONSC 595, 263 A.C.W.S. (3d) 301, 33 C.B.R. (6th) 313

**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 Essar Steel Algoma
Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma
(Alberta) ULC, Cannelton Iron Ore Company, and Essar Steel Algoma Inc. USA

Newbould J.

Heard: January 14, 2016
Judgment: January 25, 2016
Docket: 15-CV-0011169-00CL

Counsel: Eliot Kolers, Maria Konyukhova, Yannick Katirai, for Applicants
Andrew Kent, Markus Koehnen, Jeffery Levine, for Moving Parties, Cleveland-Cliffs Iron Company, Cliffs Mining
Company and Northshore Mining Company ("Cliffs")
Derrick Tay, Clifton Prophet, Nicholas Kluge, for Monitor
L. Joseph Latham, Bradley Whiffen, for Ad Hoc Committee of Noteholders
Natalie E. Levine, for Ad Hoc Committee of senior and junior secured Noteholders
Sarah-Anne Van Allen, for Wilmington Trust, National Association
Evan Cobb, for Directors of the applicants
Andrea Lockhart, for Deutsche Bank
Ronald Carr, for Her Majesty the Queen in right of Ontario

Subject: Civil Practice and Procedure; Contracts; Insolvency; International

MOTION by mining companies for dismissal or stay of steel company's motion on basis of lack of jurisdiction or forum
non conveniens.

Newbould J.:

1 The Cleveland-Cliffs Iron Company, Cliffs Mining Company and Northshore Mining Company (collectively
"Cliffs") move to object to the jurisdiction of this Court to hear a motion brought by the applicants (together "Essar
Algoma") for relief in connection with a supply contract under which Cliffs supplied Essar Algoma for a number of
years with all of its iron ore pellets until Cliffs purported to terminate the contract on October 5, 2015, shortly before
this CCAA proceeding was commenced. Cliffs submits in the alternative that Ontario is not the convenient forum in
which to determine the dispute between Cliffs and Essar Algoma, and in the further alternative a ruling that a summary
procedure for the determination of the dispute is inappropriate.

2 For the reasons that follow, I have concluded that this Court does have jurisdiction over the claim of Essar Algoma
against Cliffs and that Cliffs has not established that Ontario is not the convenient forum for the dispute. What the
procedure will be to determine the dispute has not yet been settled.

Relevant history

3 In 2001 Algoma Steel Inc. ("Old Algoma") began proceedings under the CCAA and eventually put forward and had approved a plan of compromise and arrangement. As part of its restructuring, Old Algoma divested itself of certain non-core assets, including its interest in a mine in Michigan (the "Tilden Mine") from which Old Algoma sourced its iron ore pellets. In January 2002 Old Algoma sold its interest in the Tilden Mine to Cliffs in consideration for an assumption by Cliffs of certain Old Algoma liabilities and future obligations in respect of the Tilden Mine and Old Algoma and Cliffs entering into a long-term supply agreement effective January 31, 2002 (the "Cliffs Contract"). The Cliffs Contract has been amended a number of times. Essar Algoma succeeded to Old Algoma's rights and obligations under the Cliffs Contract in 2007. The Cliffs Contract is governed by Ohio law.

4 The Cliffs Contract provides that Essar Algoma will source its long-term needs for iron ore pellets exclusively from Cliffs to 2016. As last amended by term sheet in 2013, the Cliffs Contract obliged Essar Algoma to purchase iron ore pellets exclusively from Cliffs until and including 2016. From 2017 to 2024 it obliged Essar Algoma to purchase a portion of its pellets each year from Cliffs. The Cliffs Contract provides that Essar Algoma is obliged in November of each year to provide to Cliffs its good faith estimate of its iron ore requirements (or nomination) for the next year. After Essar Algoma has set its nomination, it has certain rights to modify its nomination to increase or decrease its nomination within a specified range of percentages if it provides written notice to Cliffs by certain deadlines.

5 The Cliffs Contract specifies: (a) a formula for calculating the price of iron ore pellets for the 2013 calendar year; (b) a price for the purchase and sale of iron ore pellets for the 2014 calendar year; (c) a formula for fixing the price of iron ore pellets in 2015 and 2016; and (d) a separate pricing formula for calendar years 2017 to 2024.

6 Cliffs mines the iron ore in Michigan at its mines at the Tilden site and then processes and delivers iron ore pellets by rail to a dock in Michigan known as the Marquette dock or a railway yard in Michigan known as the Partridge rail yard, from which points Essar Algoma takes delivery. Essar Algoma then arranges delivery to Sault Ste. Marie by ship or train.

7 There have been several disputes between Cliffs and Essar Algoma under the Cliffs Contract. The most recent and relevant of such disputes relates to the timing and volume of shipments of iron ore pellets from Cliffs to Essar Algoma beginning in late 2013. At the end of 2013, Essar Algoma advised Cliffs of its nomination for the 2014 calendar year. However, it soon became apparent that the 2013/2014 winter season was one of the coldest and longest in recent history. As a result, the Great Lakes thawed later than usual and the 2014 shipping season was accordingly shortened and Essar Algoma determined that it would not be able to take and use all of the iron ore pellets that it had nominated for 2014. It met with Cliffs to discuss the situation.

8 Whether an agreement was reached to reduce the 2014 shipments became contested, Cliffs saying there was no agreement and Essar Algoma saying there was. The number of tons to be taken by Essar Algoma in 2014 remained a question of debate when Essar Algoma nominated in October 2014 what it would take in 2015 and when it reduced its nomination in July 2015. Cliffs took the position that Essar Algoma had to take the entire tonnage that it had nominated in 2014. Essar Algoma took the position that there was an agreement to reduce the tonnage for 2014.

9 On January 12, 2015, Cliffs filed a complaint in the United States District Court for the Northern District of Ohio (Eastern Division) (the "Ohio Court"). On August 31, 2015, Cliffs amended its complaint. In its Amended Complaint, Cliffs claimed, among other things, damages plus interest and costs for alleged breaches of the Cliffs Contract, including Essar Algoma's alleged failure to take timely delivery of iron ore pellets in the requisite amounts, and a declaratory judgment that Essar Algoma had materially breached the Cliffs Contract by failing to take delivery of or pay for the full amount of ore that it nominated it would require in 2013, 2014 and 2015 by the end of each calendar. Cliffs did not claim any order or direction permitting it to terminate the Cliffs Contract.

10 In response to the Amended Complaint, Essar Algoma filed an Answer to Plaintiffs' Amended Complaint and Counterclaim on September 14, 2015, wherein it denied Cliffs' allegations and counterclaimed against Cliffs, seeking

damages, including a claim for a long-term contract renewal credit payment payable to Essar Algoma pursuant to the Cliffs Contract and a claim for damages for alleged underreporting of moisture levels in pellets delivered by Cliffs.

11 On July 31, 2015, Cliffs filed a motion for partial summary judgment, seeking judgment on its claim that Essar Algoma breached a contractual duty to take its 2014 nomination and to dismiss Essar Algoma's claim for damages related to Cliffs' underreporting of moisture levels to Algoma since 2010. The Cliffs motion was scheduled to be heard on October 6, 2015.

12 On October 5, 2015 Cliffs purported to terminate the Cliffs Contract by letter which stated that as a result of multiple and material breaches and repudiation of the Cliffs Contract by Essar Algoma, Cliffs was treating the Cliffs Contract as terminated effective immediately. The termination came with no advance notice and within days of the next adjustment in price and at a time of year that Essar Algoma has historically begun building up inventory before the winter freeze.

13 On October 7, 2015, Cliffs offered to resume supplying Essar Algoma on a "just in time basis" at a materially higher price than provided for in the Cliffs Contract. The next day Essar Algoma notified Cliffs that the proposed price was commercially unfeasible for it. On October 14, 2015 Cliffs proposed a slightly lower price to Essar Algoma that was still materially higher than the price Essar Algoma had been paying.

14 The Cliffs summary judgment motion in the Ohio Court was heard on October 6, 2015. On the following day, Judge Nugent released his reasons. He granted Cliffs motion in part and denied it in part. He held that there had been no agreement reached in an exchange of emails in April 2014 regarding Essar Algoma's request to decrease its 2014 nomination and that Essar Algoma had thus failed to meet its annual requirements by a margin of at least 500,000 tons. He held however that there were issues as to whether Essar Algoma had given effective notice to reduce a further amount of tons for 2014, whether a force majeure clause gave Essar Algoma a defence to any liability for damages stemming from its alleged failure to meet its annual requirements nomination amounts for 2014, and whether any outstanding damages remained following any allowable off-sets for alleged over-billing caused by Cliffs' use of the 2014 pricing structure in its 2015 sales. In the result he dismissed Cliffs' motion for summary judgment for breach of contract relating to Essar Algoma's 2014 nomination. He also granted Cliffs' motion to dismiss the counterclaim of Essar Algoma with respect to moisture content.

15 On October 6, 2015, one day after Cliffs purported to terminate the Cliffs Contract, Essar Algoma moved in the Ohio Court for a temporary restraining order and a preliminary injunction requiring Cliffs to supply Essar Algoma with iron ore pellets. On October 15, 2015 Essar Algoma filed a notice of withdrawal of its motion. In the notice, Essar Algoma stated that it had obtained supply from another supplier that would provide it with supply for the next several weeks and that this supply removed the need for immediate injunctive relief.

16 A trial for all of the issues in the Ohio litigation was scheduled for December 7, 2015. On October 30, 2015 Essar Algoma filed a motion to adjourn the trial, essentially on the grounds that too much work, particularly documentary production, the conducting of depositions and the production of expert reports, was required for the parties to be ready to start the trial as scheduled.

17 This CCAA proceeding commenced on November 9, 2015 when the Initial Order was made. On November 10, 2015, Essar Algoma commenced ancillary insolvency proceedings under chapter 15 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware. On that day the foreign representative of Essar Algoma sought and obtained, among other things, orders recognizing and enforcing in the United States the orders granted in the CCAA proceeding which was recognized as a foreign main proceeding. The foreign representative of Essar Algoma also filed a complaint for a declaratory judgment against Cliffs and a motion for entry of an order compelling Cliffs to resume supplying iron ore pellets under the Cliffs Contract. Judge Shannon who heard the motions in Delaware was advised by counsel for the foreign representative that this motion was filed as a "placeholder" in the event that the Canadian Court declined to assume jurisdiction to hear Essar Algoma's motion for injunctive relief against Cliffs.

18 On November 11, 2015 Essar Algoma filed with the Ohio Court a notice pursuant to 11 U.S.C. Section 362 that the Ohio action was automatically stayed as to the defendant Essar Algoma. On December 3, 2015 Judge Nugent of the Ohio Court on his own without argument dismissed the case without prejudice. The order stated that upon application, the action may be reinstated, if necessary, when the bankruptcy proceedings have concluded.

19 On December 4, 2015 Cliffs moved in the Ohio Court for an order vacating the without prejudice dismissal of the action and instead placing the case on the suspense docket until the claim is resolved by the bankruptcy court. No decision on that motion has been rendered by Judge Nugent.

Relevant motions in the CCAA proceeding

20 In mid-November 2015 Essar Algoma served a motion seeking a critical supplier order against Cliffs under section 11.4 of the CCAA. The motion was adjourned to December 3, 2015 and then ultimately not proceeded with. The explanation given by Essar Algoma is that following the filing of the motion, it was able to find alternative suppliers for the shorter term. It now has supply of pellets to the end of March. What is at issue on its motion is the right of Essar Algoma under Cliffs Contract to the end of 2024.

21 On December 8, 2015 the applicants served a motion for an order (i) declaring that the CCAA proceedings are the correct forum for the determination of issues relating to the Cliffs Contract; (ii) declaring that the purported termination of the Cliffs Contract was not effective and that it remains in full force and effect and that Cliffs must supply iron ore pellets to Essar Algoma at the price payable under the Cliffs Contract; (iii) directing Cliffs to comply with its obligations under the Cliffs Contract, and (iv) directing Cliffs to pay damages resulting from its purported termination of the Cliffs Contract.

22 On December 23, 2015 Cliffs delivered a notice of motion for an order (i) dismissing or staying the applicants' motion on the grounds that this Court does not have jurisdiction to grant the relief sought by Essar Algoma; (ii) in the alternative, an order staying the applicants' motion on the grounds that Ontario is not a convenient forum for the hearing of the applicants' motion and (iii) in the further alternative, an order dismissing the applicants' motion without prejudice to the applicants to seek the same relief in the form of an action. It is this motion that was heard on January 14, 2016.

Analysis

23 Cliffs raises a number of issues, including (i) the lack of power to deal with this matter under the CCAA, (ii) a lack of jurisdiction to deal with the claim against Cliffs in Ontario, (iii) Ontario is *forum non conveniens* and (iv) the relief sought is inappropriate for a summary CCAA proceeding.

Jurisdiction under the CCAA

24 Cliffs takes the position that there is no jurisdiction in the CCAA to grant the relief sought by Essar Algoma declaring the termination of the Cliffs Contract to be ineffective and requiring Cliffs to deliver iron ore pellets as required by that contract. It says that the Cliffs Contract was terminated before the CCAA proceedings were commenced and thus the powers of the Court given under the CCAA cannot be used in this case. It relies on *SNV Group Ltd., Re*, 2001 BCSC 1644 (B.C. S.C.) in which Justice Pitfield refused to make an order under the CCAA ordering the repayment of money paid before the CCAA proceeding was brought that was said to have been in breach of an agreement that the debtor had with a third party. In that case, Pitfield J. stated:

The capacity to stay, whether pursuant to section 11 or by virtue of the Court's inherent jurisdiction, applies to prospective proceedings. By its very nature, a proceeding that has been carried to completion cannot be stayed. An order to repay an amount obtained in contravention of a stay granted by the Court would be appropriate, but it is my opinion that the Court cannot rely on the CCAA or its inherent jurisdiction to compel repayment of an amount alleged to have been obtained in reliance upon a contract in a manner that would amount to adjudication of a claim.

The CCAA is not intended to give the Court the capacity to undo transactions completed before the effective date of the initial or subsequent orders.

25 Essar Algoma takes the position that Cliffs has misconstrued what Essar Algoma seeks. Rather, it says that it is requesting the Court to invoke its broad and inherent jurisdiction in exercising its territorial jurisdiction, retaining its territorial jurisdiction under the principles of *forum non conveniens*, and determining the appropriate procedures for the determination of the substantive issues in dispute between the parties. It is the consequent modification of Cliffs' procedural rights that Essar Algoma seeks under the CCAA which it says is routinely granted.

26 I do not see the *SNV Group* case as being apposite. Essar Algoma is not asking the Court on its motion to declare the Cliffs Contract as operative because of some provision of the CCAA, which is what the situation was in *SNV Group*.

27 The CCAA is skeletal in nature and does not contain a comprehensive code that lays out all that is permitted or barred. A court under the CCAA has both statutory authority granted under the CCAA and an inherent and equitable jurisdiction when supervising a reorganization. The most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the CCAA text before turning to inherent or equitable jurisdiction to anchor measures taken in a CCAA proceeding. See *Ted Leroy Trucking Ltd., Re*, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter *Century Services*] at paras. 57, 64 and 65.

28 The CCAA provides in section 11 that a court has jurisdiction to make any order "that it considers appropriate in the circumstances"¹. A CCAA court clearly has the power as per *Century Services* to make the procedural orders of the kind sought by Essar Algoma in this case. See also *Smoky River Coal Ltd., Re* (1999), 12 C.B.R. (4th) 94 (Alta. C.A.) at paras. 60 and 67 per Hunt J.A. in which he held that a judge has the discretion under the CCAA to permit issues to be decided in another forum (in that case arbitration) but is under no obligation to do so.

29 The "single control" model also favours a CCAA court to deal with the issues between Essar Algoma and Cliffs. In *Eagle River International Ltd., Re*, [2001] 3 S.C.R. 978 (S.C.C.) ["*Sam Lévy*"] Binnie J. referred to and adopted a "single control" model that favours litigation involving an insolvent company to be dealt with in one jurisdiction. He stated:

26 The trustees will often (and perhaps increasingly) have to deal with debtors and creditors residing in different parts of the country. They cannot do that efficiently, to borrow the phrase of Idington J. in *Stewart v. LePage* (1916), 53 S.C.R. 337, at p. 345, "if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation"...

27 *Stewart* was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse...

30 *Sam Lévy*, involved a BIA proceeding. In it, Binnie J. referred to *Stewart v. LePage* [1916 CarswellPEI 1 (S.C.C.)], a winding-up application. I see no reason why the principles in *Sam Lévy*, should not be applicable in a CCAA proceeding. In *Century Services* it was noted that the harmonization of insolvency law common to the BIA and CCAA is desirable to the extent possible. The central nature of insolvency and the resolution of issues caused by insolvency are common to both BIA and CCAA proceedings and so too should the underlying principles. See my comments in *Nortel Networks Corp., Re* (2015), 23 C.B.R. (6th) 264 (Ont. S.C.J. [Commercial List]) at para. 24.

31 In this case Cliffs has sued in Ohio for damages claiming material breaches of the Cliffs Contract. It is thus a party that has claimed to be a creditor of Essar Algoma². The single control model requires that its claim against Essar Algoma be dealt with in this CCAA proceeding. Essar Algoma claims in this Court a declaration that the Cliffs Contract has not been legally terminated. Cliffs says that the material breaches by Essar Algoma that it claimed in the Ohio litigation to have occurred permit it to terminate the Cliffs Contract. These issues are completely interwoven and it would make no sense to require Essar Algoma to litigate its claim against Cliffs in the United States³ when Cliffs'

claim against Essar Algoma must be dealt with in this Court in Ontario. The claim of Essar Algoma against Cliffs is an asset of the applicants to be dealt with in this Court.

32 In *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re*, 2013 QCCS 5194 (C.S. Que.), a CCAA proceeding arising out of the Lac-Mégantic rail disaster, it was held that a claim by the debtor against its American insurer under a policy governed by Maine law with a forum selection clause in favour of Maine was an asset of the debtor and should be dealt with in Quebec. Dumas J.C.S. referred to the single control model for insolvencies and stated:

In the present case, we deal with the contrary. It concerns a bankrupt's claim (via the trustee) against its insurance company. Without a shadow of a doubt, this is an asset of the debtor over which the Bankruptcy Court has jurisdiction.⁴

33 For the single control model to apply, the third-party, in this case Cliffs, must not be a stranger to the insolvency proceedings. Cliffs has raised significant damage claims against Essar Algoma and seeks to have those claims remain alive and dealt with in Ohio. Its purported termination of the Cliffs Contract was an important factor that led to Essar Algoma filing for protection under the CCAA. Cliffs is not a stranger to these proceedings.

Jurisdiction simpliciter

34 Jurisdiction must be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. See *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17 (S.C.C.) at para. 82 per LeBel J. See also para. 79 in which LeBel J. referred to the link between the subject matter of the litigation and the defendant to the forum.

35 To establish jurisdiction *simpliciter*, a plaintiff need only establish that there is a good arguable case for assuming jurisdiction. See *Ontario v. Rothmans Inc.*, 2013 ONCA 353 (Ont. C.A.) at para. 54, 110, 118-19. The phrase a "good arguable case" is not a high threshold and means no more than a "serious question to be tried" or a "genuine issue" or that the case has "some chance of success". See *Tucows. Com Co. v. Lojas Renner S.A.*, 2011 ONCA 548 (Ont. C.A.) at para. 36.

36 It is for the plaintiff to establish that there is a presumptive connecting factor to the forum. If the plaintiff establishes that, the defendant has the burden of rebuttal and must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them. See *Van Breda* at paras. 95 and 100.

37 Apart from this test of the connection between the subject matter of the litigation and the forum, traditional tests for basing jurisdiction continue to exist. See *Van Breda* at para. 79 in which LeBel J. stated:

However, jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.

38 The subject matter of the dispute is whether the Cliffs Contract has been breached and by whom. Cliffs claims Essar Algoma has materially breached provisions of the contract, which if proven, would be grounds to terminate it under Ohio law. Essar Algoma claims that Cliffs had no basis to terminate the contract. Counsel for Cliffs in argument contended that the subject matter of the dispute is a request for specific performance of the contract in Ohio where the ore is mined and delivered to Essar Algoma. I do not agree with that contention. The subject matter of the dispute is the Cliffs Contract and who breached it. While the relief sought by Essar Algoma includes mandatory injunctive relief, that does not make that prayer for relief the subject matter of the dispute. LeBel J. in *Van Breda* stated that it was the legal situation or the subject matter of the litigation that must be connected to the forum. The legal situation is the contention that the Cliffs Contract has been breached and by whom.

39 Rule 17.02 provides a guide to what may be a presumptive factor. LeBel J. stated:

83 At this stage, I will briefly discuss certain connections that the courts could use as presumptive connecting factors. Like the Court of Appeal, I will begin with a number of factors drawn from rule 17.02 of the Ontario Rules of Civil Procedure. These factors relate to situations in which service *ex juris* is allowed, and they were not adopted as conflicts rules. Nevertheless, they represent an expression of wisdom and experience drawn from the life of the law. Several of them are based on objective facts that may also indicate when courts can properly assume jurisdiction...Thus they offer guidance for the development of this area of private international law.

40 Rule 17.02 refers to the following in dealing with contract claims:

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

(f) in respect of a contract where,

(i) the contract was made in Ontario,...

41 Essar Algoma takes the position that the Cliffs Contract was made in Ontario.

42 The genesis of the Cliffs Contract was the 2001 CCAA proceeding of Old Algoma. As part of that restructuring, Old Algoma sold Cliffs its interest in the Tilden Mine and concurrently entered into the Cliffs Contract. Old Algoma's restructuring, including the Cliffs Contract, required the approval of the CCAA court which was given by order of Chief Justice LeSage of this Court in 2002.

43 There are traditional rules governing where a contract is made. The general rule of contract law is that a contract is made in the location where the offeror receives notification of the offeree's acceptance. See *Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente* (1999), 50 B.L.R. (2d) 33 (Ont. C.A.) at para. 22 per MacPherson J.A. When acceptance of a contract is transmitted electronically and instantaneously, the contract is usually considered to be made in the jurisdiction where the acceptance is received. See *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2014 ONCA 497 (Ont. C.A.) at para. 66 per Lauwers J.A. There is an exception to this rule which is the postal acceptance rule that when contracts are to be concluded by post the place of mailing the acceptance is to be treated as the place where the contract was made. See *Eastern Power Ltd.* at para. 22.

44 There is no provision in the Cliffs Contract or any of its amendments that would give rise to the postal acceptance rule. Thus the traditional rule that a contract is made in the location where the offeror receives notification of the offeree's acceptance would apply. The evidence as to how the original Cliffs Contract or its amendments was concluded is somewhat unclear but unlikely to get better. Mr. Mee of Cliffs in his affidavit stated:

I no longer have a specific recollection of where the Agreement and each of its amendments was negotiated or signed. My general recollection is that Essar would sign amendments first and that Cliffs would sign them in Cleveland, Ohio after they had been signed by Essar. I have looked back in my calendar for face to face meetings with Essar in which I participated since 2002. I found a total of 50 meetings 20 of which were in Canada and 30 of which were in the United States.

45 Neither the original Cliffs Contract nor the amendments provide that the contract or amendments becomes binding when signed without delivery. The original Cliffs Contract states in the first recital that "concurrently with the execution *and delivery* of this Agreement [the parties] are entering into that Purchase and Sale Agreement in which [Cliffs is acquiring the interest of Algoma in the Tilden Mine Company]" (Underlining added). This language would indicate that the parties expected delivery of the contract to the other to be required for it to be binding.

46 Therefore if the evidence of Mr. Mee of Cliffs is accepted, it would mean that Essar Algoma generally signed the contract and amendments first, then sent them to Cliffs in Cleveland who then signed them and then sent them back to Essar Algoma. That would mean that the contract was formed when Essar Algoma received notice from Cliffs in Ontario of the acceptance of its offer.

47 There is no date of execution on the original Cliffs Contract effective January 31, 2002 or many of the amendments. There are exceptions. The second amendment was signed and dated by Algoma three days after it was signed by Cliffs. The third amendment was signed and dated by Algoma one day before it was signed by Cliffs. Some were signed the same day. The final amendment that extended the term to 2014 that was produced by Cliffs has an execution date by Essar Algoma of June 7, 2013 and no execution by Cliffs.

48 Based on the evidence led by Cliffs, I find that based on the traditional rules governing where a contract is made, Essar Algoma has at least an arguable case, and likely a stronger case than that, that the Cliffs Contract and its amendments generally were contracts made in Ontario.

49 Beyond this, the fact that the original Cliffs Contract became effective only when approved in Ontario by Justice LeSage under the CCAA is a strong indicator that there is a strong and substantial connection of the Cliffs Contract to Ontario. In *Trillium Lauwers J.A.* referred to Professor Waddams and consideration whether the traditional rules in determining the place of contract are appropriate for jurisdictional cases. He stated:

70 Should the traditional rules for determining the place of the contract be determinative in applying the fourth PCF [presumptive connecting factor]? This is perhaps an issue for another case, but I agree with the observation of Professor Waddams, at paras. 108-109, that the arbitrary common law rules for determining the place of a contract may not always be apposite in jurisdictional cases. The traditional contract placement rules respond to concerns that are different from those engaged by a jurisdictional analysis. A broader, more contextual analysis is required, which would inevitably engage the same considerations as the real and substantial connection test itself.

50 One may ask why a technical rule as to where an e-mail or fax was sent or received should determine the local of an international piece of litigation. The fact that the Cliffs Contract had its genesis in an Ontario CCAA process and required the approval of the CCAA court in Ontario appears to me to be at least as much a factor in holding that the contract is an Ontario contract as the factor of who sent or received confirmation of the terms of the contract. Often, and in this case, contract terms or amendments are discussed and agreed orally over the phone or in meetings and then papered afterwards.

51 I conclude and find that Essar Algoma has established a presumptive connecting factor to Ontario for its claim under the Cliffs Contract to Ontario on the basis that the contract was made in Ontario.

52 Essar Algoma also says that Cliffs has operated its business in Ontario and on that basis Ontario has jurisdiction to hear the Essar Algoma request for relief against Cliffs. As stated in para. 79 of *Van Breda*, a defendant's presence in the jurisdiction is a traditional basis for a court having jurisdiction. LeBel J. also stated that carrying on business in a jurisdiction could be an appropriate connecting factor. He stated:

87 Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction. But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence

in the jurisdiction. With these reservations, "carrying on business" within the meaning of rule 17.02(p) may be an appropriate connecting factor. (Underlining added)

53 Rule 17.02(p) provides:

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

(p) against a person ordinarily resident or carrying on business in Ontario;

54 The three Cliffs corporations that are a party to the Cliffs Contract are The Cleveland-Cliffs Iron Company, an Ohio corporation with its principal place of business in Cleveland, Cliffs Mining Company, a Delaware corporation with its principal place of business in Cleveland and Northshore Mining Company, a Delaware corporation with its principal place of business in Silver Bay, Minnesota. They are each wholly-owned subsidiaries of Cliffs Natural Resources Inc. which is an international mining and natural resources company and publicly traded in the United States and until 2014 owned a mining project in the "Ring of Fire" region of Ontario.

55 Under the Cliffs Contract, Cliffs mined the iron ore in Michigan, refined the ore into iron ore concentrate in Michigan, processed the iron ore concentrate into iron ore pellets in Michigan and delivered the iron ore pellets to Essar in Michigan. Cliffs asserts that it has not carried on any business in Canada and has no presence here. However, the fact that all of the mining and delivery took place in Michigan does not by itself mean that it did not carry on business in Canada.

56 Essar Algoma relies on the fact that during the course of the Cliffs Contract representatives of Cliffs have continuously dealt with Essar Algoma or its predecessor Old Algoma in Sault Ste. Marie in Ontario. Mr. Mee of Cliffs stated that he himself had visited Canada 20 times in connection with the Cliffs Contract. Essar Algoma and its predecessor Old Algoma has been a significant customer of Cliffs. Mr. Marwah of Essar Algoma stated in his affidavit that representatives of Cliffs visit Sault Ste. Marie and representatives of Essar Algoma visit Cleveland in alternating years, during which visits they discuss the status of the Cliffs Contract and ongoing issues relating to their business relationship. Representatives of Cliffs review Essar Algoma's operations and stockpiles of iron ore pellets when they visit Sault Ste. Marie. The most recent visit by Cliffs' personnel was on September 18, 2015 shortly before Cliffs purported to terminate the Cliffs Contract. Prior to that, representatives of Cliffs, including sales, operational, safety and quality personnel visited Essar Algoma in Sault Ste. Marie in October 2014 and August 2013. All of these visits fall within LeBel J.'s statement in *Van Breda* that "regularly visiting the jurisdiction" can constitute carrying on business in the jurisdiction.

57 Cliffs has previously appeared in the Ontario Superior Court of Justice in connection with the Cliffs Contract. In 2010 after Cliffs purported to terminate the Cliffs Contract after a pricing dispute, Essar Algoma applied for and obtained interim injunctive relief. Cliffs appeared on the application and did not oppose the jurisdiction of the Court to hear the relief. Rather it opposed the injunction on the merits. Cliffs complied with the terms of the injunction.

58 I conclude and find that Essar Algoma has established a presumptive connecting factor to Ontario for its claim under the Cliffs Contract to Ontario on the basis that Cliffs has carried on business in Ontario.

59 Cliffs has the burden of rebuttal and must establish facts which demonstrate that the presumptive connecting factors in this case do not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them. I do not think Cliffs has met that burden. The relationship between the Cliffs Contract and Ontario is not weak and the visits and meetings by Cliffs personnel in Sault Ste. Marie were not for trivial purposes. They were regular visits to meet with an important customer.

60 Accordingly I find that this Court has jurisdiction over the claim of Essar Algoma against Cliffs.

Forum non conveniens

61 The party raising *forum non conveniens* has the burden of showing that the alternative forum is clearly more appropriate. The use of the word "clearly" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. See *Van Breda* at paras. 108 and 109.

62 The factors to be considered are numerous and variable. See *Black v. Breeden*, [2012] 1 S.C.R. 666 (S.C.C.) at para. 23. In *Van Breda*, at para. 5 LeBel J. provided a non-exhaustive list of factors that could play a role. Cliffs relies on a number of these factors as supporting Ohio as the more convenient forum.

63 Before going through these factors, there is an issue as to whether Ohio is the alternative jurisdiction. Essar Algoma says the alternative jurisdiction is Delaware in which the chapter 15 proceedings are taking place. I hesitate to get into that issue and will assume that the alternative forum is the Ohio District Court. That is certainly the view of the expert witness Allan L. Gropper relied on by Cliffs.

(i) *The cost of transferring the case or of declining the stay*

64 Cliffs says it will result in substantial additional cost and delay to litigate the issues in Ontario. It says that both parties have teams of lawyers in Ohio who are intimately familiar with the case, the relevant documents, witnesses and issues. Cliffs had spent approximately U.S. \$1 million on the Ohio litigation before it was dismissed. Essar Algoma has stated that it has a team of 12 attorneys who have spent more than 5,000 hours reviewing documents in the Ohio litigation and that its attorneys have reviewed more than 43,000 documents that Cliffs has produced.

65 Cliffs is concerned that if the matter is litigated in Ontario, both sides will have to educate Ontario lawyers about all of this. At one time, that would have been a major concern. However it is now possible and becoming commonplace in cross-border litigation for American lawyers to appear in an Ontario court, and *vice versa*. The recent Nortel trial was a perfect example of that in which on many days there were 10 to 20 U.S. lawyers in Toronto attending the trial.

66 Cliffs also says that as the Cliffs Contract is governed by Ohio law, there would be the added expense of proving Ohio law. That appears to me to be a minor expense. Essar Algoma has already provided an affidavit of an expert on Ohio law, which Cliffs accepted at least on one point during argument. An affidavit on Ohio contract law could not be relatively expensive in comparison to what has already been expended. Cliffs has also provided a copy of Ohio jury instructions for a civil breach of contract case. The concepts seem virtually identical to Ontario concepts.

67 This factor is essentially a neutral one.

(ii) *The impact of a transfer on the conduct of the litigation or on related parallel proceedings*

68 Cliffs says having an Ontario court hear the dispute would deprive it of an Ohio judge who is familiar with the issues. Judge Nugent is certainly far more familiar with the issues than an Ontario judge would be. However an Ontario judge, like any other judge hearing a trial or proceeding, is used to coming in cold and picking it up quickly.

69 Judge Nugent has not ruled on whether the Cliffs Contract can be terminated or on whether there were breaches of the contract by Essar Algoma that could be considered material breaches. He merely found on the summary judgment motion, that he dismissed, that there was no legally enforceable agreement between the parties to reduce the 2014 annual nomination to 3.3 million tons and that Essar Algoma therefore failed to meet its annual requirements by a margin of at least 500,000 tons. He did not deal with other defences that Essar Algoma was asserting and stated that he could not conclude that there was a breach entitling Cliffs to damages. Cliffs did not claim any declaration that it had a right to

terminate the Cliffs Contract. Cliffs says that if it can prove that there were material breaches, it would have the right to terminate the Cliffs Contract. These are issues yet to be dealt with.

70 So far as the timing of any trial or other proceeding is concerned, there is no evidence that the Ohio District Court would be in a better position to hear the case sooner than in this Court. Cliffs says it is ready to proceed to trial. Essar Algoma has said it needs more discovery. Both Cliffs and Essar Algoma say they want the matter determined as quickly as possible.

71 Whatever the situation, this Court can accommodate the parties quickly. The situation for Essar Algoma is critical, and the Monitor has stated in its sixth report that in developing and carrying out the SISP, which has tight timelines, Algoma needs certainty concerning the status of the Cliffs Contract and an expedited determination of the rights of the parties is linked to the development of the SISP. Whether those rights can be determined that quickly may be a question mark, but this Court is in at least as good a position as the Ohio court to deal with the issues quickly.

72 I see this factor as neutral or at best perhaps slightly favouring Cliffs.

(iii) The possibility of conflicting judgments

73 I do not see this as an issue. In argument, Essar Algoma acknowledged that it is bound by the finding made by Judge Nugent, to which I have already referred. It could hardly say otherwise, given the principle of *res judicata*. All other issues remain open.

(iv) Location of evidence

74 Cliffs says it will have to call evidence of witnesses in the U.S. regarding its advance planning and why Essar Algoma's actions were a problem to Cliffs. These witnesses would come from Cleveland.

75 However, Essar Algoma's witnesses are from Sault Ste. Marie. There is no evidence how many from each side will need to be called. It is a shorter trip from Cleveland to Toronto than from Sault Ste. Marie to Toronto, whether by air or car. In this day of international contracts, particularly between parties near the Canadian border, I do not see this factor as compelling. It is a neutral factor.

(v) Applicable law

76 Ohio law governs the Cliffs Contract. Cliffs says there is a risk an Ontario court will apply Ohio law incorrectly. I suppose it can be said that an Ohio judge would also apply it incorrectly. This might be a material factor if the law in question was markedly different from Ontario law with concepts unknown to Ontario law. It is clear from the record however that this is not the case. It was acknowledged in argument that Ohio law is not substantially different from Ontario law regarding material breach.

77 Cliffs cites the standard jury instructions in Ohio which defines material breach as follows:

"Material breach" by plaintiff means a breach that violates a term essential to the purpose of the contract. Mere nominal, trifling, slight or technical departures from the contract terms are not material breaches so long as they occur in good faith.

78 The jury instructions go on to say that some Ohio courts have utilized the following five factors listed in the Restatement of the Law, (2d) Contracts (1981) in deciding whether a breach is material:

(i) The extent to which the injured party will be deprived of the benefit which he reasonably expected;

(ii) The extent to which the injured party can be adequately compensated for the part of the benefit of which he will be deprived;

- (iii) The extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (iv) The likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- (v) The extent to which the behaviour of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.
- (vi) The extent to which the behaviour of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

79 Cliffs argues that the determination of whether a party failed to comport with standards of good faith and fair dealing is an inherently local reflection of local commercial mores and that the nature of an Ontario court's determination of standards of good faith and fair dealing would inevitably reflect Ontario values and standards rather than Ohio values and standards. I find this argument a stretch. There is no suggestion in the evidence that the values in Cleveland on such an issue would be different from the values in Sault Ste. Marie. In any event, there is nothing in the Ohio law that says that in a case involving parties undertaking a contract in Cleveland and Sault Ste. Marie, it is the Cleveland values rather than the Sault Ste. Marie values that are to be considered.

80 Ontario courts can and do often apply foreign law. In this case I do not consider the fact that the law to be applied is Ohio law much of a factor, if any.

(vi) *Recognition and enforcement of an Ontario judgment*

81 Cliffs takes the position that there is no jurisdiction in this Court to deal with the Essar Algoma claim against Cliffs because an injunction should not be ordered against a U.S. resident such as Cliffs that could not be enforced.

82 This argument assumes that Cliffs would ignore a decision of an Ontario court. Whether that is so is a question. Cliffs complied with an injunction ordered in Ontario in 2010 after it purported to terminate the Cliffs Contract. Cliffs has requested alternative relief if this Court assumes jurisdiction requiring a statement of claim to be delivered by Essar Algoma, which is some indication that it intends to appear and deal with the issue if it is to be dealt with in Ontario. If it does there could be no issue of Ontario having jurisdiction that would not be recognized by a U.S. Court as Cliffs would have attorned to the jurisdiction.

83 Cliffs relies on a passage from Sharpe, *Injunctions and Specific Performance*, (loose-leaf ed. November 2015 Toronto: Canada Law Book), ¶1.1220 that refers to a reluctance of courts to make an order that cannot be enforced, as follows:

Claims for injunctions against foreign parties present jurisdictional constraints which are not encountered in the case of claims for money judgments. In the case of a money claim, the courts need not limit assumed jurisdiction to cases where enforceability is ensured. Equity, however, acts *in personam* and the effectiveness of an equitable decree depends upon the control which may be exercised over the person of the defendant. If the defendant is physically present, it will be possible to require him or her to do, or permit, acts outside the jurisdiction. The courts have, however, conscientiously avoided making orders which cannot be enforced. The result is that the courts are reluctant to grant injunctions against parties not within the jurisdiction and the practical import of rules permitting service *ex juris* in respect of injunction claims is necessarily limited. Rules of court are typically limited to cases where it is sought to restrain the defendant from doing anything within the jurisdiction. As a practical matter the defendant "who is doing anything within the jurisdiction" will usually be physically present within the jurisdiction to allow ordinary service.

84 I have not been provided with any case however involving cross-border insolvencies in which orders in proceedings under the CCAA cannot be enforced in the United States in chapter 15 proceedings under the U.S. Bankruptcy Code or that deal with evidence as in this case regarding the enforceability of a non-monetary judgment in the United States.

85 Cliffs relies on an opinion of Allan L. Gropper, a highly regarded federal bankruptcy judge for the Southern District of New York from 2000 to 2015. In that opinion, Mr. Gropper stated that United States courts have the greatest respect for the orders and judgments of courts of other nations, particularly those of Canada and judgments for money are ordinarily enforced. He stated that while non-monetary judgments are less regularly enforced, in appropriate circumstances they may be enforced under the common law principle of comity. However, in order for a foreign order or judgment to be enforced, the foreign court must have personal jurisdiction over the defendant.⁵

86 I could hardly quarrel with an opinion on these matters by someone as eminent as Mr. Gropper. However, Mr. Gropper was instructed to assume that Cliffs does not carry on business in Canada, and that assumption is critical to his analysis. That assumption cannot stand in light of the findings that I have made regarding Cliffs carrying on business in Ontario. While Mr. Gropper opines that a U.S. court must scrutinize the basis on which a foreign court asserts jurisdiction over a defendant, and in light of international concepts of jurisdiction to adjudicate, there is no discussion of this issue if the foreign court such as this Court has found that the defendant has carried on business in Ontario under a contract made in Ontario.

87 Essar Algoma relies on an opinion of Ronald A. Brand, a professor of law at the University of Pittsburgh and highly qualified in the area of the recognition of foreign judgments. Professor Brand's opinion is that the fact that a Canadian judgment provides relief in the form of (a) a declaratory order concerning the rights and obligations of parties under and the status of a contract, and/or (b) specific performance of contractual obligations, would not prevent the recognition and enforcement of that judgment in a court in the United States. Recognition is based on the principle of comity and derives from a U.S. case of *Hilton v. Guyot*, 159 U.S. 113 (U.S. N.Y. Sup. 1895). Professor Brand says that the principles of comity discussed in that case have made the U.S. one of the most liberal countries in the world in recognizing foreign judgments.

88 Cliffs relies on an opinion of Richard B. McQuade Jr., as U.S. District Court judge from 1986 to 1989 and before that an Ohio Common Pleas Court judge from 1978. Since 1998 he has served as a judge by assignment in both federal and Ohio states courts. His opinion is that an Ohio, Minnesota or Michigan court would not enforce an order of an Ontario court in the nature of specific performance. I must say that I prefer the opinion of Professor Brand for the reasons given by Professor Brand and his impressive credentials on the subject, credentials that I believe to be superior to those of Mr. McQuade.

89 Mr. McQuade states in his opinion that recognition of foreign judgments is based upon general principles of comity. He then goes on to state that the Uniform Foreign-Money Judgments Recognition Act that has been adopted in many states, including Ohio, Michigan and Minnesota, restricts the enforcement of foreign judgments to the recovery of money only. This, however, is not the whole picture. As Professor Brand points out, those state statutes are limited in scope to the recognition of foreign money judgments, but they all include a "savings clause" which specifically acknowledges that judgments other than money judgments may be recognized by applying traditional concepts of comity.

90 Mr. McQuade in his opinion stated that courts that adopted the Uniform Act have consistently denied enforcement to non-monetary judgments, and he cited one case *Sea Search Armada v. Republic of Colombia*, 821 F.Supp.2d 268 (U.S. Dist. Ct. 2011) as authority for that proposition. However, as explained by Professor Brand, that decision dealt with a version of the Uniform Foreign Money-Judgments Recognition Act that was in effect in Washington D.C. in 2011 that did not contain the savings clause that other states including Ohio, Michigan and Minnesota had adopted. A Washington D.C. statute was later passed in 2011 after the decision to expressly preserve the D.C. courts' discretion to recognize foreign non-money judgments under principles of comity or otherwise. Curiously, Mr. McQuade in a footnote to his opinion stated that a U.S. court may provide injunctive relief to enforce a foreign judgment it has recognized and that a U.S. court in doing so may take into account a number of factors typically taken into account in ordering injunctive relief. That footnote was contrary to his opinion stated in the body of his affidavit.⁶

91 There is also the issue as to what a U.S. court would consider in recognizing an injunctive order from this Court. In a recent article in 2014 by Judge Martin Glenn of the United States Bankruptcy Court for the Southern District of New York, Judge Glenn commented on the practice of comity between the U.S. and Canada. He stated:

In *Hilton v. Guyot*, the Supreme Court held that if the foreign forum provides "a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting," the judgment should be enforced and not "tried afresh." *Hilton*, 159 U.S. at 202-03. "[W]hen the foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, comity should be extended with less hesitation, there being fewer concerns over the procedural safeguards employed in those foreign proceedings." *In re Bd. of Dirs. of Hopewell Int'l. Ins. Ltd., Inc.*, 238 B.R. 25, 66 (Bankr. S.D.N.Y. 1999), *aff'd*, 238 B.R. 699 (S.D.N.Y. 2002) (internal quotation marks and citations omitted). For example, the U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process. U.S. federal courts have repeatedly granted comity to Canadian proceedings.

92 Judge Glenn also referred to a reluctance to second guess a decision of a foreign court in taking jurisdiction if the defendant appeared in the foreign court to challenge its jurisdiction and failed to prevail. He stated:

In deciding whether to enforce a foreign judgment, a court in the United States may scrutinize the basis for the assertion of jurisdiction by the foreign court. *See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 482 cmt. c. ("*Lack of jurisdiction over defendant*. The most common ground for refusal to recognize or enforce a foreign judgment is lack of jurisdiction to adjudicate in respect of the judgment debtor. If the rendering court did not have jurisdiction over the defendant under the laws of its own state, the judgment is void and will not be recognized or enforced in any other state. Even if the rendering court had jurisdiction under the laws of its own state, a court in the United States asked to recognize a foreign judgment should scrutinize the basis for asserting jurisdiction in the light of international concepts of jurisdiction to adjudicate."). Whether jurisdiction was challenged in the foreign court is relevant but not necessarily decisive in deciding whether to enforce a foreign judgment, although a renewed challenge to jurisdiction is generally precluded. *Id.* ("If the defendant appeared in the foreign court to challenge the jurisdiction of the court and failed to prevail, it is not clear whether such determination will be considered *res judicata* by a court in the United States asked to recognize the resulting judgment."); *Id.* at § 482 rn.3 ("[i]f the defendant challenged the jurisdiction of the rendering court in the first action and the challenge was unsuccessful or was not carried to conclusion ... a renewed challenge to jurisdiction of the rendering court is generally precluded").

93 I recognize the reluctance expressed by Justice Sharpe in his text that our courts avoid making orders that cannot be enforced. However on the basis of the evidence before me, Cliffs has not established that an order made in this Court requiring Cliffs to perform the Cliffs Contract would not be enforced in those states where Cliffs has assets. I accept that there may be some risk as opinions are only opinions, but the risk on the basis of the evidence before me does not rise to the level that would render Ontario a *forum non conveniens* in this case.

(vii) *Conclusion on forum non conveniens*

94 Cliffs has not met its burden of showing that the alternative forum, in this case Ohio, is clearly more appropriate.

Is the relief inappropriate for a summary proceeding?

95 Cliffs takes the position that the relief Essar Algoma seeks is inappropriate for a summary proceeding and that there is no basis for Essar Algoma claiming urgency. This is not raised as a *forum non conveniens* point. It requests an order that Essar Algoma must deliver a statement of claim.

96 So far as the urgency is concerned, the Monitor has made clear that the issue needs to be quickly decided. I cannot find that Essar Algoma has purposely delayed the issue. In any event, Cliffs in argument took the position that it wanted the issue decided quickly.

97 Regarding the kind of hearing required to deal with the dispute, there is nothing in the record before me to say that Essar Algoma is demanding some summary procedure that would impair Cliffs' procedural rights in any material way. In argument, counsel for Essar Algoma said that what procedure will be adopted is for this Court on another day and that the parties will have to work together to come up with an appropriate procedure. It could be a full trial or less.

98 I would not at this stage order that Essar Algoma deliver a statement of claim. What the form of the process will take is yet to be decided. I agree with Cliffs that the procedural rights of the parties should be protected as much as possible as the circumstances will permit. Those circumstances, of course, include the fact that Essar Algoma filed under the CCAA shortly after Cliffs purported to terminate the Cliffs Contract and that the issue needs to be dealt with quickly for the sake of both parties. As well, the principles laid out in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) and the need to be mindful of the most proportionate procedure for a case will need to be considered.

Conclusion

99 The motion of Cliffs is dismissed.

Motion dismissed.

Footnotes

- 1 The power in section 11 is "subject to the restrictions set out in this Act." Cliffs argued that an inference should be drawn that because Essar Algoma withdrew its critical supplier motion, an inference should be drawn that it did so because it could not comply with the critical supplier tests in section 11(4). Thus the failure to be able to comply with section 11(4) should be read as a restriction in the Act preventing the use of section 11 by the applicants. I decline to make such an inference and in any event do not think a failure to fall into the language of section 11(4) which provides that a court *may* make an order can be read to be a restriction under section 11. It is commonplace in CCAA proceedings to make orders requiring supply without invoking section 11(4).
- 2 At the request of Cliffs, the claims procedure order signed on January 14, 2016 in this CCAA proceeding by agreement did not cover Cliffs' claims and the procedure to govern those claims is to await the determination of this motion.
- 3 It would be up to the Delaware Bankruptcy Court to determine if the claim should proceed in that Court or in the Ohio District Court.
- 4 Although Justice Dumas referred to a trustee and the Bankruptcy Court, the case was a CCAA case and the MME was not a bankrupt.
- 5 Mr. Gropper went on in his opinion to give his view ("it is submitted...") that a U.S. Court would not find that Cliffs has submitted to the jurisdiction of the Canadian courts. I have serious doubts as to whether an expert in foreign law should go beyond stating what the foreign law is and give an opinion on what the foreign court would do in a particular case. See my comments in *Nortel Networks Corp., Re* (2014), 20 C.B.R. (6th) 171 (Ont. S.C.J. [Commercial List]) at paras. 103-104. In any event, his opinion was based on the assumption that Cliffs did not carry on business in Canada.
- 6 Mr. Gropper also referred, in a footnote to his statement that in appropriate circumstances a non-monetary may be enforced under the common law principle of comity, to the *Sea Search* case as authority that where the Uniform Act has been adopted, courts have consistently denied enforcement to non-monetary judgments. However Professor Brand's analysis is a complete answer to that case. I would note that while Mr. Gropper has extremely impressive credentials as a bankruptcy expert, his *curriculum vitae* does not list experience in dealing with state courts or the enforcement of foreign judgments under state legislation.

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TAB 4

2013 QCCS 5194
Cour supérieure du Québec

Montréal, Maine & Atlantic Canada Co. / Montréal, Maine & Atlantique Canada cie, Re

2013 CarswellQue 10709, 2013 QCCS 5194, 238 A.C.W.S. (3d) 640, J.E. 2013-1922, EYB 2013-228346

In the matter of the arrangement relating to: Montréal, Maine & Atlantic Canada Co./Montréal, Maine & Atlantique Canada Cie, Debtor-Respondent, v. Montreal Maine & Atlantic Railway Ltd, LMS Acquisition Corporation and Montréal Maine & Atlantic Corporation, Third parties, and Richter Advisory Group Inc., Monitor, and Travelers Property Casualty Company Of America, Petitioner

Dumas J.C.S.

Heard: 1 october 2013

Judgment: 9 october 2013

Docket: C.S. Qué. Saint-François 450-11-000167-134

Counsel: Noms des procureurs — non précisés

Subject: Insolvency; International

Dumas J.S.C.:

- 1 The Court is seized of a "motion to lift the stay of proceedings granted in favour of Montréal Maine & Atlantic Railway" (MMA).
- 2 Said motion was heard jointly with an identical motion filed before Honorable Justice Louis Kornreich, Judge for the Maine Bankruptcy Court, who is in charge of the case of MMA's parent company located in the United States.
- 3 By its motion, Travelers asks permission to file a motion for declaratory judgment before the "United States District Court of the District of Maine".
- 4 This motion is contested by the trustee representing MMA in Canada and by the trustee representing MMR, MMA's parent company in the United States.
- 5 The joint hearing was held under a cross-border insolvency protocol approved by the undersigned and Honorable Justice Kornreich on September 9, 2013.
- 6 All are in agreement that the Québec courts have jurisdiction to hear the motion for declaratory judgment that Petitioner Travelers intends to file. Indeed, article 3150 of the *Civil Code of Québec* states:

Les autorités québécoises ont également compétence pour décider de l'action fondée sur un contrat d'assurance lorsque le titulaire, l'assuré ou le bénéficiaire du contrat a son domicile ou sa résidence au Québec, lorsque le contrat porte sur un intérêt d'assurance qui y est situé, ou encore lorsque le sinistre y est survenu.

A Québec authority has jurisdiction to hear an action based on a contract of insurance where the holder, the insured or the beneficiary of the contract is domiciled or resident in Québec, the contract is related to an insurable interest situated in Québec or the loss took place in Québec.

7 However, even though this court has jurisdiction to hear the motion for declaratory judgment, Travelers wants the Court to lift the stay of proceedings order to allow it to present its motion before the District Court of Maine.

8 A dispute has arisen between Travelers and MMA regarding the coverage and the scope of the coverage granted to MMA under an insurance policy issued on April 19, 2013¹.

9 The main dispute between the parties concerns insurance for lost profits which Travelers seemingly issued by mistake.

10 Travelers pleads that, with the exception of MMA Canada, all of the insured parties under the American insurance policy have their places of business and their operations in the United States.

11 However, notwithstanding the fact that the other companies covered by the insurance policy have their places of business in the United States, none of them have brought any claims against Travelers.

12 Is any reminder needed that the facts leading to a motion being filed under the *Companies' Creditors Arrangement Act* (CCAA) concern a railway accident which occurred on July 6, 2013 in the Town of Megantic.

13 According to MMA's own pleadings in its motion under the CCAA, this railway accident destroyed the downtown area of the Town of Megantic and caused the death of 47 people. MMA admits its responsibility for this tragic accident.

14 Even though Travelers admits that Québec Superior Court has jurisdiction to hear its motion for declaratory judgment, it is pleading that the US District Court of Maine would be better placed to hear its motion. To this end, it is pleading that the balance of convenience sways in favour of a hearing before the District Court. In fact, without saying so, the petitioner is pleading the doctrine of *forum non conveniens*.

15 It pleads, first of all, that the potential witnesses, including its own employees, reside in the United States. It also pleads that this court could not subpoena American witnesses, including its own employees, to force them to testify in Canada.

16 This is a fairly minor problem. Indeed, the cross-border protocol stipulates that the US Bankruptcy Court could issue such subpoenas if needed. Moreover, during the hearing, Honorable Justice Kornreich confirmed that subpoenas could be issued rapidly and that they could also be executed promptly.

17 The debtor's claim against Travelers is an asset of the debtor. Travelers pleads that it is the American parent company which would have had a loss of income, not the Canadian company. In so doing, Travelers is overlooking the fact that there is a significant difference between a loss of income and receivables which could be insured.

18 Regardless of what MMA planned to do with its money, that contributes nothing to resolve the dispute. It was an insured party designated in the policy and it is the one which has suffered a loss.

19 Moreover, the Court does not need to delve into the merits to decide on the present motion. MMA has a claim against Travelers. The Court does not need to ask whether the claim is well founded to decide whether it has jurisdiction.

20 Travelers' main argument is that the legislation governing its insurance policy would be Maine law. But, as recently reiterated by the Court of Appeal²:

[100] Et surtout, parce que le critère de la loi applicable ne constitue pas en soi un facteur important. Dans tout litige international, les conflits de lois sont l'ordinaire et non l'exception.

21 This is why the Court of Appeal in the *Stormbreaker* decision instructs us:

[101] C'est l'opinion de Guillemard, Prujiner et Sabourin²²

Il est surprenant que l'application d'une loi étrangère par le tribunal, qui est l'essence même du droit international privé, puisse justifier un déclinatoire de compétence au profit de l'autorité dont il s'agit d'appliquer la loi. D'autant plus que le Code civil du Québec a introduit des dispositions de nature à faciliter la preuve du droit étranger (voir l'article 2809 C.c.Q.) et que les droits dont il était question dans les décisions rapportées n'étaient guère exotiques.

²² *Supra*, note 12, p. 945.

22 To this, it must also be added that even if the foreign court is able to rule on the dispute, that is not the first criterion for declining jurisdiction. For this reason, the Court of Appeal in *Stormbreaker* recalled:

[79] Cela ressort du texte même de l'article 3135 C.c.Q. et de l'enseignement de la Cour suprême dans *Spar Aerospace Ltée c. American Mobile Satellite Corp.* de 2002 :

69 . . . deux éléments essentiels ressortent du texte de l'art. 3135 : sa nature exceptionnelle et l'exigence qu'un autre État soit mieux à même de trancher le litige (voir E. Groffier, *La réforme du droit international privé québécois : supplément au Précis de droit international privé québécois* (1993), p. 130).

70 Ces deux caractéristiques de la doctrine du *forum non conveniens*, énoncées à l'art. 3135, sont conformes à l'exigence de common law énoncée par la Chambre des lords dans l'arrêt de principe *Spiliada Maritime Corp. c. Cansulex Ltd.*, [1987] 1 A.C. 460, p. 476, et par notre Cour dans les arrêts *Amchem*, précité, p. 919-921, et *Holt Cargo*, précité, par. 89. [. . .]

[80] Les auteurs sont du même avis.

[81] Prujiner, Guillemard et Sabourin font la réflexion suivante quant à l'interprétation que devrait recevoir l'article 3135 du *Code civil du Québec* :

L'article 3135 du Code [. . .] fait de l'exigence « que les autorités d'un autre État [soient] mieux à même de trancher le litige » une condition nécessaire mais non suffisante pour un déclinatoire de compétence. Le seul fait que les tribunaux d'un autre État soient mieux placés à l'égard d'un litige donné n'a rien d'exceptionnel et se présente chaque fois que le Québec n'est pas le for naturel de litige. Décliner sa compétence sur cette seule base ignore donc l'exigence du Code « exceptionnellement ». [. . .]

(. . .)

[86] En bref, le Code civil ne permet au tribunal de décliner compétence qu'« exceptionnellement ». Comme toute décision, celle-ci doit être motivée, ce qui n'est pas le cas dans le jugement attaqué. Il y a donc lieu d'analyser les circonstances de l'affaire pour déterminer si cette seconde condition est satisfaite.

(footnotes omitted)

23 This should put a definite end to the debate, but there is more.

24 The observation of the Supreme Court in *Sam Lévy & Associés inc. c. Azco Mining Inc.*³ must also apply under the CCAA :

76 En l'espèce, nous faisons face à une loi fédérale qui établit à première vue un centre de commandement ou un « contrôle unique » (Steward précité, p. 349) pour la totalité des procédures liées à la faillite (par. 183(1)). Le contrôle unique n'est pas nécessairement incompatible avec le renvoi de litiges particuliers à d'autres ressorts, mais le créancier

(ou le débiteur) qui désire fragmenter les procédures et qui ne peut pas prétendre être un « étranger à la faillite » a le fardeau de démontrer l'existence d'un « motif suffisant », justifiant que le syndic doive accourir dans plusieurs ressorts.

76 In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or « single control » (Stewart, *supra*, at p. 349) for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a « stranger to the bankruptcy », has the burden of demonstrating « sufficient cause » to send the trustee scurrying to multiple jurisdictions.

25 The Supreme Court reiterated this principle very recently in the *AbitibiBowater*⁴ ruling, stating:

[21] Une des caractéristiques principales du régime créé par la *LACC* est de traiter la presque totalité des réclamations contre un débiteur suivant une procédure unique devant un même tribunal. En vertu de ce modèle, le tribunal peut ordonner la suspension de la plupart des mesures d'exécution engagées contre les actifs du débiteur de façon à maintenir le statu quo durant la négociation avec les créanciers. Lorsque la négociation réussit, les créanciers consentent habituellement à recevoir moins que le plein montant de leurs réclamations, lesquelles ne sont pas nécessairement exigibles ou liquidées dès le début des procédures d'insolvabilité. Ces réclamations doivent parfois être évaluées afin d'établir la valeur pécuniaire qui fera l'objet du compromis.

21 One of the central features of the *CCAA* scheme is the single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. Under this model, the court can stay the enforcement of most claims against the debtor's assets in order to maintain the *status quo* during negotiations with the creditors. When such negotiations are successful, the creditors typically accept less than the full amounts of their claims. Claims have not necessarily accrued or been liquidated at the outset of the insolvency proceeding, and they sometimes have to be assessed in order to determine the monetary value that will be subject to compromise.

26 Consequently, the Court believes that Travelers has not satisfied its burden of demonstrating that the stay of procedures should no longer apply to it.

27 Let us add that the Bankruptcy Court is a court of equity and that the notion of equity is interpreted as conferring on the Bankruptcy Court all powers to dispose of disputes or a difficulty even when the law contains no specific provision that is likely to apply⁵.

28 The case law cited by Travelers, which it wished to use by analogy, can be of no help to it.

29 Indeed, these decisions dealt with lifting a stay to allow a third party to sue the bankrupt's insurer. In fact, they constitute a typical example of a motion to lift a stay of proceedings where a person wants to sue a bankrupt's insurer. In that situation, it is pointless for the case to proceed before the bankruptcy court because often that has no impact on the administration of the bankruptcy. In the present case, we deal with the contrary. It concerns a bankrupt's claim (via the trustee) against its insurance company. Without the shadow of a doubt, this is an asset of the debtor over which the Bankruptcy Court has jurisdiction.

30 As for Travelers' argument that the order pronounced by Justice Castonguay has no extraterritorial effect, this court does not accept it.

31 We must first note that the Court does not have to decide whether the present judgment and that of Justice Castonguay are enforceable in the United States. That is not the question before the Court.

32 However, we know that Québec courts have jurisdiction and that Travelers does business in Québec. It should also be noted that this question is somewhat theoretical, given that a cross-border protocol has been adopted by this Court and the US Bankruptcy Court.

33 In the event of doubt regarding a stay of proceedings, this protocol would allow the US Bankruptcy Court to order a stay of proceedings, just as this Court would for the parent company if proceedings were brought against it in Canada.

34 This would simply be an application of the legal courtesy (comity) recognized in both our countries⁶.

35 Even if the order pronounced by Justice Castonguay were not enforceable outside Québec, the fact remains that the decisions of Québec courts will be enforceable against Travelers. Indeed, according to the information given by its counsel, it also does business in Québec. The extraterritorial effect of Justice Castonguay's order is therefore immaterial to this case.

36 Add to this the fact that the cross-border protocol stipulates:

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 and bearing in mind the 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 in part to the other Court; or (iii) seek a joint hearing of both Courts.

37 The US Bankruptcy Court is prepared to allow Travelers specific limited relief from stay so that the U.S. debtor may be a party to a declaratory judgment proceeding in this Court.

38 It seems to us that the present decision achieves the objective of section 44 of the CCAA, which states:

La présente partie a pour objet d'offrir des moyens pour traiter des cas d'insolvabilité en contexte international et de promouvoir les objectifs suivants :

- a) assurer la coopération entre les tribunaux et les autres autorités compétentes du Canada et ceux des ressorts étrangers intervenant dans de tels cas;
- b) garantir une plus grande certitude juridique dans le commerce et les investissements;
- c) administrer équitablement et efficacement les affaires d'insolvabilité en contexte international, de manière à protéger les intérêts des créanciers et des autres parties intéressées, y compris les compagnies débitrices;
- d) protéger les biens des compagnies débitrices et en optimiser la valeur;
- e) faciliter le redressement des entreprises en difficulté, de manière à protéger les investissements et préserver les emplois.

The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
- (d) the protection and the maximization of the value of debtor company's property; and
- (e) the rescue of financially troubled businesses to protect investment and preserve employment.

FOR THESE REASONS, THE COURT:

39 *DISMISSES* the motion filed by Travelers, entitled "*motion to lift the stay of proceedings*";

40 *THE WHOLE WITH COSTS.*

APPENDIX

« Les autorités québécoises ont également compétence pour décider de l'action fondée sur un contrat d'assurance lorsque le titulaire, l'assuré ou le bénéficiaire du contrat a son domicile ou sa résidence au Québec, lorsque le contrat porte sur un intérêt d'assurance qui y est situé, ou encore lorsque le sinistre y est survenu.

A Québec authority has jurisdiction to hear an action based on a contract of insurance where the holder, the insured or the beneficiary of the contract is domiciled or resident in Québec, the contract is related to an insurable interest situated in Québec or the loss took place in Québec.

Or, malgré que le présent tribunal ait juridiction pour entendre la requête pour jugement déclaratoire, Travelers voudrait que le tribunal lève l'ordonnance de sursis des procédures afin de lui permettre de présenter sa requête devant le District Court du Maine.

Un litige est apparu entre Travelers et MMA concernant la couverture et la limite d'assurance dont bénéficierait MMA suite à l'émission d'une police d'assurance émise le 19 avril 2013⁷.

Le principal litige entre les parties concerne l'assurance pour perte de profit que Travelers aurait émis par erreur.

Travelers plaide que, à l'exception de MMA Canada, tous les assurés sous la police d'assurance américaine, ont leur place d'affaires et leurs opérations aux États-Unis.

Par contre, malgré que les autres compagnies couvertes par la police d'assurance ont leur place d'affaires aux États-Unis, celles-ci n'ont fait valoir aucune réclamation contre Travelers.

Est-il nécessaire de rappeler que les faits ayant donné lieu au dépôt d'une requête en vertu de la *Loi sur les arrangements des créanciers des compagnies* (LACC) est un accident ferroviaire survenu le 6 juillet 2013 dans la Ville de Mégantic.

Selon ce que MMA plaide elle-même dans sa requête en vertu de la LACC, cet accident ferroviaire a détruit le centre-ville de la Ville de Mégantic et a causé la mort de 47 personnes. MMA admet sa responsabilité pour ce tragique accident.

Même si Travelers admet que la Cour supérieure du Québec a juridiction pour entendre sa requête pour jugement déclaratoire, elle plaide que le US District Court du Maine serait mieux placé pour entendre sa requête. Pour ce faire, elle plaide que la balance des inconvénients penche clairement en faveur d'une audition devant le District Court. En fait, sans le dire, la requérante plaide la théorie du forum *non conveniens*.

Elle plaide tout d'abord que les témoins potentiels, incluant ses propres employés, résident aux États-Unis. Elle plaide également que le présent tribunal ne pourrait émettre de subpoenas à des témoins américains, incluant ses propres employés, pour les forcer à témoigner au Canada.

Ce problème est plutôt mineur. En effet, le *cross-border protocol* prévoit que le *US Bankruptcy Court* pourra émettre de tels subpoenas si nécessaire. D'ailleurs lors de l'audition, l'honorable juge Kornreich a confirmé que des subpoenas pouvaient être émis rapidement et que ceux-ci pouvaient également être exécutés promptement.

La réclamation de la débitrice face à Travelers est un bien de la débitrice. Travelers soulève que c'est la compagnie mère américaine qui aurait eu une perte de revenu et non pas la compagnie canadienne. Pour ce faire, Travelers fait abstraction du fait qu'il y a une différence notable entre une perte de revenu et des comptes recevables qui pourraient être assurés.

Peu importe ce que MMA comptait faire de son argent, cela n'apporte rien à la solution du litige. Elle était une assurée désignée à la police et elle est celle qui a subi une perte.

D'ailleurs, le tribunal n'a pas à entrer dans le fond du litige pour décider de la présente requête. MMA a une réclamation contre Travelers. Le tribunal n'a pas à se demander si elle est bien fondée pour décider s'il a juridiction.

Le principal argument de Travelers est que la loi gouvernant sa police d'assurance serait la *Loi du Maine*. Or, comme nous le rappelait très récemment la Cour d'appel⁸ :

[100] Et surtout, parce que le critère de la loi applicable ne constitue pas en soi un facteur important. Dans tout litige international, les conflits de lois sont l'ordinaire et non l'exception.

C'est pourquoi, la Cour d'appel dans l'arrêt *Stormbreaker* nous enseigne :

[101] C'est l'opinion de Guillemard, Prujiner et Sabourin²²

Il est surprenant que l'application d'une loi étrangère par le tribunal, qui est l'essence même du droit international privé, puisse justifier un déclinatoire de compétence au profit de l'autorité dont il s'agit d'appliquer la loi. D'autant plus que le Code civil du Québec a introduit des dispositions de nature à faciliter la preuve du droit étranger (voir l'article 2809 C.c.Q.) et que les droits dont il était question dans les décisions rapportées n'étaient guère exotiques.

²² *Supra*, note 12, p. 945.

À cela, il faut également ajouter que même si le tribunal étranger est à même de trancher le litige, cela n'est que le premier critère pour décliner compétence. C'est pourquoi la Cour d'appel dans *Stormbreaker* nous rappelait :

[79] Cela ressort du texte même de l'article 3135 C.c.Q. et de l'enseignement de la Cour suprême dans *Spar Aerospace Ltée c. American Mobile Satellite Corp.* de 2002 :

69 . . . deux éléments essentiels ressortent du texte de l'art. 3135 : sa nature exceptionnelle et l'exigence qu'un autre État soit mieux à même de trancher le litige (voir E. Groffier, *La réforme du droit international privé québécois : supplément au Précis de droit international privé québécois* (1993), p. 130).

70 Ces deux caractéristiques de la doctrine du *forum non conveniens*, énoncées à l'art. 3135, sont conformes à l'exigence de common law énoncée par la Chambre des lords dans l'arrêt de principe *Spiliada Maritime Corp. c. Cansulex Ltd.*, [1987] 1 A.C. 460, p. 476, et par notre Cour dans les arrêts *Amchem*, précité, p. 919-921, et *Holt Cargo*, précité, par. 89. [. . .]

[80] Les auteurs sont du même avis.

[81] Prujiner, Guillemard et Sabourin font la réflexion suivante quant à l'interprétation que devrait recevoir l'article 3135 du *Code civil du Québec* :

L'article 3135 du Code [. . .] fait de l'exigence « que les autorités d'un autre État [soient] mieux à même de trancher le litige » une condition nécessaire mais non suffisante pour un déclinatoire de compétence. Le seul fait que les tribunaux d'un autre État soient mieux placés à l'égard d'un litige donné n'a rien d'exceptionnel et se présente chaque fois que le Québec n'est pas le for naturel de litige. Décliner sa compétence sur cette seule base ignore donc l'exigence du Code « exceptionnellement ». [. . .]

(...)

[86] En bref, le Code civil ne permet au tribunal de décliner compétence qu'« exceptionnellement ». Comme toute décision, celle-ci doit être motivée, ce qui n'est pas le cas dans le jugement attaqué. Il y a donc lieu d'analyser les circonstances de l'affaire pour déterminer si cette seconde condition est satisfaite.

(notes de bas de page omises)

Cela devrait clore le débat de façon définitive, mais il y a plus.

Ce que nous mentionnait la Cour suprême dans *Sam Lévy & Associés inc. c. Azco Mining Inc.*⁹ doit également recevoir application en vertu de la LACC :

En l'espèce, nous faisons face à une loi fédérale qui établit à première vue un centre de commandement ou un « contrôle unique » (Steward précité, p. 349) pour la totalité des procédures liées à la faillite (par. 183(1)). Le contrôle unique n'est pas nécessairement incompatible avec le renvoi de litiges particuliers à d'autres ressorts, mais le créancier (ou le débiteur) qui désire fragmenter les procédures et qui ne peut pas prétendre être un « étranger à la faillite » a le fardeau de démontrer l'existence d'un « motif suffisant », justifiant que le syndic doive accourir dans plusieurs ressorts.

La Cour suprême a réitéré ce principe très récemment dans l'arrêt *AbitibiBowater*¹⁰ en mentionnant :

[21] Une des caractéristiques principales du régime créé par la LACC est de traiter la presque totalité des réclamations contre un débiteur suivant une procédure unique devant un même tribunal. En vertu de ce modèle, le tribunal peut ordonner la suspension de la plupart des mesures d'exécution engagées contre les actifs du débiteur de façon à maintenir le statu quo durant la négociation avec les créanciers. Lorsque la négociation réussit, les créanciers consentent habituellement à recevoir moins que le plein montant de leurs réclamations, lesquelles ne sont pas nécessairement exigibles ou liquidées dès le début des procédures d'insolvabilité. Ces réclamations doivent parfois être évaluées afin d'établir la valeur pécuniaire qui fera l'objet du compromis.

En conséquence, le tribunal croit que *Travelers* n'a pas surmonté son fardeau de démontrer que le sursis des procédures ne devrait plus s'appliquer à elle.

Ajoutons que la Cour de faillite est une Cour d'équité et que la notion d'équité est interprétée comme conférant à la Cour de faillite tous les pouvoirs pour disposer des litiges ou d'une difficulté même lorsque la loi ne contient aucune disposition particulière susceptible de recevoir application¹¹.

La jurisprudence citée par *Travelers* qu'elle voulait utiliser par analogie ne peut lui être d'aucune aide.

En effet, dans ces décisions, il s'agissait d'une levée du sursis pour permettre à un tiers de poursuivre l'assureur du failli. Il s'agit en fait d'un exemple type de requête pour levée de sursis des procédures lorsqu'une personne veut poursuivre l'assureur d'un failli. Il est alors inutile que sa procédure se fasse devant le tribunal de faillite puisque cela n'a souvent aucun impact sur l'administration de la faillite. En l'espèce, c'est le contraire qui se produit. Il s'agit d'une réclamation du failli (par l'entremise du syndic) contre sa compagnie d'assurance. Il s'agit sans l'ombre d'un doute d'un bien du failli sur lequel la Cour de faillite a juridiction.

Quant à l'argument de *Travelers* que l'ordonnance rendue par le juge Castonguay n'a aucun effet extraterritorial. Le tribunal ne peut l'accepter.

Nous devons d'abord noter que le tribunal n'a pas à décider si le présent jugement et celui du juge Castonguay est exécutoire aux États Unis. Ce n'est pas la question dont le tribunal est saisi.

Par contre, on sait que les tribunaux québécois ont juridiction et que Travelers fait affaires au Québec. Il faut aussi noter que cette question est plutôt théorique puisqu'un protocole inter-frontalier a été adopté par le présent tribunal et la US Bankruptcy Court.

Ce protocole permettrait en cas de doute sur la suspension des procédures que la US Bankruptcy Court ordonne le sursis des procédures tout comme le présent tribunal le ferait pour la compagnie mère si des procédures étaient intentées contre elle au Canada.

Il ne s'agirait que d'une simple application de la courtoisie judiciaire (Comity) reconnue dans nos deux pays¹².

Même si l'ordonnance rendue par le juge Castonguay n'avait pas d'effet à l'extérieur du Québec, il reste que les décisions des tribunaux québécois seront exécutoires contre Travelers. En effet, selon l'information donnée par ses procureurs, celle-ci fait également affaire au Québec. L'extraterritorialité de l'ordonnance du juge Castonguay n'a donc pas de conséquence en l'espèce.

Ajoutons à cela que le *cross-border protocol* prévoit :

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 and bearing in mind the 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 in part to the other Court; or (iii) seek a joint hearing of both Courts.

La U.S. Bankruptcy Court est prête à accorder une levée limitée et particulière de la suspension des procédures afin de permettre que la compagnie mère américaine M.M.R. puisse être partie à une procédure pour jugement déclaratoire devant le présent tribunal.

Il nous semble que la présente décision atteint l'objectif visé par l'article 44 LACC qui prévoit :

La présente partie a pour objet d'offrir des moyens pour traiter des cas d'insolvabilité en contexte international et de promouvoir les objectifs suivants :

- a) assurer la coopération entre les tribunaux et les autres autorités compétentes du Canada et ceux des ressorts étrangers intervenant dans de tels cas;
- b) garantir une plus grande certitude juridique dans le commerce et les investissements;
- c) administrer équitablement et efficacement les affaires d'insolvabilité en contexte international, de manière à protéger les intérêts des créanciers et des autres parties intéressées, y compris les compagnies débitrices;
- d) protéger les biens des compagnies débitrices et en optimiser la valeur;
- e) faciliter le redressement des entreprises en difficulté, de manière à protéger les investissements et préserver les emplois.

The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

(d) the protection and the maximization of the value of debtor company's property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

POUR CES MOTIFS, LE TRIBUNAL ;

REJETTE la requête de Travelers intitulée « *motion to lift the stay of proceeding* »;

LE TOUT AVEC DÉPENS.

GAÉTAN DUMAS, J.C.S.

Mail list lawyers

Date d'audience :

1^{er} octobre 2013

Footnotes

1 See exhibit C-1;

2 Stormbreaker Marketing c. Weinstock, 2013 QCCA 269, cited in another recent decision of the Court of Appeal in Droit de la famille - 132433, 2013 QCCA 1529 (decision of 12 September 2013).

3 2001 3 R.C.S. 978.

4 Newfoundland and Labrador v. AbitibiBowater Inc., [2012] 3 S.C.R. 443.

5 See re: La Société Pétrochimique Kemtec inc., 1994 R.J.Q. 1345.

6 Reflections on Comity and Sovereignty - Ten years later, in Janis P. SARRA, *Annual Review of insolvency Law 2012*, Toronto, Carswell, a division of Thompson Reuters Canada Ltd, page 1.

7 Voir pièce C-1.

8 Stormbreaker Marketing c. Weinstock, 2013 QCCA 269, citée dans un autre arrêt récent de la Cour d'appel dans Droit de la famille - 132433, 2013 QCCA 1529 (décision du 12 septembre 2013).

9 2001 3 R.C.S. 978.

10 Terre-Neuve-et-Labrador c. AbitibiBowater Inc., [2012] 3 R.C.S. 443.

11 Voir re : La Société Pétrochimique Kemtec inc., 1994 R.J.Q. 1345.

12 Reflections on Comity and Sovereignty - Ten years later, dans Janis P. SARRA, *Annual Review of insolvency Law 2012*, Toronto, Carswell, a division of Thompson Reuters Canada Ltd, page 1.

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TAB 5

2006 CarswellOnt 4929
Ontario Superior Court of Justice [Commercial List]

Muscletech Research & Development Inc., Re

2006 CarswellOnt 4929, [2006] O.J. No. 3300, 150 A.C.W.S. (3d) 534, 25 C.B.R. (5th) 218, 33 C.P.C. (6th) 131

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

In the Matter of Muscletech Research and Development Inc. and Those Entities Listed on Schedule "A" Hereto

Mesbur J.

Heard: July 31, 2006

Judgment: August 16, 2006 *

Docket: 06-CL-6241

Counsel: Fred Myers, David Bish for Applicants

Kevin P McElcheran for Representative Plaintiffs

James H. Grout, Kyla Mahar for Krys Osborne, on behalf of herself and all other similarly situated California consumers

Derrick Tay for Iovate Health & Sciences, DIP Lender

Jeff Carhart for Ad hoc Tort Claimants Committee

Natasha MacParland for Monitor, RSM Richter Inc.

Subject: Insolvency; Civil Practice and Procedure

MOTION by creditors under *Companies' Creditors Arrangement Act* to prohibit representative claims.

Mesbur J.:

Nature of the motions:

1 These motions raise the question of whether plaintiffs in uncertified class actions may file claims in the claims process in this CCAA proceeding on behalf of themselves and all other similarly situated plaintiffs. The applicant, the Monitor, the DIP lender and the Ad Hoc Tort Claimants Committee all take the position that claims filed in this manner are a nullity, and should be forever barred.

2 Mr. McElcheran, on behalf of four plaintiffs in four yet-uncertified US class actions, and Mr. Grout and Ms. Mahar for a plaintiff in a yet-uncertified class action in California all are of the view that there is jurisdiction under the CCAA to permit such representative claims, and either the claims should be permitted, or alternatively, the stay of proceedings imposed by the CCAA should be lifted to allow them to proceed to certification motions in the United States for their respective actions. I will refer to Mr. McElcheran's clients as the "Representative Plaintiffs", and Mr. Grout's clients as the "California Consumers".

Some history:

3 The applicants, whom I will refer to collectively as "Muscletech", are comprised of the applicant, Muscletech, and its various subsidiaries and related companies listed in Schedule "A". Muscletech is a Canadian company. Historically, it was in the business of the manufacture and sale of dietary supplements. Some of these supplements contained the chemical ephedra, while others contained what have been referred to as prohormones. Muscletech was not alone in

selling supplements containing these compounds. A number of American companies did so as well. Because of problems surrounding the compounds, Muscletech's products have ceased to contain them since 2002. Nevertheless, there was significant litigation, particularly in various states in the United States, brought by the consumers of these products, against both Muscletech and other companies.

4 The litigation is essentially of two kinds. The ephedra litigation primarily concerns those consumers of products containing ephedra who allege they have suffered physical damages as a result of using these products. The parties here refer to that litigation as the Products Liability litigation. The prohormone litigation has been brought by consumers of products containing prohormone who allege either that the product failed to produce the promised increased muscle mass, or alternatively, produced the promised increased muscle mass, but in doing so, must have contained a controlled substance, namely anabolic steroids. In the first instance, the prohormone consumers complain of being the victims of false and misleading advertising. In the second, they complain of being illegally sold a controlled substance.

5 For the purposes of this motion, there are several of these lawsuits that are important. First, there is the group of four yet to be certified class actions relating to prohormone claims. These have been described as the Hannon Claim, the Hochberg Claim, the Rodriguez Claim and the Guzman Claim, or collectively, the Representative Plaintiffs' Claims.

6 The Hannon Claim was commenced in the State of Florida. The Hochberg and Rodriguez claims were commenced in New York State, and the Guzman claim was commenced in California. Using the multi-district litigation (MDL) provisions available in the United States, all four proceedings have been moved to the United States District Court for the Southern District of New York (the "U.S. District Court") in New York City, to be managed, along with all the other related ephedra litigation by Justice Rakoff of that court. As I have said, I will refer to these four claims as the "Representative Plaintiffs' Claims", and to the plaintiffs in them as the "Representative Plaintiffs".

7 In addition to the Representative Plaintiffs' Claims, there is a further yet-to-be-certified class action in the United States that is germane to this motion. It has been described as the California Consumers' Claim. Unlike the Representative Plaintiffs' Claims, the California Consumers' Claim is an ephedra claim, seeking damages for personal injuries. I refer to this action as the "California Consumers' Claim", and its plaintiffs as the "California Consumers". The California Consumers participated on the motion simply to support the Representative Plaintiffs' position; they seek no relief themselves.

8 In January 2006, Muscletech sought and was granted CCAA protection in this court. The initial stay has been extended throughout the proceedings to August 11, 2006.¹ As the applicants' factum puts it, seeking CCAA protection was done "principally as a means of achieving a global resolution of the large number of product liability and other lawsuits" against the applicants and others. These lawsuits relate to the products that Muscletech and others sold.

9 Once the initial order was granted, the Monitor commenced ancillary proceedings in the USA under Chapter 15 of the U.S. Bankruptcy Code. These proceedings are before the U.S. District Court as well. As a result of these ancillary proceedings, there is a similar stay in the U.S.

10 At the same time, the Monitor also applied for a Temporary Restraining Order and Preliminary Injunction (TRO/PI Application) in the U.S. District Court, to prohibit anyone commencing or continuing any products liability actions. The TRO/PI application was granted. That application is referred to as the "Adversary Proceeding" under Chapter 15 of the U.S. Bankruptcy Code.

11 On February 8, 2006, an Ad Hoc committee of products liability claimants sought and was granted representative status in this CCAA proceeding. On March 3, 2006, this court made a Call for Claims order. American counsel for both the Representative Plaintiffs and the California Consumers were served with the motion and draft order in relation to the Call for Claims order, just as they have been served throughout these CCAA proceedings. Although many interested parties made submissions concerning the terms of the order both before the hearing and at the hearing itself, counsel for

the Representative Plaintiffs and California Consumers did not. They took no steps, as did the Ad Hoc Committee, to obtain representative status, or direction as to how they might put forward their claims.

12 As I have mentioned, Muscletech sought and obtained an order in the USA bankruptcy court, recognizing and enforcing the Ontario CCAA order, including its automatic stay. The Call for Claims order was similarly recognized and approved by Judge Rakoff in the U.S. District Court on March 22, 2006. Judge Rakoff is managing all the ephedra litigation, as well as the motions to recognize and enforce orders made here under these CCAA proceedings, and the Adversary Proceeding as well.

13 The Call for Claims order established a process for calling for what were defined as both "claims" and "product liability claims". The object of the order was to identify everyone with any kind of claim against Muscletech, its affiliates, and some defined Third Parties. The process envisions "a person" completing a proof of claim, with particulars of the claim, and sending it to the Monitor.² In this way, the Monitor could identify what Mr. Tay for the DIP lender has called the "total universe of potential claims". The Call for Claims order does not set the process for deciding on the validity of any of the claims. Its purpose is simply to identify them.

14 The Call for Claims order set out comprehensive definitions of what constitutes both types of claims, as well as an elaborate method of giving broad notice to anyone who might have a claim. In this case, the order required the Monitor to send a package containing a proof of claim and other necessary information to all known creditors of Muscletech. It also required that the Monitor file these documents and the Call for Claims order electronically on the U.S. District Court's website in all three pieces of litigation there. These are described in the Call for Claims order as the "U.S. Chapter 15 Proceedings", the "U.S. Chapter 15 Adversary Proceedings" and the "U.S. MDL Proceedings". The order required the Monitor to publish notices to creditors in the national edition of the *Globe and Mail* newspaper, the *Wall Street Journal*, and *USA Today*. The Monitor was also required to post copies of the documents and Call for Claims order on the Monitor's website. The Monitor did all these things.

15 All proofs of claim were to be filed by May 8, 2006. This date was defined in the order as the Claims Bar date. Any creditor who has not filed a proof of claim by that date is forever barred from making or enforcing any claim, and is not entitled to participate as a creditor in the CCAA proceedings, or to vote at any meeting of creditors. Prior to the Claims Bar date, the members of the Ad Hoc Tort Claimants Committee filed individual proofs of claim. The California Consumers also filed individual proofs of claim.

16 On May 8, the Representative Plaintiffs, (that is, Hannon, Hochberg, Rodriguez and Guzman), filed proofs of claim, claiming to do so on their own behalves, and "on behalf of all other similarly situated persons". Unlike the Representative Plaintiffs, the California Consumers filed individual proofs of claim. Even though they have done so, they support the Representative Plaintiffs' position on this motion.

17 The monitor received some 33 ephedra claims, both from the California Consumers individually, and from others, including the members of the Ad Hoc Tort Committee. The only prohormone claims the monitor has received are from the Representative Plaintiffs. No other individual claims relating to prohormones have been filed.

18 After the claims bar date, this court made a Claims Resolution order. That order, dated June 8, 2006 provided, among other things, for a method for the monitor to review proofs of claim, accept or reject them, and for a claims resolution process for resolving disputed claims. The Claims Resolution order is subject to an earlier Mediation Order, which provided for mediation of ephedra claims. Of the 33 ephedra claims filed, 30 have already been settled through the mediation process. The mediation process is part of a larger mediation process in New York, in the context of the much broader ephedra litigation that Judge Rakoff is managing. This litigation is referred to as the MDL, or multi-district litigation, in the U.S.

19 No one has appealed the Call for Claims order. No one moved to vary its terms, prior to the claims bar date. No one has appealed the Claims Resolution order. None of the Representative Plaintiffs have taken any steps in the United

States (where their class actions are pending), to lift the stay of proceedings there to permit their actions to proceed to certification.

The parties and their positions:

20 On these motions the applicants take the position that the proofs of claims by the Representative Plaintiffs are a nullity, since there is no provision in either the CCAA or any of the court orders that permit these claims to be made either as representative claims, or class action claims. They say that to allow these claims would unreasonably delay the CCAA process, and would undermine the process that has already been established, which all stakeholders rely on.

21 The DIP lender supports the applicants' position. The DIP lender takes the position that if the proposed claims were allowed, there is a potential for significant prejudice to the DIP lender who is funding the process, and will ultimately fund any plan of compromise. The DIP lender has already settled with a significant number of other tort claimants (albeit ephedra, as opposed to prohormone claimants). The DIP lender says it reached its settlement on the basis of a particular "known universe" of claims. It suggests that allowing these indeterminate claims, and claimants, at this late date, would prejudice its position.

22 The Ad Hoc Committee of Tort Claimants supports the applicants as well. The Committee takes the position that even before the Call for Claims order was made, it was able to obtain an order allowing it to participate as a Committee in the CCAA process and obtain what is called representative status in the proceedings. It says that if the Ad Hoc Committee was able to do so within the CCAA process, these other proposed claimants could, and should have done the same. Since the other proposed claimants did not, and took no steps to appeal the Call for Claims order, and indeed, declined to participate in the motion in which its terms were set, they should be barred from doing so at this late date.

23 The Monitor also supports the applicants' position, saying the CCAA process gave the Representative Plaintiffs adequate opportunity to file individual claims. The forms were readily accessible in plain English. The Products Liability claimants, that is, the members of the Ad Hoc Committee, were able to put individual claims forward in the CCAA process and the Representative Plaintiffs had the same opportunity to participate in exactly the same way. Lastly, the Monitor says that the CCAA process is far more economic than the lengthy process of certification of class actions, particularly in the USA, where certification would have to take place. To allow this new process to be overlaid on the existing CCAA process would be cumbersome, excessively expensive and time consuming.

24 All those opposing the Representative Plaintiffs' Claims and California Consumers suggests that the real motivation for putting these claims forward is to obtain and secure payment of significant legal fees for the lawyers involved, rather than to reap any meaningful benefits for any class participants. I need not comment on what is essentially a bald allegation. I mention it only to make the record of the parties' positions complete.

25 Both the Representative Plaintiffs and the California Consumers take a contrary view. They say their clients' claims should not be defeated on what they describe as essentially procedural grounds. They suggest that fairness requires that they be permitted to file in this way. They say the current CCAA process is not so far advanced that there would be undue prejudice to any of the other stakeholders, if their proofs of claims were allowed to be filed as representative claims.

The law and analysis:

26 The first question to consider is whether the CCAA permits representative claims, or class action claims. The next issue is whether this particular CCAA process adequately protected the interests of this potential group of claimants. Lastly, given the inherent jurisdiction of the court, I must also address whether this case might be an appropriate case to exercise my discretion and permit the Representative Plaintiffs' Claims to proceed in some fashion at this time.

Does the CCAA permit representative claims?

27 The CCAA neither expressly permits nor forbids representative claims. The CCAA defines "claim" in s. 12(1). It says that for the purposes of the CCAA, "claim" means "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*." Thus, to determine what a CCAA "claim" is, one must turn to the *Bankruptcy and Insolvency Act*, and the definition of debts "provable in bankruptcy".

28 Section 121(1) of the BIA deals with "claims provable", and says:

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

29 The BIA has a mechanism to determine whether a contingent or unliquidated claim is a provable claim. The mechanism is found in section 135(1.1), which provides:

The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

30 A determination under s. 135(1.1) is "final and conclusive", unless within a thirty day period after the trustee serves a notice of disallowance, the person to whom the notice of disallowance was sent appeals the trustee's decision.

31 Section 124 of the BIA deals with the proof of claims. First, it provides in subsection (1) that creditors shall prove claims. It says: "Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made." The section goes on, in subsection (3) to deal with who may make proof of claims. The subsection says: "The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person authorized, it shall state his authority and means of knowledge."

32 The term "creditor" is not specifically defined in the CCAA. The applicants therefore point to the definition of "creditor" in the Call for Claims order itself. There, creditor is defined as "any *Person* having a Claim or a Product Liability Claim" [emphasis added]

33 From the interplay of the sections of the CCAA and the BIA, together with the definition in the Call for Claims order, the applicants infer that only individual creditors may make claims, unless they have authorized someone else to do so on their behalf. Since there is no question the Representative Plaintiffs' Claims have not been authorized by the group of people whom they purport to represent, they have no authority to do so, and the applicants say these claims must therefore be declared a nullity, at least to the extent that they purport to advance claims for other than Hannon, Hochberg, Rodriquez and Guzman personally.

34 While this interpretation may be technically correct, it is also clear that representative orders of some kind have been used in other CCAA proceedings³, and even in this case.⁴ In addition, there have been cases in which a stay has been lifted in order to permit a potential class proceeding to file certification materials,⁵ while in other cases, a motion to lift the stay for that purpose and to file a class claim have been denied.⁶ As yet, however, there are no examples in Canada where a class proof of claim has been specifically permitted.⁷

35 It is noteworthy here, that even though Farley J made an order granting a "representation and ancillary order regarding funding" to the Ad Hoc Committee in this proceeding, there was no order permitting "representative" claims to be filed; each member of the committee filed an individual proof claim with the monitor.

36 From this I conclude that while it is possible at least to have a limited representation order in CCAA proceedings, it is by no means clear that representation orders have been extended to permit a "representative" proof of claim to be filed. Canadian courts have not yet permitted a filing of a proof of claim by a plaintiff in an uncertified class proceeding on behalf of itself and other members of the class. At best, our courts have at least once lifted a stay to permit the filing of certification materials. Any steps beyond that would be the subject of a further motion.⁸ In the case of *Re Air Canada*, however, there was no suggestion that certification motions were going to be made in a foreign jurisdiction, as would be the case here.

37 While a representative claim may therefore be possible, the next question is whether this is a proper case to either permit this kind of "representative" claim, without the necessity of the individual members of the class filing claims, or whether the stay should be lifted to permit certification motions to proceed in the United States. This involves a discussion first of whether the orders here gave adequate protection to this potential group or groups of creditors, and second, whether this might be an appropriate case for the court to exercise its discretion and grant the relief the Representative Plaintiffs seek.

Did the CCAA process adequately protect the interests of these potential claimants?

38 When I consider the CCAA process here, I am drawn inescapably to the conclusion that it adequately protected the interests of these potential claimants, had they availed themselves of the process as other claimants did.

39 The Ad Hoc committee obtained a representation order, and participates on that basis, although its members filed individual proofs of claim. Even the California Consumers filed individual claims. If the members of the Representative Plaintiff's proposed class had wished to file proofs of claim, they had as much notice and opportunity to do so as anyone else. This is particularly so since the required notices were published not only in two American nation-wide newspapers, but also in three locations on the U.S. District Court's website. Not a single "similarly situated" person, other than Hannon, Hochberg, Rodriguez and Guzman filed a proof of claim. They easily could have. They did not. I cannot conclude that the absence of additional claims implies the process was somehow unfair or flawed. To the contrary, the absence of even a single additional claim suggests there may be no other claimants at all. The process adequately protected the interests of these potential claimants. They simply chose not to utilize that process.

Should the court exercise its discretion?

40 While the court clearly has a broad discretion in CCAA matters⁹, I am not persuaded that this is a proper case to exercise that discretion either to allow the representative claims as they are, or to lift the stay to permit certification motions to proceed.

41 First, representative claims *per se*, have not been recognized in Canadian jurisprudence in the context of CCAA proceedings. It is clear that rule 10 of the *Rules of Civil Procedure* permits the court to "appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served."

42 Rule 10, however, is generally used in estates and trusts cases, or as what has been described as the "simplified procedure" version of proceedings under the *Class Proceedings Act*, particularly in pension fund disputes.¹⁰ I was referred to no case in which the rule was specifically used in CCAA proceedings to permit the filing of a representative or class claim. I do not see rule 10 as useful in these CCAA proceedings, which has created its own process and procedures. Here, a structure was established by court order, on notice to the very parties who now wish to alter the process fundamentally, after all stakeholders have relied on the structure that was established.

43 Changing and increasing the landscape of claimants after the settlement of 30 of the ephedra claims after the claims bar date could cause prejudice to the eventual success of the CCAA process. Simply put, all the arguments made

by the Representative Plaintiffs and California Consumers should have been made before Farley J when the Call for Claims order was made, or earlier motions should have been made to deal with these issues before the Call for Claims order was even made.

44 The process gave adequate opportunity for anyone with a claim to file a proof of claim. The forms were accessible, in plain English. The products liability claimants all managed to make individual claims, even though they might have been involved in class actions. No other prohormone claimants have filed a proof of claim. To allow representative or class claims at this date would be prejudicial to the entire claims process, and would impair the integrity of the CCAA process here. I decline to exercise my discretion in these circumstances.

Disposition:

45 The applicants' motion is therefore granted, and the representative plaintiffs' motion is dismissed. To be clear, the "representative" claims are to be considered as individual claims for each of Hannon, Hochberg, Rodriguez and Guzman. As the parties have agreed, there will be no order as to costs.

SCHEDULE "A"

HC Formulations Ltd.

CELL Formulations Ltd.

NITRO Formulations Ltd.

MESO Formulations Ltd.

ACE Formulations Ltd.

MISC Formulations Ltd.

GENERAL Formulations Ltd.

ACE US Formulations Ltd.

MT Canadian Supplement Trademark Ltd.

Mt Foreign Supplement Trademark Ltd.

MC Trademark Holdings Ltd.

HC US Trademark Ltd.

1619005 Ontario Ltd. (f/k/a NEW HC US Trademark Ltd.)

HC Canadian Trademark Ltd.

HC Foreign Trademark Ltd.

Motion granted.

Footnotes

- * Additional reasons at *MuscleTech Research & Development Inc., Re* (2006), 2006 CarswellOnt 5484, 25 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]).

- 1 Since hearing this motion, I have granted an order extending the stay to November 10 of this year. Judge Rakoff has made a similar order in the corresponding US litigation.
- 2 See "Notice to Creditors Re: Notice of Call for Claims and Product Liability Claims", Schedule "E" to the call for claims order.
- 3 See, for example, *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1999), 12 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]). See also the order of Blair J. in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge* dated July 29, 1998, in which he appointed representative counsel for various groups of claimants. It is noteworthy, however, that he did not provide for the filing of representative proofs of claim in the order.
- 4 See the reasons of Farley J. dated February 6, 2006 at paragraph 8, in which he says: "I understand that later this week the Ad Hoc Committee will be requesting a representation and ancillary order incorporating a joint funding agreement. [Note: as this is being typed up February 8th, I would note that I have just granted such an order.]" Again, nothing in the order permitted a representative *claim* to be filed.
- 5 *Re Air Canada*, Court File # 03-CL-4932. Endorsement of Farley J dated September 24, 2003.
- 6 *Re Canadian Red Cross, supra*
- 7 *Re Canadian Red Cross*, note 2, above, at page 197
- 8 *Re Air Canada*, note 5, above at paragraph 18.
- 9 The CCAA has been described as having a "broad remedial purpose", and cases have stated the Act should be given a large and liberal interpretation. See Holden & Morawetz *The 2006 Annotated Bankruptcy and Insolvency Act*, [Carswell, 2006] pp 1163-64, and these cases referred to there.
- 10 See *Overview* to rule 10, Killeen, Morton and James, *Ontario Superior Court Practice*

TAB 6

2006 CarswellOnt 7877
Ontario Superior Court of Justice

Muscletech Research & Development Inc., Re

2006 CarswellOnt 7877

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

**AND IN THE MATTER OF MUSCLETECH RESEARCH AND DEVELOPMENT
INC. AND THOSE ENTITIES LISTED ON SCHEDULE "A" HERETO**

Ground J.

Heard: November 3, 2006
Judgment: December 11, 2006
Docket: 06-CL-6241

Counsel: Jay A. Carfagnini, Frederick Myers, David Bish for Applicants, Muscletech Research & Development Inc. et al
D.J. Miller, Kyla E.M. Mahar for Krys Osborne & similarly situated California consumers

Subject: Insolvency

MOTION for order that proof of claim was nullity to extent it purported to advance representative claim on behalf of other persons; CROSS-MOTION for order permitting claim to be filed on behalf of other persons and for related relief.

Ground J.:

1 This motion is brought by the Applicants in the within proceeding (collectively "Muscletech") for an Order that the proof of claim filed by Krys Osborne ("Osborne") in this proceeding is invalid and a nullity to the extent that it purports to advance a representative claim on behalf of other persons.

Background

2 In response to call for claims in this proceeding, Osborne filed a proof of claim in respect of claims against the Applicants Iovate Health Sciences Group Inc., Iovate Health Sciences U.S.A. Inc., General Nutrition Corporation and other entities in a purported class representative capacity (the "Osborne Proof of Claim"). The Osborne Proof of Claim is based on alleged false and/or misleading advertising pertaining to the sale of Hydroxycut containing the ingredient ephedra and asserts a claim in the estimated amount of U.S. \$100 million.

3 Muscletech sought and obtained relief under the CCAA pursuant to an order of this court of Justice dated January 18, 2006 (the "Initial CCAA Order"). The Initial CCAA Order granted a stay of proceedings to and including February 18, 2006 in respect of the Applicants and certain non-applicant parties and appointed RSM Richter Inc. as Monitor of the Applicants (the "Monitor"). By subsequent Orders of this court, the Stay of Proceedings has been extended to and including February 1, 2007.

4 On January 18, 2006, the Monitor commenced ancillary proceedings in the United States of America in respect of the Applicants under Chapter 15 of the *U.S. Bankruptcy Code* and those proceedings are now before the United States District Court for the Southern District of New York (the "District Court").

5 The Applicants sought relief under the CCAA principally as a means of achieving a global resolution of the large number of product liability and other lawsuits commenced by numerous claimants (collectively, the "Product Liability Claimants") against Muscletech and others in the United States that related to products formerly sold by Muscletech (collectively, the "Product Liability Actions").

6 In addition to Muscletech, a number of affiliated and non-affiliated parties were also named as defendants or otherwise involved in certain of the Product Liability Actions (collectively, the "Non-Applicant Defendants"). The liability of the Non-Applicant Defendants is derivative of, and inextricably linked to, the liability of the Applicants.

7 On March 3, 2006, this court granted an order (the "Call for Claims Order") that established a process for the calling of: (a) all Claims (as defined in the Call For Claims Order) in respect of the Applicants and its officers and directors; and (b) all Product Liability Claims (as defined in the Call For Claims Order) in respect of the Applicants and the Non-Applicant Defendants. The Call For Claims Order required persons who wished to advance claims to file Proofs of Claim (as defined in the Call For Claims Order) with the Monitor by no later than 5:00 p.m. (EST) on May 8, 2006 (the "Claims Bar Date"), failing which the proposed claims would be barred. The Call For Claims Order was approved by Order of the District Court dated March 22, 2006.

8 In accordance with the Call For Claims Order, the Monitor: (a) sent a package containing the requisite proof of claim forms (the "Proof of Claim Package") to all known creditors of the Applicants; (b) filed electronically on the court dockets of the District Court the Proof of Claim Package and a notice to creditors advising of the call for claims process; (c) caused to be published a notice to creditors in The Globe and Mail (National Edition), The Wall Street Journal, and USA Today; and (d) posted a copy of the notice to creditors and the Proof of Claim Package on the Monitor's website. No Proof of Claim was filed by anyone, other than Osborne, who would be a member of the putative class sought to be represented by Osborne pursuant to the Osborne Proof of Claim.

9 The Call For Claims Order did not contain a process to resolve the Claims and Product Liability Claims. Accordingly, with the input of various key stakeholders, the Applicants established a claims resolution process (the "Claims Resolution Process") approved by this court and incorporated in a Claims Resolution Order dated June 8, 2006 (the "Claims Resolution Order") and approved by order of the District Court dated June 22, 2006.

10 The Claims Resolution Order provides: (a) a process for the review of all Proofs of Claim filed with the Monitor; (b) a process for the acceptance or dispute, in whole or in part, by the Applicants, with the assistance of the Monitor, of Claims and/or Product Liability Claims for the purpose of voting and/or distribution under a plan of compromise or arrangement in respect of the Applicants (a "Plan"); (c) the appointment of a claims officer to resolve disputed Claims or Product Liability Claims; and (d) an appeal process from the determination of the claims officer to this court.

11 Muscletech has, with the assistance of the Monitor, reviewed the proofs of claim filed with the Monitor with a view to accepting or objecting to them for voting and/or distribution purposes under a Plan and has reviewed the Osborne Proof of Claim and denies that the claim advanced therein can succeed on the merits with respect to the allegations of false or misleading advertising.

12 On August 10, 2006, in accordance with the Claims Resolution Process, the Monitor issued a Notice of Objection to the Osborne Proof of Claim. In response to the Notice of Objection, Osborne filed a Dispute Notice dated August 23, 2006.

13 Paragraph 18 of the Claim Resolution Order authorizes Muscletech to move before this court to resolve or seek directions in respect of the validity, effect and/or quantum of proofs of claim submitted on a representative basis in respect of existing consumer class actions involving the Applicants, where such class actions were uncertified as of the date of the Initial CCAA Order.

14 The Osborne Proof of Claims pertains to an action that was brought against MuscleTech and certain Non-Applicant Defendants in the Superior Court of the State of California on February 16, 2005, prior to the commencement of these CCAA proceedings alleging violations of Section 17200 of the *California Business & Professions Code*, which prohibits "unlawful, unfair or fraudulent" business practices. The case was subsequently transferred to the United States District Court of California (Los Angeles) and a motion to transfer the case to the District Court was heard and granted on June 19, 2006.

15 As stated above, the Applicants' motion now before this court seeks an order that the Osborne Proof of Claim is invalid as a nullity to the extent that it purports to advance a representative claim on behalf of other persons.

16 The class of claimants purported to be represented by Osborne was uncertified as of the date of the filing of the application in this CCAA proceeding and, as a result of the stay of proceedings, remains uncertified as of this date.

17 The cross motion filed by Osborne and now before this court seeks an order for, among other things:

(a) a declaration that the Call for Claims Order permits the filing of a proof of claim by Osborne, on behalf of herself and all other similarly situated California consumers, as the class representative of the putative class;

(b) in the alternative, to vary the Call for Claims Order *nunc pro tunc* to allow for the filing of the Osborne Proof of Claim to be determined for voting and/or distribution purposes in accordance with the Claims Resolution Order;

(c) in the further alternative, to lift the stay of proceedings to allow Osborne, as the class representative of the putative class, to take the necessary steps to certify the class action (the "California Class Action") and, contingent upon obtaining certification of the class, allow for the filing of the Osborne Proof of Claim in this proceeding to be determined for voting and/or distribution purposes in accordance with the Claims Resolution Order; and

(d) in the further alternative, to lift the stay of proceedings as against (i) Iovate Health Sciences Group, Inc. ("Iovate Group"), (ii) Iovate Health Sciences USA, Inc. ("Iovate USA") and (iii) General Nutrition Corporation ("GNC") (collectively the "Relevant Non-Applicant Defendants") to allow Osborne as the class representative of the California Consumers to continue the California Class Action as against the Relevant Non-Applicant Defendants.

Issues

18 The motions before this court raise the following issues:

(1) Is there any authority for the filing of uncertified class action claims in proceedings under the CCAA?

(2) Is Osborne the legal personal representative of the members of the putative class as referred to in the definition of "person" in the Call for Claims Order and what is the proper law for the determination of whether Osborne is a legal personal representative?

(3) Whether or not there is any such authority, should this court, in considering the equities of the case, exercise its inherent jurisdiction and accept the Osborne Proof of Claim for filing on behalf of the putative class.

Analysis

Class Proofs of Claim in CCAA Cases

19 The CCAA is silent as to whether class proofs of claim may be filed in a CCAA proceeding and it would appear that no Canadian court has definitively held that class proofs of claim may not be filed in a CCAA proceeding.

20 In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1999), 12 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]), the applicant sought an order to lift the CCAA stay to commence a class proceeding on behalf of

those who received blood tainted with Creutzfeld-Jakob Disease ("CJD"), and an order to file a class proof of claim. Blair, J. concluded that the real issue raised by the applicant was the adequacy of the notice of the established CCAA claims filing procedure. He dismissed the application on the basis that there was no evidence of inadequate notice to CJD claimants and the CCAA proceedings having gone on for one year and having had a very high profile, Blair, J. doubted that permitting a class action to proceed would yield different results, and concluded that allowing the class action to proceed would disrupt the CCAA proceedings with only marginal benefit to CJD claimants. Regarding the last point, Blair, J. stated at paras. 9-11:

In the first place, I am reluctant to impose another feature into the CCAA procedure which might upset the current timing, particularly where ___ as I have indicated ___ I think the helpfulness of the proposed class action proceeding would be marginal at best in respect of the individual CJD claimants and in respect of the CCAA proceedings. Moreover, the claims procedure for voting purposes which has already been put in place ___ with the concurrence of the various groups of Transfusion Claimants ___ is one which is founded upon individual voting by claimants with respect to the Plan.

I am not sure how individual voting would work in the context of the "class proof of claim" which Mr. Wright proposes should be filed, and I am not prepared to run the risk of upsetting the present procedure which is clearly underway and which has already absorbed a great deal of the time, energy and resources of the various Transfusion Claimants, at this late stage. There is an imperative at work here which demands that this proceeding be advanced and that voting and completion of the Plan (if accepted and approved) take place in as timely a fashion as possible, in order the Claimants receive what compensation they are entitled to as early as possible.

This is not the case, in my view ___ because it is not necessary to do so ___ to consider carefully and determine whether class proofs of claim are permissible in Canadian insolvency proceedings. There are apparently no examples in Canada yet where such a procedure has been permitted. In the United States, which has ___ as Mr. Wright's factum put it ___ a "lengthier history of class proceedings", class proofs of claim have sometimes been allowed in principle in the bankruptcy context: see, for example, In the *Matter of American Reserve Corp.*, 840 F.2d 487 (U.S. 7th Cir. III. 1988) (Feb. 18, 1988) (No. 87-1768), and *Reid v. White Motor Corp.*, 886 F.2d 1462 (U.S. C.A. 6th Cir. 1989), (Sept. 28, 1989). As I understand these cases, it is a matter for the discretion of the insolvency judge as to whether to permit the filing of a class proof of claim. For the reasons I have articulated, I would not exercise my discretion in the circumstances of this case to permit such a filing, even if I were to apply the principles to be drawn from the American authorities.

21 In *Air Canada, Re* (September 24, 2003), Farley J. (Ont. S.C.) (unreported), the applicants sought an order to lift the CCAA stay to commence a class proceeding in Federal Court on behalf of various travel agencies and requested an order permitting them to thereafter file a class proof of claim. Farley J. dismissed the applicants' request that they be permitted to apply as a class of creditors if their class action was certified, and dismissed their request to submit a favourable judgment in the class action as a class proof of claim. Since the applicants' claims under the CCAA would have to be dealt with in the near future, and it was not likely that the Federal Court would be able to dispose of the class action in time, Farley J. concluded that "nothing is gained by their request". Farley, J. therefore did not definitively rule on the appropriateness of class proofs of claim.

22 In *Muscletech Research & Development Inc., Re*, 2006 CarswellOnt 4929 (Ont. S.C.J. [Commercial List]), four plaintiffs in yet-uncertified American class actions relating to physical damages alleged to be caused by prohormones in certain products sold by Muscletech and others, applied to submit class proofs of claim and to have the CCAA stay lifted. In her Endorsement, Mesbur, J. noted that the CCAA neither expressly permits nor forbids class proofs of claim and, referring to the BIA and the cases noted above, she concluded that class proofs of claim under the CCAA were possible and the question was whether this was a proper case to permit the representative claims. For the reasons stated in her Endorsement, Mesbur, J. did not allow the class proofs of claim to be filed. It has been agreed between the parties

that the Order of Mesbur, J. does not constitute *res judicata* or issue estoppel with respect to the motions now before this court relating to the Osborne claim.

23 In *Alton, Re* (2003), 45 C.B.R. (4th) 25 (Ont. S.C.J.), the bankrupt Alton applied for a discharge. One Claude Millard opposed Alton's application. The issue was whether Millard was a proven creditor. Millard was the representative plaintiff in a certified class action against Alton for losses arising from an allegedly fraudulent investment scheme operated by Alton. A previous Order of Farley J. dated January 31, 2001, stated that Millard,

may file a proof of claim in the bankruptcy of [Alton] on behalf of himself and all Class Members in the amount of \$5,000,000...and such proof of claim shall be accepted by the Trustee for voting purposes only in the place and stead of proofs of claim filed on behalf of each of the Class Members individually.

Lax, J. accordingly found that this Order made Millard a proven creditor for all purposes other than distribution.

24 It would appear from the above authorities that this court has inherent jurisdiction to permit a class proof of claim to be filed in a CCAA proceeding but that the determination of whether it should be permitted in any particular case will depend upon the factual circumstances of the case and the equities between the parties.

Osborne as Legal Personal Representative

25 The Call for Claims Order defines "claim" as a claim of any "person" and "person" is defined as meaning:

... any individual, partnership, limited partnership, joint venture, trust, corporation, unincorporated organization, government, agency, regulatory body or instrumentality thereof, legal personal representative or litigation guardian, or any other judicial entity howsoever designated or constituted.

26 The Call for Claims Order accordingly contemplates claims being brought in a representative capacity. In addition, paragraph 18 of the Claims Resolution order contemplates a motion before this court with respect to proofs of claim submitted on a representative basis. Paragraph 18 provides as follows:

18. THIS COURT ORDERS that, notwithstanding anything herein to the contrary, the Monitor or the Applicants may move before the Court to resolve or seek directions in respect of the validity, effect and/or quantum of Proofs of Claim submitted on a representative basis in respect of existing consumer class actions involving the Applicants, where such class actions were uncertified as of the Filing Date.

27 In my view, the terms of these Orders clearly contemplate that this court may order the acceptance of a claim filed on a representative basis by a legal personal representative, including a class action claim. The issue then becomes whether Osborne qualifies as a "legal personal representative" for the purposes of this proceeding.

28 Although under the law of California Osborne may owe certain duties to members of the putative class having purported to institute a proceeding on their behalf, I am of the view that the law of Ontario must be applied to determine whether Osborne is a legal personal representative for purposes of orders of this court such that she has authority to file a proof of claim on behalf of such persons in the CCAA proceeding before this court.

29 It is not alleged that Osborne has any specific authority from any member of the putative class to file a proof of claim on his or her behalf. It is to be noted that the reference to "legal personal representative" in the definition of "claim" in the Call for Claims Order is in the context of "legal personal representative or litigation guardian, or any other judicial entity howsoever designated or constituted". It would seem to me that the definition implies that a legal personal representative must have been designated or constituted or in some way obtained authority from the persons alleged to be represented by way of power of authority, proxy, court order or some other document. In *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 24 (Alta. Q.B.) at paragraph 50, Paperny, J. stated:

A proxy signed by a participant and beneficial owner will be sufficient to authenticate a claim. However, a proxy signed by a participant and a third party claiming to have authority on behalf of a beneficial holder absent something from the beneficial holder itself is insufficient to extend to voting on behalf of the beneficial holders.

30 The definition of "claim" in the Call for Claims Order also makes reference to claims that "would have been claims provable in bankruptcy under the *Bankruptcy and Insolvency Act*". Subsection 124(3) of the *Bankruptcy and Insolvency Act* provides as follows:

124. (3) Who may make proof of claims ____ The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person so authorized, it shall state his authority and means of knowledge.

31 This again indicates that for a proof of claim to be made by a legal personal representative such representative must have some authority from the person on whose behalf the claim is being filed.

32 Accordingly, I am of the view that absent some documentary evidence that Osborne has authority from the members of the putative class to file a proof of claim on their behalf or a court order granting such authority, she is not a "legal personal representative" for purposes of Call for Claims Order.

Equities and Inherent Jurisdiction

33 As stated above, in order for the court to determine whether a class proof of claim should be accepted in a particular proceeding, the court must consider the factual circumstances of the case and the equities between the parties. In addition, in my view, the inherent jurisdiction of this court under the CCAA would enable this court to permit the acceptance of the Osborne Proof of Claim even though Osborne does not strictly qualify as a legal personal representative.

34 In making such determination there are, in my view, a number of factual matters which the court should take into account in addition in considering the equities as between the parties. Among the factual matters to be considered are the following. This CCAA proceeding was commenced for the purpose of achieving a global resolution of all product liability and other lawsuits commenced in the United States against Muscletech and others, including the Non-Applicant Defendants, relating to products formerly sold by Muscletech. As a result of strenuous negotiation and successful court-supervised mediation through the District Court, the Applicants have succeeded in resolving virtually all of the outstanding claims with the exception of the Osborne claim and, to permit the filing of a class proof of claim at this time, would seriously disrupt and extend the CCAA proceedings and the approval of a Plan and would increase the costs and decrease the benefits to all stakeholders. There appears to have been adequate notice to potential claimants and no member of the putative class other than Osborne herself has filed a proof of claim. It would be reasonable to infer that none of the other members of the putative class is interested in filing a claim in view of the minimal amounts of their claims and of the difficulty of coming up with documentation to support their claim. In this context the comments of Rakoff, J. in *Ephedra Products Liability Litigation, Re* [329 B.R. 1 (U.S. Dist. Ct. S.D. N.Y. 2005)] U.S. Dist. LEXIS 16060 at page 6 are particularly apt.

Further still, allowing the consumer class actions would unreasonably waste an estate that was already grossly insufficient to pay the allowed claims of creditors who had filed timely individual proofs of claim. The Debtors and Creditors Committee estimate that the average claim of class [*10] members would be \$ 30, entitling each claimant to a distribution of about \$ 4.50 (figures which Barr and Lackowski do not dispute; although Cirak argues that some consumers made repeated purchases of Twinlabs steroid hormones totaling a few hundred dollars each). Presumably, each claimant would have to show some proof of purchase, such as the product bottle. Because the Debtor ceased marketing these products in 2003, many purchasers would no longer have such proof. Those who did might well find the prospect of someday recovering \$ 4.50 not worth the trouble of searching for the old bottle or store receipt and filing a proof of claim. Claims of class members would likely be few and small. The only real beneficiaries of applying Rule 23 would be the lawyers representing the class. *Cf Woodward*, 205 B.R. at 376-77.

The Court has discretion under Rule 9014 to find that the likely total benefit to class members would not justify the cost to the estate of defending a class action under Rule 23.

35 In addition, in the case at bar, there would appear to be substantial doubt as to whether the basis for the class action, that is the alleged false and misleading advertising, would be found to be established and substantial doubt as to whether the class is certifiable in view of being overly broad, amorphous or vague and administratively difficult to determine. (See *Perez v. Metabolife International Inc.* [218 F.R.D. 262 (U.S. Dist. Ct. S.D. Fla. 2003)] U.S. Dist. LEXIS 21206 at pages 3-5). The timing of the bringing of this motion in this proceeding is also problematic. The claims bar date has passed. The mediation process is virtually completed and the Osborne claim is one of the few claims not settled in mediation although counsel for the putative class were permitted to participate in the mediation process. The filing of the class action in California occurred prior to the initial CCAA Order and at no prior time has this court been asked to approve the filing of a class action proof of claim in these proceedings. The claims of the putative class members as reflected in the comments of Rakoff, J. quoted above would be limited to a refund of the purchase price for the products in question and, in the context of insolvency and restructuring proceedings, *de minimus* claims should be discouraged in that the costs and time in adjudicating such claims outweigh the potential recoveries for the claimants. The claimants have had ample opportunity to file individual claims if they were so inclined and none, other than Osborne, has done so. There is no evidence that the call for claims order or the claims process as implemented has been prejudicial or unfair to the putative class members.

36 In summary, taking into account the factual circumstances of this case and the equities as between the parties, I am of the view that this court should not exercise its inherent jurisdiction to permit the filing of the Osborne Proof of Claim. An order will issue that the Osborne Proof of Claim is invalid and a nullity to the intent that it purports to advance a representative claim on behalf of other persons. The Cross-Motion is dismissed.

37 Counsel may make brief written submissions to me as to the costs of this proceeding, on or before December 29, 2006.

Schedule A

HC Formulations Ltd.

CELL Formulations Ltd.

NITRO Formulations Ltd.

MESO Formulations Ltd.

ACE Formulations Ltd.

MISC Formulations Ltd.

GENERAL Formulations Ltd.

ACE US Trademark Ltd.

MT Canadian Supplement Trademark Ltd.

MT Foreign Supplement Trademark Ltd.

HC Trademark Holdings Ltd.

HC US Trademark Ltd.

1619005 Ontario Ltd. (f/k/a New HC US Trademark Ltd.)

HC Canadian Trademark Ltd.

HC Foreign Trademark Ltd.

Motion granted; Cross-motion dismissed.

End of Document

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TAB 7

2009 CarswellOnt 3028
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 3028, [2009] O.J. No. 2166, 177 A.C.W.S. (3d) 634, 53 C.B.R. (5th) 196, 75 C.C.P.B. 206

**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
NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL
NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL
CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

APPLICATION UNDER THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Morawetz J.

Heard: April 20, 2009

Judgment: May 27, 2009 *

Docket: 09-CL-7950

Counsel: Janice Payne, Steven Levitt, Arthur O. Jacques for Steering Committee of Recently Severed Canadian Nortel Employees

Barry Wadsworth for CAW-Canada, George Borosh, Debra Connor

Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited

Alan Mersky, Derrick Tay for Applicants

Henry Juroviesky, Eli Karp, Kevin Caspersz, Aaron Hershtal for Steering Committee for the Nortel Terminated Canadian Employees Owed Termination and Severance Pay

M. Starnino for Superintendent of Financial Services or Administrator of the Pension Benefits Guarantee Fund

Leanne Williams for Flextronics Telecom Systems Ltd.

Jay Carfagnini, Chris Armstrong for Monitor, Ernst & Young Inc.

Gail Misra for Communication, Energy and Paperworkers Union of Canada

J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services

Mark Zigler, S. Philpott for Certain Former Employees of Nortel

G.H. Finlayson for Informal Nortel Noteholders Group

A. Kauffman for Export Development Canada

Alex MacFarlane for Unsecured Creditors' Committee (U.S.)

Subject: Insolvency

MOTIONS regarding appointment of counsel in proceedings under *Companies' Creditors Arrangement Act*.

Morawetz J.:

1 On May 20, 2009, I released an endorsement appointing Koskie Minsky as representative counsel with reasons to follow. The reasons are as follows.

2 This endorsement addresses five motions in which various parties seek to be appointed as representative counsel for various factions of Nortel's current and former employees (Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation are collectively referred to as the "Applicants" or "Nortel").

3 The proposed representative counsel are:

(i) Koskie Minsky LLP ("KM") who is seeking to represent all former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in respect of a pension from the Applicants. Approximately 2,000 people have retained KM.

(ii) Nelligan O'Brien Payne LLP and Shibley Righton LLP (collectively "NS") who are seeking to be co-counsel to represent all former non-unionized employees, terminated either prior to or after the CCAA filing date, to whom the Applicants owe severance and/or pay in lieu of reasonable notice. In addition, in a separate motion, NS seeks to be appointed as co-counsel to the continuing employees of Nortel. Approximately 460 people have retained NS and a further 106 have retained Macleod Dixon LLP, who has agreed to work with NS.

(iii) Juroviesky and Ricci LLP ("J&R") who is seeking to represent terminated employees or any person claiming an interest under or on behalf of former employees. At the time that this motion was heard approximately 120 people had retained J&R. A subsequent affidavit was filed indicating that this number had increased to 186.

(iv) Mr. Lewis Gottheil, in-house legal counsel for the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW") who is seeking to represent all retirees of the Applicants who were formerly members of one of the CAW locals when they were employees. Approximately 600 people have retained Mr. Gottheil or the CAW.

4 At the outset, it is noted that all parties who seek representation orders have submitted ample evidence that establishes that the legal counsel that they seek to be appointed as representative counsel are well respected members of the profession.

5 Nortel filed for CCAA protection on January 14, 2009 (the "Filing Date"). At the Filing Date, Nortel employed approximately 6,000 employees and had approximately 11,700 retirees or their spouses receiving pension and/or benefits from retirement plans sponsored by the Applicants.

6 The Monitor reports that the Applicants have continued to honour substantially all of the obligations to active employees. However, the Applicants acknowledge that upon commencement of the CCAA proceedings, they ceased making almost all payments to former employees of amounts that would constitute unsecured claims. Included in those amounts were payments to a number of former employees for termination and severance, as well as amounts under various retirement and retirement transition programs.

7 The Monitor is of the view that it is appropriate that there be representative counsel in light of the large number of former employees of the Applicants. The Monitor is of the view that former employee claims may require a combination of legal, financial, actuarial and advisory resources in order to be advanced and that representative counsel can efficiently co-ordinate such assistance for this large number of individuals.

8 The Monitor has reported that the Applicants' financial position is under pressure. The Monitor is of the view that the financial burden of multiple representative counsel would further increase this pressure.

9 These motions give rise to the following issues:

(i) when is it appropriate for the court to make a representation and funding order?

(ii) given the completing claims for representation rights, who should be appointed as representative counsel?

Issue 1 - Representative Counsel and Funding Orders

10 The court has authority under Rule 10.01 of the *Rules of Civil Procedure* to appoint representative counsel where persons with an interest in an estate cannot be readily ascertained, found or served.

11 Alternatively, Rule 12.07 provides the court with the authority to appoint a representative defendant where numerous persons have the same interests.

12 In addition, the court has a wide discretion pursuant to s. 11 of the CCAA to appoint representatives on behalf of a group of employees in CCAA proceedings and to order legal and other professional expenses of such representatives to be paid from the estate of the debtor applicant.

13 In the KM factum, it is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.

14 I am in agreement with these general submissions.

15 The benefits of representative counsel have also been recognized by both Nortel and by the Monitor. Nortel consents to the appointment of KM as the single representative counsel for all former employees. Nortel opposes the appointment of any additional representatives. The Monitor supports the Applicants' recommendation that KM be appointed as representative counsel. No party is opposed to the appointment of representative counsel.

16 In the circumstances of this case, I am satisfied that it is appropriate to exercise discretion pursuant to s. 11 of the CCAA to make a Rule 10 representation order.

Issue 2 - Who Should be Appointed as Representative Counsel?

17 The second issue to consider is who to appoint as representative counsel. On this issue, there are divergent views. The differences primarily centre around whether there are inherent conflicts in the positions of various categories of former employees.

18 The motion to appoint KM was brought by Messrs. Sproule, Archibald and Campbell (the "Koskie Representatives"). The Koskie Representatives seek a representation order to appoint KM as representative counsel for all former employees in Nortel's insolvency proceedings, except:

(a) any former chief executive officer or chairman of the board of directors, any non-employee members of the board of directors, or such former employees or officers that are subject to investigation and charges by the Ontario Securities Commission or the United States Securities and Exchange Commission;

(b) any former unionized employees who are represented by their former union pursuant to a Court approved representation order; and

(c) any former employee who chooses to represent himself or herself as an independent individual party to these proceedings.

19 Ms. Paula Klein and Ms. Joanne Reid, on behalf of the Recently Severed Canadian Nortel Employees ("RSCNE"), seek a representation order to appoint NS as counsel in respect of all former Nortel Canadian non-unionized employees to whom Nortel owes termination and severance pay (the "RSCNE Group").

20 Mr. Kent Felske and Mr. Dany Sylvain, on behalf of the Nortel Continuing Canadian Employees ("NCCE") seek a representative order to appoint NS as counsel in respect of all current Canadian non-unionized Nortel employees (the "NCCE Group").

21 J&R, on behalf of the Steering Committee (Mr. Michael McCorkle, Mr. Harvey Stein and Ms. Marie Lunney) for Nortel Terminated Canadian Employees ("NTCEC") owed termination and severance pay seek a representation order to appoint J&R in respect of any claim of any terminated employee arising out of the insolvency of Nortel for:

- (a) unpaid termination pay;
- (b) unpaid severance pay;
- (c) unpaid expense reimbursements; and
- (d) amounts and benefits payable pursuant to employment contracts between the Employees and Nortel

22 Mr. George Borosh and/or Ms. Debra Connor seek a representation order to represent all retirees of the Applicants who were formerly represented by the CAW (the "Retirees") or, alternatively, an order authorizing the CAW to represent the Retirees.

23 The former employees of Nortel have an interest in Nortel's CCAA proceedings in respect of their pension and employee benefit plans and in respect of severance, termination pay, retirement allowances and other amounts that the former employees consider are owed in respect of applicable contractual obligations and employment standards legislation.

24 Most former employees and survivors of former employees have basic entitlement to receive payment from the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan") or from the corresponding pension plan for unionized employees.

25 Certain former employees may also be entitled to receive payment from Nortel Networks Excess Plan (the "Excess Plan") in addition to their entitlement to the Pension Plan. The Excess Plan is a non-registered retirement plan which provides benefits to plan members in excess of those permitted under the registered Pension Plan in accordance with the *Income Tax Act*.

26 Certain former employees who held executive positions may also be entitled to receive payment from the Supplementary Executive Retirement Plan ("SERP") in addition to their entitlement to the Pension Plan. The SERP is a non-registered plan.

27 As of Nortel's last formal valuation dated December 31, 2006, the Pension Plan was funded at a level of 86% on a wind-up basis. As a result of declining equity markets, it is anticipated that the Pension Plan funding levels have declined since the date of the formal valuation and that Nortel anticipates that its Pension Plan funding requirements in 2009 will increase in a very substantial and material matter.

28 At this time, Nortel continues to fund the deficit in the Pension Plan and makes payment of all current service costs associated with the benefits; however, as KM points out in its factum, there is no requirement in the Initial Order compelling Nortel to continue making those payments.

29 Many retirees and former employees of Nortel are entitled to receive health and medical benefits and other benefits such as group life insurance (the "Health Care Plan"), some of which are funded through the Nortel Networks' Health and Welfare Trust (the "HWT").

30 Many former employees are entitled to a payment in respect of the Transitional Retirement Allowance ("TRA"), a payment which provides supplemental retirement benefits for those who at the time of their retirement elect to receive such payment. Some 442 non-union retirees have ceased to receive this benefit as a result of the CCAA proceedings.

31 Former employees who have been recently terminated from Nortel are owed termination pay and severance pay. There were 277 non-union former employees owed termination pay and severance pay at the Filing Date.

32 Certain former unionized employees also have certain entitlements including:

- (a) Voluntary Retirement Option ("VRO");
- (b) Retirement Allowance Payment ("RAP"); and
- (c) Layoff and Severance Payments

33 The Initial Order permitted Nortel to cease making payments to its former employees in respect of certain amounts owing to them and effective January 14, 2009, Nortel has ceased payment of the following:

- (a) all supplementary pensions which were paid from sources other than the Registered Pension Plan, including payments in respect of the Excess Plan and the SERP;
- (b) all TRA agreements where amounts were still owing to the affected former employees as at January 14, 2009;
- (c) all RAP agreements where amounts were still owing to the affected former employees as at January 14, 2009;
- (d) all severance and termination agreements where amounts were still owing to the affected former employees as at January 14, 2009; and
- (e) all retention bonuses where amounts were still owing to affected former employees as at January 14, 2009.

34 The representatives seeking the appointment of KM are members of the Nortel Retiree and Former Employee Protection Committee ("NRPC"), a national-based group of over 2,000 former employees. Its stated mandate is to defend and protect pensions, severance, termination and retirement payments and other benefits. In the KM factum, it is stated that since its inception, the NRPC has taken steps to organize across the country and it has assembled subcommittees in major centres. The NRPC consists of 20 individuals who it claims represent all different regions and interests and that they participate in weekly teleconference meetings with legal counsel to ensure that all former employees' concerns are appropriately addressed.

35 At paragraph 49 of the KM factum, counsel submits that NRPC members are a cross-section of all former employees and include a variety of interests, including those who have an interest in and/or are entitled to:

- (a) the basic Pension Plan as a deferred member or a member entitled to transfer value;
- (b) the Health Care Plan;
- (c) the Pension Plan and Health Care Plan as a survivor of a former employee;
- (d) Supplementary Retirement Benefits from the Excess Plan and the SERP plans;
- (e) severance and termination pay ; and

(f) TRA payments.

36 The representatives submit that they are well suited to represent all former employees in Nortel's CCAA proceedings in respect of all of their interests. The record (Affidavit of Mr. D. Sproule) references the considerable experience of KM in representing employee groups in large-scale restructurings.

37 With respect to the allegations of a conflict of interest as between the various employee groups (as described below), the position of the representatives seeking the appointment of KM is that all former employees have unsecured claims against Nortel in its CCAA proceedings and that there is no priority among claims in respect of Nortel's assets. Further, they submit that a number of former employees seeking severance and termination pay also have other interests, including the Pension Plan, TRA payments and the supplementary pension payments and that it would unjust and inefficient to force these individuals to hire individual counsel or to have separate counsel for separate claims.

38 Finally, they submit that there is no guarantee as to whether Nortel will emerge from the CCAA, whether it will file for bankruptcy or whether a receiver will be appointed or indeed whether even a plan of compromise will be filed. They submit that there is no actual conflict of interest at this time and that the court need not be concerned with hypothetical scenarios which may never materialize. Finally, they submit that in the unlikely event of a serious conflict in the group, such matters can be brought to the attention of the court by the representatives and their counsel on a *ex parte* basis for resolution.

39 The terminated employee groups seeking a representation order for both NS and J&R submit that separate representative counsel appointments are necessary to address the conflict between the pension group and the employee group as the two groups have separate legal, procedural, and equitable interests that will inevitably conflict during the CCAA process.

40 They submit that the pensioners under the Pension Plan are continuing to receive the full amount of the pension from the Pension Plan and as such they are not creditors of Nortel. Counsel submits that the interest of pensioners is in continuing to receive to receive their full pension and survivor benefits from the Pension Plan for the remainder of their lives and the lives of surviving spouses.

41 In the NS factum at paragraphs 44 - 58, the argument is put forward as to why the former employees to whom Nortel owes severance and termination pay should be represented separately from the pensioners. The thrust of the argument is that future events may dictate the response of the affected parties. At paragraph 51 of the factum, it is submitted that generally, the recently severed employees' primary interest is to obtain the fastest possible payout of the greatest amount of severance and/or pay in lieu of notice in order to alleviate the financial hardships they are currently experiencing. The interests of pensioners, on the other hand, is to maintain the status quo, in which they continue to receive full pension benefits as long as possible. The submission emphasizes that issues facing the pensioner group and the non-pensioner group are profoundly divergent as full monthly benefit payments for the pensioner group have continued to date while non-pensioners are receiving 86% of their lump sums on termination of employment, in accordance with the most recently filed valuation report.

42 The motion submitted by the NTCEC takes the distinction one step further. The NTCEC is opposed to the motion of NS. NS wishes to represent both the RSCNE and the NCCE. The NTCEC believes that the terminated employees who are owed unpaid wages, termination pay and/or severance should comprise their own distinct and individual class.

43 The NTCEC seek payment and fulfillment of Nortel's obligations to pay one or several of the following:

- (a) TRA;
- (b) 2008 bonuses; and
- (c) amendments to the Nortel Pension Plan

44 Counsel to NTCEC submits that the most glaring and obvious difference between the NCCE and the NTCEC, is that NCCE are still employed and have a continuing relationship with Nortel and have a source of employment income and may only have a contingent claim. The submission goes on to suggest that, if the NCCE is granted a representation order in these proceedings, they will seek to recover the full value of their TRA claim from Nortel during the negotiation process notwithstanding that one's claim for TRA does not crystallize until retirement or termination. On the other hand, the terminated employees, represented by the NTCEC and RSCNE are also claiming lost TRA benefits and that claim has crystallized because their employment with Nortel has ceased. Counsel further submits that the contingent claim of the NCCE for TRA is distinct and separate with the crystallized claim of the NTCEC and RSCNE for TRA.

45 Counsel to NTCEC further submits that there are difficulties with the claim of NCCE which is seeking financial redress in the CCAA proceedings for damages stemming from certain changes to the Nortel Networks Limited Managerial and Non-negotiated Pension Plan effective June 1, 2008 and Nortel's decision to decrease retirees benefits. Counsel submits that, even if the NCCE claims relating to the Pension Plan amendment are quantifiable, they are so dissimilar to the claims of the RSCNE and NTCEC, that the current and former Nortel employees cannot be viewed as a single group of creditors with common interests in these proceedings, thus necessitating distinct legal representation for each group of creditors.

46 Counsel further argues that NTCEC's sole mandate is to maximize recovery of unpaid wages, termination and severance pay which, those terminated employees as a result of Nortel's CCAA filing, have lost their employment income, termination pay and/or severance pay which would otherwise be protected by statute or common law.

47 KM, on behalf of the Koskie Representatives, responded to the concerns raised by NS and by J&R in its reply factum.

48 KM submits that the conflict of interest is artificial. KM submits that all members of the Pension Plan who are owed pensions face reductions on the potential wind-up of the Pension Plan due to serious under-funding and that temporarily maintaining of status quo monthly payments at 100%, although required by statute, does not avoid future reductions due to under-funding which offset any alleged overpayments. They submit that all pension members, whether they can withdraw 86% of their funds now and transfer them a locked-in vehicle or receive them later in the form of potentially reduced pensions, face a loss and are thus creditors of Nortel for the pension shortfalls.

49 KM also states that the submission of the RSCNE that non-pensioners may put pressure on Nortel to reduce monthly payments on pensioners ignores the *Ontario Pension Benefits Act* and its applicability in conjunction with the CCAA. It further submits that issues regarding the reduction of pensions and the transfers of commuted values are not dealt with through the CCAA proceedings, but through the Superintendent of Financial Services and the Plan Administrator in their administration and application of the PBA. KM concludes that the Nortel Pension Plans are not applicants in this matter nor is there a conflict given the application of the provisions of the PBA as detailed in the factum at paragraphs 11 - 21.

50 KM further submits that over 1,500 former employees have claims in respect of other employment and retirement related benefits such as the Excess Plan, the SERP, the TRA and other benefit allowances which are claims that have "crystallized" and are payable now. Additionally, they submit that 11,000 members of the Pension Plan are entitled to benefits from the Pensioner Health Care Plan which is not pre-funded, resulting in significant claims in Nortel's CCAA proceedings for lost health care benefits.

51 Finally, in addition to the lack of any genuine conflict of interest between former employees who are pensioners and those who are non-pensioners, there is significant overlap in interest between such individuals and a number of the former employees seeking severance and termination pay have the same or similar interests in other benefit payments, including the Pension Plan, Health Care Plan, TRA, SERP and Excess Plan payments. As well, former employees who have an interest in the Pension Plan also may be entitled to severance and termination pay.

52 With respect to the motions of NS and J&R, I have not been persuaded that there is a real and direct conflict of interest. Claims under the Pension Plan, to the extent that it is funded, are not affected by the CCAA proceedings. To the extent that there is a deficiency in funding, such claims are unsecured claims against Nortel. In a sense, deficiency claims are not dissimilar from other employee benefit claims.

53 To the extent that there may be potentially a divergence of interest as between pension-based claims and terminated-employee claims, these distinctions are, at this time, hypothetical. At this stage of the proceeding, there has been no attempt by Nortel to propose a creditor classification, let alone a plan of arrangement to its creditors. It seems to me that the primary emphasis should be placed on ensuring that the arguments of employees are placed before the court in the most time efficient and cost effective way possible. In my view, this can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims.

54 It is conceivable that there will be differences of opinion between employees at some point in the future, but if such differences of opinion or conflict arise, I am satisfied that this issue will be recognized by representative counsel and further directions can be provided.

55 A submission was also made to the effect that certain individuals or groups of individuals should not be deprived of their counsel of choice. In my view, the effect of appointing one representative counsel does not, in any way, deprive a party of their ability to be represented by the counsel of their choice. The Notice of Motion of KM provides that any former employee who does not wish to be bound by the representative order may take steps to notify KM of their decision and may thereafter appear as an independent party.

56 In the responding factum at paragraphs 28 - 30, KM submits that each former employee, whether or not entitled to an interest in the Pension Plan, has a common interest in that each one is an unsecured creditor who is owed some form of deferred compensation, being it severance pay, TRA or RAP payments, supplementary pensions, health benefits or benefits under a registered Pension Plan and that classifying former employees as one group of creditors will improve the efficiency and effectiveness of Nortel's CCAA proceedings and will facilitate the reorganization of the company. Further, in the event of a liquidation of Nortel, each former employee will seek to recover deferred compensation claims as an unsecured creditor. Thus, fragmentation of the group is undesirable. Further, all former employees also have a common legal position as unsecured creditors of Nortel in that their claims all arise out of the terms and conditions of their employment and regardless of the form of payment, unpaid severance pay and termination pay, unpaid health benefits, unpaid supplementary pension benefits and other unpaid retirement benefits are all remuneration of some form arising from former employment with Nortel.

57 The submission on behalf of KM concludes that funds in a pension plan can also be described as deferred wages. An employer who creates a pension plan agrees to provide benefits to retiring employees as a form of compensation to that employee. An underfunded pension plan reflects the employer's failure to pay the deferred wages owing to former employees.

58 In its factum, the CAW submits that the two proposed representative individuals are members of the Nortel Pension Plan applicable to unionized employees. Both individuals are former unionized employees of Nortel and were members of the CAW. Counsel submits that naming them as representatives on behalf of all retirees of Nortel who were members of the CAW will not result in a conflict with any other member of the group.

59 Counsel to the CAW also stated that in the event that the requested representation order is not granted, those 600 individuals who have retained Mr. Lewis Gottheil will still be represented by him, and the other similarly situated individuals might possibly be represented by other counsel. The retainer specifically provides that no individual who retains Mr. Gottheil shall be charged any fees nor be responsible for costs or penalties. It further provides that the retainer may be discontinued by the individual or by counsel in accordance with applicable rules.

60 Counsel further submits that the 600 members of the group for which the representation order is being sought have already retained counsel of their choice, that being Mr. Lewis Gottheil of the CAW. However, if the requested representative order is not granted, there will still be a group of 600 individual members of the Pension Plan who are represented by Mr. Gottheil. As a result, counsel acknowledges there is little to no difference that will result from granting the requested representation order in this case, except that all retirees formerly represented by the union will have one counsel, as opposed to two or several counsel if the order is not granted.

61 In view of this acknowledgement, it seems to me that there is no advantage to be gained by granting the CAW representative status. There will be no increased efficiencies, no simplification of the process, nor any real practical benefit to be gained by such an order.

62 Notwithstanding that creditor classification has yet to be proposed in this CCAA proceeding, it is useful, in my view, to make reference to some of the principles of classification. In *Stelco Inc., Re*, the Ontario Court of Appeal noted that the classification of creditors in the CCAA proceeding is to be determined based on the "commonality of interest" test. In *Stelco Inc., Re*, the Court of Appeal upheld the reasoning of Paperny J. (as she then was) in *Canadian Airlines Corp., Re* and articulated the following factors to be considered in the assessment of the "commonality of interest".

In summary, the case has established the following principles applicable to assessing commonality of interest:

1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.
4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

Stelco Inc., Re (2005), 15 C.B.R. (5th) 307 (Ont. C.A.), paras 21-23; *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), para 31.

63 I have concluded that, at this point in the proceedings, the former employees have a "commonality of interest" and that this process can be best served by the appointment of one representative counsel.

64 As to which counsel should be appointed, all firms have established their credentials. However, KM is, in my view, the logical choice. They have indicated a willingness to act on behalf of all former employees. The choice of KM is based on the broad mandate they have received from the employees, their experience in representing groups of retirees and employees in large scale restructurings and speciality practice in the areas of pension, benefits, labour and employment, restructuring and insolvency law, as well as my decision that the process can be best served by having one firm put forth the arguments on behalf of all employees as opposed to subdividing the employee group.

65 The motion of Messrs. Sproule, Archibald and Campbell is granted and Koskie Minsky LLP is appointed as Representative Counsel. This representation order is also to cover the fees and disbursements of Koskie Minsky.

66 The motions to appoint Nelligan O'Brien Payne and Shibley Righton, Juroviesky and Ricci, and the CAW as representative counsel are dismissed.

67 I would ask that counsel prepare a form of order for my consideration.

Order accordingly.

Footnotes

* Additional reasons at *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3530 (Ont. S.C.J. [Commercial List]).

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TAB 8

2005 CarswellOnt 1188
Ontario Court of Appeal

Stelco Inc., Re

2005 CarswellOnt 1188, [2005] O.J. No. 1171, 138 A.C.W.S. (3d) 222, 196 O.A.C.
142, 253 D.L.R. (4th) 109, 2 B.L.R. (4th) 238, 75 O.R. (3d) 5, 9 C.B.R. (5th) 135

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

And In the Matter of a proposed plan of compromise or arrangement
with respect to Stelco Inc. and the other Applicants listed in Schedule "A"

Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Goudge, Feldman, Blair JJ.A.

Heard: March 18, 2005

Judgment: March 31, 2005

Docket: CA M32289

Proceedings: reversed *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 742, [2005] O.J. No. 729, 7 C.B.R. (5th) 307 ((Ont. S.C.J. [Commercial List])); reversed *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 743, [2005] O.J. No. 730, 7 C.B.R. (5th) 310 ((Ont. S.C.J. [Commercial List])); additional reasons to *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 742, [2005] O.J. No. 729, 7 C.B.R. (5th) 307 ((Ont. S.C.J. [Commercial List]))

Counsel: Jeffrey S. Leon, Richard B. Swan for Appellants, Michael Woolcombe, Roland Keiper
Kenneth T. Rosenberg, Robert A. Centa for Respondent, United Steelworkers of America
Murray Gold, Andrew J. Hatnay for Respondent, Retired Salaried Beneficiaries of Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd., Welland Pipe Ltd.
Michael C.P. McCreary, Carrie L. Clynick for USWA Locals 5328, 8782
John R. Varley for Active Salaried Employee Representative
Michael Barrack for Stelco Inc.
Peter Griffin for Board of Directors of Stelco Inc.
K. Mahar for Monitor
David R. Byers (Agent) for CIT Business Credit, DIP Lender

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

APPEAL by potential board members from judgments reported at *Stelco Inc., Re* (2005), 2005 CarswellOnt 742, 7 C.B.R. (5th) 307 (Ont. S.C.J. [Commercial List]) and at *Stelco Inc., Re* (2005), 2005 CarswellOnt 743, 7 C.B.R. (5th) 310 (Ont. S.C.J. [Commercial List]), granting motion by employees for removal of certain directors from board of corporation under protection of *Companies Creditors' Arrangement Act*.

Blair J.A.:

Part I — Introduction

1 Stelco Inc. and four of its wholly owned subsidiaries obtained protection from their creditors under the *Companies' Creditors Arrangement Act*¹ on January 29, 2004. Since that time, the Stelco Group has been engaged in a high profile,

and sometimes controversial, process of economic restructuring. Since October 2004, the restructuring has revolved around a court-approved capital raising process which, by February 2005, had generated a number of competitive bids for the Stelco Group.

2 Farley J., an experienced judge of the Superior Court Commercial List in Toronto, has been supervising the CCAA process from the outset.

3 The appellants, Michael Woolcombe and Roland Keiper, are associated with two companies — Clearwater Capital Management Inc., and Equilibrium Capital Management Inc. — which, respectively, hold approximately 20% of the outstanding publicly traded common shares of Stelco. Most of these shares have been acquired while the CCAA process has been ongoing, and Messrs. Woolcombe and Keiper have made it clear publicly that they believe there is good shareholder value in Stelco in spite of the restructuring. The reason they are able to take this position is that there has been a solid turn around in worldwide steel markets, as a result of which Stelco, although remaining in insolvency protection, is earning annual operating profits.

4 The Stelco board of directors ("the Board") has been depleted as a result of resignations, and in January of this year Messrs. Woolcombe and Keiper expressed an interest in being appointed to the Board. They were supported in this request by other shareholders who, together with Clearwater and Equilibrium, represent about 40% of the Stelco common shareholders. On February 18, 2005, the Board appointed the appellants directors. In announcing the appointments publicly, Stelco said in a press release:

After careful consideration, and given potential recoveries at the end of the company's restructuring process, the Board responded favourably to the requests by making the appointments announced today.

Richard Drouin, Chairman of Stelco's Board of Directors, said: "I'm pleased to welcome Roland Keiper and Michael Woolcombe to the Board. Their experience and their perspective will assist the Board as it strives to serve the best interests of all our stakeholders. We look forward to their positive contribution."

5 On the same day, the Board began its consideration of the various competing bids that had been received through the capital raising process.

6 The appointments of the appellants to the Board incensed the employee stakeholders of Stelco ("the Employees"), represented by the respondent Retired Salaried Beneficiaries of Stelco and the respondent United Steelworkers of America ("USWA"). Outstanding pension liabilities to current and retired employees are said to be Stelco's largest long-term liability — exceeding several billion dollars. The Employees perceive they do not have the same, or very much, economic leverage in what has sometimes been referred to as 'the bare knuckled arena' of the restructuring process. At the same time, they are amongst the most financially vulnerable stakeholders in the piece. They see the appointments of Messrs. Woolcombe and Keiper to the Board as a threat to their well being in the restructuring process, because the appointments provide the appellants, and the shareholders they represent, with direct access to sensitive information relating to the competing bids to which other stakeholders (including themselves) are not privy.

7 The Employees fear that the participation of the two major shareholder representatives will tilt the bid process in favour of maximizing shareholder value at the expense of bids that might be more favourable to the interests of the Employees. They sought and obtained an order from Farley J. removing Messrs. Woolcombe and Keiper from their short-lived position of directors, essentially on the basis of that apprehension.

8 The Employees argue that there is a reasonable apprehension the appellants would not be able to act in the best interests of the corporation — as opposed to their own best interests as shareholders — in considering the bids. They say this is so because of prior public statements by the appellants about enhancing shareholder value in Stelco, because of the appellants' linkage to such a large shareholder group, because of their earlier failed bid in the restructuring, and because of their opposition to a capital proposal made in the proceeding by Deutsche Bank (known as "the Stalking Horse Bid"). They submit further that the appointments have poisoned the atmosphere of the restructuring process, and

that the Board made the appointments under threat of facing a potential shareholders' meeting where the members of the Board would be replaced en masse.

9 On the other hand, Messrs. Woolcombe and Keiper seek to set aside the order of Farley J. on the grounds that (a) he did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test applied by the motion judge has no application to the removal of directors, (c) the motion judge erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) the facts do not meet any test that would justify the removal of directors by a court in any event.

10 For the reasons that follow, I would grant leave to appeal, allow the appeal, and order the reinstatement of the applicants to the Board.

Part II — Additional Facts

11 Before the initial CCAA order on January 29, 2004, the shareholders of Stelco had last met at their annual general meeting on April 29, 2003. At that meeting they elected eleven directors to the Board. By the date of the initial order, three of those directors had resigned, and on November 30, 2004, a fourth did as well, leaving the company with only seven directors.

12 Stelco's articles provide for the Board to be made up of a minimum of ten and a maximum of twenty directors. Consequently, after the last resignation, the company's corporate governance committee began to take steps to search for new directors. They had not succeeded in finding any prior to the approach by the appellants in January 2005.

13 Messrs. Woolcombe and Keiper had been accumulating shares in Stelco and had been participating in the CCAA proceedings for some time before their request to be appointed to the Board, through their companies, Clearwater and Equilibrium. Clearwater and Equilibrium are privately held, Ontario-based, investment management firms. Mr. Keiper is the president of Equilibrium and associated with Clearwater. Mr. Woolcombe is a consultant to Clearwater. The motion judge found that they "come as a package".

14 In October 2004, Stelco sought court approval of its proposed method of raising capital. On October 19, 2004, Farley J. issued what has been referred to as the Initial Capital Process Order. This order set out a process by which Stelco, under the direction of the Board, would solicit bids, discuss the bids with stakeholders, evaluate the bids, and report on the bids to the court.

15 On November 9, 2004, Clearwater and Equilibrium announced they had formed an investor group and had made a capital proposal to Stelco. The proposal involved the raising of \$125 million through a rights offering. Mr. Keiper stated at the time that he believed "the value of Stelco's equity would have the opportunity to increase substantially if Stelco emerged from CCAA while minimizing dilution of its shareholders." The Clearwater proposal was not accepted.

16 A few days later, on November 14, 2004, Stelco approved the Stalking Horse Bid. Clearwater and Equilibrium opposed the Deutsche Bank proposal. Mr. Keiper criticized it for not providing sufficient value to existing shareholders. However, on November 29, 2004, Farley J. approved the Stalking Horse Bid and amended the Initial Capital Process Order accordingly. The order set out the various channels of communication between Stelco, the monitor, potential bidders and the stakeholders. It provided that members of the Board were to see the details of the different bids before the Board selected one or more of the offers.

17 Subsequently, over a period of two and a half months, the shareholding position of Clearwater and Equilibrium increased from approximately 5% as at November 19, to 14.9% as at January 25, 2005, and finally to approximately 20% on a fully diluted basis as at January 31, 2005. On January 25, Clearwater and Equilibrium announced that they had reached an understanding jointly to pursue efforts to maximize shareholder value at Stelco. A press release stated:

Such efforts will include seeking to ensure that the interests of Stelco's equity holders are appropriately protected by its board of directors and, ultimately, that Stelco's equity holders have an appropriate say, by vote or otherwise, in determining the future course of Stelco.

18 On February 1, 2005, Messrs. Keiper and Woollcombe and others representatives of Clearwater and Equilibrium, met with Mr. Drouin and other Board members to discuss their views of Stelco and a fair outcome for all stakeholders in the proceedings. Mr. Keiper made a detailed presentation, as Mr. Drouin testified, "encouraging the Board to examine how Stelco might improve its value through enhanced disclosure and other steps". Mr. Keiper expressed confidence that "there was value to the equity of Stelco", and added that he had backed this view up by investing millions of dollars of his own money in Stelco shares. At that meeting, Clearwater and Equilibrium requested that Messrs. Woollcombe and Keiper be added to the Board and to Stelco's restructuring committee. In this respect, they were supported by other shareholders holding about another 20% of the company's common shares.

19 At paragraphs 17 and 18 of his affidavit, Mr. Drouin, summarized his appraisal of the situation:

17. It was my assessment that each of Mr. Keiper and Mr. Woollcombe had personal qualities which would allow them to make a significant contribution to the Board in terms of their backgrounds and their knowledge of the steel industry generally and Stelco in particular. In addition I was aware that their appointment to the Board was supported by approximately 40% of the shareholders. In the event that these shareholders successfully requisitioned a shareholders meeting they were in a position to determine the composition of the entire Board.

18. I considered it essential that there be continuity of the Board through the CCAA process. I formed the view that the combination of existing Board members and these additional members would provide Stelco with the most appropriate board composition in the circumstances. The other members of the Board also shared my views.

20 In order to ensure that the appellants understood their duties as potential Board members and, particularly that "they would no longer be able to consider only the interests of shareholders alone but would have fiduciary responsibilities as a Board member to the corporation as a whole", Mr. Drouin and others held several further meetings with Mr. Woollcombe and Mr. Keiper. These discussions "included areas of independence, standards, fiduciary duties, the role of the Board Restructuring Committee and confidentiality matters". Mr. Woollcombe and Mr. Keiper gave their assurances that they fully understood the nature and extent of their prospective duties, and would abide by them. In addition, they agreed and confirmed that:

- a) Mr. Woollcombe would no longer be an advisor to Clearwater and Equilibrium with respect to Stelco;
- b) Clearwater and Equilibrium would no longer be represented by counsel in the CCAA proceedings; and
- c) Clearwater and Equilibrium then had no involvement in, and would have no future involvement, in any bid for Stelco.

21 On the basis of the foregoing — and satisfied "that Messrs. Keiper and Woollcombe would make a positive contribution to the various issues before the Board both in [the] restructuring and the ongoing operation of the business" — the Board made the appointments on February 18, 2005.

22 Seven days later, the motion judge found it "appropriate, just, necessary and reasonable to declare" those appointments "to be of no force and effect" and to remove Messrs. Woollcombe and Keiper from the Board. He did so not on the basis of any actual conduct on the part of the appellants as directors of Stelco but because there was some risk of anticipated conduct in the future. The gist of the motion judge's rationale is found in the following passage from his reasons (at para. 23):

In these particular circumstances and aside from the Board feeling coerced into the appointments for the sake of continuing stability, I am not of the view that it would be appropriate to wait and see if there was any explicit action

on behalf of K and W while conducting themselves as Board members which would demonstrate that they had not lived up to their obligations to be "neutral". They may well conduct themselves beyond reproach. But if they did not, the fallout would be very detrimental to Stelco and its ability to successfully emerge. What would happen to the bids in such a dogfight? I fear that it would be trying to put Humpty Dumpty back together again. The same situation would prevail even if K and W conducted themselves beyond reproach but with the Board continuing to be concerned that they not do anything seemingly offensive to the bloc. The risk to the process and to Stelco in its emergence is simply too great to risk the wait and see approach.

Part III — Leave to Appeal

23 Because of the "real time" dynamic of this restructuring project, Laskin J.A. granted an order on March 4, 2005, expediting the appellants' motion for leave to appeal, directing that it be heard orally and, if leave be granted, directing that the appeal be heard at the same time. The leave motion and the appeal were argued together, by order of the panel, on March 18, 2005.

24 This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30, [2002] O.J. No. 1377 (Ont. C.A. [In Chambers]), at para. 15. This criterion is determined in accordance with a four-pronged test, namely,

- a) whether the point on appeal is of significance to the practice;
- b) whether the point is of significance to the action;
- c) whether the appeal is *prima facie* meritorious or frivolous;
- d) whether the appeal will unduly hinder the progress of the action.

25 Counsel agree that (d) above is not relevant to this proceeding, given the expedited nature of the hearing. In my view, the tests set out in (a) - (c) are met in the circumstances, and as such, leave should be granted. The issue of the court's jurisdiction to intervene in corporate governance issues during a CCAA restructuring, and the scope of its discretion in doing so, are questions of considerable importance to the practice and on which there is little appellate jurisprudence. While Messrs. Woolcombe and Keiper are pursuing their remedies in their own right, and the company and its directors did not take an active role in the proceedings in this court, the Board and the company did stand by their decision to appoint the new directors at the hearing before the motion judge and in this court, and the question of who is to be involved in the Board's decision making process continues to be of importance to the CCAA proceedings. From the reasons that follow it will be evident that in my view the appeal has merit.

26 Leave to appeal is therefore granted.

Part IV — The Appeal

The Positions of the Parties

27 The appellants submit that,

- a) in exercising its discretion under the CCAA, the court is not exercising its "inherent jurisdiction" as a superior court;
- b) there is no jurisdiction under the CCAA to remove duly elected or appointed directors, notwithstanding the broad discretion provided by s. 11 of that Act; and that,
- c) even if there is jurisdiction, the motion judge erred:

- (i) by relying upon the administrative law test for reasonable apprehension of bias in determining that the directors should be removed;
- (ii) by rejecting the application of the "business judgment" rule to the unanimous decision of the Board to appoint two new directors; and,
- (iii) by concluding that Clearwater and Equilibrium, the shareholders with whom the appellants are associated, were focussed solely on a short-term investment horizon, without any evidence to that effect, and therefore concluding that there was a tangible risk that the appellants would not be neutral and act in the best interests of Stelco and all stakeholders in carrying out their duties as directors.

28 The respondents' arguments are rooted in fairness and process. They say, first, that the appointment of the appellants as directors has poisoned the atmosphere of the CCAA proceedings and, secondly, that it threatens to undermine the even-handedness and integrity of the capital raising process, thus jeopardizing the ability of the court at the end of the day to approve any compromise or arrangement emerging from that process. The respondents contend that Farley J. had jurisdiction to ensure the integrity of the CCAA process, including the capital raising process Stelco had asked him to approve, and that this court should not interfere with his decision that it was necessary to remove Messrs. Woollcombe and Keiper from the Board in order to ensure the integrity of that process. A judge exercising a supervisory function during a CCAA proceeding is owed considerable deference: *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.), at para. 8.

29 The crux of the respondents' concern is well-articulated in the following excerpt from paragraph 72 of the factum of the Retired Salaried Beneficiaries:

The appointments of Keiper and Woollcombe violated every tenet of fairness in the restructuring process that is supposed to lead to a plan of arrangement. One stakeholder group — particular investment funds that have acquired Stelco shares during the CCAA itself — have been provided with privileged access to the capital raising process, and voting seats on the Corporation's Board of Directors and Restructuring Committee. No other stakeholder has been treated in remotely the same way. To the contrary, the salaried retirees have been completely excluded from the capital raising process and have no say whatsoever in the Corporation's decision-making process.

30 The respondents submit that fairness, and the perception of fairness, underpin the CCAA process, and depend upon effective judicial supervision: see *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.); *Ivaco Inc., Re* (2004), 3 C.B.R. (5th) 33 (Ont. S.C.J. [Commercial List]), at para.15-16. The motion judge reasonably decided to remove the appellants as directors in the circumstances, they say, and this court should not interfere.

Jurisdiction

31 The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

32 The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd., Re*, [2000] O.J. No. 786 (Ont. S.C.J. [Commercial List]), at para. 11. See also, *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at p. 320; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]). Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]); and *Westar Mining Ltd., Re* (1992), 70 B.C.L.R. (2d) 6 (B.C. S.C.).

33 It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent Jurisdiction

34 Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law", permitting the court "to maintain its authority and to prevent its process being obstructed and abused". It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner". See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28. In Halsbury's Laws of England, 4th ed. (London: Lexis-Nexis UK, 1973 -) vol. 37, at para. 14, the concept is described as follows:

In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

35 In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the Legislature has acted. As Farley J. noted in *Royal Oak Mines Inc.*, *supra*, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play" (para. 4). See also, *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), [1976] 2 S.C.R. 475 (S.C.C.) at 480; *Richtree Inc., Re*, [2005] O.J. No. 251 (Ont. S.C.J. [Commercial List]).

36 In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in *Skeena Cellulose Inc., Re*, [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (B.C. C.A.) at para. 46, that:

... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above,² rather than the integrity of their own process.

37 As Jacob observes, in his article "The Inherent Jurisdiction of the Court", *supra*, at p. 25:

The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

38 I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however — difficult as it may be to draw — between the *court's* process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the *company's* process, on the other hand. The court simply supervises the latter process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose".³ Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

The Section 11 Discretion

39 This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, the s. 11 discretion — in spite of its considerable breadth and flexibility — does not permit the exercise of such a power in and of itself. There may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the CBCA, and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA. However, this was not argued in the present case, and the facts before the court would not justify the removal of Messrs. Woollcombe and Keiper on oppression remedy grounds.

40 The pertinent portions of s. 11 of the CCAA provide as follows:

Powers of court

11. (1) Notwithstanding anything in the *Bankruptcy* and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

Initial application court orders

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

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

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

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

Other than initial application court orders

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose.

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

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

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

Burden of proof on application

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

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

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

41 The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as *R. v. Sharpe*, [2001] 1 S.C.R. 45 (S.C.C.), at para. 33, and *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21 is articulated in E.A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) as follows:

Today, there is only one principle or approach, namely, 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.

See also Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at page 262.

42 The interpretation of s. 11 advanced above is true to these principles. It is consistent with the purpose and scheme of the CCAA, as articulated in para. 38 above, and with the fact that corporate governance matters are dealt with in other statutes. In addition, it honours the historical reluctance of courts to intervene in such matters, or to second-guess the business decisions made by directors and officers in the course of managing the business and affairs of the corporation.

43 Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparagraphs 11(3)(a)-(c) and 11(4)(a)-(c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. I agree.

44 What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff General Partner Ltd., supra*, at para 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance *the company's* restructuring efforts.

45 With these principles in mind, I turn to an analysis of the various factors underlying the interpretation of the s. 11 discretion.

46 I start with the proposition that at common law directors could not be removed from office during the term for which they were elected or appointed: *London Finance Corp. v. Banking Service Corp.* (1922), 23 O.W.N. 138 (Ont. H.C.); *Stephenson v. Vokes* (1896), 27 O.R. 691 (Ont. H.C.). The authority to remove must therefore be found in statute law.

47 In Canada, the CBCA and its provincial equivalents govern the election, appointment and removal of directors, as well as providing for their duties and responsibilities. Shareholders elect directors, but the directors may fill vacancies that occur on the board of directors pending a further shareholders meeting: CBCA, ss. 106(3) and 111.⁴ The specific power to remove directors is vested in the shareholders by s. 109(1) of the CBCA. However, s. 241 empowers the court — where it finds that oppression as therein defined exists — to "make any interim or final order it thinks fit", including (s. 241(3)(e)) "an order appointing directors in place of or in addition to all or any of the directors then in office". This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of misconduct required to trigger oppression remedy relief: see, for example, *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2004] O.J. No. 4722 (Ont. S.C.J.).

48 There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment, and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, *supra*, at p. 480; *Royal Oak Mines Inc. (Re)*, *supra*; and *Richtree Inc. (Re)*, *supra*.

49 At paragraph 7 of his reasons, the motion judge said:

The board is charged with the standard duty of "manage[ing], [sic] or supervising the management, of the business and affairs of the corporation": s. 102(1) CBCA. *Ordinarily the Court will not interfere with the composition of the board of directors. However, if there is good and sufficient valid reason to do so, then the Court must not hesitate to do so to correct a problem.* The directors should not be required to constantly look over their shoulders for this would be the sure recipe for board paralysis which would be so detrimental to a restructuring process; thus interested parties should only initiate a motion where it is reasonably obvious that there is a problem, actual or poised to become actual.

[emphasis added]

50 Respectfully, I see no authority in s. 11 of the CCAA for the court to interfere with the composition of a board of directors on such a basis.

51 Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power — which the courts are disinclined to exercise in any event — except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

The Oppression Remedy Gateway

52 The fact that s. 11 does not itself provide the authority for a CCAA judge to order the removal of directors does not mean that the supervising judge is powerless to make such an order, however. Section 20 of the CCAA offers a gateway to the oppression remedy and other provisions of the CBCA and similar provincial statutes. Section 20 states:

The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

53 The CBCA is legislation that "makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them". Accordingly, the powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances.

54 I do not accept the respondents' argument that the motion judge had the authority to order the removal of the appellants by virtue of the power contained in s. 145(2)(b) of the CBCA to make an order "declaring the result of the disputed election or appointment" of directors. In my view, s. 145 relates to the procedures underlying disputed elections or appointments, and not to disputes over the composition of the board of directors itself. Here, it is conceded that the appointment of Messrs. Woollcombe and Keiper as directors complied with all relevant statutory requirements. Farley J. quite properly did not seek to base his jurisdiction on any such authority.

The Level of Conduct Required

55 Colin Campbell J. recently invoked the oppression remedy to remove directors, without appointing anyone in their place, in *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, *supra*. The bar is high. In reviewing the applicable law, C. Campbell J. said (para. 68):

Director removal is an *extraordinary remedy* and certainly should be *imposed most sparingly*. As a starting point, I accept the basic proposition set out in Peterson, "Shareholder Remedies in Canada"⁵:

SS. 18.172 *Removing and appointing directors to the board is an extreme form of judicial intervention. The board of directors is elected by the shareholders, vested with the power to manage the corporation, and appoints the officers of the company who undertake to conduct the day-to-day affairs of the corporation. [Footnote omitted.] It is clear that the board of directors has control over policymaking and management of the corporation. By tampering with a board, a court directly affects the management of the corporation. If a reasonable balance between protection of corporate stakeholders and the freedom of management to conduct the affairs of the business in an efficient manner is desired, altering the board of directors should be a measure of last resort. The order could be suitable where the continuing presence of the incumbent directors is harmful to both the company and the interests of corporate stakeholders, and where the appointment of a new director or directors would remedy the oppressive conduct without a receiver or receiver-manager.*

[emphasis added]

56 C. Campbell J. found that the continued involvement of the Ravelston directors in the *Hollinger* situation would "significantly impede" the interests of the public shareholders and that those directors were "motivated by putting their interests first, not those of the company" (paras. 82-83). The evidence in this case is far from reaching any such benchmark, however, and the record would not support a finding of oppression, even if one had been sought.

57 Everyone accepts that there is no evidence the appellants have conducted themselves, as directors — in which capacity they participated over two days in the bid consideration exercise — in anything but a neutral fashion, having regard to the best interests of Stelco and all of the stakeholders. The motion judge acknowledged that the appellants "may well conduct themselves beyond reproach". However, he simply decided there was a risk — a reasonable apprehension — that Messrs. Woollcombe and Keiper would not live up to their obligations to be neutral in the future.

58 The risk or apprehension appears to have been founded essentially on three things: (1) the earlier public statements made by Mr. Keiper about "maximizing shareholder value"; (2) the conduct of Clearwater and Equilibrium in criticizing and opposing the Stalking Horse Bid; and (3) the motion judge's opinion that Clearwater and Equilibrium — the shareholders represented by the appellants on the Board — had a "vision" that "usually does not encompass any significant concern for the long-term competitiveness and viability of an emerging corporation", as a result of which the appellants would approach their directors' duties looking to liquidate their shares on the basis of a "short-term hold" rather than with the best interests of Stelco in mind. The motion judge transposed these concerns into anticipated predisposed conduct on the part of the appellants as directors, despite their apparent understanding of their duties as directors and their assurances that they would act in the best interests of Stelco. He therefore concluded that "the risk to the process and to Stelco in its emergence [was] simply too great to risk the wait and see approach".

59 Directors have obligations under s. 122(1) of the CBCA (a) to act honestly and in good faith with a view to the best interest of the corporation (the "statutory fiduciary duty" obligation), and (b) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the "duty of care" obligation). They are also subject to control under the oppression remedy provisions of s. 241. The general nature of these duties does not change when the company approaches, or finds itself in, insolvency: *People's Department Stores Ltd. (1992) Inc., Re*, [2004] S.C.J. No. 64 (S.C.C.) at paras. 42-49.

60 In *Peoples* the Supreme Court noted that "the interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders" (para. 43), but also accepted "as an accurate statement of the law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" (para. 42). Importantly as well — in the context of "the shifting interest and incentives of shareholders and creditors" — the court stated (para. 47):

In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders.

61 In determining whether directors have fallen foul of those obligations, however, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. Although the motion judge concluded that there was a risk of harm to the Stelco process if Messrs Woollcombe and Keiper remained as directors, he did not assess the level of that risk. The record does not support a finding that there was a sufficient risk of sufficient misconduct to warrant a conclusion of oppression. The motion judge was not asked to make such a finding, and he did not do so.

62 The respondents argue that this court should not interfere with the decision of the motion judge on grounds of deference. They point out that the motion judge has been case-managing the restructuring of Stelco under the CCAA for over fourteen months and is intimately familiar with the circumstances of Stelco as it seeks to restructure itself and emerge from court protection.

63 There is no question that the decisions of judges acting in a supervisory role under the CCAA, and particularly those of experienced commercial list judges, are entitled to great deference: see *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 (Ont. C.A.) at para. 16. The discretion must be exercised judicially and in accordance with the principles governing its operation. Here, respectfully, the motion judge misconstrued his authority, and made an order that he was not empowered to make in the circumstances.

64 The appellants argued that the motion judge made a number of findings without any evidence to support them. Given my decision with respect to jurisdiction, it is not necessary for me to address that issue.

The Business Judgment Rule

65 The appellants argue as well that the motion judge erred in failing to defer to the unanimous decision of the Stelco directors in deciding to appoint them to the Stelco Board. It is well-established that judges supervising restructuring proceedings — and courts in general — will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in *Peoples, supra*, at para. 67:

Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making . . .

66 In *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (Ont. C.A.) at 320, this court adopted the following statement by the trial judge, Anderson J.:

Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority.⁶

67 McKinlay J.A then went on to say:

There can be no doubt that on an application under s. 234⁷ the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not mean that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.

68 Although a judge supervising a CCAA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind. See also *Skeena Cellulose Inc., Re, supra*, *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]); *Olympia & York Developments Ltd. (Re), supra*; *Alberta-Pacific Terminals Ltd., Re* (1991), 8 C.B.R. (3d) 99 (B.C. S.C.). The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.

69 Here, the motion judge was alive to the "business judgment" dimension in the situation he faced. He distinguished the application of the rule from the circumstances, however, stating at para. 18 of his reasons:

With respect I do not see the present situation as involving the "management of the business and affairs of the corporation", but rather as a quasi-constitutional aspect of the corporation entrusted albeit to the Board pursuant to s. 111(1) of the CBCA. I agree that where a board is actually engaged in the business of a judgment situation, the board should be given appropriate deference. However, to the contrary in this situation, I do not see it as a situation calling for (as asserted) more deference, but rather considerably less than that. With regard to this decision of the Board having impact upon the capital raising process, as I conclude it would, then similarly deference ought not to be given.

70 I do not see the distinction between the directors' role in "the management of the business and affairs of the corporation" (CBCA, s. 102) — which describes the directors' overall responsibilities — and their role with respect to a "quasi-constitutional aspect of the corporation" (i.e. in filling out the composition of the board of directors in the event of a vacancy). The "affairs" of the corporation are defined in s. 1 of the CBCA as meaning "the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include

the business carried on by such bodies corporate". Corporate governance decisions relate directly to such relationships and are at the heart of the Board's business decision-making role regarding the corporation's business *and* affairs. The dynamics of such decisions, and the intricate balancing of competing interests and other corporate-related factors that goes into making them, are no more within the purview of the court's knowledge and expertise than other business decisions, and they deserve the same deferential approach. Respectfully, the motion judge erred in declining to give effect to the business judgment rule in the circumstances of this case.

71 This is not to say that the conduct of the Board in appointing the appellants as directors may never come under review by the supervising judge. The court must ultimately approve and sanction the plan of compromise or arrangement as finally negotiated and accepted by the company and its creditors and stakeholders. The plan must be found to be fair and reasonable before it can be sanctioned. If the Board's decision to appoint the appellants has somehow so tainted the capital raising process that those criteria are not met, any eventual plan that is put forward will fail.

72 The respondents submit that it makes no sense for the court to have jurisdiction to declare the process flawed only after the process has run its course. Such an approach to the restructuring process would be inefficient and a waste of resources. While there is some merit in this argument, the court cannot grant itself jurisdiction where it does not exist. Moreover, there are a plethora of checks and balances in the negotiating process itself that moderate the risk of the process becoming irretrievably tainted in this fashion — not the least of which is the restraining effect of the prospect of such a consequence. I do not think that this argument can prevail. In addition, the court at all times retains its broad and flexible supervisory jurisdiction — a jurisdiction which feeds the creativity that makes the CCAA work so well — in order to address fairness and process concerns along the way. This case relates only to the court's exceptional power to order the removal of directors.

The Reasonable Apprehension of Bias Analogy

73 In exercising what he saw as his discretion to remove the appellants as directors, the motion judge thought it would be useful to "borrow the concept of reasonable apprehension of bias . . . with suitable adjustments for the nature of the decision making involved" (para. 8). He stressed that "there was absolutely no allegation against [Mr. Woollcombe and Mr. Keiper] of any actual 'bias' or its equivalent" (para. 8). He acknowledged that neither was alleged to have done anything wrong since their appointments as directors, and that at the time of their appointments the appellants had confirmed to the Board that they understood and would abide by their duties and responsibilities as directors, including the responsibility to act in the best interests of the corporation and not in their own interests as shareholders. In the end, however, he concluded that because of their prior public statements that they intended to "pursue efforts to maximize shareholder value at Stelco", and because of the nature of their business and the way in which they had been accumulating their shareholding position during the restructuring, and because of their linkage to 40% of the common shareholders, there was a risk that the appellants would not conduct themselves in a neutral fashion in the best interests of the corporation as directors.

74 In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.

75 Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants — including the respondents in this case — but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.

76 If the respondents are correct, and reasonable apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 (S.C.C.) at para. 35, "persons are assumed to act in good faith unless proven otherwise". With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

Part V — Disposition

77 For the foregoing reasons, then, I am satisfied that the motion judge erred in declaring the appointment of Messrs. Woollcombe and Keiper as directors of Stelco of no force and effect.

78 I would grant leave to appeal, allow the appeal and set aside the order of Farley J. dated February 25, 2005.

79 Counsel have agreed that there shall be no costs of the appeal.

Goudge J.A.:

I agree.

Feldman J.A.:

I agree.

Appeal allowed.

Footnotes

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

2 The reference is to the decisions in *Dyle*, *Royal Oak Mines*, and *Westar*, cited above.

3 See paragraph 43, *infra*, where I elaborate on this distinction.

4 It is the latter authority that the directors of Stelco exercised when appointing the appellants to the Stelco Board.

5 Dennis H. Peterson, *Shareholder Remedies in Canada* (Markham: LexisNexis — Butterworths — Looseleaf Service, 1989) at 18-47.

6 Or, I would add, unpopular with other stakeholders.

7 Now s. 241.

TAB 9

2016 ONSC 5426
Ontario Superior Court of Justice [Commercial List]

Urbancorp Toronto Management Inc., Re

2016 CarswellOnt 13839, 2016 ONSC 5426, 270 A.C.W.S. (3d) 474, 40 C.B.R. (6th) 93

**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 URBANCORP
TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP
(PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP
DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING
RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC.
(collectively, the "Applicants") AND THE AFFILIATED ENTITIES IN SCHEDULE "A" HERETO

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF URBANCORP
(WOODBINE) INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF URBANCORP
(BRIDLEPATH) INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

Newbould J.

Heard: August 25, 2016

Judgment: August 29, 2016

Docket: CV-16-11389-00CL, 31-2114850

Counsel: Lisa S. Corne, David P. Preger, for Moving Parties
Edmond F.B. Lamek, for Urbancorp interests
Robin B. Schwill, for KSV Kofman Inc., the Monitor and Proposal Trustee
Adam Slavens, for Taron Warranty Corporation
Vern W. DaRe, for Stefano Serpa and Adrian Serpa
James M. Wortzman, for Atrium Mortgage Investment Corporation
Trent Morris, for Several Purchasers
Monique Sassi, for Mattamy Homes Limited
Dominique Michaud, for Terra Firma Capital Corporation
Kenneth D. Kraft, for Guy Gissin, the Foreign Representative of Urbancorp Inc.
Chris Burr, for Laurentian Bank

Subject: Civil Practice and Procedure; Contracts; Insolvency; Property

MOTION by creditors for appointment of representative counsel in bankruptcy proceedings, and order that legal fees and disbursements be paid and secured by administrative charge against debtor's properties.

Newbould J.:

1 This is a motion brought at the request of 40 different purchasers of residential units from Urbancorp (Lawrence) Inc. ("Lawrence"), Urbancorp (St. Clair Village) Inc. ("St. Clair"), Urbancorp (Woodbine) Inc. ("Woodbine"), and Urbancorp (Bridlepath) Inc. ("Bridlepath") for the appointment of Dickinson Wright LLP ("Dickinson Wright") as their

representative counsel in the CCAA and BIA NOI proceedings and for an order that their legal fees and disbursements capped at \$150,000 be paid and secured by an administrative charge against the four properties.

2 The motion is supported by Tarion. It is opposed by KSV, the Monitor and Proposal Trustee, and by Mr. Gissin, the Foreign Representative of Urbancorp Inc. appointed by the Israeli Court. It is also opposed by the Urbancorp entities and with respect to the Bridlepath project by two purchasers of units and Atrium, a secured lender on that project.

3 For the reasons that follow, the motion is granted in part.

4 The four properties in question are vacant properties which Urbancorp intended to develop for residential use. No construction has been commenced and the properties consist of raw land. Each of the Urbancorp companies pre-sold freehold homes and received deposits from home buyers in connection with the home sales. The deposits were \$3.7 million on the Lawrence property, \$3.3 million on the St. Clair property, \$1.9 million on the Woodbine property and \$5.6 million on the Bridlepath property. The Urbancorp companies did not hold the deposits in trust and they have all been spent. As the projects involved the construction of freehold homes, there was no legislation requiring home buyer deposits to be segregated or held in trust.

5 On June 30, 2016, orders were made in the CCAA proceedings and the NOI proceedings approving sale processes for the properties¹. Offers were due on August 16, 2016. Multiple offers were received for each of the properties. As of the date of August 23rd, offers had been accepted for the Lawrence and Bridlepath properties and the sale process is advancing for the other properties. Any transaction will be subject to approval by this Court.

6 All of the leading offers received in the sale process required that clean title be vested in the purchaser free of all obligations, including the agreements of purchase and sale entered into between the Urbancorp companies and home buyers. The agreements of purchase and sale are obligations of the Urbancorp companies and do not attach to the real estate owned by them.

7 In the event that the contemplated transactions are completed, KSV states that it appears that the sale proceeds from each transaction will be sufficient to repay in full the amount of the deposits as well as any registered liens and mortgages. KSV as Monitor and Proposal Trustee is in the process of commencing a claims process in the CCAA and NOI proceedings, so further claims may be identified. However, no creditor not already known to KSV has contacted KSV advising that they may have a material claim against one or more of the Urbancorp companies.

8 Ms. Corne advises that forty buyers have either retained her firm Dickinson Wright or requested it to bring this motion for a representative order and a charge for legal fees and disbursements. Buyers that have signed retainer engagements had agreements for the purchase of homes on three of the projects, being St. Clair, Lawrence and Bridlepath. None of the Woodbine purchasers have signed engagement letters but Dickinson Wright has been asked by 11 of the purchasers to represent their interests. Some of the purchasers wish to just get their deposits back while others would like to see that the homes they purchased be built and their contract accepted by any purchaser of the lands. There are a total of approximately 183 purchasers of pre-construction homes who have lost their deposits. Some have retained other firms. Fogler Rubinoff has been retained by two purchasers of the Bridlepath property and Mr. Morris has been retained by five undisclosed purchasers of one or more of the four properties.

9 The agreements of purchase and sale are in a standard form and provide that in the event that the construction of a dwelling has not been completed by the closing date, the vendor shall not be liable for any damages or costs other than the costs paid by Tarion, which has a maximum coverage of \$40,000 per purchaser.

Legal framework

10 The authority to appoint representative counsel in CCAA proceedings is undoubted under section 11 of the CCAA and rules 10.01 and 12.07 of the rules of practice in Ontario. See *Target Canada Co., Re* (2015), 22 C.B.R. (6th) 323 (Ont. S.C.J.) and *Nortel Networks Corp., Re* [2009 CarswellOnt 146 (Ont. S.C.J. [Commercial List])], 2009 CanLII 26603. I

agree with Justice Wilton-Siegel in *Re Kitchener Frame Limited*, July 7, 2011 unreported, that there is no reason why the same should not pertain to a proposal under the BIA.

11 In *Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 65 C.B.R. (5th) 152 (Ont. S.C.J. [Commercial List]), Pepall J. (as she then was) stated that factors that have been considered by courts in granting these orders include:

- the vulnerability and resources of the group sought to be represented;
- any benefit to the companies under CCAA protection;
- any social benefit to be derived from representation of the group;
- the facilitation of the administration of the proceedings and efficiency;
- the avoidance of a multiplicity of legal retainers;
- the balance of convenience and whether it is fair and just, including to the creditors of the Estate;
- whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- the position of other stakeholders and the Monitor.

12 As the issue of whether to appoint a representative counsel is one of equity, there can be no hard and fast rules governing any particular case, but these factors need be considered.

13 So far as granting a charge to secure the fees and disbursements of a representative counsel, this is covered by section 11.52 (1)(c) of the CCAA which provides:

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

14 Thus the court must be satisfied that the security or charge is necessary for the effective participation of representative counsel in the proceedings. In considering this issue. Pepall J. in *Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) stated that factors that might be considered would include:

- (a) the size and complexity of the businesses being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the Monitor.

Analysis

15 It is contended that the purchasers are an especially vulnerable and disparate group of creditors and that without representation counsel who can advocate for their rights, they will be prejudiced. It is said that with such a large group of purchasers, it is administratively preferable to have one representative counsel who can deal with the purchasers of the properties and with KSV rather than have a multiplicity of individual legal retainers and the inefficiencies that would involve.

16 It is argued that for the majority of purchasers, it would not be economical to retain their own legal counsel to represent their interests in these proceedings. However, the evidence to support this is very meagre. There are two purchasers, one from the St. Clair project and one from the Lawrence project, who state in affidavits that they cannot afford to retain counsel individually to represent them. However, there is no evidence that the purchasers could not together retain any law firm to represent all of them, as Dickinson Wright seeks to do on this motion. If all 185 purchasers retained a law firm with a cap on fees and disbursements of \$150,000, it would amount to approximately \$800 per purchaser.

17 A group retaining one law firm is not unknown to the Urbancorp saga. In the Leslieville project that was being developed by an Urbancorp entity, Dickinson Wright was retained by a group of approximately 35 purchasers of residential townhouse condominium units. Due to Urbancorp's failure to complete the construction and sale of the Leslieville homes, these purchasers retained Dickinson Wright to commence an application for the appointment of an investigative receiver of Urbancorp Leslieville. That application prompted Urbancorp Leslieville's senior secured creditor to seek the appointment of a receiver of Urbancorp Leslieville. Dickinson Wright is continuing to represent these purchasers in respect of the ongoing receivership proceedings of Urbancorp Leslieville.

18 KSV, the Monitor and Proposal Trustee, is opposed to the appointment of representative counsel and an administration charge against the properties for the legal fees. It does not believe that \$150,000 is well spent taken that it is likely that all purchasers will get their deposits back. It says that there is no question but that the purchasers are in an unfortunate position because of the Urbancorp insolvency, as is the case for unsecured creditors in any insolvency, and that it will be the purchasers' interests to be represented by counsel. It says that the issue is really one of asking the estates to fund the purchasers, and that as funding has to be fair to all stakeholders, it would be wrong to have funding that would be solely in the interest of one group of stakeholders. Funding the purchasers' lawyers would not assist in maximizing the assets or in negotiating a plan of compromise in this liquidating proceeding. So far as dealing with claims of the purchasers, that is a normal process for a Monitor or Proposal Trustee to deal with claimants.

19 Ms. Corne says that the majority or nearly all of the purchasers who have contacted Dickinson Wright will want to try to hold on to whatever equity there is in their agreements caused by the increasing market values, and will want a seat at the table to sit down with prospective purchasers of the properties to attempt to negotiate some arrangement to continue with their purchase agreements, perhaps by way of paying some top-up. It is pointed out by KSV and Urbancorp that what is being sold is raw land and there is no knowledge of what the purchasers of the land will intend to build on the land. To suggest that the purchasers of the pre-construction units will be able to save their purchase agreements in some way is speculative at this stage.

20 I have considerable doubt that appointing a representative counsel by whom all 185 purchasers are to be represented unless they opt out is warranted. It is likely that their interests are not all similar. Some may be prepared to simply walk from the situation if they get back their deposit, which appears in all likelihood will be the case. Some are investors whose interests might be quite different. Some want to negotiate with a purchaser of the raw land. Already there have been two other lawyers retained by some purchasers, albeit a small number. I recognize however that whether a conflict will exist is to some extent hypothetical at this stage.

21 This is not a situation such as *Target* in which representative counsel was appointed to represent some 17,600 employees or in *Nortel* in which there were many thousands of affected employees and representative counsel was obviously needed to represent their interests.

22 I recognize that purchasers are better off if they have legal advice and be represented by counsel. This issue is really whether the Urbancorp estates should fund representative counsel. I am not at all satisfied that a security or charge against the Urbancorp properties is necessary for the effective participation of purchasers in these proceedings. There is no evidence of any financial inability of the purchasers to jointly engage counsel to represent them. Two purchasers of the Bridlepath project are opposed to representative counsel being appointed for the Bridlepath purchasers. On that project the pre-sales for the then proposed 37 units averaged approximately \$1.18 million.² Purchasers in the Urbancorp Leslieville insolvency were able to jointly retain Dickenson Wright and there is no evidence that the purchasers on the four Urbancorp projects in question could not do the same.

23 Taken that all purchasers are likely to get back their deposits, legal representation for further action would likely be to negotiate with the known or potential purchasers of the raw lands to agree to some arrangement that would result in purchasers obtaining some part of their equity in their deals being preserved³. There would be nothing wrong in their attempting to do so. However to do that with estate funds could well be contrary to the interests of the insolvent estates. Any purchaser of the raw lands would want the lands free and clear of any claims, and the best prices offered have reflected that. If such a purchaser were to provide to any of the pre-sale construction buyers some of the equity in their agreements, that no doubt would reduce what a purchaser would be willing to pay for the raw land and be against the interests of the estates as a whole. As well, KSV points out that there is no certainty that purchasers would have bid for the properties in the sales process if they were required to construct homes conforming to the requirements in the agreements with the home buyers.

24 Estate funds should be spent for the benefit of the estate as a whole, not for the benefit of one group whose interests are contrary to the interests of the estate as a whole. If there is some equity available after all creditors of these Urbancorp entities have been paid, there are other interests entitled to share in such equity, including other Urbancorp entities under cross-collateralization agreements and Urbancorp Inc., represented by its Foreign Representative Mr. Gissin, which owes approx. \$64 million plus interest on debentures issued in Israel and which is the shareholder of many of the Urbancorp insolvent entities.

25 Thus it is not at all clear that funding a representative of the purchasers will be for the benefit of the companies in question.

26 It is said that the amount of funding and the security for it is minimal, being \$150,000. That may be but the issue is whether in principle it should be ordered. As well, it is by no means clear that representative counsel would not come back and later ask for that amount to be increased. Originally they proposed a total of \$300,000 but later reduced that to \$150,000.

27 In all of the circumstances, I am prepared to make an order appointing Dickenson Wright as representative counsel for the purchasers of the four projects in question, but rather than having an opt-out provision as requested, the order shall provide an opt-in process in which purchasers are clearly advised that they will be represented by Dickenson Wright only if they choose to do so.

28 I am not prepared to make an order that the fees and disbursements of Dickenson Wright be paid from the estates or secured by a charge. Counsel for KSV contended that if any representative order is made, the fees and disbursements could be paid by the estates from the distributions to be made to the purchasers who opted in. That would align the interests of whatever purchaser wanted to retain Dickenson Wright with the steps taken on behalf of such purchasers. I accept that position and the order may provide that Dickenson Wright is entitled to be paid its fees and disbursements by

the particular estates from the distributions to be made to those purchasers who choose to be represented by Dickenson Wright. The notice to purchasers advising them of their right to opt-in shall make this payment provision clear.

Motion granted in part.

Footnotes

- 1 The order covered more than the four projects in question. This endorsement covers only the four properties which are the subject of this motion.
- 2 The average purchase price for the St. Clair Village project was approximately \$800,000 and for the Lawrence project approximately \$652,000. I do not believe the average price for the Woodbine project is in the record.
- 3 During argument Ms. Corne said that her firm had no intention of commencing litigation against the Urbancorp entities in question. In light of the contractual provisions, that is understandable. It does not mean that some purchaser might not want to do that however.

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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 PSG WIND-DOWN LTD., ET AL.

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

**ONTARIO
SUPERIOR COURT OF JUSTICE -
COMMERCIAL LIST**

Proceeding commenced at Toronto

BOOK OF AUTHORITIES

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