Court File No. M38120

COURT OF APPEAL FOR ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP (the "Applicants")

BRIEF OF AUTHORITIES OF PETER J. GRANT SR.
(Re: Motion to Stay)
(Returnable October 27, 2009)

October 26, 2009

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TAB 1

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2003 CarswellOnt 3783

Ontario (Minister of Natural Resources) v. Mosher
In the Matter of Land Use Permit No. 16-000222, in respect of public lands described as parts of Lots 27 & 28, Concession III, Drayton Township, North of Patara Lake
In the Matter of the expiry of Land Use Permit No. 16-000222
In the Matter of the Public Lands Act, R.S.O. 1990, c. P. 43, as amended, and regulations thereunder
Minister of Natural Resources (Respondent (Respondent in Appeal)) - and -
Donald B. Mosher and Laurel Mosher (Applicant (Appellant in Appeal))
Ontario Court of Appeal
Cronk J.A.
Heard: July 24, 2003
Judgment: September 3, 2003[FN*]
Docket: CA C40231, M30064

Proceedings: additional reasons at *Ontario (Minister of Natural Resources) v. Mosher* (2003), 2003 CarswellOnt 3767 (Ont. C.A.)

Counsel: Donald B. Mosher for himself

Elaine Atkinson for Respondent

Subject: Public; Property; Civil Practice and Procedure

Crown --- Crown property -- Purchase of Crown lands -- General

Plaintiff brought action alleging that provincial Crown had reneged on 1978 agreement to sell him certain public lands which he had been occupying for many years -- Plaintiff's action was dismissed on basis that court lacked jurisdiction to determine entitlement to Crown patent and that plaintiff had failed to prove enforceable agreement to purchase lands in dispute -- Plaintiff unsuccessfully appealed -- Crown brought back earlier Crown application, which had been stayed pending trial of plaintiff's civil action, for declaration that land use permit issued to plaintiff had expired and for order for vacant possession of lands in dispute -- Plaintiff made counter-application -- Crown application was granted -- Plaintiff appealed and sought stay of order pending appeal -- Stay was refused -- Plaintiff failed to establish that there was serious issue raised on appeal -- Record did not support plaintiff's claim that he had legal authority to occupy lands in dispute -- Original land use permit had expired and plaintiff had not signed new permit or paid outstanding rental charges -- Record, properly read, was not unclear as to lands in issue -- Applications judge did not fail to consider plaintiff's counter-application when granting Crown application -- Applications judge did not err in not directing trial; plaintiff could have cross-examined Crown affiants on any disputed matters set out in their affidavits but did not do so.

Cases considered by *Cronk J.A.*:

Circuit World Corp. v. Lesperance (1997), 33 O.R. (3d) 674, 100 O.A.C. 221, 1997 CarswellOnt 1840 (Ont. C.A. [In Chambers]) -- referred to

Ogden Entertainment Services v. Retail, Wholesale Canada, Canadian Service Sector, U.S.W.A., Local 440 (1998), 1998 CarswellOnt 1787, (sub nom. *Ogden Entertainment Services v. United Steelworkers of America, Local 440)* 110 O.A.C. 297, (sub nom. *Ogden Entertainment Services v. United Steelworkers of America, Local 440)* 38 O.R. (3d) 448, 98 C.L.L.C. 220-046, (sub nom. *Ogden Entertainment Services v. Kay)* 43 C.L.R.B.R. (2d) 48 (Ont. C.A.) -- considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120, (sub nom. *RJR-Macdonald Inc. c. Canada (Procureur général))* 171 N.R. 402 (note) (S.C.C.) -- referred to

Statutes considered:

Public Lands Act, R.S.O. 1990, c. P.43

Generally -- referred to

s. 24(2) -- referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 63.02(1)(b) -- considered

MOTION by plaintiff for stay of order for vacant possession of lands pending appeal.

***Cronk J.A.*:**

Background

1 This litigation arises from a dispute concerning the alleged entitlement of Donald B. Mosher to occupy public lands forming parts of Lots 27 & 28, Concession III, Drayton Township, north of Patara Lake, in Ontario (the "Lands").

2 The record before me indicates that the previous lengthy civil proceedings between Mr. Mosher and the Minister of Natural Resources (the "Crown") included the following:

A) The Civil Action

1. Mr. Mosher commenced a civil action against the Crown in August 1997 (the "Civil Action") in

which he sought patented, absolute title to the Lands and to certain additional Crown lands, general damages in the amount of $350,000, interest and costs. Mr. Mosher also claimed in the Civil Action that the Crown had breached a contract entered into with him in September 1978 by which the Crown agreed to sell the Lands to him.

2. The Crown defended the Civil Action in December 1997. Thereafter, it brought several pre-trial motions, including an unsuccessful motion for summary judgment (March 1998), a second unsuccessful motion for summary judgment on different grounds (January 1999), and a motion under rule 21 of the *Rules of Civil Procedure* raising a jurisdictional issue, which the court declined to determine (May 2000).

3. Mr. Mosher delivered his trial record in the Civil Action in April 1999.

4. Six months later, Mr. Mosher brought a motion seeking, among other things: (i) leave to amend his pleading in the Civil Action to allege conspiracy and to claim punitive damages; and (ii) an order restraining all Crown employees and agents from entering upon lands in respect of which he had obtained a certificate of pending litigation.

By order dated December 21, 1999, Stach J. of the Superior Court of Justice dismissed Mr. Mosher's motion. Mr. Mosher appealed that dismissal order to this court. His appeal, heard on January 12, 2001, was dismissed. The Crown alleges that, to date, Mr. Mosher has not paid either the costs of the motion awarded to the Crown by the motions judge (fixed at $500 and payable forthwith) or those ordered by this court in respect of his appeal.

5. The Civil Action was originally scheduled for trial in September 2000. As a result of a motion brought by the Crown under rule 21 of the *Rules of Civil Procedure*, and the Crown's efforts to obtain leave to pursue an appeal of the resulting order, the trial date was postponed.

6. In September 2000, the parties agreed to a trial date of March 12 to 16, 2001 for the Civil Action. In late February 2001, Mr. Mosher obtained an adjournment of the trial due to the illness of his wife, whom he intended to call as a witness at trial. A new trial date was set for June 25 to 29, 2001.

7. Shortly after obtaining the adjournment, Mr. Mosher brought a motion returnable in Toronto seeking some of the same relief that had been refused by Stach J. in his December 21, 1999 order, as upheld by this court on January 12, 2001.

Mr. Mosher's motion was heard on May 25, 2001 by Croll J. of the Superior Court of Justice, who dismissed the motion. Mr. Mosher appealed that decision to this court. He ultimately abandoned that appeal in late June 2002.

8. While Croll J. was in chambers preparing the endorsement on Mr. Mosher's motion on May 25, 2001, Mr. Mosher served the Crown with a motion for summary judgment, returnable six days later. The motion was adjourned on May 31, 2001 and was not heard before the June 2001 trial date in the Civil Action.

B) The First Trial of the Civil Action

9. Mr, Mosher brought a motion for adjournment of the trial returnable June 20, 2001, five days before the trial was to commence. The grounds relied upon by him for the adjournment were his outstanding appeal of part of the May 25, 2001 order of Croll J. and the health of his wife, whom he had identified as a key trial witness. The motion was heard by the assigned trial judge on June 20, 2001, and was adjourned until the commencement of the trial on June 25, 2001.

10. The trial proceedings commenced in Kenora on June 25, 2001. At the outset of the trial, the trial judge dismissed Mr. Mosher's adjournment motion, subject to terms for the taking of Mrs. Mosher's evidence in Sioux Lookout, rather than in Kenora. The trial judge then reviewed the trial procedure with Mr. Mosher and thereafter indicated that the trial would commence after the morning break.

11. During the morning break and after the trial judge ruled on the adjournment motion, Mr. Mosher collected his documents and left the courtroom. He did not return to the courtroom and was not present when court resumed. Consequently, the Crown requested that the Civil Action be dismissed. The trial judge adjourned the matter to June 27, 2001, prepared a written endorsement concerning the adjournment, and directed the Crown to serve the endorsement on Mr. Mosher. The Crown did so.

12. The trial resumed on June 27, 2001 in Kenora. Mr. Mosher did not attend and the Civil Action was dismissed.

13. Mr. Mosher then brought a motion to set aside the dismissal of the Civil Action on the basis that he and his wife were present at the provincial courthouse in Sioux Lookout on the morning of June 27, 2001, rather than in Kenora.

The motions judge granted Mr. Mosher's motion and set aside the dismissal of the Civil Action. A new trial commencement date was set for December 10, 2001.

14. Prior to December 10, 2001, the Crown brought a motion to have the area covered by Mr. Mosher's certificate of pending litigation reduced from 3,800 hectares to a smaller size. Stach J. made an order reducing the area covered by the certificate to approximately 500 acres.

15. At about the same time, Mr. Mosher sought to have his motion for summary judgment, which had been adjourned on May 31, 2001, heard by the court. On October 1, 2001, Stach J. determined that leave to bring that motion, which was required because Mr. Mosher brought the motion after the Civil Action had been set down for trial, should not be granted, Accordingly, the motion was dismissed.

C) The Second Trial of the Civil Action

16. In November 2001, Mr. Mosher again brought a motion seeking an adjournment of the trial of the Civil Action, which had been set for December 2001. The motion was dismissed by Molloy J. of the Superior Court of Justice.

17. The second trial of the Civil Action commenced on December 10, 2001. At the outset of the trial, Mr. Mosher again requested an adjournment. The trial judge, McCartney J. of the Superior

Court of Justice, denied his request and the trial proceeded.

18. By reasons for judgment dated January 8, 2002, McCartney J. dismissed the Civil Action on the basis that: (i) the court lacked jurisdiction to determine entitlement to Crown patent; and (ii) on the evidence, Mr. Mosher had failed to establish an enforceable agreement to purchase the lands in dispute. On May 10, 2002, the trial judge awarded the Crown its costs of the Civil Action, in the amount of $43,932.77. According to the Crown, those costs remain unpaid to date.

D) Appeal to this Court

19. By notice of appeal delivered on or about February 5, 2002, Mr. Mosher appealed the decision of the trial judge to this court. He did not seek leave to appeal the costs awarded against him by the trial judge.

20. Mr. Mosher failed to order or pay a deposit for the transcripts of the trial and did not otherwise attempt to perfect his appeal. On April 10, 2002, his appeal was dismissed by the Registrar of this court, for delay.

21. Mr. Mosher then moved to set aside the dismissal of his appeal, and the relief sought was granted, subject to certain terms. Mr. Mosher failed to comply with those terms, and his appeal was again dismissed for delay on March 12, 2003.

E) The Crown's Application

22. In about April 1999, representatives of the Crown requested that Mr. Mosher remove a locked gate that he had installed on the roadway leading to the Lands near Patara Lake. When Mr. Mosher did not do so, the gate was ultimately removed by the Crown's representatives.

23. In November 1999, the Crown brought an application seeking an order for vacant possession of the Lands under the *Public Lands Act*, R.S.O. 1990, c. P. 43, as amended, and regulations thereunder, and an order preventing Mr. Mosher from blocking the roadway leading to the Lands. The Crown's application materials described the Lands as "the public lands described as parts of Lots 27 & 28, Concession III, Drayton Township, north of Patara Lake."

By order of Stach J. of the Superior Court of Justice dated February 23, 2000, the Crown's application for an order for vacant possession was stayed pending the trial of the Civil Action, which was then scheduled for September 2000. An order prohibiting Mr. Mosher from blocking access to the roadway was granted.

24. Thereafter, Mr. Mosher erected another gate on the roadway leading to the Lands. Consequently, the Crown brought a contempt motion against Mr. Mosher. A contempt order was granted, and an appeal by Mr. Mosher therefrom was dismissed by this court on May 28, 2001.

3 After Mr. Mosher's appeal to this court from the dismissal of the Civil Action was dismissed for delay in March 2003, the Crown brought its application under the *Public Lands Act*, *supra*, back on for hearing. In its application, the Crown sought: (i) a declaration that the land use permit issued to Mr. Mosher concerning the Lands had expired and that the occupation of the Lands by Mr. Mosher, or his agents or successors, was unauthorized; and (ii) an order for vacant possession of the Lands.

4 Mr. Mosher, in turn, served a document entitled "notice of counter-application", whereby he sought a declaration of an interest in various Crown lands, including in the Lands described by the Crown in its application, and a declaration concerning the nature and extent of the boundaries of the lands in dispute. In his affidavit sworn May 5, 2003 in support of his counter-application, Mr. Mosher:

> 1. acknowledged that he had signed land use permit number 16-00222, dated October 16, 1990, and that it applied to nine hectares of pasture land and one hectare of land for his residence (known as "Patara Farm") in the vicinity of Patara Lake;
>
> 2. acknowledged that he did not pay any of the rental fees for occupancy of the lands covered by land use permit number 16-00222 after August 31, 1994;
>
> 3. acknowledged that his wife, Laurel Mosher, vacated Patara Farm in August 1994;
>
> 4. claimed that:
>
> > i. land use permit number 16-00222 expired on August 31, 1995;
> >
> > ii. 1999 and 2000 assessment roll documents and a 1999 property tax invoice concerning the Lands (including Patara Farm) gave him legal authority to occupy the Lands; and
> >
> > iii. the Crown had issued a new land use permit to him in 1999, bearing number 43494, but had failed to deliver the new permit to him; and
>
> 5. acknowledged that the Crown cancelled the 1999 property tax invoice in April 2003 on the basis that it had been issued in error.

5 By order dated May 29, 2003, Stach J. of the Superior Court of Justice granted the declaration and the order for vacant possession of the Lands sought by the Crown and dismissed Mr. Mosher's counter-application. Mr. Mosher has appealed that order to this court. In this motion, Mr. Mosher seeks an order staying the May 29, 2003 order of the applications judge, pending the disposition of his appeal.

Issues

6 In support of his motion for a stay of the order of the applications judge, Mr. Mosher argues that:

> 1. the location of the Lands referenced by the Crown in its application and in the order of the applications judge may be confused with the location of Mr. Mosher's home and if that occurs, and a stay is not granted, Mr. Mosher will be deprived of the occupancy of his home pending the disposition of his appeal;
>
> 2. the Crown's application concerned land use permit number 16-000222, which permit was never issued to or held by Mr. Mosher. Accordingly, the applications judge erred by granting declaratory relief and an order for vacant possession of the Lands to the Crown;
>
> 3. in the alternative, the applications judge erred by not ordering a trial of the issues;
>
> 4. the applications judge erred by refusing to hear Mr. Mosher's counter-application and by concluding that the counter-application, in reality, was an attempt to appeal the decision of the trial

judge dismissing the Civil Action;

5. the applications judge further erred by failing to consider the legal authorities and principles relied upon by Mr. Mosher for the purpose of the application and the counter-application; and

6. the applications judge erred by concluding that Mr. Mosher's land use permit had expired on August 31, 1997 and that it had not been replaced by any other authorization to Mr. Mosher to occupy the Lands.

The Test for a Stay

7 Under rule 63.02 (1)(b) of the *Rules of Civil Procedure*, to obtain a stay of a final order pending the disposition of an appeal therefrom to this court, the moving party must demonstrate that his or her pending appeal raises a serious issue to be tried, he or she will suffer irreparable harm if the stay is not granted, and the balance of convenience favours the granting of a stay of the order under appeal: *RJR-MacDonald Inc. v. Canada (Attorney General)* , [1994] 1 S.C.R. 311 (S.C.C.) and *Circuit World Corp. v. Lesperance* (1997), 33 O.R. (3d) 674 (Ont. C.A. [In Chambers]). In *Ogden Entertainment Services v. Retail, Wholesale Canada, Canadian Service Sector, U.S.W.A., Local 440* (1998), 38 O.R. (3d) 448 (Ont. C.A.), this court held that a strong case for a stay must be made out by the party seeking the stay. The court must proceed on the assumption that the judgment under appeal is correct and the motions judge's findings must *prima facie* be accepted.

Analysis

8 The Crown argued before the applications judge that the land use permit authorizing Mr. Mosher and his wife to occupy the Lands expired in 1997 and that no other authorization to occupy the Lands had been granted to them. By the time that the Crown's application was heard, the Civil Action had been dismissed. The Crown, therefore, also relied before the applications judge on the trial judge's conclusions in the Civil Action that Mr. Mosher had failed to establish an enforceable agreement of purchase and sale with the Crown concerning the Lands and, further, that: "It is doubtful whether [Mr. Mosher] has established that even if such an agreement existed that he had fulfilled his responsibilities under it."

9 In his reasons for decision, the applications judge stated:

> I have the very strong impression that Mr. Mosher, even now, believes so strongly in the soundness of his claims to entitlement from the [Crown], he has made the decision to ignore other realities, including the outcome of [the Civil Action] and the reality that continued occupation of the site without a land use permit is not possible.
>
> The court is satisfied on a balance of probabilities that the last active land use permit governing the site (16-00222) expired on August 31, 1997 and that it has not been supplanted by any other authorization to Mr. Mosher to occupy the lands.

10 On this motion, the Crown argues that Mr. Mosher cannot satisfy the first requisite factor for the granting of a stay, that is, he cannot demonstrate that there is a serious issue to be tried. Accordingly, the Crown submits that it is unnecessary to consider the remaining factors of irreparable harm and balance of convenience. The Crown further asserts that even if those remaining factors are considered, Mr. Mosher has not satisfied the burden imposed upon him, as the moving party, because the refusal to grant a stay will not cause irreparable harm

to Mr. Mosher and the balance of convenience favours the refusal of a stay.

(1) Serious Issue to be Tried

11 I agree with the Crown's submission that Mr. Mosher has not demonstrated that there is a serious issue to be tried. I reach that conclusion for several reasons.

12 First, the record before me does not support Mr. Mosher's claim that he has legal authority to occupy the Lands, including the lands on which Patara Farm is situated.

13 The Crown filed on its application, among other materials, an affidavit by Simon Peet sworn May 12, 2003. Mr. Peet is an area supervisor for the Ministry of Natural Resources in the Sioux Lookout District of the Ministry. In that affidavit, Mr. Peet described the land use permits pertaining to the Lands which had been issued to Mr. Mosher between 1978 and 1997, indicated that permit number 16-00222 (which applied to the Lands in dispute and covered the years 1992 to 1997) had expired on August 31, 1997, and confirmed that no other authorization to occupy the Lands had been issued thereafter to either Mr. Mosher or his wife. Moreover, Mr. Peet's affidavit indicated that land use permit number 43494, relied upon by Mr. Mosher in his counter-application, predated land use permit number 16-00222.

14 In addition, the Crown filed an affidavit sworn by another area supervisor of the Ministry, Robert D. David, on January 4, 2000. In his affidavit, Mr. David also indicated that the last land use permit issued to Mr. Mosher regarding the Lands had expired on August 31, 1997.

15 It does not appear that Mr. Mosher cross-examined Mr. Peet or Mr. David on their respective affidavits. As well, Mr. Mosher offered no evidence on the application or on his counter-application of any land use permit granted to him or to his wife by the Crown after August 31, 1997 to occupy the Lands.

16 The applications judge found that Mr. Mosher was informed by the Crown in April 1999 that his land use permit for the Lands (including for Patara Farm) had expired, he had no legal authorization to occupy the Lands, and a land use permit would be issued pending resolution of the Civil Action if Mr. Mosher signed a new permit and returned it to the Crown, together with payment of outstanding rental charges. Further, as found by the applications judge based on Mr. David's sworn evidence, Mr. Mosher failed to sign and return the proposed new permit and to pay any of the rental charges outstanding after August 1994. As a result, no new permit was issued.

17 Those findings were not disputed by Mr. Mosher on this motion; nor, as I have indicated, did Mr. Mosher challenge Mr. David's evidence by seeking to cross-examine him on his affidavit. As I have also mentioned, Mr. Mosher admitted in his affidavit sworn in support of his counter-application that he made no rental payments for use of the Lands after August 1994.

18 On this motion, Mr. Mosher again argues that 1999 and 2000 assessment roll documents and a 1999 property tax invoice pertaining to the Lands provided legal authorization to him to occupy the Lands. That argument was considered, and rejected, by the applications judge who stated in that regard: "The inference to be drawn from the property tax invoice, for example, is more probably a reflection of outdated assessment records. The invoice does not constitute a lurking or hidden authorization for Mr. Mosher's continued occupation of the site." Moreover, as I have indicated, Mr. Mosher acknowledged in his affidavit sworn in support of his counter-application that the Crown cancelled the 1999 property tax invoice in April 2003. He does not assert that he paid

the property taxes referred to in the invoice.

19 Thus, the record before me indicates that Mr. Mosher failed to produce any evidence on the application and the counter-application of valid legal authorization to occupy the Lands, including the lands on which his farm is located, after August 1997. He does not deny that he has occupied the Lands since September 1994 without paying any of the applicable rental charges.

20 Second, I do not accept Mr. Mosher's submission that the Crown's application concerned land use permit number *16-000222* rather than land use permit number *16-00222*, the latter as issued to Mr. Mosher in 1990, Nor am I persuaded that the record, properly read, is unclear as to the lands in issue.

21 The body of the Crown's notice of application did not specify the precise land use permit in issue, although reference was made in the style of proceedings to permit number 16-000222. Although that permit number was referenced in two paragraphs of Mr. David's affidavit of January 4, 2000, the balance of Mr. David's affidavit and Mr. Peet's affidavit identified land use permit number 16-00222 as the applicable permit. Permit number 16-00222, as signed by Mr. Mosher and attached as an exhibit to Mr. David's affidavit of January 4, 2000, bore an original termination date of August 31, 1995 but was amended to provide for a termination date of August 31, 1997. The permit applies to 10 hectares of land forming part of Lots 27 & 28, Concession III, in the Township of Drayton, bearing grid section identifiers of "E" and "N", located north of Patara Lake. Mr. Mosher acknowledged in his affidavit that the lands described in the permit included the land on which his farm is situated. As well, the exhibits to Mr. David's affidavit included a map and a location plan showing the location of the Lands, including the location of the farm site. Finally, the reasons for decision of the applications judge refer to land use permit number 16-00222.

22 Accordingly, in my view, it is clear that the Crown's application concerned land use permit number 16-00222, the lands governed by that permit were clearly identified as the Lands at issue, and there was ample evidence to support the applications judge's conclusion that permit number 16-00222 expired on August 31, 1997.

23 Third, I reject Mr. Mosher's contentions that the applications judge declined to consider his counter-application, misconstrued the issues raised therein, and failed to consider the legal principles and authorities relied upon by Mr. Mosher.

24 The applications judge confirmed in his reasons for decision that he considered the counter-application and the arguments advanced by the parties concerning it, notwithstanding irregularities in the filing of the counter-application by Mr. Mosher. The applications judge said:

> Mr. Mosher failed to have his "counter-application" issued in the office of the registrar before the hearing. He had, however, served the minister with all of the documents and materials he relied upon. Although the Rules of Civil Procedure do not provide for a "counter-application" *per se*, Rule 33.03(4) allows a party to make an application at the same place and time to the same judge. Because the minister's application and Mr. Mosher's "counter-application" appear to have questions of law or fact in common and the relief claimed in them arises out of the same series of transactions or occurrences, the court considered the materials presented by Mr. Mosher and heard his submissions, along with the materials filed and submissions made by the minister, effectively consolidating these two related matters. In order to regularize the procedure, Mr. Mosher is granted leave to issue his "counter-application" in the office of the court registrar after the hearing. An order for consolidation will then be deemed to have been made

> *nunc pro [illegible text]* pursuant to Rule 6.01(2). Justice will effectively have been served by this process. Indeed, it was helpful to me from the perspective of appropriate focus to have heard both sides argue their respective positions [citations omitted].

25 Thus, the applications judge expressly indicated that he considered the counter-application and "the materials presented by Mr. Mosher and...his submissions". Consequently, there is no basis on which to suggest that the applications judge failed to consider the counter-application, the legal principles and authorities relied upon by Mr. Mosher, and his submissions concerning the application and the counter-application.

26 In connection with the nature of the counter-application and the relief sought in it, the applications judge stated:

> From the description of the relief sought in the counter-application presented by Mr. Mosher *viz: declaration of an interest in land, including the nature and extent of the boundaries of the land*, from his outline of the issues in the factums, and from the nature of the materials contained in his record, it becomes clear that Mr. Mosher is attempting to relitigate issues finally determined by McCartney J. in [the Civil Action]. Because that is not possible here, I have attempted to gather from the various materials now presented by Mr. Mosher and from his oral submissions such core items that serve to challenge the position of the minister on the application now before the court
>
> [emphasis in original].

27 I have reviewed Mr. Mosher's notice of counter-application, together with the contents of his application and counter-application record as filed with the applications judge. Those materials indicate that the issues raised by Mr. Mosher in his counter-application concerned the alleged agreement with the Crown to purchase the Lands, the associated decision reached by the trial judge in the Civil Action, and the steps allegedly taken by Mr. Mosher to comply with the conditions necessary to enforce the alleged agreement to purchase. Those matters formed the subject matter of the Civil Action or the trial judge's decision to dismiss the Civil Action. It was therefore open to the applications judge to characterize the relief sought by Mr. Mosher in his counter-application as being an attempt to re-litigate the issues determined in the Civil Action. In my view, that characterization does not give rise to any serious issue to be tried.

28 Finally, I am also of the view that Mr. Mosher's submission that the applications judge erred by failing to direct the trial of an issue does not raise a serious issue to be tried. It was open to Mr. Mosher to cross-examine the Crown's witnesses on any disputed matters set out in their affidavits on the application. Mr. Mosher failed to do so. Moreover, s. 24(2) of the *Public Lands Act*, *supra*, entitles the Crown, by application, to seek an order for vacant possession where a person refuses to deliver up public lands or where a trespasser is in possession of public lands. As observed by the applications judge, that procedure was followed in this case.

(2) Irreparable Harm and Balance of Convenience

29 I have concluded that Mr. Mosher, as the moving party, has not satisfied a crucial element of the requisite test for the granting of a stay: he has failed to establish that there is a serious issue to be tried. Accordingly, as asserted by the Crown, it is unnecessary to consider the additional requirements of a demonstration of irreparable harm and the balance of convenience. Had it been necessary to consider those factors, however, it is important to note that the Crown's materials indicate that Mr. Mosher's continued occupation of the Lands has prevented or impeded other members of the public and staff of the Ministry of Natural Resources from using or access-

ing the Lands, despite efforts to do so.

Disposition

30 For the reasons given, the motion for a stay of the May 29, 2003 order of the applications judge is dismissed. The Crown is entitled to its costs of this motion, if sought, on a partial indemnity basis. The Crown shall file its submissions, if any, concerning the quantum of costs with this court, and shall provide a copy of same to Mr. Mosher, within seven days from the date hereof. Mr. Mosher shall file his written responding costs submissions with this court, and shall provide a copy of same to counsel for the Crown, within seven days after receipt by him of the Crown's costs submissions. I would expect that the costs submissions of each party, if any, would not exceed two pages in length.

Motion dismissed.

FN*. Additional reasons at 2003 CarswellOnt 3767 (Ont. C.A.).

END OF DOCUMENT

TAB 2

(sub nom. Ogden Entertainment Services v. United Steelworkers of America, Local 440), 110 O.A.C. 297, (sub nom. Ogden Entertainment Services v. United Steelworkers of America, Local 440) 38 O.R. (3d) 448, 98 C.L.L.C. 220-046, (sub nom. Ogden Entertainment Services v. Kay) 43 C.L.R.B.R. (2d) 48

C

1998 CarswellOnt 1787

Ogden Entertainment Services v. Retail, Wholesale/Canada Canadian Service Sector, U.S.W.A., Local 440

Ogden Entertainment Services, Plaintiff/Respondent Moving Party and Al Kay, in his representative capacity as Area Representative of Retail, Wholesale/Canada Canadian Service Sector Division of The United Steel Workers of America, Local 440, Jack Davis, in his capacity as Picket Captain and on behalf of all members of the aforementioned Union, Defendants/Appellants Responding Parties

Ontario Court of Appeal

Robins, McKinlay, Weiler JJ.A.

Heard: April 24, 1998

Oral reasons: April 24, 1998

Docket: CA M22334, C29462

Counsel: F. Paul Morrison and Steven G. Mason, for the moving party.

Dougald Brown, for the responding parties.

Anita Lyon, for Her Majesty The Queen In Right of Ontario as represented by the Ontario Provincial Police.

Subject: Civil Practice and Procedure; Labour and Employment

Injunctions --- Form and operation of order -- Suspension of operation -- Pending appeal -- General

Plaintiff stadium operator moved to set aside order of appeal judge staying injunction granted in favour of plaintiff pending appeal -- Injunction restrained defendant union picketers during lawful strike from obstructing vehicles or people entering or leaving stadium -- Trial judge's findings must be prima facie accepted and strong case in favour of stay made out in determiing whether stay granted pending appeal -- Actions of picketing union members unsafe and caused incidents of dangerous driving and assault -- Injunction did not constitute ban on lawful picketing but restricted it to certain areas -- No valid reason to stay injunction except with respect to police enforcement of order -- No basis for directing police to enforce order arising out of civil proceeding -- Stay of injunction vacated except with respect to enforcement provision.

Cases considered by Robins J.A.:

> RJR-Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, 54 C.P.R. (3d) 114, (sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)) 164 N.R. 1, (sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)) 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) -- applied

Statutes considered by Robins, J.A.:

(sub nom. Ogden Entertainment Services v. United Steelworkers of America, Local 440), 110 O.A.C. 297, (sub nom. Ogden Entertainment Services v. United Steelworkers of America, Local 440) 38 O.R. (3d) 448, 98 C.L.L.C. 220-046, (sub nom. Ogden Entertainment Services v. Kay) 43 C.L.R.B.R. (2d) 48

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 7(5) -- pursuant to

s. 102(3) -- referred to

s. 141 -- referred to

MOTION by stadium operator for lifting of stay imposed on injunction restraining picketing union from obstructing stadium traffic.

***Robins J.A.* (*Orally*):**

1 This is a motion by the plaintiff Ogden Entertainment Services (the respondent in the appeal) under s. 7(5) of the *Courts of Justice Act* to set aside the order of Abella J.A. staying the order of McKinnon J. dated April 2, 1998 granting an injunction restraining the defendants and others from:

> ...intimidating, molesting or interfering with or blocking or physically obstructing or delaying whatsoever any person or vehicle from entering or exiting the property administered by Ogden Entertainment Services located at 1,000 Palladium Drive in the City of Kanata, including but not limited to all parking areas and parking lots where Ogden Entertainment Services carry on its operations.

2 The defendants (the appellants in the appeal), who shall be referred to as "Local 440", hold bargaining rights for approximately 90 cleaners employed by the plaintiff at the Corel Centre in Ottawa. On February 5, 1998 the union commenced a lawful strike. On March 20, 1998 the plaintiff brought this application contending that picketers were improperly impeding and obstructing traffic to and from the Corel Centre, which is a multiple-purpose arena located to the west of Ottawa. It appears that on the days when the events were scheduled anywhere from 40 to 120 picketers were present at 11 different locations in the area.

3 It is uncontroverted that union members and their supporters impeded the access of passenger vehicles, transport buses carrying event spectators, passenger vehicles carrying employees, commercial vehicles, team buses and vehicles carrying performers to the centre. During these events, and particularly events involving the Ottawa Senators Hockey Club, between 17,500 and 18,500 members of the public have attended the Corel Centre. Approximately 7,500 passenger vehicles entered the Centre over a 90 minute period prior to each game.

4 In determining whether a stay should be granted pending appeal, the appropriate test to be applied is that set out in *RJR-Macdonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.). This test is the same as the test for an interlocutory injunction. Generally, the court must decide whether the interests of justice call for a stay.

5 In determining whether a stay should be granted, regard must be had to the judgment under appeal and a strong case in favour of a stay must be made out. The court must proceed on the assumption that the judgment is correct and that the relief ordered was properly granted. The court is not engaged in a determination of the merits of the appeal on a stay application.

6 In this case, there are factual disputes that will have to be dealt with on the appeal. However, there is no basis at this stage for rejecting the findings of the motions judge. He stated in granting the injunction in question, that:

(sub nom. Ogden Entertainment Services v. United Steelworkers of America, Local 440), 110 O.A.C. 297, (sub nom. Ogden Entertainment Services v. United Steelworkers of America, Local 440) 38 O.R. (3d) 448, 98 C.L.L.C. 220-046, (sub nom. Ogden Entertainment Services v. Kay) 43 C.L.R.B.R. (2d) 48

> During the normal course of events, the OPP have nine officers monitoring the Corel Centre. Since the protocol was developed the OPP have had to send as many as 43 officers in an attempt to maintain order. Numerous troubling incidents have occurred, particularly during hockey events. Because the picketers have stood on public roadways leading to the Corel Centre and stopped vehicles for two minutes per vehicle, traffic on Highway 417 has been backed up for many miles. Some patrons have parked their cars on the side of the Highway 417 and walked to the Corel Centre. OC Transpo buses have not been permitted entry, requiring passengers to be let off at some distance from the Corel Centre and having people walk to the arena. Predictably and inevitably, this situation has led to numerous incidents of "road rage" on the part of patrons, who have on numerous occasions nudged picketers with their cars, become involved in emotionally charged verbal exchanges with picketers and on a number of occasions have caused minor injury to picketers. To date, five members of the public have been charged with dangerous driving, and one other person has been charged with assault. Luckily, no serious injuries have occurred.
>
> . . . . .
>
> All the picketers have placards. Vehicle traffic is backed up; various vehicles have tried to circumvent the picketers; squealing tires can be heard; shouts can be heard; and, during the video, Inspector Beechey can be heard to say, "We have a real unsafe situation here".
>
> . . . . .
>
> Inspector Beechey of the OPP is the officer in charge of maintaining order relating to the strike. If his examination for discovery, he stated that in his opinion there was an unsafe situation he was concerned about the picketers; about his own officers, one of whom had had a flashlight ripped out of his hand; about the pedestrians entering the Corel Centre, trying to run through the line of cars, some of which were gunning their engines....
>
> . . . . .
>
> He was asked whether or not he could prevent similar incidents at future events. His answer was this,
>
>> Gauging from the history of what has gone on, I would say that no way can we prevent incidents from happening. They are going to happen. You have, as you heard before, in the neighbourhood of 7,500 vehicles for any events. And any place where there are picketers, we have always had nudging. We have had people hit. We have had cars running through and those type of things. They are really unforeseeable and uncontrollable. Our presence out there should deter most of this, but it seems that the people getting held up for long periods of time don't even consider that.

7 The defendants' argument in favour of a stay appears to be based primarily on two grounds. First, it is contended that the plaintiff has not satisfied the requirements of s. 102(3) of the *Courts of Justice Act* in that it has not established that reasonable efforts to obtain police assistance, protection and action to prevent or remove any obstruction of or interference with lawful entry or exit from the plaintiffs premises have been unsuccessful. While this will properly be a matter of argument on the hearing of the appeal, at this stage, the judge's finding must *prima facie* be accepted. The evidence of the police, as the motions judge interpreted that evidence, appears sufficient to satisfy the requirements of s. 102(3). It is not for this panel on a stay application to place a contrary interpretation on this evidence of the police action and the safety factors that came under consideration.

8 The second ground advance in support of the stay is to the effect that the defendants are entitled to impede

or delay traffic by stopping cars for short periods in furtherance of their acknowledged right to picket in the course of their lawful strike. We have set out the terms of the order. It is clear that this order does not, as suggested, constitute a ban on picketing. Nor can the order be said to be analogous to a ban. The striking employees remain fully entitled to peacefully picket the plaintiffs premises in the locations where they have been doing so. They are restrained only from engaging in the type of conduct specified in the order, in particular, from interfering with or blocking or physically obstructing or delaying any person or vehicle from entering or exiting the property. The prohibition is against engaging in conduct of that nature.

9 A question arose during argument today as to the interpretation of the order as a result of comments which were apparently made during the hearing before the motions judge. The question is whether picketers are entitled to offer leaflets or pamphlets to motorists who may be stopped while waiting to enter the parking lots or who may of their own free will stop in order to accept information of this nature. The injunction does not appear to restrain this type of activity and Mr. Morrison, counsel for the plaintiff, agrees that such conduct would not, in and of itself, constitute a violation of the order. We make this comment in the hope of avoiding any misunderstanding as to what is covered by the order.

10 Applying the test in *R.J.R. v. MacDonald* to the facts as found by the motions judge, we have concluded that there is no valid reason to stay his order, save in one respect. Counsel has appeared here today, with our leave, representing the Ontario Provincial Police. She takes the position that there was no jurisdiction on the part of the motions judge to direct, quoting the order, that "the Ontario Provincial Police enforce the Order of this Honourable Court". Counsel for the parties do not argue against the position advanced on behalf of the OPP. We are of the opinion that there is no basis for directing the OPP to enforce an order arising out of a civil proceeding. Unless a statute directs the contrary, such an order should be directed to a sheriff for enforcement. In the present circumstances, there is no statute directing the contrary. Where the enforcement of an order may give rise to a breach of the peace, the sheriff may require a police officer to assist in the execution. No order is required to gain this assistance. Reference may be had to s. 141 of the *Courts of Justice Act*.

11 Accordingly, in so far as paragraph 4 of the order of McKinnon J. is concerned, the stay previously granted will be continued. Otherwise, the stay is vacated. Costs of this application will be reserved to the panel hearing the appeal.

Motion granted in part.

END OF DOCUMENT

TAB 3

2004 CarswellOnt 1966

G. (N.) v. Upper Canada College
N.G., Plaintiff (Responding Party) and Upper Canada College, Defendant (Responding Party)
Ontario Court of Appeal [In Chambers]
Sharpe J.A.
Heard: March 19, 2004
Judgment: March 22, 2004
Docket: M31085, M31088

Counsel: Luba Kowal, Crystal O'Donnell for Appellant (Non-Party), The Attorney General for Ontario

David Outerbridge for Respondent, Upper Canada College

Elizabeth Grace for Respondent, N.G.

Subject: Civil Practice and Procedure

Civil practice and procedure --- Discovery -- Discovery of documents -- Scope of documentary discovery -- Documents in possession of non-party -- Video and tape recordings

Plaintiff alleged that he was victim of sexual assault perpetrated by teacher formerly employed by defendant -- Criminal charges were brought against teacher -- Plaintiff brought civil action for damages against defendant -- Plaintiff gave police videotaped statement following teacher's arrest -- Videotape was produced to teacher in criminal proceedings as part of Crown disclosure -- Attorney General refused to produce videotape in civil proceedings -- Defendant obtained order compelling production on terms -- Attorney General intended to bring motion for leave to appeal -- Attorney General brought motion to stay order for production -- Motion dismissed -- It was so unlikely that leave to appeal would be granted that it could be concluded that Attorney General failed to satisfy test for stay -- There was no merit to ground of appeal that master did not have jurisdiction to hear motion -- There was no merit to ground of appeal that Divisional Court erred in ruling that master was entitled to order production pursuant to R. 30.10 of Rules of Civil Procedure and that common law screening process did not conflict with R. 30.10 -- There was no merit to ground of appeal that videotape was subject to litigation privilege -- Since privilege claim was without merit, it was not arguable that production before disposition of criminal proceeding could give rise to irreparable harm -- Balance of convenience strongly favoured refusing stay order -- Master and Divisional Court found that it would be unfair to require defendant to proceed to trial without production -- Harm that would be suffered in civil action clearly outweighed any harm that might be suffered by Attorney General and its interest in fair criminal trial by reason of production.

Civil practice and procedure --- Practice on appeal -- Staying of proceedings pending appeal -- General principles

Plaintiff alleged that he was victim of sexual assault perpetrated by teacher formerly employed by defendant -- Criminal charges were brought against teacher -- Plaintiff brought civil action for damages against defendant -- Shortly after teacher was arrested, plaintiff gave police videotaped statement -- Statement formed part of Crown brief prepared for criminal charges -- Videotape was produced to teacher in criminal proceedings as part of Crown disclosure -- Attorney General refused to produce videotape in civil proceedings -- Defendant obtained order compelling production on terms -- Attorney General intended to bring motion for leave to appeal -- Attorney General brought motion to stay order for production -- Attorney General contended that grounds for appeal constituted serious question to be tried, that production of videotape would give rise to irreparable harm, and that balance of convenience favoured granting stay -- Motion dismissed -- It was so unlikely that leave to appeal would be granted that it could be concluded that Attorney General failed to satisfy test for stay -- There was no merit to ground of appeal that master did not have jurisdiction to hear motion -- There was no merit to ground of appeal that Divisional Court erred in affirming that master was entitled to order production pursuant to R. 30.10 and that screen process in common law did not conflict with R. 30.10 -- There was no merit to ground of appeal that videotape was subject to litigation privilege -- There was no irreparable harm -- Balance of convenience strongly favoured refusing stay.

Cases considered by Sharpe J.A.:

Ontario v. 974649 Ontario Inc. (2001), (sub nom. R. v. 974649 Ontario Inc.) 2001 SCC 81, 2001 CarswellOnt 4251, 2001 CarswellOnt 4252, (sub nom. R. v. 974649 Ontario Ltd.) 56 O.R. (3d) 359 (headnote only), (sub nom. R. v. 974649 Ontario Inc.) 206 D.L.R. (4th) 444, (sub nom. R. v. 974649 Ontario Inc.) 159 C.C.C. (3d) 321, 47 C.R. (5th) 316, (sub nom. R. v. 974649 Ontario Inc.) 88 C.R.R. (2d) 189, (sub nom. R. v. 974649 Ontario Inc.) 279 N.R. 345, (sub nom. R. v. 974649 Ontario Inc.) 154 O.A.C. 345, (sub nom. R. v. 974649 Ontario Inc.) [2001] 3 S.C.R. 575 (S.C.C.) -- considered

Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner) (2002), 2002 CarswellOnt 4070, 220 D.L.R. (4th) 467, (sub nom. Attorney General of Ontario v. Big Canoe et al) 22 C.P.R. (4th) 169, 62 O.R. (3d) 167, (sub nom. Ontario (Attorney General) v. Big Canoe) 167 O.A.C. 125, 48 Admin. L.R. (3d) 279 (Ont. C.A.) -- considered

P. (D.) v. Wagg (2002), 2002 CarswellOnt 3288, 165 O.A.C. 209, 61 O.R. (3d) 746, 26 C.P.C. (5th) 377, 97 C.R.R. (2d) 324, 222 D.L.R. (4th) 97 (Ont. Div. Ct.) -- considered

R. v. Felderhof (2003), 2003 CarswellOnt 4943, 235 D.L.R. (4th) 131, 180 O.A.C. 288, 17 C.R. (6th) 20, 180 C.C.C. (3d) 498 (Ont. C.A.) -- considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally -- referred to

R. 30.10 -- considered

MOTION by Attorney General to stay order for production in civil action of videotape statement given by plaintiff to police for use in criminal proceedings.

Sharpe J.A.:

1 The Attorney General for Ontario moves for a stay of an order requiring the production in a civil action of a videotape statement given by the plaintiff to the police for use in criminal proceedings.

2 The stay motion arises in the following context. The plaintiff and others have made allegations of sexual assault against Douglas Brown, a teacher formerly employed by the defendant school. Those allegations have led to criminal charges against Brown and this civil action in which the plaintiff claims damages against the defendant Upper Canada College, alleging negligence, breach of fiduciary duty, vicarious liability and occupier's liability.

3 Shortly after Brown's arrest in August 2001, the plaintiff gave the police a videotaped statement that is the subject of this motion. The videotape formed part of the Crown brief prepared with respect to the criminal charges against Brown. The videotape has been produced to Brown in the criminal proceedings as part of the Crown disclosure. The Crown initially agreed to produce the videotape, but changed its position when a new Crown counsel took over the file. The plaintiff consents to the production of the videotape in this action.

4 The defendant moved for production of the videotape as a document in the possession of a non-party to a civil action pursuant to rule 30.10. Master Albert found that it would be unfair to require the defendant to proceed to trial without the videotape and that the public interest in preserving the integrity of the criminal proceedings could be met by imposing confidentiality safeguards as conditions of the production order. On appeal to a single judge of the Divisional Court, Lang J. agreed with both findings, but added to the confidentiality safeguards. The result is that the videotape must be produced, but on the following conditions:

> 1. Only counsel for the parties to the civil action may receive copies of the videotape and transcript;
>
> 2. Counsel may show the videotape to their clients (including insurers) and may discuss the contents with them, but counsel shall ensure that no copies are made for anyone;
>
> 3. Counsel and the parties are to take all reasonable steps to ensure that potential witnesses in the criminal trial are not exposed to the contents of the videotape, subject to any ruling the trial judge may make with respect to admissibility and the imposition of any safeguards appropriate to that context.

5 The Attorney General has applied for leave to appeal to this court from the judgment of the Divisional Court.

6 The criminal trial, originally scheduled to begin in February 2004 is now scheduled to proceed in September 2004. The civil action is scheduled to begin on April 13, 2004, although the defendant has indicated that it will argue that the confidentiality conditions are unduly restrictive and that the trial should be adjourned to ensure that it can make full use of the videotape. The plaintiff is most anxious to have the civil trial proceed at the earliest possible date.

7 The Attorney General raises three grounds in its application for leave to appeal:

> 1. That the master has no jurisdiction to order production of documents generated in criminal proceedings for use in collateral civil proceedings as such jurisdiction is reserved exclusively to judges of the Superior Court.

> 2. That production of documents generated in criminal proceedings for use in collateral civil proceedings may only be ordered pursuant to the screening mechanism established in *P. (D.) v. Wagg* (2002), 61 O.R. (3d) 746 (Ont. Div. Ct.) and that the Divisional Court erred in holding that the master was entitled to order production pursuant to rule 30.10.
>
> 3. That the videotape is subject to litigation privilege.

8 The Attorney General argues that these grounds of appeal constitute a serious question to be tried, that production of the videotape would give rise to irreparable harm, and that the balance of convenience favours granting the stay.

Analysis

1. Serious Question To Be Tried.

i. Jurisdiction of the Master

9 The Attorney General relies on the following passage from paras 48-50 of *Wagg* for the proposition that only a Superior Court judge can order production from a Crown brief in an on-going criminal proceeding for the purposes of a collateral civil action:

> The notion of the court reserving control over documentation contained in the Crown Brief is consistent with, and supports, the court's general jurisdiction to control its own process in order to protect the public interest and ensure the proper administration of justice....
>
> A superior court has original and plenary jurisdiction in all civil and criminal matters including inherent jurisdiction to control and regulate its process and to prevent this from being abused or obstructed....
>
> I am therefore satisfied that the court has the authority to make the ruling and give the directions respecting the process that I propose.

10 This statement must be read in context. *Wagg* dealt with a request for production of a Crown brief that was in the possession of one of the parties as a result of Crown disclosure. Under the Rules of Civil Procedure, there was no procedural mechanism to put the Crown on notice and to afford the Crown an opportunity to be heard on the issue. I agree with the respondent U.C.C.'s submission that the quoted statements do not deal with exclusivity of jurisdiction, but rather with the question of jurisdiction to create the screening mechanism. As the present case involves production from the Crown as a non-party, rule 30.10 applies and provides the required mechanism. Masters have jurisdiction to deal with rule 30.10 motions and statutory courts have by necessary implication the power to control their own process and the procedural tools to ensure the effective and efficient disposition of matters falling within their competence: *R. v. Felderhof*, [2003] O.J. No. 4819 (Ont. C.A.) at para 41; *Ontario v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 (S.C.C.) at para 38. Under rule 30.10, masters routinely weigh and balance the public interest concerns of non-parties, including government agencies. Masters also routinely make procedural orders arising under the rules that arguably have a more significant impact upon criminal proceedings than the order sought here: for example, ordering accused persons to be examined for discovery as non-parties and staying civil proceedings pending the completion of related criminal proceedings. In my view, the master and the Divisional Court correctly dismissed the Attorney General's submission that the master lacked jurisdiction and I see no merit in this ground of appeal.

11 Even if the Attorney General is correct and the master did not have jurisdiction to entertain the motion, the matter has now been carefully reviewed by a Superior Court judge who, indeed, did modify the confidentiality conditions on the production order. No arguable point has been advanced to suggest that the Divisional Court erred in its assessment of the public interest. In these circumstances, it seems to me highly unlikely that leave to appeal would be granted.

ii. Application of Rule 30.10

12 It would appear that to a significant extent, this point overlaps with the argument relating to the jurisdiction of the master. Putting the jurisdiction argument to one side, I see nothing in rule 30.10 that is inconsistent or incompatible with the screening mechanism contemplated by *Wagg* . In my view, Lang J. correctly concluded that in the context of a request for production of material from a Crown brief, the fairness test under rule 30.10 "encompasses balancing consideration of the needs of the moving party for access to the particular material against the interests of a third party, the interests of the public in protecting the material from disclosure, and any other relevant interests." The reasons of both the master and the Divisional Court, as well as the conditions they imposed upon production, demonstrate that they both fully considered the public interest arguments identified in *Wagg* under the regime of rule 30.10. Accordingly, I conclude that this ground of appeal does not meet the "serious issue to be tried" test.

iii. Litigation Privilege

13 In my view, the Divisional Court correctly concluded that litigation privilege does not apply in the circumstances of this case. The Attorney General does not suggest that the videotape is protected by solicitor-client privilege. Litigation privilege may attach to some materials prepared by the police for the purpose of a criminal trial, but I fail to see any basis for its application in the circumstances of this case. The purpose of litigation privilege, as distinct from solicitor-client privilege, is to protect work product in the adversarial litigation process: see *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner)* (2002), 62 O.R. (3d) 167 (Ont. C.A.). It follows that production to the opposite party in the litigation effectively ends the privilege. The videotape has already been produced to the accused in the criminal proceedings and hence in that litigation, privilege no longer attaches to the videotape. Litigation privilege, unlike solicitor-client privilege, does not survive the litigation in which it arose, although legislation may extend broader protection to material prepared for the purposes of litigation: *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner).*

14 At this stage, any interest the Attorney General may assert to refuse production does not arise from litigation privilege but rather under the heading of the public interest identified in *Wagg*. As I have already stated, those concerns were fully and fairly considered by the master and the Divisional Court.

Serious Question to be Tried - Conclusion

15 While I am mindful that the threshold is low, I consider it so unlikely that leave to appeal will be granted in this case that I am prepared to conclude that the Attorney General has failed to satisfy this first branch of the test for a stay. I see no merit in the only substantive ground of appeal (privilege) and the remaining two grounds of appeal are entirely procedural in nature. The Attorney General's submissions with respect to the jurisdiction of the master and the application of rule 30.10 are not strong. Moreover, the Attorney General has had the benefit of a comprehensive review by a Superior Court judge and no arguable point has been advanced to suggest that the Divisional Court erred in its assessment of that issue. In these circumstances, the leave to appeal application appears to me to be doomed to almost certain failure.

2. Irreparable Harm

16 The Attorney General contends that it will suffer irreparable harm if the civil trial proceeds with the videotape in the hands of the defendant, as there is a risk that witnesses in criminal proceedings could become "tainted" if they were to learn what the plaintiff told the police in the videotape. I find this submission to be without merit. First, the risk of "tainting" witnesses is met by the strict confidentiality conditions imposed by the master and the Divisional Court. Second, this motion deals only with production of the videotape, not its use at trial, and so the fears raised by the Attorney General are entirely speculative. If and when the defendant seeks to make use of the videotape during the trial, it would be open to the trial judge to impose conditions to shield the videotape from eyes that should not see it, if indeed that is required. Third, even if we were to focus on the use of the videotape at trial, any risk of tainting from the videotape seems to me to be remote, if not non-existent. If there is a risk of tainting, it surely stems from the fact that the plaintiff will testify, not from production of the videotape. The videotape may enter the trial if the plaintiff is cross-examined on any inconsistent statements, but any added tainting that would flow from revealing such contradictions seems to me to be very remote.

17 If there was any merit to the Attorney General's argument that the videotape is protected by privilege, it would be arguable that requiring production before the determination of the criminal proceeding could give rise to irreparable harm. However, as I view the privilege claim to be without merit, I find no irreparable harm on that count.

3. Balance of Convenience

18 In my view, the balance of convenience strongly favours denying the stay. There have been concurrent findings by the master and by the Divisional Court that it would be unfair to require the defendant to proceed to trial without production of the videotape. The likely effect of a stay will be to force the trial court to decide whether to proceed without production of the videotape, or adjourn the trial until after the Attorney General's proposed appeal has run its course or until after the completion of the criminal trial. If the civil trial proceeds before the criminal trial, the defendant will suffer prejudice. If the defendant is granted an adjournment of the civil trial because the videotape has not been produced, the plaintiff will suffer the prejudice of delay. In my view, the harm that would be suffered by the parties in the civil action clearly outweighs any harm that might be suffered by the Attorney General and its interest in a fair criminal trial by reason of the production of the videotape. The rights of the parties to fair and expeditious justice should prevail.

19 The Attorney General submits that denial of the stay may render its appeal moot. Given my assessment of the merits of the proposed appeal, I do not regard that possibility as having any weight on the balance of convenience.

20 I hardly need to add that if I am wrong in my assessment of the merits of the proposed appeal, and three of my colleagues conclude that the Attorney General does raise points deserving the consideration of this court, they clearly have the discretion to grant leave to appeal even where the appeal has become moot.

Conclusion

21 Accordingly, the motion for a stay is dismissed. The respondents are entitled to their costs of the motion fixed at $2,500 to each party, inclusive of GST and disbursements.

22 As an addendum, I note that Exhibit 3 to the supplementary affidavit of Thomas Ward contains a copy of

the information in the criminal proceedings revealing the names of the complainants, that affidavit shall be sealed and the plaintiff is directed to file for the public record another copy of the affidavit with those names deleted.

Motion dismissed.

END OF DOCUMENT

TAB 4

C
2002 CarswellOnt 1038

Country Style Food Services Inc., Re
IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985 C. c-36, AS AMENDED; AND IN THE MATTER OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, C. c-43, AS AMENDED; AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF COUNTRY STYLE FOOD SERVICES INC., COUNTRY STYLE FOOD SERVICES HOLDINGS INC., COUNTRY STYLE REALTY LIMITED, MELODY FARMS SPECIALTY FOODS AND EQUIPMENT LIMITED, BUNS MASTER BAKERY SYSTEMS INC. and BUNS MASTER BAKERY REALTY INC.
APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985 C. c-36
Ont. C.A. [In Chambers]
Feldman J.A.
Heard: April 15, 2002
Judgment: April 16, 2002
Docket: CA M28458

Counsel: Craig R. Colraine, Mitchell D. Goldberg, for Applicants, Tozeng Limited, 1124019 Ontario Ltd. and 665371 Ontario Ltd.

Joanna Board, for 1304271 Ontario Limited and 995804 Ontario Inc. (supporting the Applicants)

Patrick J. O'Kelly, Ashley J. Taylor, for Respondent, Country Style

Frank J.C. Newbould, Q.C., for Respondent, Bank of Nova Scotia

Mahesh Uttamchandani, for Respondent, CAI, DIP Lender

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

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

Plan of arrangement for group of corporations was sanctioned by court -- No one opposed approval of plan at sanction hearing -- Three franchisees then applied for leave to appeal order based on facts discovered after hearing -- Franchisees alleged that they became aware of debt owed to them by group of corporations after approval of plan, that group of corporations offered improper incentives to creditors to vote for plan and that Monitor was in conflict of interest -- Application dismissed -- Applicants did not exercise due diligence and could have discovered information prior to hearing -- Fresh evidence did not meet criterion for admissibility -- No evidence existed to indicate that if affected franchisees had made claims and voted Plan would have been defeated or amended -- No alternative plan was proffered at any stage -- Nothing to suggest plan approved was not fair and reasonable -- If leave to appeal was granted progress of action would be hindered.

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

Plan of arrangement for group of corporations was sanctioned by court -- No one opposed approval of plan at sanction hearing -- Three franchisees then applied for leave to appeal order based on facts discovered after hearing -- Franchisees alleged that they became aware of debt owed to them by group of corporations after approval of plan, that group of corporations offered improper incentives to creditors to vote for plan and that Monitor was in conflict of interest -- Application dismissed -- Applicants did not exercise due diligence and could have discovered information prior to hearing -- Fresh evidence did not meet criterion for admissibility -- No evidence existed to indicate that if affected franchisees had made claims and voted Plan would have been defeated or amended -- No alternative plan was proffered at any stage -- Nothing to suggest plan approved was not fair and reasonable -- If leave to appeal was granted progress of action would be hindered.

Cases considered by Feldman J.A.:

Blue Range Resource Corp., Re, 1999 CarswellAlta 809, 244 A.R. 103, 209 W.A.C. 103, 12 C.B.R. (4th) 186 (Alta. C.A.) -- referred to

Cineplex Odeon Corp., Re, 2001 CarswellOnt 1258, 24 C.B.R. (4th) 201 (Ont. C.A.) -- referred to

Consumers Packaging Inc., Re, 2001 CarswellOnt 3482, 27 C.B.R. (4th) 197, 150 O.A.C. 384, 12 C.P.C. (5th) 208 (Ont. C.A.) -- referred to

Multitech Warehouse Direct Inc., Re, 32 Alta. L.R. (3d) 62, 1995 CarswellAlta 331 (Alta. C.A.) -- referred to

R. v. Palmer (1979), [1980] 1 S.C.R. 759, 30 N.R. 181, 14 C.R. (3d) 22, 17 C.R. (3d) 34 (Fr.), 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212, 1979 CarswellBC 533, 1979 CarswellBC 541 (S.C.C.) -- followed

Statutes considered:

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

Generally -- considered

s. 13 -- referred to

s. 18.1 [en. 1997, c. 12, s. 125] -- referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 134(4) -- referred to

APPLICATION by franchisees for leave to appeal order that sanctioned plan of arrangement for respondent group of corporations.

***Feldman J.A.*:**

1 This is an application for leave to appeal the order of Spence J. made on March 7, 2002, whereby he sanctioned a Plan of Arrangement (the "Plan" under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36 ("*CCAA*") for the respondent, Country Style Group of Corporations. The application is brought under s. 13 of the *CCAA* which provides:

> s. 13 Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

2 The application was originally brought before Spence J. but as he was unable to hear it before April 16, 2002, the date scheduled for the closing of the plan transaction, he suggested that the application be brought to this court.

3 All three applicants are Country Style franchisees. Only one, Tozeng Limited, is also a creditor that filed a proof of claim and voted in the proceeding.

4 The applicants concede that on the record before him, Spence J. did not make any error in approving the Plan which was approved by a substantial percentage of the unsecured creditors and by the secured creditor. In fact, no one opposed the approval of the plan at the sanction hearing. The basis for this application is that immediately after the hearing approving the Plan, the applicants became aware of facts which they say vitiate the approval process in three ways:

- (1) Over a period of time, some franchisees had contributed to Country Style's national advertising fund while others had not. The applicants claim that to the extent that some franchisees thereby overcontributed, they were entitled to claim as creditors against the company for unjust enrichment in the Plan process. However, because they did not know about the overcontribution and unequal treatment until it was too late to claim in the plan process, they have been denied both the amount of their claim and the opportunity to vote for or against the Plan and to participate in the process.

- (2) The company was offering improper incentives to creditors to vote for the Plan.

- (3) The Monitor was in a conflict of interest.

5 The applicants rely on fresh evidence in order to assert these claims and rely on s. 134(4) of the *Courts of Justice Act* R.S.O. 1990, c.C-43, which allows a court in a proper case, to accept fresh evidence. In *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), at 775, the Supreme Court of Canada set out four criteria for the admission of fresh evidence on appeal, summarized as follows:

- (1) by due diligence, the evidence could not have been adduced in the proceeding below;

- (2) it is relevant to a decisive or potentially decisive issue;

- (3) it is reasonably capable of belief;

- (4) if believed, it may reasonably have affected the result.

6 The respondents object to the admission of the fresh evidence on this application and rely heavily on the as-

sertion that the first criterion, due diligence, has not been met in this case. They also suggest that the record discloses that Mr. English, the principal of Tozeng Limited, did know about the differential treatment of franchisees as long as one year ago.

7 Mr. O'Kelly on behalf of Country Style, points to the fact that a creditor, Tarragon Mercantile Inc., did propose to oppose the sanction order until an out-of-court settlement was reached on the evening before the sanction motion. Tarragon filed a motion record with the court that contained affidavits outlining some of the allegations on which the applicants now rely (in particular, the alleged irregularities with the proxy solicitation process and the alleged conflict of interest of the Monitor) and raised other matters as well. I am told that Spence J. was advised on the return of the motion that Tarragon was withdrawing its opposition. The plan was thereupon sanctioned by the court. I am advised that no one opposed the order.

8 Mr. O'Kelly's submission is that because Tarragon was in a position to find out the information necessary to bring forth some of the allegations now asserted by the applicants, the applicants could have done so as well had they exercised due diligence. In my view, on the face of it, there is merit in that submission.

9 The one issue which is not fully detailed in the Tarragon material is the national advertising fund issue. However, the information relied on in respect of the fund is contained in an affidavit of Catherine Mauro dated March 25, 2002 and filed on this application. She is the former director of marketing and product development who was terminated by Country Style on February 4, 2002. Ms Mauro also provided one of the affidavits which is included in the Tarragon material. Again, therefore, it appears that the applicants could have discovered further information from Ms. Mauro prior to the March 7 hearing had they acted with due diligence in speaking with her.

10 Even more significant, however, is the fact that in his affidavit filed in connection with the original material seeking court protection, Mr. Gibbons, the President of Country Style, disclosed as part of his description of the financial status of the debtor companies that one of the historical responses by management when a franchisee developed financial difficulties was "deferring or accepting reduced royalty, advertising and/or sign rental payments for a period of time" (affidavit para. 37). This information was also included in the Management proxy circular which was sent out to all creditors, of which Mr. English was one.

11 The applicants' position is that until they talked to Catherine Mauro after the sanction hearing, they did not know that some franchisees were not paying the full 3.5% of monthly gross sales to the national advertising fund, and that the 13 corporate stores, taken over from failed franchisees, paid nothing into the fund. The applicants also take the position that the company and the monitor made it impossible for the franchisees to learn of this by failing to disclose it to the franchisees. Their evidence is that representations were made to franchisees by senior management that all franchisees paid the same percentage of their sales into the national advertising fund.

12 However, it appears that there was disclosure of the differential treatment of franchisees in respect of the advertising fund in Mr. Gibbons' affidavit and the Management circular. Counsel also pointed out that franchisees could ask to be added to the service list for all of the documentation and that some were added, including Ms. Board's clients who have been represented by her here in support of the application.

13 I conclude, based on the material currently before the court, that it cannot be said that there was non-disclosure of the differential treatment of franchisees in respect of the contribution to the national advertising fund, or that the applicants could not have discovered this evidence if they had exercised due diligence. Al-

though it appears that the potential significance of the different contributions as a possible claim against Country Style based on unjust enrichment, may not have been considered by the applicants until after the sanction motion, a failure to appreciate the significance of information does not meet the due diligence test.

14 Finally, the respondents point to the fact that Mr. English has deposed that in May 2000, he sought and obtained differential treatment in respect of the royalty fees he was paying and that he has been trying to retain the so-called "tiered store" status for his stores which allows them to pay lower fees. Therefore, Mr. English was aware of differentiation among franchisees in respect of some of the amounts payable to the franchiser and wanted to preserve that differentiation when it benefited him. The respondents say this shows that the new evidence should not be accepted and that furthermore, there is no merit to the suggestion that the franchisees have any claim against the debtor company based on alleged overpayments. As a result, they argue that the new evidence would not have affected the outcome of the sanction hearing had it been available at that hearing.

15 I am satisfied that I need not deal with this part of the submission on this motion, as the due diligence criterion is not met.

16 Even if the fresh evidence met the test for admission, which it does not on the due diligence criterion, the court must be satisfied that this is a case where leave to appeal ought to be granted. The jurisprudence in this area dictates that leave to appeal in *CCAA* proceedings should be granted sparingly: *Consumers Packaging Inc., Re* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.), at 199; *Blue Range Resource Corp., Re* (1999), 12 C.B.R. (4th) 186 (Alta. C.A.), at 190. In order to grant leave the court must be satisfied that there are "serious and arguable grounds that are of real and significant interest to the parties": *Multitech Warehouse Direct Inc., Re* (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.), at 63. This is determined in accordance with a four-pronged test as follows:

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

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

18 (c) whether the appeal is *prima facie* meritorious or frivolous;

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

20 See *Blue Range Resource Corp., Re*, *supra* at 190; *Cineplex Odeon Corp., Re* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.), at 202

21 As I understand it, the main issue on appeal is the submission that the applicant franchisees and other franchisees, some of whom have filed affidavits in support, over-contributed to the national advertising fund in relation to other franchisees and the company in connection with its corporate stores. This overcontribution entitled them to make a claim against the company for unjust enrichment. However, because they did not know about this potential claim until after the sanction hearing, they did not file claims in the process; they therefore did not have the right to participate as unsecured creditors, and they did not have the right to vote for or against the Plan.

22 Counsel for the applicants concedes that there is no evidence in the record to demonstrate that had the affected franchisees made claims and voted, the Plan would have been defeated or amended in any way.

23 Counsel also concedes that no alternative plan has been proferred at any stage. He suggests, however, that because of the circumstances set out, the Plan cannot be considered fair and reasonable. The Monitor has made it

clear in its reports that the only alternative to the Plan is bankruptcy or receivership, whereunder there would be nothing for the unsecured creditors. Counsel suggested in argument that his clients would be prepared to see the debtor company go bankrupt rather than proceed with the sanctioned Plan. There is no affidavit evidence to this effect, and I frankly find it hard to accept that franchisees with viable operations would prefer to see the corporate entity with which they are associated be liquidated in a bankruptcy or receivership.

24 Based on the record, there is nothing to suggest that the Plan as sanctioned and approved by the court is not "fair and reasonable." If leave to appeal is granted, the progress of the action will clearly be hindered and the restructuring may not go ahead at all. If the appeal were to be successful and the process reopened, the applicants do not propose any alternative to the plan, so that the significance to the action appears to be procedural but not substantive.

25 For all of these reasons, the applicants have not satisfied the test for the court to exercise its discretion to grant leave to appeal.

26 During argument, counsel for the applicants suggested that one of the problems facing his clients is that they owe money to the debtor company, but are not able to make a claim against the company in respect of the overpayment into the advertising fund because of the orders made in the *CCAA* process. In response, counsel for Country Style took the position that s. 18.1 of the *CCAA* preserves the applicants' ability to assert a right of set-off against the company in respect of their claims against any monies which they may owe to the company. In other words, their claims against the company are not necessarily barred.

27 As this was not an issue for resolution on this leave to appeal motion, I make no comment on (1) the effect of s. 18.1 of the *CCAA* on post- Plan claims by or against the debtor company; or (2) on the effect of the claims bar order in respect of claims by people who were not listed or served as creditors in the proceeding, or people who did not know that they had claims against the company.

28 Finally, I note that the franchisees as a group were not considered to be people to be officially served with and included in the *CCAA* process. I was advised by a representative of the Monitor who was present in court for this appeal, that Mr. Gibbons did send a letter to all franchisees enclosing the original stay order and advising them of the Monitor's website where much of the *CCAA* material would be posted. Although the process under the Act contemplates the participation and protection of creditors, the debtor company, and possibly the shareholders, in cases where the debtor company is a franchisor, the franchisees may have an interest in the ultimate structure of the franchise operation as proposed by the Plan process. It may therefore be appropriate where a franchisor seeks *CCAA* protection, to consider whether the franchisees ought to be given notice of the proceedings and the opportunity to request the ability to participate on an appropriate basis.

CONCLUSION

29 Leave to appeal is denied.

Application dismissed.

END OF DOCUMENT

TAB # 5.

H

2007 CarswellAlta 1097

Calpine Canada Energy Ltd., Re

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

And In the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited and 3094479 Nova Scotia Company (the "CCAA Applicants")

Calpine Power L.P. (Appellant / Applicant (Creditor)) and The CCAA Applicants and Calpine Energy Services Canada Partnership, Calpine Canada Natural Gas Partnership and Calpine Canadian Saltend Limited Partnership (Respondents / Applicants)

Calpine Canada Natural Gas Partnership (Respondent / Applicant / CCAA Party) and Calpine Energy Services Canada Partnership and Lisa Winslow, Trustee of Calpine Greenfield Commercial Trust (Respondents / (CCAA Applicant and Interested Parties)) and Calpine Power L.P. (Appellant / Applicant / (Creditor in CCAA Proceedings))

Alberta Court of Appeal (In Chambers)

C. O'Brien J.A.

Heard: August 15, 2007

Judgment: August 17, 2007

Docket: Calgary Appeal 0701-0222-AC, 0701-0223-AC

Proceedings: refusing leave to appeal *Calpine Canada Energy Ltd., Re* (2007), 2007 CarswellAlta 1050, 2007 ABQB 504 (Alta. Q.B.)

Counsel: P.T. Linder, Q.C., R. Van Dorp for Applicant, CPL

L.B. Robinson, Q.C., S.F. Collins, J.A. Carfagnini for CCAA Applicants and the CCAA Parties (Respondents)

H.A. Gorman for Ad Hoc ULCI Noteholders Committee

P.H. Griffin, U. Sheikh for Calpine Corporation and other US Debtors

F.R. Dearlove for HSBC

P. McCarthy, Q.C., J. Kruger for Ernst & Young Inc., the Monitor

N.S. Rabinovitch for Lien Debtholders

R. De Waal for Unsecured Creditors Committee

Subject: Insolvency

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Arrangements -- Approval by court -- "Fair and reasonable"

Applicants obtained order granting them protection from their creditors under Companies' Creditors Arrangement Act ("CCAA") -- Order appointed monitor and provided for stay of proceedings against applicants and against CESC Partnership, CCNG Partnership, and CCS Limited Partnership -- Applicants and these three parties were together referred to as CCAA debtors -- Parties negotiated terms of global settlement agreement ("GSA") -- Monitor noted that GSA resolved all material issues that existed between applicants and US debtors -- Monitor concluded that GSA was beneficial to CCAA debtors and their creditors and unequivocally endorsed GSA -- Application for approval of settlement was granted and GSA was approved -- Supervising judge found that GSA was not linked to or subject to plan of arrangement and did not compromise rights of creditors that were not parties to it or did not consent to it, and did not have effect of unilaterally depriving creditors of contractual rights without their participation in GSA -- Applicants were granted order approving terms of GSA and directing various parties to execute such documents and implement transactions necessary to give effect to GSA, order permitting CCR Co. and its holdings of CCEF ULC Notes to take necessary steps to sell Notes, and extension of stay contemplated by initial order to December 20, 2007 -- Creditor brought application for stay pending appeal and leave to appeal three orders on basis that supervising judge erred in concluding that GSA was not compromise or plan of arrangement -- Application dismissed -- Supervising judge did not make any palpable or overriding error -- Supervising judge had discretion to approve GSA -- Creditor failed to establish serious and arguable grounds for granting leave -- Creditor did not demonstrate that appeal for leave was sought was prima facie meritorious -- There was no compromise of debt if indebtedness was paid in full which was likely result as found by supervising judge -- Fact that GSA impacted upon assets of debtor companies was common feature of any settlement agreement and did not automatically result in vote by creditors -- GSA did not usurp right of creditors to vote on plan of arrangement if it became necessary to propose such plan to creditors -- Settlement between CCAA debtors and US debtors unlocked Canadian proceedings to meaningful progress in asset realization and claims resolution, and provided mechanisms for resolving remaining issues and significant creditor claims, and clarification of priorities.

Cases considered by *C. O'Brien J.A.*:

Air Canada, Re (2004), 2004 CarswellOnt 469, 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]) -- referred to

Canadian Airlines Corp., Re (2000), 80 Alta. L.R. (3d) 213, 2000 ABCA 149, 2000 CarswellAlta 503, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) -- referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) -- referred to

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

Liberty Oil & Gas Ltd., Re (2003), 2003 ABCA 158, 2003 CarswellAlta 684, 44 C.B.R. (4th) 96 (Alta.

C.A.) -- followed

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

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

Stelco Inc., Re (2005), 204 O.A.C. 216, 78 O.R. (3d) 254, 2005 CarswellOnt 6283, 15 C.B.R. (5th) 288 (Ont. C.A.) -- referred to

T. Eaton Co., Re (1999), 14 C.B.R. (4th) 288, 1999 CarswellOnt 3542 (Ont. S.C.J. [Commercial List]) -- referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 11 -- referred to

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

Generally -- referred to

s. 4 -- considered

s. 5 -- considered

s. 6 -- considered

s. 11(4) -- referred to

APPLICATION by creditor for stay pending appeal and leave to appeal from judgment reported at *Calpine Canada Energy Ltd., Re* (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 33 B.L.R. (4th) 68 (Alta. Q.B.), granting application for approval of settlement.

***C. O'Brien J.A.*:**

Introduction

1 Calpine Power L.P. (CLP) applies for a stay pending appeal and leave to appeal three orders granted on July 24, 2007 in a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (CCAA). At the request of counsel, the applications have been dealt with on an expedited basis. Oral submissions were heard on August 15, at the close of which I undertook to deliver judgment by the end of the week. I do so now.

Background facts

2 In December 2005, Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy

Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (CCAA Applicants) sought and obtain protection under the CCAA. At the same time, the parties referred to as the US Debtors sought and obtained similar protection under Chapter 11 of the U. S. Bankruptcy Code.

3 A monitor, Ernst & Young Inc., was appointed under the CCAA proceedings and a stay of proceedings was ordered against the CCAA Applicants and against Calpine Energy Services Canada Partnership, Calpine Canada Natural Gas Partnership and Calpine Canadian Saltend Limited Partnership. The latter three parties collectively are referred to as the CCAA Parties and those parties together with the CCAA Applicants as the CCAA Debtors.

4 This insolvency is extremely complex, involving many related corporations and partnerships, and highly intertwined legal and financial obligations. The goal of restructuring and realizing maximum value for assets has been made more difficult by a number of cross-border issues.

5 As described in the Monitor's 23rd Report, dated June 28, 2007, the CCAA Debtors and the US Debtors concluded that the most appropriate way to resolve the issues between them was to concentrate on reaching a consensual global agreement that resolved virtually all the material cross-border issues between them. The parties negotiated a global settlement agreement (GSA) subject to the approval of both Canadian and U. S. courts, execution of the GSA and the sale by Calpine Canada Resources Company of its holdings of Calpine Canada Energy Finance ULC (ULC1) Notes in the face amount of US$359,770,000 (the CCRC ULC1 Notes). Counsel at the oral hearing informed me that the Notes were sold on August 14, 2007, yielding a net amount of approximately US $403 million, an amount exceeding the face amount.

6 On July 24, 2007, the CCAA Applicants sought and obtained three orders. First, an order approving the terms of the GSA and directing the various parties to execute such documents and implement the transactions necessary to give effect to the GSA. Second, an order permitting CCRC and ULC1 to take the necessary steps to sell the CCRC ULC1 Notes. Third, an extension of the stay contemplated by the initial CCAA order to December 20, 2007. No objection was taken to the latter two orders and both were granted. The supervising judge also, in brief oral reasons, approved the GSA with written reasons to follow. Written Reasons for Judgment were subsequently filed on July 31, 2007: *Calpine Canada Energy Ltd., Re*, 2007 ABQB 504 (Alta. Q.B.). The reasons are careful and detailed. They fully set out the relevant facts and canvas the applicable law and as I see no need to repeat the facts and authorities, the reasons should be read in conjunction with these relatively short reasons dealing with the applications arising therefrom.

7 The applications to the supervising judge were made concurrently with applications by the US Debtors to the US Bankruptcy Court in New York state, the applications proceeding simultaneously by video conference. The applications to the US Court, including an application for approval of the GSA, were also granted.

8 The applicant, CLP, the Calpine Canada Energy Finance II ULC (ULC2) Indenture Trustee and a group referring to itself as the "Ad Hoc Committee of Creditors of Calpine Canada Resources Company" opposed the approval of the GSA. CPL is the only party seeking leave to appeal.

9 CLP submits that the supervising judge erred in concluding that the GSA was not a compromise or plan of arrangement and therefore, sections 4 and 5 of the CCAA did not apply and no vote by creditors was necessary.

10 Sections 4 and 5 of the CCAA provide:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

11 CLP further submits that the jurisdiction of the supervising judge to approve the GSA is governed by section 6 of the CCAA. Section 6 provides:

> Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

12 The supervising judge found that the GSA is not linked to or subject to a plan of arrangement and does not compromise the rights of creditors that are not parties to it or have not consented to it, and it does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA. She concluded that the GSA was not a compromise or arrangement for the purposes of section 4 of the CCAA. In the course of her reasons she cites a number of cases for support that the court has jurisdiction to review and approve transactions and settlement agreements during the stay period of a CCAA proceedings if an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally.

Test for leave to appeal

13 This Court has repeatedly stated, for example in *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158, 44 C.B.R. (4th) 96 (Alta. C.A.), at paras. 15-16, that the test for leave under the CCAA involves a single criterion that there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are:

> (1) Whether the point on appeal is of significance to the practice;

(2) Whether the point raised is of significance to the action itself;

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

(4) Whether the appeal will unduly hinder the progress of the action.

14 In assessing these factors, consideration should also be given to the applicable standard of review: *Canadian Airlines Corp., Re*, 2000 ABCA 149, 261 A.R. 120 (Alta. C.A. [In Chambers]). Having regard to the commercial nature of the proceedings which often require quick decisions, and to the intimate knowledge acquired by a supervising judge in overseeing a CCAA proceedings, appellate courts have expressed a reluctance to interfere, except in clear cases: *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 237 A.R. 326 (Alta. C.A.) at para. 61.

Analysis

15 The standard of review plays a significant, if not decisive, role in the outcome of this application for leave to appeal. The supervising judge, on the record of evidence before her, found that the GSA was "not a plan of compromise or arrangement with creditors" (Reasons, para. 51). This was a finding of fact, or at most, a finding of mixed law and fact. The applicant has identified no extricable error of law so the applicable standard is palpable or overriding error.

16 The statute itself contains no definition of a compromise or arrangement. Moreover, it does not appear that a compromise or an arrangement has been *proposed* between a debtor company and either its unsecured or secured creditors, or any class of them within the scope of sections 4 or 5 of the CCAA. Neither the company, a creditor, nor anyone made application to convene a meeting under those sections.

17 Rather, the GSA settles certain intercorporate claims between certain Canadian Calpine entities and certain US Calpine entities subject to certain conditions, including the approvals both of the Court of Queen's Bench of Alberta and of the US Bankruptcy Court.

18 This is not to minimize the magnitude, significance and complexity of the issues dealt with in the intercorporate settlement which, by definition, was not between arm's length companies. The material cross-border issues are identified in the 23rd Report of the monitor and listed by the supervising judge (Reasons, para. 5).

19 It is implicit in her reasons, if not express, that the supervising judge accepted the analysis of the monitor, and found that the GSA would likely ultimately result in payment in full of all Canadian creditors, including CLP. CLP does not challenge this finding, but points out that payment is not assured, and rightly relies upon its status as a creditor to challenge the approval in the meantime until such time as it has been paid.

20 The supervising judge further found that the GSA "does not compromise the rights of creditors that are not parties to it or have not consented to it, and it certainly does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA" (Reasons, para. 51). CPL challenges this finding. In order to succeed in its proposed appeal, CPL must also demonstrate palpable and overriding error in these further findings of the supervising judge which once again, involve findings of fact or of mixed law and fact.

Application in this case

21 CPL submits that the "fundamental problem" with the approval granted by the supervising judge is that the

GSA is in reality a plan of arrangement because it settles virtually all matters in dispute in the Canadian CCAA estate and therefore, entitles the applicant to a vote. CPL argues that the GSA must be an arrangement or compromise within the meaning of sections 4, 5 and 6 of the CCAA because, in its view, the GSA requires non party creditors to make concessions, re-orders the priorities of creditors and distributes assets of the estate.

22 The supervising judge acknowledged at the outset of her analysis that if the GSA were a plan of arrangement or compromise, a vote by creditors would be necessary (Reasons, para. 41). However, she was satisfied that the GSA did not constitute a plan of arrangement with creditors.

23 The applicant conceded that a CCAA supervising judge has jurisdiction to approve transactions, including settlements in the course of overseeing proceedings during a stay period and prior to any plan of arrangement being proposed to creditors. This concession was proper having regard to case authority recognizing such jurisdiction and cited in the reasons of the supervising judge, including *Air Canada, Re* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]), *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]), *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), *T. Eaton Co., Re* (1999), 14 C.B.R. (4th) 288 (Ont. S.C.J. [Commercial List]) and *Stelco Inc., Re* (2005), 78 O.R. (3d) 254 (Ont. C.A.).

24 The power to approve such transactions during the stay is not spelled out in the CCAA. As has often been observed, the statute is skeletal. The approval power in such instances is usually said to be found either in the broad powers under section 11(4) to make orders other than on an initial application to effectuate the stay, or in the court's inherent jurisdiction to fill in gaps in legislation so as to give effect to the objects of the CCAA, including the survival program of the debtor until it can present a plan: *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]) at para. 8.

25 Hunt, J.A. in delivering the judgment of this Court in *Smoky River Coal* considered the history of the legislation and its objectives in allowing the company to take steps to promote a successful eventual arrangement. She concluded at para. 53:

> These statements about the goals and operation of the CCAA support the view that the discretion under s. 11(4) should be interpreted widely.

and further at para. 60:

> To summarize, the language of s. 11(4) is very broad. The CCAA must be interpreted in a remedial fashion.

26 In my view, there is no serious issue as to the jurisdiction of a supervising judge to approve a settlement agreement between consenting parties prior to consideration of a plan of arrangement pursuant to section 6 of the CCAA. The fact that the GSA is not a simple agreement between two parties, but rather resolves a number of complex issues between a number of parties, does not affect the jurisdiction of the court to approve the agreement if it is for the general benefit of all parties and otherwise meets the tests identified in the reasons of the supervising judge.

27 CPL urges that the legal issue for determination by this Court is where the line is to be drawn to say when a settlement becomes a compromise or arrangement, thus requiring a vote under section 6 before the court can grant approval. It suggests that it would be useful to this practice area for the court to set out the criteria to be

considered in this regard.

28 An element of compromise is inherent in a settlement as there is invariably some give and take by the parties in reaching their agreement. The parties to the GSA made concessions for the purpose of gaining benefits. It is obvious that something more than compromise between consenting parties within a settlement agreement is required to constitute an arrangement or compromise for purposes of the CCAA as if that were not so, no settlement agreement could be approved without a vote of the creditors. As noted, that is contrary to case authority accepted by all parties to these applications.

29 The CCAA deals with compromises or arrangements sought to be imposed upon creditors generally, or classes of creditors, and a vote is a necessary mechanism to determine whether the appropriate majority of the creditors proposed to be affected support the proposed compromise or arrangement.

30 As pointed out by the supervising judge, a settlement will almost always have an impact on the financial circumstances of a debtor. A settlement will invariably have an effect on the size of the estate available for other claimants (Reasons, para. 62).

31 Whether or not a settlement constitutes a plan of arrangement requiring a vote will be dependent upon the factual circumstances of each case. Here, the supervising judge carefully reviewed the circumstances and concluded, on the basis of a number of the fact findings, that there was no plan of arrangement within the meaning of the CCAA, and that the settlement merited approval. She recognized the peculiar circumstances which distinguishes this case, and observed at para. 76 of her Reasons:

> The precedential implications of this approval must be viewed in the context of the unique circumstances that have presented a situation in which all valid claims of Canadian creditors likely will be paid in full. This outcome, particularly with respect to a cross-border insolvency of exceptional complexity, is unlikely to be matched in other insolvencies, and therefore, a decision to approve this settlement agreement will not open any floodgates.

32 At the time of granting her approval, the supervising judge had been overseeing the conduct of these CCAA proceedings since their inception -- some 18 months earlier. She had the benefit of the many reports of the monitor and was familiar with the record of the proceedings. Her determination of this issue is entitled to deference in the absence of legal error or palpable and overriding error of fact.

33 CPL submits that the GSA compromises its rights and claims, and thus, challenges the express finding of the supervising judge that the settlement neither compromises the rights of creditors before it, nor deprives them of their existing contractual rights. The applicant relies upon the following effects of the GSA in making this submission:

> (i) a priority payment of $75 million out of the proceeds of the sale of bonds owned by Calpine Canada Resources Company;
>
> (ii) the release of a potential claim against Calpine Canada Energy Limited, the parent of Calpine Canada Resources Company, which is a partner of Calpine Energy Services Canada Ltd., against which CPL has a claim;
>
> (iii) the dismissal of a claim by Calpine Canada Energy Limited against Quintana Canada Holdings

> LLC, thereby depleting Calpine Canada Energy Limited of a potential asset which that company could use to satisfy any potential claim by CPL for any shortfall, were it not for the release of claims against Calpine Canada Energy Limited (see (ii) above); and
>
> (iv) the dismissal of the Greenfield Action brought by another CCAA Debtor against Calpine Energy Services Canada Ltd. for an alleged fraudulent conversion of its interest in Greenfield LP which was developing a 1005 Megawatt generation plant.

34 For purposes of the CCAA proceedings, the applicant is a creditor of Calpine Energy Services Canada Ltd., Calpine Canada Power Ltd. and perhaps, also, Calpine Canada Resources Company. The GSA does not change its status as a creditor of those companies, nor does it bar the applicant from any existing claims against those companies.

35 In my view, the submission of the applicant does not show any palpable and overriding error in the findings of the supervising judge that the right of creditors not parties to the GSA have not been compromised or taken away. Firstly, there is no compromise of debt if such indebtedness, as ultimately found due to the applicant, is paid in full, which is the likely result as found by the supervising judge, albeit she acknowledged that this result was not guaranteed (Reasons, para. 81). Secondly, and in any event, the fact that the GSA impacts upon the assets of the debtor companies, against which the applicant may ultimately have a claim for any shortfall experienced by it, is a common feature of any settlement agreement and as earlier explained, does not automatically result in a vote by the creditors. The further fact that one of the affected assets of the debtor companies is a cause of action, or perhaps, more correctly, a possible cause of action, does not abrogate the rights of a creditor albeit there may be less monies to be realized at the end of the day.

36 The GSA does not usurp the right of the creditors to vote on a plan of arrangement if it becomes necessary to propose such a plan to the creditors. As explained by the supervising judge, the settlement between the CCAA Debtors and the US Debtors unlocked the Canadian proceedings to meaningful progress in asset realization and claims resolution, and provided the mechanisms for resolving the remaining issues and significant creditor claims, and the clarification of priorities.

37 It is correct, of course, that if the claims of CPL are paid in full in the course of the CCAA proceedings, it will never be necessary for it to vote on a plan of arrangement. The applicant should have no complaint with that result. On the other hand, if the claims are not satisfied, it seems likely a plan of arrangement will ultimately be proposed to the applicant, who will then have its right to vote on any such plan.

38 CPL argues that the supervising judge was not entitled to assess the merits of the GSA *vis-à-vis* the creditors as this was a matter for the exclusive business judgment of the creditors and to be exercised by their vote. As became apparent during the course of its submissions, if a vote were required, from the perspective of the CPL, this would give it veto power over the GSA. Unless clearly mandated by the statute, this is a result to be avoided. While it is understandable that an individual creditor seeks to obtain as much leverage as possible in order to enhance its negotiating position, the objectives and purposes of the CCAA could easily be frustrated in such circumstances by the self interest of a single creditor. Court approval requires, as a primary consideration, the determination that an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally. As the supervising judge noted, court approval of settlements and major transaction can and often is given over the objections of one or more parties because the court must act for the greater good consistent with the purpose and spirit and within the confines of the legislation.

39 I am not persuaded that the applicant has demonstrated any reasonably arguable error of law in the reasons of the supervising judge or any palpable and overriding errors in her findings of fact or findings of mixed fact and law. In the absence of any such error, it follows that she had discretion to approve the GSA, which she exercised based upon her assessment of the merits and reasonableness of the settlement, and other factors in accordance with the principles set out in the authorities, cited in her reasons, governing the approval of transactions, including settlements, during the stay period prior to a plan of arrangement being submitted to the creditors.

Conclusion

40 CPL has failed to establish serious and arguable grounds for granting leave. In particular, two of the factors used to assess whether this criterion is present have not been met. It has not been demonstrated that the point on appeal is of significance to the parties having regard to the fact dependent nature of whether a plan of arrangement has been proposed to creditors. More importantly, having regard to the standard of review and the findings of the supervising judge, the applicant has not demonstrated that the appeal for which leave is sought is *prima facie* meritorious.

41 The application for leave is dismissed. It follows that the application for a stay likewise fails and is dismissed.

42 Finally, I would be remiss if I did not acknowledge the excellent quality of the submissions, both written and oral, of counsel on these applications. The submissions were of great assistance in permitting the application to be dealt with in an abbreviated time frame.

Application dismissed.

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TAB # 6.

H
1998 CarswellBC 1878

Repap British Columbia Inc., Re
In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44
In the Matter of the Company Act, R.S.B.C. 1979, c. 59
In the Matter of Repap British Columbia Inc., Buffalo Head Forest Products Ltd., Orenda Forest Products Ltd. and Orenda Logging Ltd.
British Columbia Court of Appeal [In Chambers]
Finch J.A.
Oral reasons: August 7, 1998
Docket: Vancouver CA024657

Proceedings: refusing leave to appeal (May 4, 1998), Doc. Vancouver A970588 (B.C.S.C.)

Counsel: *J. Sandrelli*, appearing for the Appellant.

C.S. Bird, appearing for H.M.T.Q. for B.C.

J.C. McArthur, appearing for Skeena.

C.T. Reardon, appearing for Non-Union Employees.

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

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

Court had approved plan of arrangement for restructuring of company under which workers at pulp mill would receive 20 per cent of equity in restructured company -- Three different groups of employees could not agree on allocation of equity among themselves -- Local 4 of Pulp and Paper Workers of Canada claimed that distribution of equity should be on per capita basis as of October 3, 1997 -- British Columbia Government Employees Union claimed that distribution should be per capita as of October 2000 -- Provincial government took position that distribution of shares should be based on wages earned by each group in given year -- Non-union employees supported government's position -- Chambers judge adopted position put forward by government -- Local 4 appealed on ground that chambers judge erred in failing to take into account relevant considerations and failing to recognize principle of fairness that was embodied in proposal for distribution -- Appeal was of no general importance -- Appeal and consequent prolongation of process would only lead to uncertainty -- Insufficient basis to conclude that allocation of equity settled on by chambers judge was clearly wrong or that it had worked substantial injustice -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by *Finch J.A.*:

Mueller v. Coronation Insurance Co. (1995), 12 B.C.L.R. (3d) 90, 63 B.C.A.C. 47, 104 W.A.C. 47 (B.C. C.A.) -- referred to

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

Woodward's Ltd., Re (1993), 23 B.C.A.C. 224, 39 W.A.C. 224, 105 D.L.R. (4th) 517, 83 B.C.L.R. (2d) 31, 22 C.B.R. (3d) 25 (B.C. C.A.) -- referred to

Statutes considered:

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

s. 13 -- considered

s. 14(1) -- considered

APPLICATION by Local 4 of Pulp and Paper Workers of Canada for leave to appeal from judgment, reported at (1998), 4 C.B.R. (4th) 96 (B.C. S.C.), directing distribution of shares on basis of wages earned.

***Finch J.A.*:**

1 Local 4 of the Pulp and Paper Workers of Canada applies for leave to appeal the order of Mr. Justice Thackray made May 4, 1998 in proceedings under the *Companies' Creditors Arrangement Act*.

2 On January 9, 1998 the judge granted an order approving a plan of arrangement for the restructuring of Skeena Cellulose Incorporated under which the workers at the pulp mill on Watson Island were to receive 20 per cent of the equity in the restructured company. The issue decided by Mr. Justice Thackray on May 4, 1998 was how that 20 per cent equity should be allocated among three groups of workers, namely members of Local 4, members of the British Columbia Government Employees Union and non-union employees.

3 Local 4 contended that the distribution of equity to the three groups should be on a per capita basis as of October 3, 1997. The BCGEU argued that distribution should be per capita as of October, 2000. The provincial government took the position that the distribution of shares to the three groups should be based on the wages earned by each group in a given year. The non-union employees supported the government's position.

4 The learned chambers judge adopted the position put forward by the government and supported by the non-union workers. He reasoned that because the 20 per cent equity interest was obtained by the workers in exchange for their accepting wage roll-backs and other concessions, the share distribution should reflect the wage reductions each group had agreed to. He concluded his reasons in this way:

> [22] I agree with the concept as proposed by the Government. I am not in a position to analyze details such as the trust arrangement and the income tax considerations that are part of the proposal. What I approve is the initial distribution being to all of the workers based upon wages earned in a given year.
>
> [23] Ms. Reagan [sic] asked, rhetorically, "How can the unions say that a per capita distribution is the fair mechanism when the PPWC is going to use the Government proposal for internal distribution?" She

submitted that if it is unfair to distribute on the basis of wages then the Court, if it accepts the principles of fairness between workers, cannot approve a per capita distribution to groups knowing that the PPWC will then, having reaped the lion's share, distribute internally on the basis of wages.

[24] I agree. The proposals of the PPWC and the BCGEU were designed to reap the maximum benefit for their members. There is nothing wrong with this, indeed it is probably their mandate. However, this is not a foundation upon which the Court can ground a judgment. Similarly, while it might be correct that the initiatives and efforts of the PPWC had a significant impact upon the final equity offer from the Government, that cannot be the basis for distribution of the equity. The distribution must be as fair as possible to all workers regardless of how the offer came to pass.

[25] Nor can I accept, as a basis for this judgment, the PPWC's suggestions that the non-union workers are not actually subject to a wage reduction and that they might give themselves a raise. Neither of these suggestions were established on the evidence.

[26] The Government proposal accords with the principles that resulted in the Plan of Arrangement. It incorporates the concept of each worker receiving compensation relative to his or her concession. I therefore hold that the distribution will be, in principle, in accordance with the Government proposal.

5 Local 4 says the learned chambers judge erred in directing distribution of shares on the basis of wages earned rather than on a per capita basis. It says he failed to take account of relevant considerations and failed to recognize the principle of fairness embodied in the proposal for distribution. It says that as a result he made an order which discriminates against Local 4 and the BCGEU.

6 On this leave application the Crown and the company took no position. No one appeared for the BCGEU. The application for leave was opposed only by the non-union workers. Leave to appeal is required in this case by the provisions of ss. 13 and 14 of the *Companies' Creditors Arrangement Act* which read:

13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

14. (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

7 Counsel for Local 4 says that any delay caused by an appeal will not affect the implementation of the restructuring approved by the Court. He says that plan is already in place and is working. He says the basis on which equity is to be allocated is important to the parties and is important in the field of labour relations generally. He says the learned chambers judge erred in exercising his discretion and in particular failed to take into account the concessions made by Local 4 on the issues of trade flexibility and contracting out. He says there would be no prejudice to any stakeholder in allowing an appeal to go forward.

8 Counsel for the non-union workers referred me to cases holding that the Court should be slow to interfere with orders made by a chambers judge supervising a reorganization under the *Companies' Creditors Arrangement Act*: see *Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (B.C. C.A.) and *Woodward's Ltd., Re* (1993), 83 B.C.L.R. (2d) 31 (B.C. C.A.). Counsel for the non-union workers also emphasized the

discretionary nature of the order and says that the issues sought to be raised by Local 4 are matters of fact on which the chambers judge's conclusion cannot be shown to be plainly wrong.

9 In my respectful view, the application for leave to appeal must fail. The appeal is of no general importance. The basis for allocation of equity among the interested groups must be unique to the particular circumstances of this restructuring. While the issue of share distribution is important to these parties, an appeal and the consequent prolongation of process can only lead to uncertainty.

10 In addition, the prospects of success on such an appeal are very poor. The applicant concedes the discretionary nature of the order. I cannot see any basis on which it might be said that the allocation of equity settled on by the judge is clearly wrong or that it has worked a substantial injustice: see *Mueller v. Coronation Insurance Co.* (1995), 12 B.C.L.R. (3d) 90 (B.C. C.A.), nor do I think it could be concluded that the learned chambers judge failed to consider or give appropriate weight to the relevant factors. The application for leave to appeal is dismissed.

Leave refused.

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TAB # 7.

H
2004 CarswellAlta 1607

San Francisco Gifts Ltd., Re

San Francisco Gifts Ltd., San Francisco Retail Gifts Incorporated (previously called San Francisco Gifts Incorporated), San Francisco Gift Stores Limited, San Francisco Gifts (Atlantic) Limited, San Francisco Stores Ltd., San Francisco Gifts & Novelties Inc., San Francisco Gifts & Novelty Merchandising Corporation (previously called San Francisco Gifts and Novelty Corporation), San Francisco (The Rock) Ltd. (previously called San Francisco Newfoundland Ltd.) and San Francisco Retail Gifts & Novelties Limited (previously called San Francisco Gifts & Novelties Limited) (Applicants) and Oxford Properties Group Inc., Ivanhoe Cambridge 1 Inc., 20 Vic Management Ltd., Morguard Investments Ltd., Morguard Real Estate Investments Trust, Riocan Property Services, and 1113443 Ontario Inc. (Respondents)

Alberta Court of Appeal

Conrad J.A.

Heard: November 24, 2004

Judgment: December 2, 2004

Docket: Edmonton Appeal 0403-0325-AC

Proceedings: refused leave to appeal *San Francisco Gifts Ltd., Re* (2004), 2004 ABQB 705, 2004 CarswellAlta 1241 (Alta. Q.B.)

Counsel: R.T.G. Reeson, Q.C. for Applicants

J.H.H. Hockin for Respondents

M.J. McCabe, Q.C. for Court Appointed Monitor

Subject: Civil Practice and Procedure; Insolvency

Bankruptcy and insolvency --- Practice and procedure in courts -- Appeals -- To Court of Appeal -- Availability -- Leave by judge

SF group of companies was composed of operating company and several nominee companies -- Operating company held all of SF's assets and was one hundred per cent owned by L Corp. -- L Corp. was wholly owned by BS, who was also president and sole director of nearly all SF group of companies -- BS and L Corp. were operating company's only secured creditors -- On January 7, 2004, SF group of companies was granted protection under Companies' Creditors Arrangement Act ("CCAA") -- On June 22, 2004, operating company was permitted to file plan of compromise or arrangement and submit it to its creditors for consideration and voting -- Plan classified BS and L Corp. as "unaffected creditors", meaning that their claims survived reorganization and they would vote as unsecured creditors -- On July 14, 2004, group of six objecting landlords asked court to create separate classes of creditors -- Court removed BS and L Corp. from unsecured creditors class, placing them in separate class for voting purposes -- SF group of companies applied for leave to appeal -- Application dismissed -- In arriving at her decision to place BS and L Corp. in separate class, chambers judge relied on different treatment afforded BS and L Corp. under plan -- BS and L Corp. would be unaffected by bankruptcy of SF companies, whereas all other creditors in class would receive nothing -- BS and L Corp. were in position to control vote and cancel all unsecured creditors' debt but their own -- Under those circumstances, there would be no meaningful consultation about plan -- Chambers judge correctly held that there was no "commonality of interest" between BS and L Corp. and other creditors -- While questions of class in CCAA proceedings were important, application for leave failed to establish that appeal was prima facie meritorious.

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

SF group of companies was composed of operating company and several nominee companies -- Operating company held all of SF's assets and was one hundred per cent owned by L Corp. -- L Corp. was wholly owned by BS, who was also president and sole director of nearly all SF group of companies -- BS and L Corp. were operating company's only secured creditors -- On January 7, 2004, SF group of companies was granted protection under Companies' Creditors Arrangement Act ("CCAA") -- On June 22, 2004, operating company was permitted to file plan of compromise or arrangement and submit it to its creditors for consideration and voting -- Plan classified BS and L Corp. as "unaffected creditors", meaning that their claims survived reorganization and they would vote as unsecured creditors -- On July 14, 2004, group of six objecting landlords asked court to create separate classes of creditors -- Court removed BS and L Corp. from unsecured creditors class, placing them in separate class for voting purposes -- SF group of companies applied for leave to appeal -- Application dismissed -- In arriving at her decision to place BS and L Corp. in separate class, chambers judge relied on different treatment afforded BS and L Corp. under plan -- BS and L Corp. would be unaffected by bankruptcy of SF companies, whereas all other creditors in class would receive nothing -- BS and L Corp. were in position to control vote and cancel all unsecured creditors' debt but their own -- Under those circumstances, there would be no meaningful consultation about plan -- Chambers judge correctly held that there was no "commonality of interest" between BS and L Corp. and other creditors -- While questions of class in CCAA proceedings were important, application for leave failed to establish that appeal was prima facie meritorious.

Cases considered by *Conrad J.A.*:

> *Liberty Oil & Gas Ltd., Re* (2003), 44 C.B.R. (4th) 96, 2003 ABCA 158, 2003 CarswellAlta 684 (Alta. C.A.) -- followed
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> *Royal Bank v. Fracmaster Ltd.* (1999), 1999 CarswellAlta 539, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230 (Alta. C.A.) -- considered
>
> *Sovereign Life Assurance Co. v. Dodd* (1892), [1891-94] All E.R. Rep. 246, [1892] 2 Q.B. 573 (Eng. C.A.) -- considered

Statutes considered:

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

Generally -- referred to

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

Generally -- considered

Tariffs considered:

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

Sched. C, Tariff of Costs, column 1 -- referred to

APPLICATION by insolvent group of companies for leave to appeal from judgment reported at *San Francisco Gifts Ltd., Re* (2004), 5 C.B.R. (5th) 92, 42 Alta. L.R. (4th) 352, 359 A.R. 71, 2004 ABQB 705, 2004 CarswellAlta 1241 (Alta. Q.B.) with respect to classes of creditors under *Companies' Creditors Arrangement Act*.

***Conrad J.A.*:**

I. Introduction

1 The San Francisco group of companies ("San Francisco") seeks leave to appeal an order finding Barry Slawsky ("Slawsky") and Laurier Investments Corp. ("Laurier") do not share a "commonality of interest" with other unsecured creditors, and placing them in a separate class for purposes of voting on a plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

II. Facts

2 San Francisco is composed of the operating company, San Francisco Gifts Ltd., and several nominee companies. The operating company holds all of San Francisco's assets and is 100% owned by Laurier. Laurier is wholly owned by Slawsky, who is also the president and sole director of nearly all of the San Francisco group of companies. Slawsky and Laurier are San Francisco's only secured creditors. In addition, they have substantial unsecured debt with the company.

3 On January 7, 2004, San Francisco was granted protection under the *CCAA*. The initial order was extended, and San Francisco remains in business. On June 22, 2004, San Francisco was permitted to file a Plan of Compromise or Arrangement ("Plan") and submit it to its creditors for consideration and voting. The Plan classified Slawsky and Laurier as "unaffected creditors," meaning that their claims survive the reorganization. Slawsky and Laurier would not share in the distribution of $500,000.00; however, they would value their security and vote as unsecured creditors.

4 On July 14, 2004, a group of six objecting landlords asked the Court to create a separate class or classes for landlords and any similarly-affected parties, to assist the Court-appointed monitor in identifying and preserving creditor claims, and to remove any "related parties" from the unsecured creditors class (or, alternatively, deny them a vote).

III. Decision Below

5 The motion was heard on September 1 and 2, 2004. In a reserved written judgment, the supervising chambers justice declined to create a separate class for landlords, but made provision for preserving certain landlords'

claims relating to the right to distrain. The decision removed Slawsky and Laurier from the unsecured creditors class, placing them in a separate class for voting purposes, and awarded costs against San Francisco under Column 1. It is the removal of Slawsky and Laurier from the unsecured creditors class for which San Francisco seeks leave to appeal. If granted leave to appeal, San Francisco asks this Court to also review the costs award.

6 The chambers justice focused on the lack of "commonality of interest" between Slawsky and Laurier and the rest of the unsecured creditors. Her concerns centred on the different treatment afforded Slawsky and Laurier. Although Slawsky and Laurier would not share in the $500,000.00 distribution, their debt would not be compromised. If the reorganization failed and San Francisco became bankrupt, Slawsky and Laurier would be unaffected, whereas the rest of the unsecured creditors would receive nothing. The chambers justice concluded at para. 49 of her reasons that in light of their divergent interests, "[i]t stretches the imagination to think that other creditors in the class could have meaningful consultations about the Plan with Barry Slawsky and, through him with Laurier."

IV. Test for Leave to Appeal

7 Any person dissatisfied with an order under the *CCAA* is permitted an appeal of that order on obtaining leave: *CCAA*, s.13. The test for leave to appeal is set out in *Liberty Oil & Gas Ltd., Re* (2003), 44 C.B.R. (4th) 96, 2003 ABCA 158 (Alta. C.A.) at paras. 15 and 16:

> The test for granting leave, as articulated in this Court, involves a single criterion subsuming four factors. The single criterion is that there must be serious and arguable grounds that are of real and significant interest to the parties . . . .
>
> The four factors subsumed in an assessment whether the criterion is present are:
>
> (1) Whether the point on appeal is of significance to the practice;
>
> (2) Whether the point raised is of significance to the action itself;
>
> (3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> (4) Whether the appeal will unduly hinder the progress of the action . . . .

V. Standard of Review

8 In considering whether the appeal is *prima facie* meritorious, it is necessary to consider the standard of review the Court would apply if leave was granted. This Court has stated that the supervising chambers justice in a *CCAA* matter is tasked with an ongoing management process similar to that of a judge in the course of a trial: *Liberty Oil & Gas Ltd., Re, supra* at para. 20. Consequently, the reviewing court will only interfere with the decision where the chambers justice "acted unreasonably, erred in principle or made a manifest error": *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) at para. 3.

VI. Decision

9 The applicants' main complaints are that the chambers justice erred in her application of the common-law "commonality of interests" test and she misunderstood the facts. The *CCAA* does not explicitly state what factors differentiate creditors so as to place them in separate classes for voting purposes. But in determining issues re-

lating to class, it is important to recognize that the right to vote as a separate class and thereby defeat a proposed plan of arrangement is the statutory protection provided to the different classes of creditors. While fairness on many issues is assessed again at a later stage, it is the initial placing within a separate class that provides this non-discretionary right to creditors.

10 To give effect to this protection, a "commonality of interests" test was developed. The foundation for the "commonality of interests" test is that the classes must be structured so as to "prevent a confiscation and injustice" and to enable the members to "consult together with a view to their common interest": *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q.B. 573 (Eng. C.A.), at 583. It follows that it is important to carefully examine classes with a view to protecting against injustice, and not simply rely on fairness being evaluated later.

11 The means of preventing confiscation and injustice raises some very interesting issues when it comes to determining who should be in a separate class for voting purposes. Unlike the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the *CCAA* does not specifically provide for treatment of related parties. While unsecured creditors and shareholders have similar legal rights with respect to debts owing, a shareholder *qua* shareholder has other legal rights that may impact on, or make impossible, the ability of the class to hold a common interest. This is an important issue that has not yet been addressed by this Court. As interesting and important as that issue is, however, it is not the issue on this appeal and resolution of the issue must wait to another day.

12 The chambers judge did not need to, and did not, make her decision on commonality of interest based merely on the fact that Slawsky and Laurier were shareholders. Rather, in arriving at her decision to place the shareholders in a separate class, the chambers judge relied on the different treatment afforded Slawsky and Laurier under the Plan. She stated (at para. 49):

> Here, there is no compromise by Slawsky or Laurier. Further, they would, but for a security position shortfall, be unaffected by a bankruptcy of the companies, whereas all of the other creditors in the class would receive nothing. Slawsky has created a Plan which gives him voting rights that he doubtless wants to employ if he senses the need to sway the vote. In return, he gives up nothing. It stretches the imagination to think that other creditors in the class could have meaningful consultations about the Plan with Slawsky and, through him, with Laurier. For that reason, Slawsky and Laurier must be placed in a separate class.

13 I do not accept the applicants' argument that the chambers judge failed to understand that Slawsky and Laurier *had* given up something in that the Plan did not provide for their participation in the $500,000.00 available for distribution. This judge was alive to that element of the Plan. When she said that "he gives up nothing," she was referring to the fact that under the Plan the shareholders' debt remains outstanding and is not compromised, unlike the other unsecured creditors' debt. In short, Slawsky and Laurier may be in a position to control the vote and cancel all unsecured creditors' debt but their own. Under these circumstances, there would be no meaningful consultation about the Plan.

14 In my view, the chambers judge was absolutely correct in her assessment that it stretches the imagination to think that there would be meaningful consultation about the Plan between shareholders whose debts would not be cancelled and other unsecured creditors whose debts would be. Certainly, bearing in mind the standard of review, there is absolutely no merit to this appeal.

15 Thus, while I acknowledge that questions of class are important, both to the practice and the parties, this application for leave must fail because it fails to establish that the appeal is *prima facie* meritorious.

16 In the result, the chambers judge did not err in principle, she did not misunderstand the evidence, and her decision to remove Slawsky and Laurier from the class of unsecured creditors was correct. In my view, any other decision would have resulted in an injustice to the other unsecured creditors. At a minimum, bearing in mind the standard of review, there is no chance of success on the appeal.

17 Leave to appeal is denied.

(Counsel speaks to costs)

18 Costs are allowed to the Respondent in Column 1 and I allow costs for the filing of their Memorandum, notwithstanding the red stamp.

Application dismissed.

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Court File No.: M38120

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 GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP (the "Applicants")

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

BRIEF OF AUTHORITIES
OF PETER J. GRANT SR.
(Re: Motion to Stay)
(Returnable October 27, 2009)

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