Court File No. CV-15-10832-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP. and TARGET CANADA PROPERTY LLC (the "Applicants")

BRIEF OF AUTHORITIES OF THE RESPONDING PARTY, CAPITAL BRANDS, LLC

November 25, 2016

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Blue Range Resource Corp., Re

2000 CarswellAlta 1145, 2000 ABCA 285, [2000] A.J. No. 1232, [2001] 2 W.W.R. 477, 100 A.C.W.S. (3d) 956, 193 D.L.R. (4th) 314, 234 W.A.C. 138, 271 A.R. 138, 87 Alta. L.R. (3d) 352

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

Russell, Sulatycky, Wittmann JJ.A.

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

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

Counsel: *A. Robert Anderson* and *Scott J. Burrell*, for Enron Canada Corp. and Creditors' Committee.
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D. Mann, for Barrington Petroleum Ltd. and PetroCanada Oil & Gas.
K.E. Staroszik, for Founders Energy Ltd.
J.N. Thom, for National-Oilwell Canada Ltd. and Campbell's Industrial Supply Ltd.

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

Headnote

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

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legitimate creditors being able to participate in available proceeds — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

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

APPEAL by creditor EC Corp. and creditors committee from judgment reported at (1999), 251 A.R. 1 (Alta. Q.B.), permitting creditors to file notices of claim, or amended claims, after expiry of claims bar date.

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

Introduction

1 The *Companies' Creditors Arrangement Act*, R.S.A. 1985, c. C-36, as amended ("*CCAA*"), permits the compromise and resolution of claims of creditors against an insolvent corporation. In this appeal, as part of the ongoing resolution of the insolvency of Blue Range Resources Corporation ("Blue Range"), this Court has been asked to state the applicable criteria in considering whether to allow late claimants to file claims after a stipulated date in an order ("claims bar order").

2 In his decision below, the chambers judge determined that in the circumstances of this case it was appropriate to allow the respondents ("late claimants") to file their claims thus entitling them to participate in the *CCAA* distribution.

Facts

3 Blue Range sought and received court protection from its creditors under the *CCAA* on March 2, 1999. The claims procedure established by PriceWaterhouse Coopers Inc. ("the Monitor"), and approved by the court in a claims bar order, fixed a date of May 7, 1999 at 5:00 p.m. by which all claims were to be filed. Due to difficulties in obtaining the appropriate records, the date was extended in a second order to June 15, 1999 at 5:00 p.m., for the joint venture partners. The relevant orders stated that claims not proven in accordance with the set procedures "shall be deemed forever barred" (A.B.P.01, A.B.P.06). Under this procedure $270,000,000 in claims were filed.

4 The respondent creditors in this appeal fall into two categories: first, those who did not file their Notices of Claim before the relevant dates in the claims bar orders, and second, those who filed their initial claims in time but sought to amend their claims after the relevant dates. All of these creditors applied to the chambers judge for relief from the

restriction of the date in the claims bar orders and to have their late or amended claims accepted for consideration by the Monitor.

5 The chambers judge allowed the late and amended claims to be filed. The appellants, Enron Capital Corp. ("Enron") and the Creditor's Committee, seek to have that decision overturned. I granted leave to appeal on January 14, 2000 on the following question:

> What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result? (A.B.928).

Judgment Below

6 The chambers judge found that the applicable section of the *CCAA*, s. 12(2)(iii) did not mandate a claims procedure. He stated that preserving certainty in the *CCAA* process was not a sufficient reason to deny the late claimants a second chance. In his view, taking a strict reading of the claims bar orders would have the effect of denying creditors, who have a logical explanation for their non- compliance with the order, any recovery. While the chambers judge noted that compromise is required by creditors in a *CCAA* proceeding, he did not think it fair that these late claimants be required to compromise 100 per cent of their legitimate claims. In addition, the chambers judge was of the view that process required flexibility and should avoid pitting creditors against one another.

7 Having decided that flexibility in the process was required, the chambers judge then considered an appropriate test for allowing the filing of late claims. Although encouraged by the appellants to adopt an approach similar to that contained in the *United States Bankruptcy Code*, *Federal Rules of Bankruptcy Procedure*, for Chapter 11 Reorganization Cases, ("*U.S. Bankruptcy Rules*") the chambers judge chose to incorporate the test in place under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Specifically, he found that because the situation of Blue Range was essentially a liquidation, the approach used in the *BIA* was appropriate. Under the *BIA*, late claims are permitted under almost any circumstance provided no injustice is done to other creditors. A late filing creditor under the *BIA* may only share in undistributed assets. Therefore, the chambers judge found that the creditors should be allowed to file late claims, or to amend existing claims late.

Standard of Review

8 It has been recently held by this court that decisions of a *CCAA* supervising judge should only be interfered with in clear cases. Deference to a *CCAA* supervising judge is generally appropriate where the questions before the court deal with management issues and are of necessity matters which must be decided quickly. This issue was addressed by Macfarlane, J.A. in *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) (cited with approval by Hunt, J.A. in *Smoky River Coal Ltd., Re* (1999), 237 A.R. 326 (Alta. C.A.)) as follows at 272:

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

The chambers judge was exercising his discretion under the *CCAA* in granting an extension of the claims bar dates. However, the criteria upon which that discretion is to be exercised is a matter of legal principle, and therefore on that issue, the standard of review is correctness.

Analysis

9 As a preliminary matter I wish to comment on the nature of the order granted and the notices sent out to the individual creditors. The order dated April 6, 1999 stated in paragraph 2:

> Claims not proven in accordance with the procedures set out in Schedules "A" and "B" shall be deemed forever barred and may not thereafter be advanced as against Blue Range in Canada or elsewhere. (A.B.P.01)

The first page of Schedule "A" stated in part:

> A Claims' Bar Date of 5:00 p.m. Calgary time on May 7, 1999 has been set by the Alberta Court of Queen's Bench. All claims received by the monitor or postmarked after the Claims' Bar Date will be forever extinguished, barred and will not participate in any voting or distributions in the CCAA proceedings.
>
> [Emphasis added] (A.B.P.03).

The language used in Schedule "A" goes beyond the text of the order. Although it may not be of practical significance, barring the right of a claimant to a remedy is fundamentally different from erasing the debt. The court under the *CCAA* has powers to compromise and determine, but only in accordance with the process prescribed in the statute.

10 It was urged before the court in oral argument by counsel for the appellants that the purpose of the wording of the claims bar orders was to "smoke out" the creditors. I am dubious that the severe wording of the claims bar orders is effective to "smoke out" the creditor who may otherwise lie dormant. The objective of making certain that all legitimate creditors come forward on a timely basis has to be balanced against the integrity and respect for the court process and its orders. Courts should not make orders that are not intended to be enforced in accordance with their terms. All counsel conceded that the court had authority to allow late filing of claims, and that it was merely a matter of what criteria the court should use in exercising that power. It necessarily follows that a claims bar order and its schedule should not purport to "forever bar" a claim without a saving provision. That saving provision could be simply worded with a proviso such as "without leave of the court", which appears to be not only what was contemplated, but what in fact occurred here.

The Appropriate Criteria

11 The appellants advocated the adoption of the criteria under the *U.S. Bankruptcy Rules*, Chapter 11, while the respondents favoured either the application of the tests under the *BIA* or some blending of the two standards.

12 Rule 9006 of the *U.S. Bankruptcy Rules* deals with the extension of time in these circumstances. The relevant portion of the Rule states:

> 9006 (b)(1) ... when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

The key phrase in this section is "excusable neglect". In *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489 (U.S. Tenn. 1993) the U.S. Supreme Court dealt with the interpretation of this phrase. In *Pioneer*, the creditor's attorney, due to disruptions in his legal practice and confusion over the form of notice, failed to file a Notice of Claim in time. The U.S. Supreme Court noted that excusable neglect may extend to "inadvertent delays" (at pg 391) and went on to identify the relevant considerations when determining whether or not a delay is excusable. The Court said at 395:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable", we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

The American authorities also seem to reflect that the burden of meeting all of these elements, including showing the absence of prejudice, lies with the party seeking to file the late claim: e.g. *Specialty Equipment Cos. Inc., Re*, 159 B.R. 236 (U.S. Bankr. N.D. Ill. 1993).

13 The Canadian approach under the *BIA* has been somewhat different. Canadian courts have been willing to allow the filing of late or amended claims under the *BIA* when the claims are delayed due to inadvertence, (which would include negligence or neglect), or incomplete information being available to the creditors, see: *Mount James Mines (Que.) Ltd., Re* (1980), 110 D.L.R. (3d) 80 (Ont. Bktcy.). The Canadian standard under the *BIA* is, therefore, less arduous than that applied under the *U.S. Bankruptcy Rules.*

14 I accept that some guidance can be gained from the *BIA* approach to these types of cases but I find that some concerns remain. An inadvertence standard by itself might imply that there need be almost no explanation whatever for the failure to file a claim in time. In my view inadvertence could be an appropriate element of the standard if parties are able to show, in addition, that they acted in good faith and were not simply trying to delay or avoid participation in *CCAA* proceedings. But I also take some guidance from the *U.S. Bankruptcy Rules* standard because I agree that the length of delay and the potential prejudice to other parties must be considered. To this extent, I accept a blended approach, taking into consideration both the *BIA* and *U.S. Bankruptcy Rules* approaches, bolstered by the application of some of the concepts included in other areas, such as late reporting in insurance claims, and delay in the prosecution of a civil action.

15 In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.), the applicant was an unsecured creditor of Alberta Pacific Terminals Ltd. ("APCL"). Transtec Canada Ltd. was indebted to the applicant and APCL had guaranteed the obligation. APCL sought protection under the *CCAA*. Through oversight, the applicant Lindsay was not sent the relevant *CCAA* materials by APCL and was not included in the *CCAA* proceedings. He did not, therefore, have the opportunity to vote on the plan of arrangement. It is clear, however, that Lindsay at some point during the *CCAA* proceedings became aware of them, and at various stages had his lawyers contact APCL's lawyers to inquire about the process. Despite this knowledge he did not pursue the matter. Lindsay then came to the court seeking permission to sue APCL as a guarantor, potentially recovering considerably more than those creditors who participated in the *CCAA* process.

16 After reviewing all of the facts, Huddart, J. found that "Lindsay (or solicitors on his behalf) made considered, deliberate, decisions not to notify Alberta-Pacific of his claim until after the approval order and then not until after the closing of the share purchase agreement" (para 19). She then went on to conclude that Lindsay preferred not to participate in the *CCAA* process and chose to take his chances later on.

17 In deciding how to exercise her discretion, Huddart, J. applied the following factors: "the extent of the creditor's actual knowledge and understanding of the proceedings; the economic effect on the creditor and debtor company; fairness to other creditors; the scheme and purpose of the *CCAA* and the terms of the plan" (para 56). On these criteria, Huddart, J. found that it would not be equitable to allow Lindsay to pursue a claim as he was well aware of what was going on in the *CCAA* proceedings, chose not to participate, and his late action would cause serious prejudice both to the debtor company and to the other creditors.

18 While *Lindsay* is clearly distinguishable on its facts from the within appeal, the case does highlight the issues of the conduct of the late claimants and the potential prejudice to other creditors and the debtor. Lindsay was the classic creditor "lying in the weeds", waiting for the appropriate moment to pounce. He did not act in good faith and his conduct was potentially prejudicial to other creditors and the debtor company. By avoiding the *CCAA* proceedings, Lindsay was attempting to gain an advantage not available to other creditors.

19 There is further support for a blended approach in several other areas of the law where courts have had to deal with the impact of delays and late filings. In particular, I have considered the courts' treatment of delays in the prosecution of actions and the late filing of notices of claim to insurers.

20 In *Lethbridge Motors Co. v. American Motors (Can.) Ltd.* (1987), 53 Alta. L.R. (2d) 326 (Alta. C.A.) the court had to decide whether or not to allow an action to continue where no steps had been taken by the plaintiff for five years. In deciding that the action could continue, Laycraft, C.J.A. relied on the following test from the English Court of Appeal in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543 (Eng. C.A.) where Salmon L.J. said at 561:

> In order for the application to succeed the defendant must show:
>
> (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.
>
> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
>
> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

Relying on this test, as well as additional refinements, the Court found that the fundamental rule was that it was "necessary for a defendant to show serious prejudice before the court will exercise its jurisdiction to strike out an action for want of prosecution" (at pg. 331). The onus of showing serious prejudice has now been substantially altered as the result of amendments to the *Alberta Rules of Court* in 1994. Rule 244(4) now states that proof of inordinate and inexcusable delay constitutes *prima facie* evidence of serious prejudice: *Kuziw v. Kucheran Estate*, 2000 ABCA 226 (Alta. C.A.).

21 Similar questions can arise in an insurance context where an insured is required to file a proof of loss or other notice of claim within a certain time period under a contract of insurance. For example, s. 205 of the *Insurance Act*, R.S.A. 1980, c. I-5 states:

> 205 [w]here there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to by done or omitted by the insured with respect to the loss and the consequent forfeiture or avoidance of the insurance in whole or in part and the Court considers it inequitable that the insurance should be forfeited or avoided on that ground, the Court may relieve against forfeiture or avoidance on such terms as it considers just.

22 Similar wording is also found in ss. 211 and 385 of the *Insurance Act* and similar legislation exists throughout the common law provinces.

23 When deciding whether to grant relief from forfeiture in an insurance context the Alberta courts have generally adopted a two part test, see: *Hogan v. Kolisnyk* (1983), 25 Alta. L.R. (2d) 17 (Alta. Q.B.). In *Hogan* the court found it appropriate to look first at the conduct of the insured to determine whether the insured is guilty of fraud or wilful

misconduct. Second, the court considered whether the insurer had been seriously prejudiced by the imperfect compliance with the statutory provision (at 35). The "noncomplying" party can show that there was no prejudice by showing that the innocent party had actual knowledge of the events in question and was thereby able to investigate the situation.

24 Considering whether the insurer has suffered any prejudice, the court in *Hogan* quoted from a decision of Stevenson, D.C.J. in *W. Schoeler Trucking Ltd. v. Markel Insurance Co. of Canada* (1979), 9 Alta. L.R. (2d) 232 (Alta. Dist. Ct.) at 237 where Stevenson, D.C.J. said "[t]he root of the question is whether or not it (the insurer) would have acted any differently if it had been given notice of the loss when it should have been given notice". In *312630 British Columbia Ltd. v. Alta Surety Co.* (1995), 10 B.C.L.R. (3d) 84 (B.C. C.A.) the B.C. Court of Appeal set out a more recent formulation of the test, namely whether the insurer by reason of the late notice had lost a realistic opportunity to do anything that it might otherwise have done.

25 These authorities arise in a clearly different context from that which I am dealing with in this case, but they demonstrate that there is a somewhat consistent approach in a variety of areas of the law when dealing with the impact of late notice or delays in particular processes.

26 Therefore, the appropriate criteria to apply to the late claimants is as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

27 In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.

National-Oilwell Canada Ltd. ("National")

28 National, and National as the successor in interest to Dosco Supply, a division of Westburne Industrial Enterprises Ltd. ("Dosco") indicate that their claims were filed late due to the unexpected illness and resulting lengthy absence of their credit manager who was in charge of the Blue Range accounts receivable. National submitted the National and Dosco notices of claims on June 7, 1999 (AB V, pgs 538 and 542). National's claim is $58,211.00 and Dosco's claim is $390,369.13. National and Dosco clearly acted in good faith and provided the Notices of Claim as soon as the relevant personnel became aware of the situation.

Campbell's Industrial Supply Ltd. ("Campbell's")

29 Campbell's initial claim in the amount of $14,595.22 was filed prior to the date in the relevant claims bar order. Campbell's then amended its claim on June 25, 1999 and again on July 8, 1999 to $23,318.88. The claim was amended after the relevant date as a result of a representative from Blue Range informing Campbell's that its claim should include invoices sent to Trans Canada Midstream, Berkley Petroleum, Big Bear Exploration and Blue Range Resources Corporation (A.B. 495-496). In addition, there appears to have been some delay due to the Notices of Claim not being sent to the correct Campbell's office. Campbell's acted in good faith throughout and it is in fact arguable that any delay in the proper filing of its claims was actually due to errors on the part of Blue Range rather than its own doing.

TransAlta Utilities Corporation ("TransAlta")

30 TransAlta did not comply with the dates in the claims bar orders. It contends that it did not receive the claims package prior to the relevant dates. It is apparent from the evidence that the claims package was sent to TransAlta at its accounts receivable office, rather than the registered office for service (A.B.432-434). TransAlta was permitted to file its total claim of $120,731.00 by order of the chambers judge dated September 7, 1999. There is no evidence that TransAlta was attempting to circumvent the *CCAA* process. On the contrary, as soon as the appropriate personnel became aware of the situation, TransAlta took the necessary steps to have its Notice of Claim filed.

Petro-Canada Oil and Gas ("PCOG")

31 PCOG filed extensive claims material with the Monitor prior to the relevant dates showing several unsecured claims. The Monitor's draft third interim report indicated that four of PCOG's claims should properly have been classified as secured. The mistake by PCOG was the result of a misapprehension of how operator's liens functioned under the CAPL Operating Procedures incorporated into the contracts giving rise to the claims. PCOG then sought to amend its claims and have them changed from unsecured to secured status (A.B. 554), on July 7, 1999. The change in status would result in claims of $137,981.30 being amended from unsecured to secured. There was no lack of good faith.

Barrington Petroleum Ltd. ("Barrington")

32 Barrington was acquired by Sunoma Energy Corp ("Sunoma") in about September, 1998. An affidavit filed by Sunoma's controller indicates that the financial records of Barrington were found to have been in complete disarray. Barrington's initial Notice of Claim in the amount of $223,940.06 was submitted prior to the relevant date. Barrington received a Notice of Dispute of Claim which approved the claim to the extent of $57,809.37, but disputed the remainder. On reviewing the issue, Barrington's controller determined that Blue Range was correct, but at the same time she identified additional invoices of which she had been unaware (A.B.549-551). On discovering the additional invoices, Barrington then submitted an amended Notice of Claim on July 22, 1999 and an objection to the Notice of Dispute of Claim. Barrington acted in good faith.

Rigel Oil & Gas Ltd. ("Rigel")

33 The full amount of Rigel's Notice of Claim was $146,429.68. This Claim was filed prior to the relevant date and the amount was approved by Blue Range. After the relevant date, on August 12, 1999, Rigel moved to amend and to allege that, despite Blue Range's claims to the contrary, its claim was secured, rather than unsecured. The only issue for Rigel on appeal is if their claim is properly secured can it be accepted because it was not claimed as secured until August 12, 1999.

Halliburton Group Canada Inc. ("Haliburton")

34 Halliburton was in the process of attempting to collect on accounts receivable owed by Big Bear Exploration Ltd. through May and June, 1999. They subsequently became aware, after the relevant date, that a claim in the amount of $11,309.90 was in fact against Blue Range, and should properly have been filed as a Notice of Claim in the *CCAA* proceedings (A.B. 497-499). On making this discovery, Halliburton wrote to the Monitor on July 14, and July 26, 1999 requesting that its claim be included in the *CCAA* proceeding. The Monitor disputed this claim as having been filed too late (A.B. 498). It appears that Halliburton acted in good faith.

Founders Energy Ltd. ("Founders")

35 Founders filed its claim prior to the relevant date, but, due to an oversight, claimed as an unsecured rather than a secured creditor. After filing its initial Notice of Claim, Founders received a Notice of Dispute from Blue Range. Within the 15 day appeal period, but outside the claims bar date, Founders then filed an amended Notice of Claim claiming a secured interest in the sum of $365,472.39, on July 26, 1999.

Prejudice

36 The timing of these proceedings is a key element in determining whether any prejudice will be suffered by either the debtor corporation or other creditors if the late and late amended claims are allowed. The total of all late and amended claims of the late claimants, secured and unsecured, is approximately $1,175,000. As set out above, in the initial claims bar order, the relevant date was 5:00 p.m. May 7, 1999. This date was extended for joint venture partners to 5:00 p.m. on June 15, 1999. The Plan of Arrangement, sponsored by Canadian Natural Resources Ltd. ("CNRL"), was voted on and passed on July 23, 1999. Status as a creditor, the classification as secured or unsecured, and the amount of a creditor's claim, are relevant to voting: s.6 *CCAA*.

37 Enron and the Creditor's Committee claim that they would be prejudiced if the late claims were allowed because, had they known late claims might be permitted without rigorous criteria for allowance, they might have voted differently on the Plan of Arrangement. Enron in particular submits that it would have voted against the CNRL Plan of Arrangement, thus effectively vetoing the plan, if it had known that late claims would be allowed. This bald assertion after the fact was not sufficient to compel the chambers judge to find this would in fact have been Enron's response. Nowhere else in the evidence is there any indication that late claimants being allowed would have impacted the voting on the different proposed Plans of Arrangement. In addition, materiality is relevant to the issue of prejudice. The relationship of $1,175,000 (which is the total of late claims) to $270,000,000 (which is the total of claims filed within time) is .435 per cent.

38 Also, the contrary is indicated in the Third Interim Report of the Monitor where it is shown in Schedule D-1 (A.B.269) that $2 million was held as an estimate of unsecured disputed claims. Therefore, when considering which Plan of Arrangement to vote for, Enron, and all of the creditors, would have been aware that $2 million could still be legitimately allowed as unsecured claims, and would have been able to assess that potential effect on the amount available for distribution.

39 Further, the late claimants were well known to the Monitor and all of the other creditors. The evidence discloses that officials at Enron received an e-mail from the Monitor on May 18, 1999 indicating that there were several creditors who had filed late, after the first deadline of May 7, and the Monitor thought that even though they were late the court would likely allow them (A.B.1040). Finally, all of the late claimants were on the distribution list as having potential claims. (A.B. 9-148). It cannot be said that these late claimants were lying in the weeds waiting to pounce. On the contrary, all parties were fully aware of who had potential claims, especially Enron and the Creditors Committee.

40 In a *CCAA* context, as in a *BIA* context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the *CCAA* involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: *Cohen, Re* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in *312630 British Columbia Ltd.* It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

Summary of Criteria

41 In considering claims filed or amended after a claims bar date in a claims bar order, a *CCAA* supervising judge should proceed as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

Conclusion

42 Applying the criteria established, I find that the conclusion reached by the chambers judge ought not to be disturbed, and the late claims filed by the respondents should be permitted under the *CCAA* proceedings. The appeal is dismissed.

Appeal dismissed.

End of Document

TAB 2

26 CBR-ART 142
Canadian Bankruptcy Reports (Articles)
2001

The Treatment of Late Claims Under the CCAA

Vern DaRe *

For those unfamiliar with the *Companies Creditors' Arrangement Act* (the CCAA), it is often surprising the extent to which the Act is "silent" and dependent upon the vagaries of judicial discretion on some of the more fundamental aspects of the restructuring process. Late claimants, who file claims after a set date ("claims bar date") in an order ("claims bar order") granted under the CCAA, might feel that way about their treatment. The Act provides no guidance [1] and whether such claims are "forever barred" or "excusable" is left to be determined by the courts. Unfortunately, the courts have had little opportunity to address the issue. It is this lack of guidance, both from the legislature and judiciary, that distinguishes the recent series of cases dealing with late claims under the CCAA.

In *Re Blue Range Resources Corp.*, [2] *Canadian Airlines Corp.*, [3] *Re Royal Oak Mines Inc.*, [4] and *Re T. Eaton Co.*, [5] the court canvassed various approaches to a claimant's "lateness". These included the "BIA approach", the "US Chapter 11 approach", a "blended approach" and a "less liberal approach". While agreement was not reached as to which approach governed the treatment of late filings, the cases nonetheless provide some guidance on whether the court will allow a second chance in the circumstances. In this comment, I review these recent "late filing" cases and suggest what guidelines now govern the court's discretion in allowing or disallowing late claims under the CCAA.

Blue Range

Blue Range Resource Corporation sought and obtained court protection from its creditors under the CCAA on March 2, 1999. The claims procedure established by PriceWaterhouse Coopers Inc. (the "Monitor") was approved by the court on April 6, 1999 in a claims bar order. May 7, 1999 was set as the date in which all claims had to be filed. This date was extended to June 15, 1999 in a second order. The relevant orders also stated that claims not proven in accordance with the set procedures shall be deemed forever barred. Following this procedure, $270 million in claims were filed. On July 23, 1999, a plan of arrangement sponsored by Canadian Natural Resources Limited (the "CNRL Plan of Arrangement") was voted upon and approved by the eligible voting creditors of Blue Range Resource Corp. No applications were brought before that date to vary any of the claims bar orders or dates.

The respondent creditors subsequently applied to LoVecchio J. to have their late or amended claims accepted for consideration by the Monitor. He allowed the claims to be filed, thereby extending the claims bar dates and varying the claims bar orders. LoVecchio J. adopted a "flexible approach" analogous to that of the *Bankruptcy and Insolvency Act* (the BIA) on the basis that he was essentially dealing with a liquidation and refused to follow the American approach. Enron Capital Corp., the largest single creditor, and the Creditor's Committee sought leave to appeal the decision. [6] In granting leave, [7] the court provided an appellate court, for the first time in Canada, with the opportunity to decide how to treat late claims in these circumstances. [8] On appeal, the court allowed the claims to be filed, applying a "blended approach" which incorporated elements from the BIA approach, the American approach and other areas where the court has had to deal with late claims.

At first instance, LoVecchio J. was unwilling to accept the finality of the claims bar date. He refused to extinguish the substantive rights of the late claimants by strictly enforcing the claims bar orders. This would deny them any recovery

where they had legitimate reasons for missing the deadline. For LoVecchio J., this outcome was too harsh and he was not going to permit it regardless of the specific terms of the Orders, the reliance placed on them by those creditors voting and approving the CNRL Plan of Arrangement and the importance of certainty in the CCAA process. While creditors were expected to compromise in a CCAA proceeding, a discount of 100% on late claims was arbitrary according to LoVecchio J. As to the value of the late claims in relation to total claims, the amount was less than 1.4 million dollars compared to 270 million dollars.

LoVecchio J. acknowledged that the CCAA did not really "give us any guidance" [9] in the matter. Notwithstanding, he was of the view that the process required flexibility and should avoid pitting creditors against one another. The court should exercise its discretion under the CCAA as a "facilitator", in an "even handed manner" that promotes flexibility and fairness in the claims procedure according to LoVecchio J. [10] To achieve this, he adopted the flexible approach under the BIA, on the basis that he was essentially dealing with a liquidation. Under the BIA approach, late claims are permitted in most circumstances provided no injustice occurs to other creditors. However, a late claimant under the BIA may only share in undistributed assets. [11] LoVecchio J. was not persuaded to adopt a more restrictive approach in a liquidation scenario as contained in the United States Bankruptcy Code for Chapter 11 Reorganization Cases (the "US Chapter 11 approach"). [12] Under the approach, the creditor is required to show that its neglect in filing the claim in time was "excusable" in the circumstances. Such an approach may be more appropriate under the CCAA in a sale scenario according to LoVecchio J. Applying the less onerous BIA approach, however, he extended the claims bar dates and allowed the filing of the late claims.

Although agreeing with the result, the Alberta Court of Appeal sought to set out an approach or guidelines by which supervising judges under the CCAA could exercise their discretion in the treatment of late claims. Writing for the court, Wittmann J.A. adopted a "blended approach" incorporating elements from various approaches. Unlike LoVecchio J., Wittmann J.A. adopted certain aspects of the US Chapter 11 approach, citing with approval the following considerations made by American courts when deciding whether or not a delay is excusable: the danger of prejudice to the debtor; the length of the delay; the impact of the delay on judicial proceedings; the reason for the delay; whether the delay was within the reasonable control of the claimant; and whether the claimant acted in good faith. The burden of meeting all of these elements under the American approach is with the party attempting to file the late claim. [13] Some guidance could also be derived from the BIA approach, but Wittmann J.A. had some concerns that it was too permissive. Under the BIA, Canadian courts were willing to allow late filings on the basis of mere inadvertence, negligence or incomplete information. Wittmann J.A. concluded, that:

> An inadvertence standard by itself might imply that there need be almost no explanation whatever for the failure to file a claim in time. In my view inadvertence could be an appropriate element of the standard if parties are able to show, in addition, that they acted in good faith and were not simply trying to delay or avoid participation in CCAA proceedings. But I also take some guidance from the U.S. Bankruptcy Rules standard because I agree that the length of delay and the potential prejudice to other parties must be considered. To this extent, I accept a blended approach, taking into consideration both the BIA and U.S. Bankruptcy Rules approaches, bolstered by the application of some concepts included in other areas, such as late reporting in insurance claims, and delay in the prosecution of a civil action. [14]

The Court then set down the following guidelines for CCAA supervising judges to consider when deciding whether or not to allow claims filed after a claims bar date in a claims bar order:

> 1. Was the delay caused by inadvertence (i.e., carelessness, negligence, accident, unintentionally) and if so, did the claimant act in good faith?
>
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing? [15]

Applying these criteria, Wittmann J.A. held that while the claimants were careless by filing late, they nonetheless acted in good faith and not with an intent to circumvent the CCAA process or gain some advantage over other creditors by "lying in the weeds" waiting for the best time to pounce. [16] Indeed, with some claims, the debtor had contributed to the delay. As to what constitutes prejudice, the court asked whether the creditors had lost, by reason of the claimants' late filings, a realistic opportunity to do anything they otherwise might have done. The court found no prejudice by the late filings. The creditors already knew about the late claims. It is unlikely they would have voted any differently as a result of allowing the filing of the late claims. Also, the dollar value of the late claims in relation to the total amount of the "timely" claims (representing only .435% of the total amount) was not considered material. Nor was the court swayed by the argument of potentially higher costs and reduced dividends as a result of allowing the filing of the late claims (assuming the claimants were subsequently successful on their claims). For Wittmann J.A., this factor was not relevant to the prejudice criterion. That late claims potentially reduce the amount of money available to creditors in a CCAA proceeding was not prejudicial according to the Court. With the above criteria satisfied, Wittmann J.A. allowed the filing of the late claims.

Canadian Airlines Corp.

In the CCAA proceedings involving Canadian Airlines International Ltd., the province of Ontario missed the claims bar date and relied on *Blue Range* (referred to as *Enron*) to file its late claim. Canadian argued that the Court of Appeal in *Enron (Blue Range)* restricted the application of the above guidelines to liquidation-style CCAA proceedings and therefore had no application to this sale-type reorganization. In rejecting the argument, Paperny J. held that:

> This is a narrow interpretation. In my view the Court of Appeal was providing guidelines generally applicable to late claims in CCAA proceedings. Even if the Court of Appeal did intend to direct its criteria only to liquidation-style CCAA proceedings, I would in any case find the principled approach of the Court of Appeal to be an excellent framework for the exercise of my discretion; ... the prejudice to the funder of the plan, Air Canada, will necessarily need to be considered. However, the criteria described by the Court of Appeal in Enron do not in my view rule out, but instead embrace addressing the interests of such a party. The Enron criteria are consistent with the rationale of the CCAA to consider and attempt to balance the interests of all affected parties, the character of which will vary with each case and type of plan involved. Emphasis on those interests and the appropriate weight to be given to each will also necessarily vary. In my view the criteria in Enron allow for this type of analysis. [17]

Applying the *Enron/Blue Range* criteria, Paperny J. allowed Ontario to file its late claim. The province was not served with the initial order. When the voting package was mailed, it was mailed to the wrong office just three days before the claims bar date. Also, nearly a month passed before Ontario was advised that its late claim was rejected. Under the circumstances, Paperny J. had little difficulty concluding that the delay was due to inadvertence and that Ontario had acted in good faith in filing its claim. Indeed, as in *Blue Range*, Canadian had contributed to the delay according to Paperny J. Under the second criteria of "any relevant prejudice", Paperny J. considered the interests of creditors, the debtor company and the funder of the plan. In a reorganization, as opposed to a liquidation, considering the prejudice to the funder of the plan deserved particular attention according to Paperny J. The question posed was whether Air Canada lost a realistic opportunity to do anything that it might otherwise have done because of the late filing by Ontario. Air Canada specifically knew about Ontario's claim and following the reasoning in *Blue Range*, Paperny J. held that this knowledge negated any allegation of prejudice. Canadian's tax liability to Ontario had been in dispute for several years and this was known to Air Canada. As to the materiality of the late claim, the late claim of Ontario in the amount

of $2 million in relation to Air Canada's total funding cost of approximately $3 billion including anticipated dividends on creditors' claims was not considered material by the court. Having satisfied the *Enron/Blue Range* test, Ontario was allowed seven days to submit its claim.

Eaton's Restructuring, Royal Oak and Eaton's Liquidation

In *Eaton's Restructuring*, Melinda Moss sought relief from the claims bar date in order to file her late proof of claim in Eaton's 1997 restructuring under the CCAA. The claims bar date was July 15, 1997. The Plan of Arrangement was approved and sanctioned by the Court on September 12, 1997 and implemented on October 30, 1997. Blair J. refused to lift the claims bar to allow the late filing in the circumstances. He emphasized the need for certainty and a structured environment in the restructuring process. Without it, a compromise between the debtor company and its creditors so that the company is able to continue in business, was unlikely according to Blair J. Late claims potentially undermined the process at various stages including the negotiating, voting and distribution stages and could negatively impact upon the ongoing stability of the restructured company in the post-arrangement period. In particular, allowing late claims to be filed after the implementation of a Plan was tantamount to altering it according to Blair J. since late claims and others that followed (if valid) would be paid out of the post-arrangement cash and assets of the restructured debtor. At some point, the restructuring process should provide for closure or finality according to Blair J. In this regard, he cited the following passage with approval:

> The Claims Bar Date was an essential element of that process as [Eaton's] had to definitively know what claims existed, and the quantum of such claims, for the purpose of addressing future liquidity and financing requirements associated with the restructuring initiatives. [18]

He also concluded that the permissive BIA approach to late filings should not apply in these circumstances. This was not a bankruptcy or liquidation situation where, the corporate debtor ceased, its assets pooled for distribution and its assets undistributed at the time of the late filing. Rather, this was a non-liquidation CCAA proceeding. The objective was the survival of Eaton's. Its continuity depended on meeting costs in the ordinary course of business and not exposing its post-arrangement cash flow and assets to "surprise" late claims. This prejudice to Eaton's outweighed the rights of late claimants in the circumstances. On this basis, Blair J. concluded that:

> ...a less liberal approach to permitting claims that have been barred to be continued after a CCAA Plan has been approved, sanctioned by the Court, and implemented, is justified than is generally the case in bankruptcy situations. [19]

Applying this approach, Blair J. was unwilling to extend the claims bar date to allow Ms. Moss to file her proof of claim.

In the *Royal Oak* and *Eaton's Liquidation* cases, Farley J. distinguished *Eaton's Restructuring*. He pointed out that in *Eaton's Restructuring*, Ms. Moss filed her claim after Eaton's completed its restructuring, as an on-going entity, under the CCAA and to allow the filing of the late claim in these circumstances would have prejudiced Eaton's. This was not the situation in *Royal Oak* and *Eaton's Liquidation*. In the first case, the late claim (a Dispute to the Disallowance of a Proof of Claim) arose before the Plan of Arrangement was completed. If a Plan was subsequently formulated, it would on a *prospective* basis be able to take into account the late claim according to Farley J. [20] He also listed the following factors in support of allowing the late filing: the claimant had always intended to pursue its claim; only through inadvertence and inappropriate reliance on a previous course of conduct had it missed the deadline; no one was prejudiced in a procedural or substantive way by the late filing; and this "corrective" motion was brought forthwith upon the claimant discovering its mistake. The "less liberal approach" to late filings adopted in *Eaton's Restructuring* was not applied in these circumstances.

In *Eaton's Liquidation*, Farley J. not only considered *Eaton's Restructuring* but he also commented on the *Blue Range* decision. This being a liquidation scenario, he distinguished *Eaton's Restructuring* and allowed the filing of the late claim (a Dispute Notice to the Notice of Distribution Claim) on the basis that GE Capital had always intended to pursue its

claim for distribution and only by inadvertence had not filed in a timely fashion. The "less liberal approach" to late filings was not adopted in this liquidation-type restructuring under the CCAA. More interesting was Farley J.'s treatment of the "blended approach" adopted in *Blue Range*. After citing the passage outlining the approach, and referring to the test or guidelines applicable to late claims in CCAA proceedings, Farley J. raised the following concerns:

> While I have no quarrel with that test *for that particular case*, I would caution parties and practitioners that it is inappropriate to unthinkingly adopt standards from another jurisdiction whose legislation is a different code from ours and one would think that its constitutional aspects were developed in such a way to meet the evolving needs of that jurisdiction's different culture and business needs. [21]

A General Approach to Late Claims under the CCAA?

Despite Farley J.'s reservations about adopting *Enron/Blue Range* as a test of general application to late claim filings in CCAA proceedings and Paperny J.'s support for such a test (in *Canadian Airlines Corp.*), there is no question that judicial discretion in this area is now governed by these recent "late filing" cases. Regardless of whether the test in *Blue Range* is formally recognized or characterized as one of general application or as limited to "that particular case", the "late filing" cases provide common guidelines which, in my view, must be considered by CCAA supervising judges when exercising their discretion in relation to late claims. In this section, I outline those guidelines mandated by the "late filing" cases.

Before so doing, I would like to respond to Farley J.'s concerns, and Paperny J.'s enthusiasm for the test in *Blue Range*. In *Eaton's Liquidation*, Farley J. limited the test to the facts of that case and cautioned against adopting, without due consideration, a "blended approach" which incorporated standards from American bankruptcy law. Since those standards originated in another jurisdiction, with its own distinct culture, business needs and bankruptcy code, Farley J. considered it inappropriate to "unthinkingly" adopt foreign standards. Giving the matter some thought, however, these concerns may be overstated. Despite its origins, significant guidance to treating late claims may still be derived from American jurisprudence. As Houlden and Morawetz have pointed out, American jurisprudence and authorities are "of assistance in interpreting" bankruptcy matters. [22] The authors have also noted the increasing convergence of bankruptcy regimes. [23] This development is a likely consequence of the integrating economies of North America.

By limiting the *Blue Range* test to the facts of the case, Farley J. may have downplayed another development. In *Royal Oak* and *Eaton's Liquidation*, he considered several criteria before allowing the late claims. These included asking: Whether the "lateness" was due to the inadvertence and inappropriate reliance of the claimant? Whether the claimant took "corrective"action forthwith upon discovering it was late? Whether any party was prejudiced by the late filing? Whether the CCAA proceeding was a restructuring or liquidation and at what stage in that proceeding was the late claim filed (i.e., before or after implementation of the Plan or distribution)? Interestingly enough, these are virtually the same criteria applied in *Blue Range*, which suggests that they are not limited in application to the facts of that case. In fact, to go further, I would argue that what emerges from the "late filing"cases is a somewhat consistent and general approach to the filing of late claims under the CCAA. [24]

In this regard, I agree with Paperny J. in *Canadian Airlines Corp.* that the test/criteria in *Enron/Blue Range* provides a framework to late claims under the CCAA regardless of whether the proceeding is a liquidation or reorganization. In the latter situation, Paperny J. pointed out that under the second criteria of "any relevant prejudice", a critical consideration is whether there is any prejudice to the funder of the reorganization. However, in her enthusiasm for the test, Paperny J. did not address the situation where there is a restructuring of an on-going entity and the late claim arises after the CCAA Plan has been sanctioned and implemented as in *Eaton's Restructuring*.

In this scenario, under the second criteria of prejudice, the concerns raised by Blair J. in *Eaton's Restructuring* seem appropriate. Do the late claims pose a threat to the continuity and survival of the debtor company? If allowed to be filed (and proven valid), will they deplete post-arrangement funds and assets of the debtor? At the post-arrangement stage (where the CCAA Plan has been approved, sanctioned and implemented), Blair J. adopted "a less liberal approach"

towards late filings. This suggests that in the post-arrangement stage of a reorganization it will be more difficult to prove that the corporate debtor is not prejudiced by the late filings. In my view, the concerns raised by Blair J. under "a less liberal approach" are not inconsistent with a more general approach to late filings and that such concerns may be addressed under the second criteria of prejudice.

What then is the general approach emerging from the "late filing" cases? The following criteria or guidelines appear to govern a CCAA supervising judge's discretion when deciding whether or not to allow the filing of a claim after a claims bar date in a claims bar order:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

"Inadvertence" may arise by carelessness, negligence, accident and is unintentional. In addition, the late claimant must have acted in good faith and not for the purpose of circumventing the process, delaying or avoiding participation in the CCAA proceedings or "lying in the weeds" to gain advantage unavailable to other creditors. Some of the considerations under the first criteria include the length of the delay; the reason for the delay and whether it was within the reasonable control of the claimant; the "corrective" measures brought by the claimant upon discovering its tardiness and whether these measures were brought in a timely manner; and the original intent of the claimant to pursue its claim.

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

The nature and stage of the CCAA proceeding are key elements in determining whether there is "any relevant prejudice" caused by the late filing. Where the proceeding concerns the reorganization of an on-going entity and the claim is made at the post-arrangement stage (i.e., after the Plan is implemented), it will be more difficult to prove that the late claim is not prejudicial given the courts adoption of "a less liberal approach" in the circumstances and its concern for the continuity of the debtor. In a sale-type scenario, the prejudice to the funder of the plan is an important consideration and in a liquidation-style CCAA proceeding, the interests of creditors are important considerations under this criterion. As pointed out by Paperny J. in *Canadian Airlines Corp.*, the "interests of all affected parties" should be considered by the court. Under this criterion, the court's determination of the existence and impact of any relevant prejudice caused by the late filing will therefore "vary with each case and type of plan involved".

The materiality of the late claim is also relevant to prejudice. When the amount of the claim in relation to the total amount of "timely" claims is low, the cost of the claim is not likely to be considered material. Another consideration under this criterion is whether the late claim was really a "surprise claim". If the debtor company, creditors and funder of the plan (in a non-liquidation scenario) were aware of the potential late claim, any prejudice may be negated by this knowledge. Finally, the mere fact that less money will be available to other creditors if the late filings are allowed (and subsequently proven valid) is not prejudice relevant to this criterion. Taking these factors into consideration, the question posed under the criteria of prejudice is as follows: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

Criteria 3 and 4 are not discussed in the "late filing" cases. The determination of whether or not to allow late filings is fundamentally an equitable one that involves balancing the interests of all affected parties. The final two criteria recognize that there may exceptional circumstances where the prejudice to some parties is outweighed by the equities in favour of a late filing under the CCAA.

Conclusion

With the decision in *Blue Range*, the court provided some guidance on the treatment of late claims under the CCAA. Relying on the *Blue Range* test, as well as additional refinements provided in the other "late filing" cases, it was argued that the court's discretion in this area is now governed by these guidelines.

Footnotes

* Associate, Chaiton & Chaiton. The views expressed are those of the author.

1 Section 12(2)(iii) of the CCAA simply states that claims shall be summarily determined and does not mandate a claims procedure.

2 *Re Blue Range Resource Corp.*, 1999 CarswellAlta 1053 (Alta. Q.B.); affirmed 2000 CarswellAlta 1145 (Alta. C.A.), leave to appeal to S.C.C. [2000] S.C.C.A. No. 648 (note) (S.C.C.). The novel nature of the topic was pointed out in *Blue Range*. One argument advanced in the case was that the "decision is the first of its kind in Canada and there is no appellate authority in Alberta or elsewhere precisely on point", *infra*, note 6, para. 21(3).

3 *Ontario v. Canadian Airlines Corp.*, 2000 CarswellAlta 1336 (Alta. Q.B.).

4 *Re Royal Oak Mines Inc.* (September 20, 1999) (Ont. S.C.J.) [unreported].

5 *Re T. Eaton Co.* (December 1, 2000) (Ont. S.C.J.) [unreported]; *Re T. Eaton Co.* (May 5, 1999) (Ont. S.C.J.) [unreported].

6 *Re Blue Range Resource Corp.*, 2000 CarswellAlta 30 (Alta. C.A. [In Chambers]).

7 Section 13 of the CCAA governs leave applications and generally an appellate court will exercise its power sparingly granting leave only where there are serious and arguable grounds of real and significant interest. For a review of the cases under section 13, see Houlden and Morawetz, *The 2001 Annotated Bankruptcy & Insolvency Act* (Toronto: Carswell, 2000), p. 1001.

8 *Re Blue Range Resource Corp.*, 2000 CarswellAlta 30 (Alta. C.A. [In Chambers]), para. 26. The exact wording of the question before the Alberta Court of Appeal was as follows: "What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimant, and applying the criteria to each case, what is the result?"

9 *Supra*, note 2, para. 20.

10 *Supra*, note 2, paras. 49-52.

11 The BIA approach is a permissive one. As LoVecchio J. pointed out in para. 82, *supra*, note 2: "In essence, the BIA approach would permit almost any circumstance provided a distribution had not been made, which is really our case, and, even if one had been made, the change would likely still be permitted but without retroactive effect".

12 Chapter 11 of the United States Bankruptcy Code Annotated, section 205 (7)(c) specifically allows for the setting of a claims bar date and for relief from that date. Under the provision, the "judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed may participate except on order for cause shown". The section should be read with Rule 9006 of the U.S. Bankruptcy Rules, which allows for the extension of time in these circumstances "where the failure to act was the result of excusable neglect".

13 *Supra*, note 2, para. 12.

14 *Supra*, note 2, para. 14.

15 *Supra*, note 2, para. 26.

16 *Supra*, note 2, para. 18.

17 *Supra*, note 3, paras. 12, 13.

18 *Supra*, note 5, para. 9 (emphasis added).

19 *Supra*, note 5, para. 15.

20 *Supra*, note 4 (from the endorsement of Farley J. dated September 20, 1999).

21 *Supra*, note 5 (from the endorsement of Farley J. dated December 1, 2000) (emphasis added).

22 *Supra*, note 7, p. 3. See also *Re A. & F. Baillargeon Express Inc.* (1993), 27 C.B.R. (3d) 36 (Que. S.C.).

23 *Supra*, note 7, p. 3.

24 *Blue Range* was recently adopted as a test of general application to late claim filings in CCAA proceedings by Registrar Bray in *Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of)*, 2001 CarswellNB 21, 21 C.B.R. (4th) 222 (N.B. Q.B.).

TAB 3

2000 CarswellAlta 1336
Alberta Court of Queen's Bench

Ontario v. Canadian Airlines Corp.

2000 CarswellAlta 1336, [2000] A.J. No. 1321, [2001] A.W.L.D. 280, 101 A.C.W.S. (3d) 11, 276 A.R. 273

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

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

The Province of Ontario, Applicant and Canadian Airlines Corporation and Canadian Airlines International Ltd., Respondents

Paperny J.

Heard: November 3, 2000
Judgment: November 7, 2000
Docket: Calgary 0001-05071

Counsel: *Larry B. Robinson*, for Applicant.
Chris Simard, for Respondents.

Subject: Provincial Tax; Corporate and Commercial; Insolvency

Headnote

Taxation --- Provincial and territorial taxes — Ontario — Sales tax — Miscellaneous issues

Province assessed airline for taxes owing under Retail Sales Tax Act and Corporations Tax Act — Airline filed notices of objection and appeals were ongoing — Airline provided province with letters of credit to secure assessments under appeal — Airline obtained court protection under Companies' Creditors Arrangement Act — Airline neglected to serve province with copy of court order setting claims bar date — Province first received copy of order with voting package, which arrived three days before claims bar date — Claims bar date had passed by time information reached appropriate department — Province brought motion for extension of time to file proof of claim — Motion granted — Province's delay was inadvertent and partly caused by airline — Once package arrived at correct department, steps were taken promptly to file claim — No evidence suggested that province was attempting to gain any advantage over other creditors — Funder of airline's reorganization would suffer no prejudice if extension were granted — Funder had long been aware of province's claim — Equities did not favour airline's position in circumstances — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — Corporations Tax Act, R.S.O. 1990, c. C.40 — Retail Sales Tax Act, R.S.O. 1990, c. R.31.

Taxation --- Provincial and territorial taxes — Ontario — Miscellaneous taxes

Province assessed airline for taxes owing under Retail Sales Tax Act and Corporations Tax Act — Airline filed notices of objection and appeals were ongoing — Airline provided province with letters of credit to secure assessments under appeal — Airline obtained court protection under Companies' Creditors Arrangement Act — Airline neglected to serve province with copy of court order setting claims bar date — Province first received copy of order with voting package, which arrived three days before claims bar date — Claims bar date had passed by time information reached appropriate department — Province brought motion for extension of time to file proof of claim — Motion granted — Province's delay was inadvertent and partly caused by airline — Once package arrived at correct department, steps were taken promptly to file claim — No evidence suggested that province was attempting to gain any advantage over other creditors — Funder of airline's reorganization would suffer no

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

Province assessed airline for taxes owing under Retail Sales Tax Act and Corporations Tax Act — Airline filed notices of objection and appeals were ongoing — Airline provided province with letters of credit to secure assessments under appeal — Airline obtained court protection under Companies' Creditors Arrangement Act — Airline neglected to serve province with copy of court order setting claims bar date — Province first received copy of order with voting package, which arrived three days before claims bar date — Claims bar date had passed by time information reached appropriate department — Province brought motion for extension of time to file proof of claim — Motion granted — Province's delay was inadvertent and partly caused by airline — Once package arrived at correct department, steps were taken promptly to file claim — No evidence suggested that province was attempting to gain any advantage over other creditors — Funder of airline's reorganization would suffer no prejudice if extension were granted — Funder had long been aware of province's claim — Equities did not favour airline's position in circumstances — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — Corporations Tax Act, R.S.O. 1990, c. C.40 — Retail Sales Tax Act, R.S.O. 1990, c. R.31.

Table of Authorities

Cases considered by *Paperny J.*:

Blue Range Resource Corp., Re, 2000 ABCA 285, (sub nom. *Enron Canada Corp. v. National-Oilwell Canada Ltd.*) 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477 (Alta. C.A.) — applied

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

Statutes considered:

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

Corporations Tax Act, R.S.O. 1990, c. C.40
Generally — referred to

Retail Sales Tax Act, R.S.O. 1990, c. R.31
Generally — referred to

MOTION by province for extension of time to file distribution dispute notice.

***Paperny J.*:**

1 This is an application by the province of Ontario ("Ontario") to extend the time within which to file its distribution dispute notice ("Dispute Notice"). I granted the application with reasons to follow. These are those reasons.

I. Facts

2 Canadian Airlines International Ltd. ("Canadian") has followed a practice of self-assessing its tax liabilities and has made installment payments of tax under two Ontario statutes, the *Retail Sales Tax Act* and the *Corporations Tax Act*. Pursuant to an ongoing auditing process, Ontario has assessed Canadian for taxes owing under these two statutes. The assessments date back as far as 1981. Following the assessments, Canadian filed eight notices of objection and appeals are ongoing. Canadian has provided Ontario with three separate letters of credit to secure the assessments under appeal. The letters of credit have been renewed at least once.

3 Ontario estimates the total assessments at approximately $2 million. This may be subject to adjustment due to ongoing audits and the failure of Canadian to have completed its 1999 and 2000 tax returns. Canadian has disputed these assessments from the outset and as stated in the affidavit of Nhan Le, Canadian's Director of Taxation, is of the view that its liability to Ontario for these taxes is contingent and negligible. In short, the tax liability of Canadian to Ontario has been in dispute for several years.

4 Canadian received court protection under the *Companies' Creditors Arrangement Act* on March 24, 2000.

5 Canadian included Ontario in its list of "Affected Unsecured Claims" and quantified Ontario's claim at zero. Contrary to paragraph 27 of the March 24, 2000 order, Ontario was not served with a copy.

6 Ontario did not receive a copy of the March 24, 2000 order until it received it as part of the voting package sent out in accordance with my April 7, 2000 order in these proceedings. The package was mailed on April 25, 2000, the last possible day under the terms of the April 7, 2000 order and arrived in the mail room of the Corporations Tax Branch of the Revenue Division of Ontario on May 2, 2000, three days before the Claims Bar Date set in that order. The Revenue Division has nine branches. According to the affidavit of Rosita Vinkovic, Senior Collections Officer for the Bankruptcy and Insolvency Unit in the Collections and Compliance Branch of the Ministry of Finance, the normal procedure is for insolvency related documents to be mailed directly to the Insolvency Unit, not to the Corporations Tax Branch. According to Ms. Vinkovic, a notice to this effect was published by the Minister of Finance in a 1997 newsletter of the Canadian Insolvency Practitioners' Association. Canadian did not cross-examine Ms. Vinkovic on her affidavit and does not challenge this practice in its own evidence.

7 The voting package did not make its way to the Insolvency Unit until May 18, 2000. Despite extensive inquiries, Ms. Vinkovic has been unable to determine the reason for this delay. The collection officer in the Insolvency Unit that received the package on May 18, 2000 did not have an opportunity to review it in its entirety until May 23, 2000, the first business day after the long weekend (and the date that a second package was sent by the monitor to the Ministry of Finance public inquiry desk and directly routed to the Insolvency Unit).

8 As Senior Collections Officer, Ms. Vinkovic was assigned to handle the matter on May 25, 2000. She immediately noted the May 5, 2000 Claims Bar Date and a proof of claim along with copies of the letters of credit were faxed to the monitor that same day. The amount claimed was expressed as preliminary due to the ongoing audit, which was lengthy due to the extent of Canadian's operations and its failure to timely respond to requests for information and documents. The monitor initially advised Ms. Vinkovic that the claim would not be accepted as it was past the Claims Bar Date, but changed its position upon being advised of the related security.

9 On June 19, 2000, nearly one month later, Ontario received a letter from Canadian's counsel advising that its claim would not be accepted because it was submitted after the Claims Bar Date. Ms. Vinkovic was away on vacation from June 23, 2000 until July 10th. On her return on the 10th she read the June 19th letter and immediately sent a request for assistance to Joel Weintraub, Senior Legal Counsel in the Legal Services Branch. Mr. Weintraub contacted the Alberta firm that had handled a similar claim for the BC government and a request was sent to the Assistant Deputy Attorney General for Ontario to authorize the retention of outside counsel. Mr. Robinson advised that he was retained September 14, 2000 and immediately advised Canadian's counsel of his intention to bring this motion but that it would take some

time to prepare the necessary material and have it sworn. A notice of motion to extend the time to file a proof of claim in these proceedings was filed by Mr. Robinson on September 26, 2000.

II. Discussion

10 The Alberta Court of Appeal has recently developed an approach that CCAA supervising judges should follow in considering claims filed or amended after a claims bar date, as follows:

> 1. Was the delay caused by inadvertence, and if so, did the claimant act in good faith?
>
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
>
> 3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order to permitting late filing?
>
> 4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

(*Blue Range Resource Corp., Re*, 2000 ABCA 285 (Alta. C.A.) at paragraph 41)

11 Canadian argued that the Court of Appeal in *Blue Range Resource Corp.* restricted the use of these criteria to liquidation-style CCAA proceedings and that therefore the test is not applicable here. This is a narrow interpretation. In my view the Court of Appeal was providing guidelines generally applicable to late claims in CCAA proceedings. Even if the Court of Appeal did intend to direct its criteria only to liquidation-style CCAA proceedings, I would in any case find the principled approach of the Court of Appeal to be an excellent framework for the exercise of my discretion; I applied similar criteria in my June 28, 2000 reasons in these proceedings allowing the government of British Columbia to file a late claim.

12 On the facts of this case, the prejudice to the funder of the plan, Air Canada, will necessarily need to be considered. However, the criteria described by the Court of Appeal in *Blue Range Resource Corp.* do not in my view rule out, but instead embrace addressing the interests of such a party. The *Blue Range Resource Corp.* criteria are consistent with the rationale of the CCAA to consider and attempt to balance the interests of all affected parties, the character of which will vary with each case and type of plan involved. Emphasis on those interests and the appropriate weight to be given to each will also necessarily vary. In my view the criteria in *Blue Range Resource Corp.* allow for this type of analysis. Accordingly I now turn to application of these criteria.

1. Delay due to inadvertence and presence of good faith

13 In *Blue Range Resource Corp.*, Wittmann J.A. held that "inadvertence" includes carelessness, negligence, accident and is unintentional. The distinction to be drawn is that between a careless claimant and one who "lies in the weeds" hoping to gain an advantage.

14 Ontario is not in this latter category. It was not served with the initial order. The voting package was mailed on the last possible day to the wrong office, arriving just three days prior to the Claims Bar Date. I can fairly infer from the circumstances that the internal procedures in the government of Ontario failed in having the package re-routed to the proper place in a timely fashion. Once it arrived at the correct destination, however, steps were taken promptly by the responsible officer to file the claim and the monitor received it by fax on May 25, 2000, the very day that the responsible officer was assigned to handle the matter.

15 Canadian did not notify Ontario of its decision to reject its claim until June 19th, 2000. Vacations intervened and a request by the Insolvency Unit for assistance from internal government counsel to deal with this rejection was made within about two weeks. This led to a request to the Assistant Deputy Attorney General of Ontario for permission to

hire outside Alberta counsel to handle the matter. It is reasonable to assume that this authorization process would have taken some time and counsel confirmed that this was the case.

16 I have difficulty concluding that the delay here was due to anything but inadvertence. Canadian conceded that there was no evidence of deliberate intent by Ontario to avoid participating in the CCAA process. There is no suggestion or evidence that Ontario was intentionally attempting to circumvent the CCAA process or gain some advantage over other creditors, unlike the applicant in *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.). The position of Ontario is not unlike that of TransAlta Utilities Corporation as described in *Blue Range Resource Corp.* at paragraph 30 (appeal book references omitted):

> It is apparent from the evidence that the claims package was sent to TransAlta at its accounts receivable office, rather than the registered office for service ... There is no evidence that TransAlta was attempting to circumvent the CCAA process. On the contrary, as soon as the appropriate personnel became aware of the situation, TransAlta took the necessary steps to have its Notice of Claim filed.

17 Further, there is a similarity to the late claim filed by Campbell's Industrial Supply Ltd. also referred to in *Blue Range Resource Corp.* at paragraph 29 where Wittmann J.A. noted that it was arguable that errors on the part of the debtor company resulted in the late filing. In this case, Canadian contributed to the delay by failing to serve Ontario with the initial order, not mailing the voting package until the last possible day, mailing it to the wrong office and waiting nearly a month to advise Ontario that its late claim was rejected.

2. Any relevant prejudice caused by the delay

18 Canadian argues that the most critical factor in this and any re-organization (as opposed to a liquidation) case is the economic effect on the funder of the reorganization. I note that the second criteria of "any relevant prejudice" is broadly drawn and not restricted by the Court of Appeal to the interests of creditors and the debtor company. I agree that in consideration of this criteria in this case I must focus on the prejudice to Air Canada.

19 I would firstly note that despite being served with this application, Air Canada chose not to attend and make submissions or present evidence of prejudice.

20 Applying the test for prejudice adopted by the Court of Appeal in *Blue Range Resource Corp.*, the question here is whether by reason of the late filing by Ontario, Air Canada lost a realistic opportunity to do anything that it might otherwise have done. There is no evidence to suggest this. As with the creditors in *Blue Range Resource Corp.*, Air Canada and Canadian were specifically aware of the existence of Ontario's claim; Ontario was listed on the Affected Unsecured Claims list. The tax dispute with Ontario was longstanding and Canadian has filed eight notices of objection. Letters of credit have been posted as security for the assessments under appeal. Air Canada is the funder of the plan and has been directly involved in Canadian management and operations since early this year. This knowledge effectively negates any allegation of prejudice. As Wittmann J.A. concluded with respect to the late claimants in *Blue Range Resource Corp.*, it cannot be said that Ontario was "lying in the weeds waiting to pounce" (paragraph 39).

21 Canadian referred to "procedural prejudice" in the costs associated with determination of the dispute and with potentially having to pay a dividend to Ontario. However, this prejudice too is negated by the knowledge of Ontario's claim. Air Canada and Canadian would have been well aware of the potential that the matter would need to be resolved, with concomitant costs, either by the tax courts in Ontario or the claims officer in these proceedings.

22 Wittmann J.A. held in *Blue Range Resource Corp.* that the materiality of the late claims is also relevant to prejudice. In that case, the late claims totalled $1,175,000 as compared to the total timely claims pool of $270,000,000. In this case, the evidence of Air Canada's Chief Financial Officer at the fairness hearing was that Air Canada's funding cost amounted to approximately 3 billion dollars, including the anticipated dividend on creditors' claims. The possibility of paying 14 cents on the dollar on a further $2 million (which assumes Ontario will be entirely successful on its claim, which Canadian suggests is not likely) in relation to Air Canada's total cost cannot be described as material.

23 Having concluded that there is no relevant prejudice to Canadian or Air Canada, I need not review the final two criteria in the *Blue Range Resource Corp.* test.

24 Even if I were to couch my analysis as a consideration of the equities between Air Canada and Ontario, as Canadian would have me do in following what they submit is the applicable test as set out in *Lindsay*, I would not find that the equities lie in Air Canada's favour. This analysis is largely encompassed in my review of the first two *Blue Range Resource Corp.* criteria. Canadian adds that, as in *Lindsay*, if not for Air Canada's funding, the unsecured creditors would have received only 1-3 cents on the dollar and accordingly, Air Canada is entitled to certainty at some point in the process. It submits that Ontario's failure to act in a timely manner should subordinate its interest to the interest of certainty to the funding party, who will have to absorb the entirety of Ontario's claim. Canadian argues that the interests of Air Canada must be supreme in this non-liquidation scenario.

25 The problem with this argument is that unlike the "white knight" in *Lindsay*, for the reasons I have already described it cannot be fairly said that Air Canada was unaware of Ontario's claim. I emphasize that it is not a surprise claim by a creditor hoping to gain an advantage by delaying action; there is no suggestion of bad faith and certainly there was nothing to be gained by waiting. Under the circumstances, which are distinct from those in *Lindsay*, it is not unfair to the funder of this plan to deal with Ontario's claim. Certainty, while always desirable, is not as compelling in this case as in *Lindsay* due to the knowledge surrounding Ontario's claim. Canadian and Air Canada were well aware of the claim and are now attempting to use the delay to avoid having to resolve the dispute with Ontario and potentially paying a further dividend.

26 Ontario shall have seven days from the date of these reasons to amend and submit its claim. It shall be entitled to make any further amendments necessitated by the late filing of Canadian's 1999 and 2000 returns.

27 Each party shall bear its own costs of this application.

Motion granted.

TAB 4

WHEN LATE IS BETTER THAN NEVER Missing The Claims Bar Date

Kershman's Collection of Bankruptcy and Insolvency Articles

by Stanley J. Kershman[1]
KERN/RP-021 (March 31, 2005) [Posted on Quicklaw May 13, 2005]

Kershman Collection of Bankruptcy and Insolvency Articles > ***2005***

INTRODUCTION

1. IS THE CLAIMS BAR DATE THE FINAL ANSWER?

1 It has long been an accepted part of bankruptcy and reorganization law that a creditor must file a proof of claim in order to vote at a meeting of creditors, acquire dividends or repossess property that is held by a debtor at the date of the bankruptcy. The proof of claim form must be completed for the creditor to establish their claim. If a proof of claim is not filed at all, the creditor loses their right to vote at any meeting of creditors and their entitlement to any dividends in a proposal or a bankruptcy proposal.[2]

2 But what happens if a creditor misses the claims bar date and files a proof of claim late? Under certain circumstances, the Courts have allowed the claim to be filed. As this issue generally arises in the context of the Companies Creditors' Arrangement Act ("CCAA"), which does not include clear procedures for dealing with late proofs of claim, this paper will concentrate on the regime under this Act. But, as you will notice, the courts have relied extensively on the Bankruptcy and Insolvency Act ("BIA") in the interpretation of the CCAA provisions with respect to the claims procedure. Therefore, the regime under the BIA - which can be quite permissive in this matter - must also be considered and discussed. Given the fact-specific nature of the analysis in the jurisprudence, however, there will be only a brief overview in terms of the application of the respective tests.

2. THE COMPANIES CREDITORS' ARRANGEMENT ACT REGIME

3 While CCAA s.12(2)(a)(ii) and s.12(2)(a)(iii) can be compared to the procedure under the BIA, neither mandate a clear procedure for the filing of late proofs of claims. It is clear, however, that under the CCAA, allowing a proof of claim to be filed after the claims bar date will be subject to a stricter standard than under the BIA regime. The leading case in this regard is Blue Range Resources Corp. (Re),[3] a recent Alberta Court of Appeal case. The test laid out in the case by Wittman J.A. authoritatively states that a proof of claim will be allowed in certain circumstances, depending on the answers to the following questions:

1) Was the delay caused by inadvertence and if so, did the claimant act in good faith?
1) What is the effect of permitting the claim in terms of relevant prejudice caused by the delay?
1) If the relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing? and
1) If relevant prejudice is found which cannot be alleviated, are there any other considerations that may warrant late filing?

4 Because this case is widely cited in several recent decisions across Canada, it is important to understand the ramifications of the test that it discusses, and thus the rationale and reasoning behind this decision.[4]

5 In Blue Range Resources, a number of creditors had failed to meet the deadline for filing their proofs of claim in accordance with the claims bar order, and so the Monitor disallowed their claims.

6 The Order read in part:

> All claims received by the Monitor or postmarked after the Claims' Bar Date will be forever extinguished, barred and will not participate in any voting or distributions in the CCAA proceedings.

7 The trial judge, LoVecchio J., extended the claims bar date to permit late filing by several claimants. This decision was ultimately upheld by the Court of Appeal, because the criteria outlined above did not alter the final disposition of the matter.

8 The rationale for trial level decision is important, as it formed a major part of the reasoning in the Court of Appeal's final determination (leave to the Supreme Court of Canada was refused). The argument for maintaining a strict standard of compliance was to ensure certainty of the process, because the creditors relied on the CCAA claims bar order to enable them to assess their chances of recovery under a plan of arrangement and ensure timely completion of the CCAA proceedings.[5] But, LoVecchio J. felt that the literal meaning of the words in the order would forever extinguish the right of a creditor that under normal limitation rules would survive for several more years, and would be a severe response that rejects a creditor's substantive rights and ultimately undermines the respect for the process.[6] If those rights were allowed to be so arbitrarily extinguished and universally barred without regard to potentially legitimate justifications, it would limit the potential recovery of those barred from making their claims and, in effect, would place creditors at odds with each other in their efforts to maximize their individual return.[7] This is inherently contrary to the philosophy of reorganization legislation, which is to promote the equitable sharing of the deficiency among various creditors.[8] The Court is meant to act as a facilitator rather than as a means to extinguish valid claims due to inadvertence or other logical explanations.[9] Moreover, he maintained the importance of exercising the discretion afforded to the Court by the CCAA in an evenhanded manner.[10]

9 Interestingly, the Court drew a distinction between a late filing in the liquidations context and one in the context of a sale or infusion of cash by a third party who wholly absorbs the loss.[11] In the context of liquidations, the BIA regime was to govern, because the expectation of the creditors is to absorb equally the impact. However, if the context was a sale to or the infusion of cash by a third party who wholly absorbs the loss, then a more restrictive approach could be upheld. Regardless, a case-specific approach was crucial. Although this distinction was not adopted by Wittmann J.A., the Court of Appeal nevertheless advocated in its general test an overarching approach that took into account all of the factors of every case and championed a holistic framework.

10 Ultimately, LoVecchio J. believed that there was a need to provide a flexible standard similar to the BIA, which is permissive in the face of inadvertence or incomplete information. Essentially, almost any circumstance will be accepted provided there is no injustice to the other creditors. Even if monetary distributions have been made, the late claim would likely be allowed without the retroactive effect.

11 Though broad and guided by equity and fairness principles, the approach used by LoVecchio J. did not provide specific guidance in terms of applying a test. The Court of Appeal agreed that it held the authority to allow late filings in principle; however, it sought to detail the criteria by which it would be done.

12 The Court of Appeal's approach was a merger between the restrictive, United States-inspired approach advocated by those wanting to keep the late filers out of luck and the BIA approach advocated by the creditors seeking relief from the claims bar date.

13 The United States Bankruptcy Rules, Chapter 11, Rule 9006 deals with the extension of time when a proof of claim is filed late. The Rule states:

> 9006 (b)(1): ...when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion

(1) with or without motion or notice order the period enlarged if the request is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

14 "Excusable neglect" requires a survey of the relevant factors that led to the party's omission, such as the potential prejudice to the debtor, the length of the delay, the potential impact on any judicial proceedings, the explanation for the delay, and whether the delay was reasonable and in good faith.[12] Under the US Bankruptcy Rules, all of these factors must be proven by the party that filed the claim late, which creates a significant challenge to the acceptance of that claim.

15 The Canadian approach under the BIA is much less onerous, and there have been situations where the Court has used its discretion to allow late filings of claims if those claims were inadvertently delayed or otherwise incomplete.[13] However, in Blue Range Resources, Wittmann J.A. felt that the inadvertence standard alone provides too much leeway to creditors that are attempting to have their claims filed late just because they were acting in good faith. It almost suggests a bare-minimum standard, and so Wittmann J.A. took guidance from the stricter US Bankruptcy Rules. After all, there will be instances where inadvertence is not an acceptable excuse. For example, Wittmann J.A. referred to Lindsay v. Transtec Canada,[14] wherein the creditor did not have notice of the claims bar date and thus failed to file its proof of claim in time - yet, once he learned of this inadvertence, he still did not make efforts to remedy the matter and essentially attempted to gain an advantage over other creditors. Therefore, the judge held that it was inequitable to allow Lindsay to pursue the claim, because it could be prejudicial to other creditors.

16 Therefore, applying a blended approach in Blue Range Resources, Wittmann J.A. determined that the criteria would take into account good faith, prejudice caused by the delay, and whether that prejudice can be alleviated or is warranted within the facts of the case. Wittmann J.A. defined "inadvertent" to include carelessness, negligence, accidental and unintentional actions. In terms of prejudice, the timing of the proceedings will be an important consideration, but the test adopted by the Court is: "Did the creditors by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done?"[15]

17 There have been several instances where Courts across the country have followed the reasoning in Blue Range Resources, which is, thus far, the highest authority on the subject. The underlying theme in all of the cases governing whether the claims can be filed tends to be equitable principles of overall fairness to all involved. Therefore, in some instances, a delay of three years in and of itself would not automatically invalidate the claims. It is safe to say, then, that the Courts will generally not let technical or formal flaws, such as missing the claims bar date, be fatal to an application for an extension or from otherwise preventing late filings.[16]

18 Of course, this will only be allowed within reason. For example, if there is a late filing due to inadvertence but the creditor does not pursue the claim for seventeen months, the courts will look unfavourably upon it and disallow the Claim[17]. Moreover, the courts appreciate that sometimes proofs of claim will be filed late when the creditor does not have notice of the procedure, and therefore those attempting to rely on a strict claims bar date are estopped from doing so.[18] Ultimately, the court will therefore take a holistic approach and consider all relevant factors.

3. THE BANKRUPTCY AND INSOLVENCY ACT REGIME

19 Although the filing of late claims arises mainly within the CCAA context, it may also arise under the BIA. There are several sections that are relevant.

20 Section 109(1) requires that a creditor lodge a proof of claim with the trustee before the time appointed for the meeting in order to be entitled to vote. However, this provision regarding time is directory only and the key appears to be the requirement for "reasonable compliance" with the requirements of the Act for proofs of claim[19] In determining reasonable compliance, one must recall that Section 187(9) refers to the fact that formal defects should

not invalidate any proceedings and that allowance should be made so that creditors can file their proofs of claim if there is no injustice resulting.[20] There have also been some cases that recognize that more latitude will be granted to less sophisticated creditors rather than traders and other more sophisticated parties.[21]

21 However, it is within the context of sections 149 and 150 - which deal with dividends - where the analogy drawn in the Blue Range Resources case arises. Section 149 deals with situations where the trustee has notified the creditor to file a claim. The process under this section usually begins with the trustee that has notice or knowledge of a creditor's potential claim sending out a notice by registered or certified mail. Note, though, that this is discretionary and the trustee is not obliged to send out the notice. Within the notice, the trustee will state that the creditor must prove his or her claim within thirty (30) days after the mailing of the notice by registered or certified mail (s.149(1)). If the creditor fails to file the proof of claim within the thirty days, the trustee will continue to declare the dividends without taking into account that creditor's claim.

22 Essentially, the effect of such an action is that the creditor that has failed to file its claim within that time or within such further time that the court allows will be precluded from sharing in any dividend (s.149(2)). However, s.149(2) provides that the court has the power to extend the time for filing a proof of claim and therefore, if one has notice, it may still be able to file the proof of claim before the trustee actually begins the distribution process. The application for an extension is not made by the trustee but by the creditor who has received the s.149(1) notice and failed to file the claim within that time. It is up to the creditor to make sure that its proof of claim does not go unnoticed, rather than the trustee's obligation to repeatedly check to see whether the creditor received notice.

23 Although the standard of inadvertence appears to be quite low, the court will not blindly grant extensions. Instead, the court will only enable a creditor to file a claim past the time fixed if proper grounds are shown. The creditor must not only prove that the claim has merit, but must also provide some explanation for the delay in filing the proof of claim within the claims bar date. Whereas under section 150 (see below) the ability of a creditor to file the proof of claim after the date required is dependent upon the timing of the distribution of dividends, the key under section 149 is not that the creditor establish that the trustee can accommodate the late application and satisfactorily administer the estate without that claim, but rather that the creditor warrants special consideration.[22] Note however, that s. 149(2) does not set a time limit within which a creditor must bring its application for an extension.

24 Section 150 deals with the effect upon a creditor that fails to file its proof of claim in time. Essentially, if you have not filed the proof of claim before the trustee has declared any dividends, you are entitled to be paid out of the money still in the hands of the trustee. However, the creditor cannot affect the distribution of dividends determined before its claim was proved - but that creditor will still be entitled to the monies that come into the trustee's possession before further dividends are paid to other creditors.

25 This flows from the basic bankruptcy law principle as was stated in Ex Parte Boddam:[23]

> I take the general rule to be, that so long as there remain undistributed assets in bankruptcy a creditor is entitled to come in and prove, as is the case in an administration suit so long as there are assets unadministered.[24]

26 Therefore, even if the creditor is negligent, its actions still do not automatically disentitle the creditor from the opportunity to share in the assets, which is the main objective of bankruptcy legislation. Some justices have therefore suggested other methods of penalizing the late filing creditor such as by imposing costs, because to disallow the creditor from filing at all is too harsh.[25]

27 One must always remember that the BIA is a "businessman's Act" and the courts should apply a liberal approach when dealing with proofs of claim, and therefore disallowance based on technicalities should be avoided.[26] In several cases, the courts have been concerned with overall fairness and whether there has been injustice to the other creditors.

28 It is not, therefore, surprising that courts have been considerably lenient when allowing the filing of a late proof

of claim before distribution: Glen Wright Trucking Ltd. v. Pilot Butte Sand and Gravel Co. (Trustee of), *[1968] S.J. No. 50, 11 C.B.R. (N.S.) 254* (Sask Q.B.); Bank of Nova Scotia v. Janzen (Trustee of) (N.S.S.C); Atlas Acceptance Corporation v. Fratkin (Man. C.A.); Brown Estate v. Amourgis, *[1994] O.J. No. 942, 26 C.B.R. (3d) 134* (Ont. S.C.).

29 The most recent Ontario decision dealing with this matter is Re MacDonald Homes Inc.[27] In this case, a declaration of the final dividend was made, authorization for a final distribution was granted and cheques had been mailed. Although Chadwick J. recognized that the general trend within the jurisprudence often treated late filings of proofs of claim as being easily remedied, the Court here refused to allow the late filing of a claim that was based on an agreement that had not been brought to the trustee's attention during the administration of this complex estate. The Court found that the estate had, in essence, already been distributed since most of the cheques had already been cashed.

30 As previously noted, even if the Court agrees to extend the period within which the proofs of claim may be allowed by the trustee, the Court may nevertheless also impose terms or conditions within which the claim is to be filed,[28] such as ordering the costs of the motion to be paid by the applicant. Therefore any potential injustice can be averted.[29]

31 Though the various jurisprudence with regards to these sections often refer to the same principles, it is important to note the interplay between sections 149 and 150. A creditor that has been given notice under s.149(1) cannot thereafter resort to section 150, as it has no application once the process under s.149(1) is triggered.[30]

CONCLUSION

4. LATE BUT NOT FORGOTTEN

32 Although the Alberta Court of Appeal in Blue Range Resources articulated specific criteria that must be used when considering the late filing of proofs of claim, there are overlapping concerns that arise within both the CCAA and the BIA contexts. Through a review of the relevant statutory framework, it becomes apparent that the remedial nature of both the BIA and the CCAA are a significant influence to the reasoning within the jurisprudence. In several instances, the rationale for allowing late proofs of claim took into account the purpose of the governing legislation.

33 Of course, it is always better to file the proofs of claim on time; however, if a creditor inadvertently misses the deadline, it is not the end of the world - as long as they were not trying to gain an unfair advantage over the other creditors, they did not unintentionally prejudice the others, and they have a legitimate explanation for the delay. The key to success in filing a proof of claim after the claims bar date is to understand that the Courts have consistently applied a contextual analysis - one that takes into account all possible explanations of the creditor's delay in its filings, and all possible effects upon those creditors that filed their claims on time.

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2 Wright v. Schwalm (Re), *[1926] O.J. No. 21, 7 C.B.R. 465* (Ont. S.C.).

3 *[2000] A.J. No. 1237, 87 Alta. L.R. (3d) 352* (sub nom. Enron Canada Corp. v. National Oil Well Canada Ltd.) Affirming *[1999] A.J. No. 1308, 251 A.R. 1* (Alta. Q.B.).

4 See: Oancia v. Rempel, *[2000] A.J. No. 1327* (Alta.Q.B.), Ontario v. Canadian Airlines Corp., *[2000] A.J. No. 1321* (Alta.Q.B.), Carlen Transport Inc. v. Juniper Lumber Co. Ltd. (Monitor of) *[2001] N.B.J. No. 20* (N.B.Q.B.T.D.), Noma Co. (Re) *[2004] O.J. No. 4914* (Ont. S.C.), Ivorylane Corp. v. Country Style Realty Ltd., *[2004] O.J. No. 2662* (Ont. S.C.), Pangeo Pharma inc. c. Ernst & Young, *[2004] J.Q. No. 706* (Que. S.C.).

5 Page 72.

6 Paras 33-34.

7 Para 51.

8 Para 52.

9 Para 50.

10 Ibid.

11 Para 70.

12 Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 1993 U.S. LEXIS 2402, 507 U.S. 380 (U.S. Tenn. 1993).

13 Mount James Mines (Quebec) Ltd. (Re), *(1980) 28 O.R. (2d) 271, 110 D.L.R. (3d) 80*

14 *[1994] B.C.J. No. 2213, 28 C.B.R. (3d) 110* (B.C.S.C.).

15 312630 British Columbia Ltd. v. Alta. Surety Co., *[1995] B.C.J. No. 1600, [1995] 10 W.W.R. 100*

16 See Carlen Transport Inc. v. Juniper Lumber Co. Ltd. (Monitor of), *[2001] N.B.J. No. 20, 21 C.B.R. (4th) 222*. See Carlen Transport Inc. v. Juniper Lumber Co. Ltd. (Monitor of), *[2001] N.B.J. No. 20, 21 C.B.R. (4th) 222*.

17 Noma Co. (Re) *2004 CarswellOnt 5033*; see also Lindsay v. Transtec Canada Ltd., supra note 13.

18 Ivorylane Corp v. Country Style Realty Ltd., *2004 CarswellOnt 2567*, see also Ontario v. Canadian Airlines Corp., *[2000] A.J. No. 1321, 276 A.R. 273* and T. Eaton Co. (Re), 1997 CarswellOnt 5053.

19 Houlden and Morawetz, Bankruptcy and Insolvency Law of Canada at pg. 5-18.3

20 Re D.W. McIntosh Ltd. *(1939) 20 C.B.R. 267* (Ont. S.C.).

21 Corduroys (Unlimited) Inc. (Re), (1962) 4 C.B.R. (N.S.) 140, but see Totton Publishers Ltd. (Re) *[1975] O.J. No. 1631, 20 C.B.R. (N.S.) 140*

22 Lindsay Distilleries (Re), (1931) 12 C.B.R. 146 (Ont. S.C.).

23 (1908) 9 O.W.R. N.S. 675.

24 As quoted with approval by Hallett J. in Bank of Nova Scotia v. Janzen (Trustee of), *[1989] N.S.J. No. 11*

25 Ibid.

26 Atlas Acceptance Corp v. Milford-Riverton Airways Ltd. (Trustee of), *[1978] M.J. No. 102, 27 C.B.R. (N.S.) 220, [1978] 3 W.W.R. 289* (Man. C.A.).

27 (2003), 48 C.B.R. 105 (Ont. S.C.).

28 Re Player, [1936] 1 All E.R. 568

29 Re McMurdo, Penfield and McMurdo, [1902] 2 Ch. 685

30 Walker and Corsa (Re), *[1986] O.J. No. 1236, 64 C.B.R. (N.S.) 183* (Que. S.C.).

TAB 5

Chapter 4

EXPIRY OF LIMITATION PERIODS

1. WHAT IS EXTINGUISHED — A SUBSTANTIVE RIGHT OR MERELY THE REMEDY TO ENFORCE IT?

The common law tradition considers statutes of limitation as procedural, as contrasted with the position in most civil law countries, where limitations are regarded as substantive.

As a result, limitation provisions found in Canadian statutes have, for the most part, been interpreted as extinguishing remedies[1] rather than substantive legal rights.[2] Thus, one commonly finds that an action must be commenced "within"[3] or "within and not after"[4] the prescribed period. As a result, although a party is barred from enforcing its remedies once that time period has expired, its legal right will survive. The rationale for this approach is explained as follows:

> Extinguishing rights is not an objective of a limitations system. Rather, its objective is to force the timely litigation of disputes if there is to be litigation. Nevertheless, if, pursuant to a limitations statute, a defendant gains immunity from liability to any remedy which the law provides for the enforcement of the right upon which the claim was based, the right, although not extinguished, will become sterile.[5]

Thus, in the absence of a remedy to enforce a right, such right, in and of itself, is of little, if any, value. It is not surprising, therefore, that both case law and legal texts seldom distinguish between whether it is the right or the remedy that is lost upon the expiration of the limitation period.

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1 Provisions dealing with adverse possession also extinguish a substantive right (to recover land after expiry of the limitation period) — *e.g.*, *Limitations Act*, R.S.O. 1990, c. L.15 ("Ont."), s. 4. The B.C. *Limitation Act*, R.S.B.C. 1996, c. 266 and Newfoundland and Labrador *Limitations Act*, S.N. 1995, c. L-16.1 expressly extinguish causes of action upon expiry of the limitation period: see the discussion at 1.1, *infra*. A claim for damages arising from international carriage of persons, baggage or cargo performed by aircraft for reward is absolutely barred by Art. 29(1) of *The Convention for the Unification of Certain Rules Relating to International Carriage by Air* (the "Warsaw Convention"), which is implemented in Canada by the *Carriage by Air Act*, R.S.C. 1985, c. C-26.

2 *Brown v. Marwieh* (1993), 19 C.P.C. (3d) 265, 125 N.S.R. (2d) 389 (C.A.).

3 For example, Alberta *Limitations Act*, R.S.A. 2000, c. L-12, s. 3.

4 For example, Ont., s. 45(1); Saskatchewan *Limitation of Actions Act*, R.S.S. 1978, c. L-15, s. 3; Manitoba *Limitation of Actions Act*, R.S.M. 1987, c. L150 s. 2(1).

5 Institute of Law Research and Reform, *Limitations, Report for Discussion No. 4* (Edmonton: September 1986), at 325.

TAB 6

1997 CarswellOnt 2928
Supreme Court of Canada

Peixeiro v. Haberman

1997 CarswellOnt 2928, 1997 CarswellOnt 2929, [1997] 3 S.C.R. 549, [1997] S.C.J. No. 31, 103 O.A.C. 161, 12 C.P.C. (4th) 255, 151 D.L.R. (4th) 429, 217 N.R. 371, 30 M.V.R. (3d) 41, 46 C.C.L.I. (2d) 147, 74 A.C.W.S. (3d) 117, J.E. 97-1825

Peter Haberman, Appellant v. Mauricio Peixeiro and Fernanda Peixeiro, Respondents

L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Oral reasons: March 13, 1997
Judgment: September 26, 1997 (written reasons)
Docket: 24981

Proceedings: affirming (1995), 25 O.R. (3d) 1 (Ont. C.A.)

Counsel: *T.H. Rachlin, Q.C.*, and *Alan L. Rachlin*, for the appellant.
Antonio F. Azevedo, for the respondents.

Subject: Torts; Civil Practice and Procedure

Headnote

Limitation of actions --- Actions in tort — Statutory limitation periods — When statute begins to run — General

Discoverability principle — Action was commenced three years and nine months after motor vehicle accident — Plaintiff did not know within limitation period that extent of back injury met threshold for action under s. 266(1) of Insurance Act — Discoverability principle applied to postpone commencement of two-year limitation in s. 206(1) of Highway Traffic Act — Under no-fault scheme, no cause of action accrues until sufficient severity of injury exists — Highway Traffic Act, R.S.O. 1990, c. H.8, s. 206(1) — Insurance Act, R.S.O. 1990, c. I.8, ss. 266(1), 266(3).

Limitation of actions --- Actions in tort — Specific actions — "Damages occasioned by motor vehicle"

Discoverability principle — Action was commenced three years and nine months after motor vehicle accident — Plaintiff did not know within limitation period that extent of back injury met threshold for action under s. 266(1) of Insurance Act — Discoverability principle applied to postpone commencement of two-year limitation in s. 206(1) of Highway Traffic Act — Under no-fault scheme, no cause of action accrues until sufficient severity of injury exists — Highway Traffic Act, R.S.O. 1990, c. H.8, s. 206(1) — Insurance Act, R.S.O. 1990, c. I.8, ss. 266(1), 266(3).

Prescription --- Actions en dommages-intérêts — Délais statutaires de prescription — Moment où la prescription commence à courir — En général

Règle de la possibilité de découvrir le dommage — Action a été intentée trois ans et neuf mois après que l'accident d'automobile se soit produit — Demandeur ignorait avant que la prescription ne soit acquise que la gravité de sa blessure au dos rencontrait le seuil établi pour intenter une poursuite en vertu de l'art. 266 de la Loi sur les assurances — Règle de la possibilité de découvrir le dommage était applicable et repoussait le commencement du délai de prescription de deux ans en vertu de l'art. 206 du Code de la route — Selon le régime de responsabilité sans faute, il n'y a pas de cause d'action tant qu'il n'y a pas de blessure suffisamment grave — Code de la route, L.R.O. 1990, c. H.8, art. 206(1) — Loi sur les assurances, L.R.O. 1990, c. I.8, arts. 266(1), 266(3).

Prescription — Action en dommages-intérêts — Actions à caractère particulier — « Dommages causés à la suite d'un accident de véhicule à moteur »

Règle de la possibilité de découvrir le dommage — Action a été intentée trois ans et neuf mois après que l'accident d'automobile se soit produit — Demandeur ignorait avant que la prescription ne soit acquise que la gravité de sa blessure au dos rencontrait le seuil établi pour intenter une poursuite en vertu de l'art. 266 de la Loi sur les assurances — Règle de la possibilité de découvrir le dommage était applicable et repoussait de deux ans le commencement du délai de prescription en vertu de l'art. 206 du Code de la route — Selon le régime de responsabilité sans faute, il n'y a pas de cause d'action tant qu'il n'y a pas de blessure suffisamment grave — Code de la route, L.R.O. 1990, c. H.8, art. 206(1) — Loi sur les assurances, L.R.O. 1990, c. I.8, arts. 266(1), 266(3).

The plaintiff was injured in a motor vehicle accident in October 1990, and was initially diagnosed as having soft tissue damage in his lower back. X-rays were taken, but disclosed nothing unusual. The plaintiff did not sue at that time because he thought that his injuries were not serious enough to qualify for compensation in tort. The plaintiff was involved in a second accident in January 1992. His resultant injuries were again diagnosed as being soft tissue in nature. In June 1993, a CT scan revealed that the plaintiff had a herniated disc in his spine. In July 1994, the plaintiffs commenced action wherein they claimed that the injuries sustained by the plaintiff as a result of the first action met the requirement of the exception to the general liability immunity afforded to persons involved in a motor vehicle accident by s. 266(1) of the *Insurance Act*. A motions judge concluded that the action was statute-barred under s. 206(1) of the *Highway Traffic Act*, which stipulates that actions for "damages occasioned by a motor vehicle" must be commenced within two years of the time when the "damages were sustained." He held that it was not open to the court to apply the discoverability principle and postpone the running of time in relation to s. 206(1), since that limitation period applies in all cases from the moment the physical injury is sustained. The Court of Appeal reversed the trial judge on the issue of the applicability of the discoverability principle.

The defendant appealed.

Held: The appeal was dismissed.

Under s. 206(1) of the *Highway Traffic Act*, there is no cause of action until the injury meets the statutory exceptions to liability immunity in s. 266(1) of the *Insurance Act*. No cause of action exists until sufficient severity of injury exists. This view is strengthened by s. 266(3) of the *Insurance Act*, which allows for a pre-trial motion on the issue of the existence of a cause of action. Therefore, time under s. 206(1) does not begin to run until it is reasonably discoverable that the injury meets the threshold of s. 266(1). It is unlikely that by using the words "damages were sustained," the legislature intended that the determination of the starting point of the limitation period should take place without regard to the injured party's knowledge. The discoverability principle applies to avoid the injustice of precluding an action before the person is unable to sue. It is an interpretive tool for the construing of limitations statutes which ought to be considered each time a limitations provision is in issue. In the present case, the existence of a cause of action was not reasonably discoverable until the plaintiffs learned that the damage sustained as a result of the first accident was a herniated disc. It could not be said that they ought to have discovered the serious nature of the damage earlier. Therefore, the action was not statute-barred, as it was started within two years of the time they first learned that they had a cause of action.

Le demandeur a été blessé à la suite d'un accident de la route survenu au mois d'octobre 1990, et les examens médicaux ont d'abord révélé des lésions aux tissus mous au bas du dos. Des radiographies ont été prises mais n'ont rien révélé d'anormal. Le demandeur n'a pas intenté de poursuite à ce moment, convaincu que ses blessures n'étaient pas graves au point d'avoir droit à une indemnisation. Le demandeur a été victime d'un second accident au mois de janvier 1992. Encore une fois, le diagnostique a indiqué des lésions des tissus mous. En juin 1993, une scanographie a révélé que le demandeur souffrait d'une protrusion à un disque intervertébral. Au mois de juillet

1994, les demandeurs ont intenté une action dans laquelle ils alléguaient que les blessures subies par le demandeur à la suite du premier accident rencontraient les conditions de l'exception au principe général d'immunité contre les poursuites, dont jouissent les victimes d'accidents de la route en vertu de l'art. 266 de la *Loi sur les assurances*. Le juge des requêtes a conclu que l'action était prescrite en vertu de l'art. 206 du *Code de la route*, qui stipulait que les actions en vue de réclamer des « dommages résultant d'un accident de la route » devaient être intentées dans les deux ans de la date « où les dommages ont été subis ». Il a également statué qu'il n'appartenait pas à la Cour d'appliquer la règle de la possibilité de découvrir le dommage et ainsi reporter le commencement de la prescription prévue à l'art. 206(1), puisque ce délai de prescription s'appliquait chaque fois qu'il y avait existence de lésions corporelles. La Cour d'appel a infirmé la décision du juge des requêtes sur la question de l'application de la règle de la possibilité de découvrir le dommage.

Le défendeur a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Selon l'art. 206 du *Code de la route*, il n'y a pas de cause d'action tant que les blessures n'atteignent pas le seuil de gravité défini dans le cadre des exceptions à l'immunité de poursuite stipulée à l'art. 266(1) de la *Loi sur les assurances*. En somme, il n'y a de cause d'action que si les blessures sont suffisamment graves. Cette règle trouve appui dans l'art. 266(3) de la *Loi sur l'assurance*, qui permet la tenue d'une requête avant le procès sur la question de l'existence d'une cause d'action. Ainsi, le délai de prescription prévu à l'art. 266(1) ne commence pas à courir tant qu'il n'est pas raisonnablement possible de découvrir que le dommage atteint le seuil de l'art. 266(1). En utilisant l'expression « dommages ont été subis », le législateur n'a sûrement pas voulu que la détermination de la date de commencement de la prescription ait lieu à l'insu de la personne blessée. La règle de la possibilité de découvrir le dommage existe pour éviter l'injustice qui serait faite à une personne, si celle-ci se voyait empêchée d'intenter une action avant même qu'elle n'ait eu le droit de le faire. Il s'agit d'une règle d'interprétation des prescriptions statutaires qui devrait être prise en compte chaque fois qu'une prescription est en cause. En l'espèce, il n'était pas raisonnablement possible de découvrir l'existence d'une cause d'action, avant que les demandeurs n'apprennent que le dommage subi lors du premier accident était en fait une hernie discale. On ne pouvait prétendre qu'ils auraient dû découvrir la gravité du dommage plus tôt. Par conséquent, l'action n'était pas prescrite puisqu'elle avait été intentée dans les deux ans du moment de la connaissance de la cause d'action.

APPEAL by defendant from judgment reported at (1995), 16 M.V.R. (3d) 46, 25 O.R. (3d) 1, 127 D.L.R. (4th) 475, 85 O.A.C. 2, 42 C.P.C. (3d) 37 (C.A.), allowing plaintiffs' appeal from decision of motions judge holding that action for damages sustained in motor vehicle accident was statute-barred.

POURVOI du défendeur à l'encontre de l'arrêt publié à (1995), 16 M.V.R. (3d) 46, 25 O.R. (3d) 1, 127 D.L.R. (4th) 475, 85 O.A.C. 2, 42 C.P.C (3d) 37 (C.A.), accueillant le pourvoi des demandeurs à l'encontre d'un jugement d'un juge des requêtes, concluant que l'action en dommages-intérêts intentée à la suite d'un accident de la route était prescrite.

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

I. Introduction

1 This appeal arises from a motion brought by the respondents Peixeiro to determine whether their action against the appellant Haberman was statute-barred. The appeal was heard and dismissed on March 13, 1997.

2 The question raised was whether the discoverability principle applied to postpone the commencement of the two-year limitation period contained in s. 206(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 ("HTA"). It stipulates that actions for "damages occasioned by a motor vehicle" must be commenced within two years of the time when the "damages were sustained". The respondents commenced their action against the appellant three years and nine months after the

motor vehicle accident. In that action they claimed that Mr. Peixeiro's injuries met the requirement of the exception to the general liability immunity afforded to persons involved in a motor vehicle accident by s. 266(1) of the *Insurance Act*, R.S.O. 1990, c. I.8. This liability immunity is a key feature of the statutory no-fault automobile accident compensation scheme. It operates to effectively bar causes of action in tort in all but a few cases. The resolution of the issue in this appeal requires a consideration of the liability immunity and the no-fault scheme before consideration of the applicability of the discoverability principle.

II. Statement of Facts

3 The application before the motions judge proceeded on agreed facts. A two-car accident occurred on October 11, 1990 at the intersection of Ossington Avenue and Harbord Street in the City of Toronto. The appellant Haberman and the respondent Mauricio Peixeiro were the drivers. Liability in the accident is disputed but it is agreed that Mr. Peixeiro knew he was injured.

4 Mr. Peixeiro consulted his family doctor and was told that he had suffered soft tissue injuries in the form of a severe contusion to the right side of his back. He was also referred to a specialist who recommended a course of physiotherapy. X-rays were taken at that time but disclosed nothing unusual. He was unable to work as a general contractor, from the date of the accident to November 1991, a period of over 13 months.

5 On January 7, 1992, Mr. Peixeiro was involved in a second two-car accident. Mr. Jose Silva was the other driver in this second accident. Mr. Peixeiro's resultant injuries were again diagnosed as being soft tissue in nature. Mr. Peixeiro was unable to work from the date of the second accident until May 1992. He ceased employment again in August 1992 and has not returned to work.

6 On January 15, 1993, Mr. Peixeiro consulted his family physician. As a result, a CT scan was performed in June 1993. The scan revealed a disc protrusion in the respondent's spine at L5-S1. At that time, Mr. Peixeiro was not a good candidate for surgery. However, on December 8 when he developed paresis on his right leg, he was admitted to emergency. He underwent a hemilaminectomy and a discectomy to remove the herniated disc on December 22, 1993.

7 On December 17, 1993, the respondents commenced an action against Mr. Silva. The respondents initially attempted to add the appellant as a defendant to the Silva action. By agreement, a separate action was commenced on July 27, 1994 against the appellant and a motion on a question of law was brought to determine whether the claim against him for the injuries of October 11, 1990 was statute-barred by s. 206(1) *HTA*.

8 On November 1, 1994, the chambers judge Paisley J. held that the respondents' action against Haberman was statute-barred.

9 The Court of Appeal for Ontario allowed the respondents' appeal on September 5, 1995: (1995), 25 O.R. (3d) 1, 127 D.L.R. (4th) 475, 85 O.A.C. 2, 42 C.P.C. (3d) 37, 16 M.V.R. (3d) 46, [1995] O.J. No. 2544 (Ont. C.A.) (QL).

10 The parties agreed that the respondents first learned about a herniated disc in Mr. Peixeiro's back in June 1993.

III. Relevant Statutory Provisions

11 *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 206(1)

> *206.*-(1) Subject to subsections (2) and (3), no proceeding shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of two years from the time when the damages were sustained.

Insurance Act, R.S.O. 1990, c. I.8, s. 266

266.-(1) In respect of loss or damage arising directly or indirectly from the use or operation, after the 21st day of June, 1990, of an automobile and despite any other Act, none of the owner of an automobile, the occupants of an automobile or any person present at the incident are liable in an action in Ontario for loss or damage from bodily injury arising from such use or operation in Canada, the United States of America or any other jurisdiction designated in the *No Fault Benefits Schedule* involving the automobile unless, as a result of such use or operation, the injured person has died or has sustained,

(a) permanent serious disfigurement; or

(b) permanent serious impairment of an important bodily function caused by continuing injury which is physical in nature.

(2) Subsection (1) does not relieve any person from liability other than the owner of the automobile, occupants of the automobile and persons present at the incident.

(3) In an action for loss or damage from bodily injury arising directly or indirectly from the use or operation of an automobile, a judge shall, on motion made before or at trial, determine if the injured person has, as a result of the accident, died or has sustained,

(a) permanent serious disfigurement; or

(b) permanent serious impairment of an important bodily function caused by continuing injury which is physical in nature.

(4) Even though a defence motion under subsection (3) is denied, the defendant may, at trial, in the absence of the jury, and following the hearing of evidence, raise the defence provided in subsection (1).

V. Judicial History

A. Ontario Court (General Division)

12 The motions judge held that it was not open to the court to apply the discoverability principle and postpone the running of time in relation to s. 206(1) *HTA*, since that limitation period applies in all cases from the moment the physical injury is sustained. He distinguished *Murphy v. Welsh*, [1993] 2 S.C.R. 1069 (S.C.C.), on the basis the respondent here was not under a legal disability. The motions judge held that the respondents' action was statute-barred as it was brought more than two years after the date of the accident. A similar conclusion was reached in *Bair-Muirhead v. Muirhead* (1994), 20 O.R. (3d) 744 (Ont. Gen. Div.).

B. Court of Appeal for Ontario (1995), 25 O.R. (3d) 1 (Ont. C.A.)

13 The Court of Appeal reversed the trial judge on the issue of the applicability of the discoverability principle to s. 206(1) *HTA*. Carthy J.A. held that the discoverability rule was not limited to narrow classes of actions but was a general rule. He assumed, as we do, for the purposes of the motion that the respondent Mr. Peixeiro had been reasonably diligent but incapable of identifying the cause of action. The Court of Appeal held that the balance between greater uncertainty, an increased burden of investigation and the continuance of potential claims against defendants remained "in favour of the discoverability rule" (p 7).

14 The Court of Appeal stated that if the victim does not know that the injury meets the requirement of s. 266(1), then he or she is not capable of identifying the cause of action. It is no answer to say that the plaintiff could protect his or her position by starting an action notwithstanding the fact that there was no evidence of an injury that met the threshold in s. 266(1) of the *Insurance Act*. This procedure was obviated by s. 266(3), which provided for a pre-trial motion by the defence to strike the plaintiff's claims. See *Grossi v. Bates* (1995), 21 O.R. (3d) 564 (Ont. Div. Ct.).

V. Issues

15 There is one issue in this appeal. The question is whether the discoverability rule applies to the limitation period in s. 206(1) *HTA*. Included in a consideration of this question are issues related to the implementation of the province of Ontario's no-fault insurance scheme and rationales behind limitation periods such as s. 206(1) *HTA* as it existed in 1990.

VI. Analysis

16 It was conceded by the respondents that Mr. Peixeiro suffered a back injury and was aware of it immediately after the first accident. It was of sufficient severity that he remained off work for a period of 13 months. After the second accident of January 1992, he only worked three months between May 1992 and August 1992 and has not worked since.

17 While the respondents knew of some injury, they did not know within the limitation period that the damage Mr. Peixeiro sustained as a result of the first accident was a herniated disc. They did not know that it met the threshold for an action under s. 266(1) of the *Insurance Act*. He did not sue because he thought that his injuries were not serious enough to qualify for compensation in tort.

18 It was conceded that at common law ignorance of or mistake as to the extent of damages does not delay time under a limitation period. The authorities are clear that the exact extent of the loss of the plaintiff need not be known for the cause of action to accrue. Once the plaintiff knows that some damage has occurred and has identified the tortfeasor (see *Cartledge v. E. Jopling & Sons*, [1963] A.C. 758 (U.K. H.L.), at p. 772 *per* Lord Reid, and *July v. Neal* (1986), 57 O.R. (2d) 129 (Ont. C.A.)), the cause of action has accrued. Neither the extent of damage nor the type of damage need be known. To hold otherwise would inject too much uncertainty into cases where the full scope of the damages may not be ascertained for an extended time beyond the general limitation period.

19 However, it was submitted that because of Ontario's no-fault insurance scheme at the time of the accident, the starting point of the running of time is when the damages are known to comprise "permanent serious impairment" within the meaning of s. 266 of the *Insurance Act*. The argument was that the intervention of the liability immunity, one of the mandatory features of Ontario's no-fault system, alters the time of accrual of the cause of action until the material fact of sufficient injury is reasonably discoverable.

A. The No-Fault Scheme in Ontario

20 Tort law provides fault-based compensation for car accidents. Fault as the basis of liability is grounded on the fundamental proposition that a person who is injured due to the fault of another person has the right to compensation from the wrongdoer. Tort law is based on individual responsibility.

21 As the number and severity of car accidents and injuries increased, liability insurance became commonplace and the compensation of victims became the main focus of tort law.

22 Guaranteed compensation of the victim is one of the goals of a no-fault system. One of the hallmarks of a no-fault system is the limitation or abolition of liability based on fault, i.e. tort liability. No-fault systems are a reflection of the conscience of the community. Professor Lewis Klar, in "No-Fault Insurance for Auto Accident Victims: A Background Paper" prepared for the Canadian Bar Association, Alberta Branch Task Force on Fault/No-Fault Insurance (1991) stated, at p. 13, that the goals of fault-based accident compensation and no-fault are fundamentally different:

> First, and foremost, it must always be remembered that the two types of compensation schemes attempt to achieve different goals. The full compensation, justice, accident deterrence, safety and education goals of tort are not the aims of no fault insurance. No fault insurance is predicated upon the desire to provide accident benefits to all victims, regardless of fault, efficiently and expeditiously. It does not seek to provide full compensation, to deal with the effect of wrongdoing, or to deter accidents. If these goals are to be accomplished, they must be accomplished outside of the no fault insurance scheme, through criminal laws, traffic regulations, and so forth.

23 The no-fault scheme in place at the time of the respondent's accident was the Ontario Motorist Protection Plan (OMPP) inaugurated on June 22, 1990 with the proclamation of the *Insurance Statute Law Amendment Act, 1990*, S.O. 1990, c. 2 (Bill 68).

24 No-fault benefits were available as an alternative prior to June 22, 1990, to cover medical and rehabilitation expenses, loss of income payments, funeral expenses and death benefits. No-fault became mandatory and its complement of benefits more extensive with Bill 68. More significantly, for the purposes of this appeal, Bill 68 introduced a restriction on the right to sue in tort.

25 The Ontario Court of Appeal had the following to say with respect to the legislative intent behind s. 266 of the *Insurance Act* in *Meyer v. Bright* (1993), 15 O.R. (3d) 129 (Ont. C.A.), at p. 134:

> In our view, the Ontario legislature enacted s. 266 and other related amendments to the Act for the purpose of significantly limiting the right of the victim of a motor vehicle accident to maintain a tort action against the tortfeasor. The scheme of compensation provides for an exchange of rights wherein the accident victim loses the right to sue unless coming within the statutory exemption, but receives more generous first-party benefits, regardless of fault, from his or her own insurer. The legislation appears designed to control the cost of automobile insurance premiums to the consumer by eliminating some tort claims. At the same time, the legislation provides for enhanced benefits for income loss and medical and rehabilitation expenses to be paid to the accident victim regardless of fault.

26 Since 1990, the prohibition on suing unless the party qualifies under one of the exceptions has identified the Ontario plan as a "threshold" no-fault system. See Allan O'Donnell, *Automobile Insurance in Ontario* (1991), at p 202:

> In effect, the Ontario Legislature imposed a social contract on its citizens whereby in consideration of all injured persons receiving an indemnity for most economic losses, regardless of fault, and in consideration for saving on automobile insurance premiums, the great bulk of those injured could not sue.
>
> In very rough terms, only 8 per cent to 10 per cent of those injured will be able to meet the threshold test but since these cases will tend to be the most expensive ones in tort, about 60 per cent of the previous third-party liability bodily injury premium will be consumed in order to pay for such claims. The other 40 per cent of bodily injury dollars, when added to the previous existing No-Fault Benefits premium, will be spent on delivering No-Fault Benefits.

27 In *Meyer v. Bright*, at p. 136, the Ontario Court of Appeal characterized s. 266 as a general immunity and not a threshold:

> At the outset we wish to make a comment about the word "threshold", which has been widely used to describe the provisions of s. 266(1). We think the use of that word in such a fashion, while perhaps convenient or handy, is inaccurate and tends to lead one away from the real inquiry which should be made. Section 266(1) does not establish any general threshold which injured persons need pass before they are entitled to sue. Section 266(1) essentially does two things. First, it immunizes the owner and occupants of motor vehicles, and persons present at the incident, from actions in Ontario for loss or damage arising out of motor vehicle accidents which occur after June 21, 1990 in Canada, the United States and certain other jurisdictions. The second thing which s. 266(1) does is create an exception for certain injured persons. The real inquiry required by the legislation in each case is to determine whether "the injured person" falls within one or more of the statutory exceptions to the general immunity.

28 The Court of Appeal for Ontario set the following standards for allegations of injuries falling under s. 266(1)(b):

> (1) Has the person sustained permanent impairment of a bodily function caused by continuing injury which is physical in nature?
>
> (2) Is the bodily function which is permanently impaired an important one?

(3) Is the impairment of the important bodily function serious?

Only if all three of the above questions are answered in the affirmative, they said, is the test met.

29 By whatever name it is called, s. 266 effectively bars actions for recovery in tort unless a certain level of physical injury, permanent in nature and entailing serious impairment of an important bodily function, is met. Unlike schemes in Michigan, New York and Florida upon which the Ontario scheme was said to be modelled, the Ontario threshold bars *all* tort claims, pecuniary and non-pecuniary, if the injury fails to pass the threshold.

30 What insight can we gain into the meaning of s. 206(1) *HTA*, given the exclusion of liability under s. 266 of the *Insurance Act*? An action governed by s. 206(1) fails if it does not qualify under the exception provided for in s. 266(1). The cause of action referred to in s. 206(3) does not accrue until the statutory requirement of s. 266(1) of the *Insurance Act* is met. Under the no-fault system in place at the time of the accident, the mere happening of an injury in a car accident does not found a cause of action. No cause of action exists until sufficient severity of injury exists. This view is strengthened by s. 266(3), which allows for a pre-trial motion on the issue of the existence of a cause of action. Under s. 266(3), a motion may be brought to determine whether there is a cause of action evident on the face of the record. The onus is on the plaintiff to prove that his injuries meet the requirements in s. 266(1)(b): *Buffa v. Gauvin* (1994), 18 O.R. (3d) 725 (Ont. Gen. Div.), and *Meyer v. Bright*, *supra*, at p. 146.

31 In my view, the right of action contemplated in s. 206(1) *HTA* must refer to an action that is not excluded by s. 266 of the *Insurance Act*. It cannot be otherwise. Ontario's system of mandatory automobile insurance is not a pure no-fault system; it cannot be said that the legislature intended to preclude all causes of action arising from motor vehicle accidents.

32 In this case, had the respondents started an action prior to June 1993, they would not have had evidence of a sufficient serious physical injury. They would have failed the *Meyer v. Bright* test at the first step. It is unreasonable to suggest that the respondents, given the existing knowledge of the injury, should have proceeded. It would have been futile.

B. Does the discoverability rule apply?

33 The cause of action under s. 206(1) does not arise unless the injury meets the statutory exceptions set out in the *Insurance Act*. The question which remains is whether the discoverability principle applies to postpone the running of time until the material facts underlying the cause of action, including extent of the injury, are known.

34 Short limitation periods indicate that the legislature put a premium on their function as a statute of repose. This is one of the three rationales which serve society and the courts' continued interest in maintaining the respect of these statutes. Whatever interest a defendant may have in the universal application of a limitation period must be balanced against the concerns of fairness to the plaintiff who was unaware that his injuries met the conditions precedent to commencing an action: *Murphy v. Welsh*, *supra*; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.). All the rationales were set out in *M. (K.) v. M. (H.)*, where this Court considered the *Limitations Act*, R.S.O. 1980, c. 240 (now R.S.O. 1990, c. L.15) in order to determine the time of accrual of the cause of action in a manner consistent with its purposes (at pp. 29-30):

> There are three, and they may be described as the certainty, evidentiary, and diligence rationales....
>
> Statutes of limitation have long been said to be statutes of repose .... The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations....
>
> The second rationale is evidentiary and concerns the desire to foreclose claims based upon stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim....

> Finally, plaintiffs are expected to act diligently and not "sleep on their rights": statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion.

35 *M. (K.) v. M. (H.)* applied the three rationales to the fact situation there and found that neither the guarantee of repose, the evidentiary concerns nor the expectation of diligence on the part of the plaintiff precluded the application of the discoverability principle.

36 Since this Court's decisions in *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.), and *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), at p. 224, discoverability is a general rule applied to avoid the injustice of precluding an action before the person is able to raise it. See *Sparham-Souter v. Town & Country Developments (Essex) Ltd.*, [1976] Q.B. 858 (Eng. C.A.), at p. 868 *per* Lord Denning, M.R., citing *Cartledge v. E. Jopling & Sons, supra*:

> It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury, and therefore before it is possible to raise any action.

See also *M. (K.) v. M. (H.), supra*, at p. 32 and *Murphy v. Welsh, supra*, at pp. 1079-81.

37 In this regard, I adopt Twaddle J.A.'s statement in *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200 (Man. C.A.), at p. 206, that the discoverability rule is an interpretive tool for the construing of limitations statutes which ought to be considered each time a limitations provision is in issue:

> In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed.

38 The appellant submitted here that the general rule of discoverability was ousted because the legislature used the words "damages were sustained", rather than the date "when the cause of action arose". It is unlikely that by using the words "damages were sustained," the legislature intended that the determination of the starting point of the limitation period should take place without regard to the injured party's knowledge. It would require clearer language to displace the general rule of discoverability. The use of the phrase "damages were sustained" rather than "cause of action arose", in the context of the *HTA*, is a distinction without a difference. The discoverability rule has been applied by this Court even to statutes of limitation in which plain construction of the language used would appear to exclude the operation of the rule. *Kamloops, supra*, dealt in part with s. 739 of the *Municipal Act*, R.S.B.C. 1960, c. 255, which required that notice should be given within two months "from and after the date on which [the] damage was sustained". However, this Court applied the discoverability rule even with respect to this section; see *Kamloops, supra*, at pp. 35-40.

39 I agree with the Court of Appeal that to hold that the discoverability principle does not apply to s. 206 *HTA* would unfairly preclude actions by plaintiffs unaware of the existence of their cause of action. In balancing the defendant's legitimate interest in respecting limitations periods and the interest of the plaintiffs, the fundamental unfairness of requiring a plaintiff to bring a cause of action before he could reasonably have discovered that he had a cause of action is a compelling consideration. The diligence rationale would not be undermined by the application of the discoverability principle as it still requires reasonable diligence by the plaintiff.

40 The appellant submitted that as a matter of law, the discoverability principle was inapplicable to personal injury actions. Notwithstanding *Cartledge v. E. Jopling & Sons, supra*, there is no principled reason for distinguishing between an action for personal injury and an action for property damage (see *Kamloops*, *Sparham-Souter* and *M. (K.) v. M. (H.)*).

41 The appellant also submitted that the natural inference from this Court's application of s. 47 of the Ontario *Limitations Act* in *Murphy v. Welsh, supra*, was that the common law discoverability rule does not apply to s. 206(1). If this were not so, it was argued, the Court would not have had to resort to s. 47 in that case. However discoverability played no part in the case. There the minor's injuries were immediately identified and legal advice sought. The limitation period was missed because files were misplaced by lawyers. As the legislature had specifically provided for the postponement of time in the case of minors and those suffering from other legal disability, it was incumbent upon the courts to apply the specific provision. There is no conflict between the rule in s. 47 of the Ontario *Limitations Act* (which merely codifies the common law rules against allowing time to run against those under a legal disability) and the discoverability principle.

C. Application of the discoverability principle to the facts

42 The respondent Mr. Peixeiro was injured in October 1990 and first discovered that his injury was physical in nature, within the meaning of *Meyers*, in June 1993. He commenced his action against the appellant in July 1994. Given the medical advice that Mr. Peixeiro had, and in spite of reasonable diligence by him, his injury was reasonably discoverable for the first time in June 1993.

43 As a matter of law, I do not think that the existence of a cause of action was reasonably discoverable until the respondents learned that Mr. Peixeiro had a herniated disc. Therefore, the respondents' action is not statute-barred, as it was started within two years of the time when they first learned that they had a cause of action.

VII. Conclusion

44 Under s. 206(1) *HTA*, there is no cause of action until the injury meets the statutory exceptions to liability immunity in s. 266(1) of the *Insurance Act*. The discoverability principle applies to avoid the injustice of precluding an action before the person is able to sue. Time under s. 206(1) does not begin to run until it is reasonably discoverable that the injury meets the threshold of s. 266(1). It was agreed that the respondents first learned of the herniated disc in June 1993. The respondents were reasonably diligent in this respect. It cannot be said that they ought to have discovered the serious nature of the damage earlier. As the action was commenced in July a year later within the limitation period, it cannot be statute-barred.

45 I would dismiss the appeal, with costs.

Appeal dismissed.

Pourvoi rejeté.

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TAB 7

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST): Tax — Miscellaneous; Insolvency

Headnote

Tax — Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax — General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation — Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation — Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

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— Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative

context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation

témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la présance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

Table of Authorities

Cases considered by *Deschamps J.*:

Air Canada, Re (2003), 42 C.B.R. (4th) 173, 2003 CarswellOnt 2464 (Ont. S.C.J. [Commercial List]) — referred to

Air Canada, Re (2003), 2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List]) — referred to

Alternative granite & marbre inc., Re (2009), (sub nom. *Dep. Min. Rev. Quebec v. Caisse populaire Desjardins de Montmagny*) 2009 G.T.C. 2036 (Eng.), (sub nom. *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*) [2009] 3 S.C.R. 286, 312 D.L.R. (4th) 577, [2009] G.S.T.C. 154, (sub nom. *9083-4185 Québec Inc. (Bankrupt), Re*) 394 N.R. 368, 60 C.B.R. (5th) 1, 2009 SCC 49, 2009 CarswellQue 10706, 2009 CarswellQue 10707 (S.C.C.) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

Canadian Airlines Corp., Re (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — referred to

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA's* supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases

simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA's* purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

TAB 8

HMANALY G§184
Houlden & Morawetz Analysis G§184

Houlden and Morawetz Bankruptcy and Insolvency Analysis

Bankruptcy and Insolvency Act
Part V (ss. 102-157)

L.W. Houlden and Geoffrey B. Morawetz

G§184 — Creditor Proving Claim before Distribution but after Declaration of a Dividend

G§184 — Creditor Proving Claim before Distribution but after Declaration of a Dividend

See ss. 148, 149, 150, 151, 152, 153, 154

While a creditor must file a proof of claim in order to receive a dividend (see *ante* G§168 "Payment of Dividends"), there is no time limit on the filing of claims. The failure to file a proof of claim in a timely fashion deprives a creditor from sharing in or upsetting any dividend declared prior to the filing of a proof of claim: s. 150; *Brown Estate v. Amourgis* (1994), 26 C.B.R. (3d) 134, 1994 CarswellOnt 283 (Ont. Gen. Div.); *Re Borreson* (2004), 49 C.B.R. (4th) 6, 2004 CarswellSask 101, 246 Sask. R. 19, 2004 SKQB 37 (Sask. Q.B.).

A creditor who pays no attention to the filing of a proof of claim or whose claim by inadvertence, carelessness or some other reason is not filed before the declaration of a dividend, cannot come in and disturb the declaration of the dividend. But such a creditor is entitled to be paid the amount of its dividend from money that comes into the hands of the trustee before that money is used to pay further dividends to creditors: S. 150; *Re Baker* (1922), 3 C.B.R. 297 (N.B. K.B.); *Re Malkin* (1922), 3 C.B.R. 26, 22 O.W.N. 330 (Ont. S.C.); *Re H.W. Petrie Ltd.*, 19 C.B.R. 129, [1938] O.W.N. 62 (S.C.).

If a dividend has been declared but not paid, the court will allow a creditor to prove its claim and share in the dividend: *Bank of Nova Scotia v. Janzen (Trustee of)* (1989), 71 C.B.R. (N.S.) 277, 90 N.S.R. (2d) 67, 230 A.P.R. 67 (T.D.). The policy of the courts is to allow creditors to share in a distribution: *Bank of N.S. v. Janzen, supra*. In directing the trustee to revise the dividend sheet to include an omitted creditor, the court may impose terms. Frequently the creditor will be penalized with respect to costs: see *Re Baker, supra*; *Re H.W. Petrie, supra*; *Re Pilot Butte Sand & Gravel Co.* (1968), 11 C.B.R. (N.S.) 254 (Sask. Q.B.); *Bank of Nova Scotia v. Janzen, supra*.

Where the inspectors had authorized and the court approved a final distribution, the trustee had prepared the distribution statement and cheques in accordance with the distribution sheet, the cheques had been deposited with Canada Post (thereby becoming the property of the addressees), and some of the cheques had been cashed, the court concluded that the estate had been distributed notwithstanding that the trustee had managed to retrieve most of the cheques before they had been cashed. The court noted there was no explanation in this lengthy and complex bankruptcy why substantial proofs of claim had been delivered to the trustee seven years after the initial bankruptcy event: *Re MacDonald Homes Inc.* (2003), 2003 CarswellOnt 5054, 48 C.B.R. (4th) 105 (Ont. S.C.J.).

Section 150 does not apply to a case where a creditor has proved its claim on one basis of calculation and seeks to withdraw its original proof and to substitute an amended proof on a different basis of calculation. Section 150 only applies where a creditor has not proved a claim: *Re Stobie Forlong & Co.*, 19 C.B.R. 189, [1938] S.C.R. 193, [1938] 2 D.L.R. 209. For the right to withdraw or amend a claim, see *ante* G§48 "Necessity for Filing Proof of Claim — (2) Withdrawal of a Claim and (3) Amendment of a Claim".

The remedial provisions of s. 150 do not apply where a creditor has received a notice under s. 149(1) to prove a claim and has failed to do so or has not obtained an extension of time for doing so. Such a creditor must first obtain an extension of time under s. 149(2) and file a claim before seeking the benefit of s. 150: *125258 Canada Inc. (Trustee of) v. Walker* (1986), 64 C.B.R. (N.S.) 183 (Que. S.C.).

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TAB 9

1922 CarswellOnt 45
Ontario Supreme Court, In Bankruptcy

Malkin, Re

1922 CarswellOnt 45, 22 O.W.N. 330, 3 C.B.R. 26

In re Malkin

Ex parte Fesserton Timber Company, Limited

Orde, J.

Judgment: May 16, 1922

Counsel: *G. W. Mason, K.C.*, and *F. C. Carter*, for the Fesserton Timber Co.
G. M. Willoughby, for the trustee.

Subject: Corporate and Commercial; Insolvency

Headnote

Bankruptcy — Proving claim — Provable debts — Unliquidated damages

Bankruptcy — Dividends — Distribution of dividends — General

I. Bankruptcy — Dividend — New Creditor's Claim — Stay of Further Distribution Until New Creditor's Dividend Made Up — Bankruptcy Act, Sec. 37(3).

A bankruptcy trustee who has given the necessary notices of two dividends and has paid the same without knowledge of a claim for damages for breach of contract against the debtor is protected as to the distribution already made, but can make no further distribution on proof of the damage claim until the claimant shall have received the equivalent of the two dividends from the estate and thereby have been placed on an equality with the other creditors.

II. Proof of Claim — Damages for Breach of Contract — Whether Two Contracts between Debtor and Another Are Independent or Interdependent — Mutual Defaults — Bankruptcy Act, Sec. 44, 1 C.B.R. 50.

In the case of two independent contracts between the same contracting parties, the breach of one of the contracts by one party does not excuse the other party from performing the other contract. In case of the latter's bankruptcy, proof of claim will be allowed for the damages without prejudice to any right of set off or counterclaim in respect of the first party's non-performance of the first contract.

Motion by way of appeal from the trustee's disallowances of claims heard before Orde, J. in Chambers, Toronto, February 1 and 2, 1922. [*The Bankruptcy Act*, sec. 53, 1 C.B.R. 58.]

Orde, J.:

1 The company's claim is for $1,700 damages for the insolvent's breach of the contract made on November 15, 1919, for the sale by him to the company of 100,000 feet of two-inch log run dry jack pine at $23 per thousand, F.O.B. Nellie Lake, the measure of damages claimed being at the rate of $17 per thousand feet.

2 The main question to be determined is as to the measure of damages. The refusal by Malkin to deliver because the com pany were holding back a sum due him for a shipment of lumber made under an entirely distinct contract furnished no legal ground for such refusal. Apart from the law of set-off in the case of mutual accounts, or the right of counterclaim, which are largely matters of procedure, there is no law which in the case of two independent contracts between the same people makes the breach of one contract by one party a ground or excuse for the other party's refusal to perform the other contract. In the absence of an agreement that the performance of one contract was to be conditional upon the performance of the other, the two contracts are quite independent of each other [1]

3 As to the damages, without reviewing the evidence in detail, I am of the opinion that the amount claimed by the company is not excessive. There was unquestionably a very rapid rise in the price of lumber during the spring and summer of 1920, and I accept the evidence on behalf of the company as to what it cost them to purchase other lumber to fulfil their own contracts after Malkin's refusal to deliver. The company's claim to rank against the insolvent estate for $1,700 will therefore be allowed.

4 The position of the parties is complicated by reason of the bankruptcy and the proceedings taken subsequent thereto. The trustee had no notice of the Fesserton Company's claim until some time after the assignment in bankruptcy, which was made on November 1, 1920. In the meantime, the assets, including the insolvent's claim against the Fesserton Company for $435.97 owing by them to him on the other contract, were sold to Malkin's wife for a sum sufficient to pay the creditors, as then known to the trustee, in full. It was not until Mrs. Malkin commenced or threatened action against the company for the $435.97 that they learned that Malkin had assigned, and on June 17, 1921, they filed their claim for $1,700 with the trustee. The trustee had then paid dividends amounting to fifty per cent to the creditors whose claims had been filed, and afterwards paid a further twenty per cent.

5 The sale to Mrs. Malkin was not for cash, and the balance still owing by her to the trustee was secured by a chattel mortgage, and also by the retention of the claim for $435.97 against the company in the hands of the trustee but by way of security only.

6 Under these circumstances, I cannot, without giving Mrs. Malkin an opportunity of asserting her right, make any order as to the setting-off of the $435.97 against the company's right to prove for $1,700. The correspondence put in would indicate that Mrs. Malkin knew all about the contract in question, as she wrote many of the insolvent's letters for him, but I cannot dispose of her rights in her absence.

7 To the extent of the payment of the dividends up to fifty per cent the trustee is of course entitled to protection. But any assets then remaining or subsequently coming into the trustee's hands will be subject first to the payment to the Fesserton Timber Company of seventy per cent of their claim, before making any further distribution among the other creditors. See sec. 37, subsec. 3 of *The Bankruptcy Act* [1 C.B.R. 43]. The claimants and the trustee will also be entitled to their costs out of the estate. The order ought to be without prejudice to the right of the Fesserton Timber Company to set up, if so advised, in any action brought against them for the $435.97, the right, if any, to set off their present claim against that indebtedness. It is to be hoped that this can be adjusted among all the parties without further litigation.

Appeal allowed.

Footnotes

1 INDEPENDENT OR INTERDEPENDENT CONTRACTS BETWEEN SAME PARTIES. — If in any case the Court finds two enforceable agreements executed in such circumstances that one is intended to affect the other, such effect will be given to them as the superimposing operation of the governing contract requires: but in that case it is not collateral but dominant. *Gartside v. Silkstone & Dodworth Coal & Iron Co.* (1882) 21 Ch. D. 762, at p. 767, 51 L.J. Ch. 828; *Hoyt's Proprietary Ltd. v. Spencer* (1919) 27 Com. L.R. 133, at p. 147 (Australia), affirming 19 S.R. (N.S.W.) 200.

A collateral contract may be either antecedent or contemporaneous, and being supplementary only to the main contract cannot impinge on it or alter its provisions or the rights created by it; consequently where the main contract is relied on as the

consideration, in whole or part, for the promise contained in the collateral contract. it is a wholly inconsistent and impossible contention that the other party is not to have the full benefit of the main contract as made. *Hoyt's Proprietary Ltd. v. Spencer, supra.*

TAB 10

1968 CarswellSask 2
Saskatchewan Court of Queen's Bench, In Bankruptcy

Pilot Butte Sand & Gravel Co., Re

1968 CarswellSask 2, 11 C.B.R. (N.S.) 254

Re Pilot Butte Sand and Gravel Co. Ltd.; Glen Wright Trucking Ltd. v. Guaranty Trust Company of Canada

MacDonald J.

Judgment: March 28, 1968

Counsel: *J. B. Goetz, Q.C.*, for Glen Wright Trucking Ltd.
J. M. L. Embury, for Western Surety Company Ltd.
A. M. Nicol, Q.C., for trustee.

Subject: Corporate and Commercial; Insolvency

Headnote

Bankruptcy — Dividends — Distribution of dividends — General

Dividends — Creditor failing to prove claim — Dividend declared — Cheques written — Trustee stopping payment on cheques — Creditor permitted to rank for dividend — The Bankruptcy Act. R.S.C. 1952, c. 14, s. 108.

On 5th June 1967 the debtor company made an assignment in bankruptcy. Notice of the bankruptcy was sent to G.W. In accordance with the instructions of the inspectors, the trustee on 27th February 1968 prepared a dividend sheet and mailed cheques to the creditors. On the morning of 28th February, G.W. advised the trustee that its name was not on the dividend sheet and the trustee stopped payment on the cheques. An officer of G.W. swore that a proof of claim was prepared by its solicitor and to the best of its knowledge deposited with the trustee in September 1967. The trustee had no record of receiving the proof of claim. This was an application by a major creditor for an order directing the trustee to pay the dividend without regard to the claim of G.W. and an application by G.W. for an order permitting it to prove its claim and to participate in the dividend already declared.

Held, G.W. should be permitted to file a claim and to share in the dividend already declared.

There were two principles involved.

(1) There is a policy of the court if distribution of the funds has not taken place to let a creditor prove if he is able to establish a claim and to participate in the distribution of the funds.

(2) This policy does not apply if a creditor has paid no attention to his proof of claim or has been inadvertent or careless. In the latter situation, a late filing creditor is only entitled to share in future distributions.

On the evidence G.W. had not been inadvertent or careless in the filing of its claim. In view of the size of G.W.'s claim, the trustee should have considered sending it a notice under s. 108 of the Bankruptcy Act to prove its claim and this would have called to its attention the fact that its proof of claim was not in the hands of the trustee.

MacDonald J.:

1 On 5th June 1967 Guaranty Trust Company of Canada was appointed trustee with respect to an assignment in bankruptcy made by Pilot Butte Sand and Gravel Co. Ltd. On 7th August 1967 a notice to creditors was sent out by registered mail. Included in the list of creditors was Glen Wright Trucking Ltd., hereinafter referred to as "Glen Wright" and Western Surety Company, hereinafter referred to as "Western Surety". Two meetings of creditors were held. On 29th December 1967 all proof of claims were inspected and the trustee was authorized to pay the first dividend to certain creditors who had submitted proof of their claims. On 27th February 1968 a dividend sheet was prepared by the trustee and cheques mailed to the creditors set out on the dividend sheet. On the morning of 28th February 1968 an officer of Glen Wright advised the trustee that its name as creditor was not on the dividend sheet although it had filed its proof of claim with the trustee. The trustee immediately stopped payment on the dividend cheques and asked that they be returned to the trustee.

2 An officer of Glen Wright swears that a proof of claim was prepared by the company's solicitor and "to the best of my knowledge" deposited with the trustee in September 1967. The trustee has no record that any proof of claim was received from Glen Wright.

3 The major creditor, Western Surety, now makes an application for an order directing the trustee to pay the dividend to creditors as directed by the inspectors. The authority for the the application is s. 107(3) of the Bankruptcy Act:

> 107. (3) No action for a dividend lies against the trustee, but, if the trustee refuses or fails to pay any dividend after having been directed to do so by the inspectors, the court may, on the application of any creditor, order him to pay it, and also to pay personally interest thereon for the time that it is withheld and the costs of the application.

4 Glen Wright applies for an order permitting it to prove its claim under s. 85(1) of the Bankruptcy Act and to participate in the distribution of the already declared dividend. Counsel agreed that both motions should be heard at the same time. The trustee of course adopted a neutral stand. The applicant, Western Surety, asked that the trustee be ordered to pay the costs of the application personally; I presume because it failed to distribute in accordance with the dividend sheet. Under the circumstances the trustee is to be complimented for its prompt action in maintaining the *status quo* by stopping payment on the cheques as soon as it was advised as to the facts.

5 The rights of a creditor who has not proved its claim before declaration of a dividend are set out in s. 109 of the Bankruptcy Act.

> 109. A creditor who has not proved his claim before the declaration of any dividend is entitled upon proof of his claim to be paid out of any money for the time being in the hands of the trustee any dividend or dividends he may have failed to receive, before that money is applied to the payment of any future dividend, but he is not entitled to disturb the distribution of any dividend declared before his claim was proved by reason that he has not participated therein, except on such terms and conditions as may be ordered by the court.

6 While it was suggested by counsel for Western Surety that further funds will be available for distribution, the dividend sheet that was prepared refers to final dividend. There is no evidence before me upon which I can conclude that the present distribution will not be the last. So that if the applicant, Glen Wright, does not participate in this dividend it will not participate to any considerable degree at all. The material indicates that the claim of the applicant, Glen Wright, is $32,480.26. The claim of Western Surety is in the sum of $120,938.76 and its dividend will be affected adversely by the inclusion of Glen Wright's claim. At the hearing the trustee advised that should the Court order a new dividend including Glen Wright's claim, there would be no additional costs charged by the trustee.

7 There appear to be two principles to bear in mind. The first one was stated by Fisher J. in *Re Bryant, Isard & Company; Ex parte Turner* (1925), 28 O.W.N. 93, 5 C.B.R. 571 at 578, 3 Can. Abr. (2nd) 664, as follows: "and it has always been the policy of the Court, even after a creditor is late in filing and prosecuting his claim, *if distribution of*

the fund in question has not taken place, to let him in to prove, and if he is able to establish a claim, to permit him to participate in the distribution of the fund." (The italics are mine.)

8 The second one is stated in Houlden and Morawetz, Bankruptcy Law of Canada, p. 247:

> A creditor who pays no attention to the proof of his claim, or whose claim by inadvertence or carelessness is not filed, in the event of a trustee declaring a dividend, cannot come in and disturb the distribution of that dividend so declared before his debt is proved; but such a creditor is entitled to be paid the amount of that dividend from money which comes into the hands of the trustee before future dividends are paid to other creditors. The court will order the costs of altering the dividend sheet to be borne by the creditor concerned: *In re Baker* (1922), 3 C.B.R. 297, 3 Can. Abr. (2nd) 1927; *In re Malkin* (1922), 22 O.W.N. 330, 3 C.B.R. 26, 3 Can. Abr. (2nd) 1932; *In re H. W. Petrie Ltd.*, [1938] O.W.N. 62, 19 C.B.R. 129, 3 Can. Abr. (2nd) 1936.

9 Webster defines "inadvertence" as "heedless, negligent, inattentive".

10 I am satisfied on the evidence before me that a proof of claim was prepared by the solicitor for Glen Wright. It is entirely possible that the company officer deposited the proof of claim with an employee of the trustee and that it was misplaced in the office of the trustee. It is also possible that the proof of claim was not given to the trustee. Western Surety would appear to be the only creditor opposed to the application of Glen Wright. Mr. Lionel H. Ray, the manager of Western Surety, is one of the inspectors of the estate of Pilot Butte Sand and Gravel Ltd. He swore in his affidavit that Arliss G. Wright, the secretary of Glen Wright, was personally present at the creditors' meetings held on 25th September 1967 and on 20th October 1967, and that the inspectors and trustee were directed by the creditors to proceed with the preparation of a dividend and distribution at that meeting. This evidence satisfied me that the officers of Glen Wright were paying attention to the bankruptcy and I would infer that Arliss G. Wright must have been satisfied that his company's proof of claim was in the hands of the trustee. He would not be attending creditors' meetings and taking an interest in the bankruptcy if he did not consider that Glen Wright had an interest. It is strange that when the claim of Glen Wright was the third largest that the trustee did not send out a notice under s. 108 of the Act. While the section is permissive it would certainly have resulted in Glen Wright becoming aware that its proof of claim was not in the hands of the trustee.

11 There will be an order permitting Glen Wright Trucking Ltd. to file proof of claim with the trustee in accordance with s. 85(1) of the Bankruptcy Act. Provided its claim is proved, Glen Wright will be entitled to share in the dividend already declared. Glen Wright will pay its own costs of this application. The costs of the trustee and Western Surety Company will be paid out of the bankrupt's estate. Western Surety had every right to bring the motion by authority of s. 107(3) and while its application is not granted, the application served a useful purpose in bringing the matter to a conclusion and so it is entitled to its costs.

End of Document

TAB 11

1938 CarswellOnt 66
Ontario Supreme Court, In Bankruptcy

H.W. Petrie Ltd., Re

1938 CarswellOnt 66, [1938] 1 D.L.R. 793 (note), [1938] O.W.N. 62, 19 C.B.R. 129

In re H. W. Petrie Limited

Urquhart, J.

Judgment: February 12, 1938

Counsel: *E. Bristol, K.C.*, for the trustee.
R. M. W. Chitty, K.C., and *R. R. McMurtry*, for Barber, a creditor.

Subject: Corporate and Commercial; Insolvency

Headnote

Bankruptcy --- Dividends — Distribution of dividends — General

Discharge of Trustee — Petition Filed and Interim Receiver Appointed — Transaction Approved by Court whereby Petitioner Paid in Full — Dividends Paid to Creditors by Interim Receiver — Second Petition Filed and Trustee Appointed — Final Dividend Sheet and Discharge of Trustee Opposed by Creditor to whom Dividends Had Not Been Paid by Interim Receiver — Revision of Dividend Sheet Ordered — The Bankruptcy Act, Secs. 9(4), 76, 84, 123, 9 C.B.R. 42, 187, 190, 259.

A petition in bankruptcy was filed against the debtor company in December, 1931 and R. Williamson was appointed interim receiver with power to carry on the business. Later the interim receiver was permitted to sell machinery to the petitioner on a contra account basis resulting in the petitioner being paid in full. By two orders of the Court in 1932 the interim receiver was permitted to pay dividends whereby each creditor received 20 per cent. of his total claim. In 1933 the Premier Trust Company was substituted as interim receiver. On October 23, 1935 a new petition in bankruptcy was filed, and in July, 1936 a receiving order was made, the Premier Trust Company becoming trustee. A motion by the trustee (a) approve a final dividend, (b) to discharge the trustee and (c) to fix the remuneration of the applicant as interim receiver was opposed by counsel on behalf of one Barber, whose claim to rank as a creditor arose upon a promissory note for $6,000 with interest dated April 28, 1931 made by the debtor company and endorsed by the promisee to the Bank of Nova Scotia. The bank had filed a claim with the trustee on August 19, 1936 for $7,460.54 and later in December, 1936 Barber took an assignment from the bank of all its interest in the note and claim. It was contended on Barber's behalf that Barber was entitled to be paid the same dividend as had been paid by the interim receiver to other creditors before any further distribution was made.

Held, that the scheme of *The Bankruptcy Act* requires that all creditors be treated equally. At the time of the presentation of the second petition in bankruptcy the property of the debtor company had been in custody of the Court for over three years. The whole proceedings were continuous and must be regarded as being one proceeding in bankruptcy.

An order was accordingly made declaring that the dividend sheet be revised, and provision made for the payment to Barber of 20 per cent. of his claim fixed at $6,000, and the balance in the trustee's hands be distributed *pari passu* among all creditors.

The remuneration of the interim receiver was approved and the motion for the trustee's discharge enlarged.

Urquhart, J.:

1 Motion by the trustee (a) to approve of a final dividend: (b) to discharge trustee and (c) to fix remuneration of applicant as interim receiver.

2 On December 30. 1931, Frankel Brothers Limited filed in this Court a petition in bankruptcy against the debtor who carried on the business of buying and selling machinery in the city of Toronto.

3 On January 4, 1932, an order appointing the interim receiver was made appointing Rutherford Williamson interim receiver with power to carry on the business and borrow money, etc., subject to further order of the Court.

4 At that time sec. 5 of *The Bankruptcy Act* in its present form had not been passed, although for the purposes of this application the former section may be considered comparable to the present one.

5 On January 12, 1932, by order of Sedgewick, J., the interim receiver was permitted to sell machinery to the petitioning creditor on a contra-account basis, and the result of this sale was that the petitioning creditor was paid his claim in full about that time.

6 The interim receivership was continued from time to time; and by two orders of Sedgewick, J., on June 7, 1932, and December 1, 1932, respectively, the interim receiver was permitted to pay a dividend of 10 per cent. to the creditors. The result was that each creditor had by the end of December, 1932, received 20 per cent. of his total claim.

7 So far as I can see from the Act, there is no authority for the payment by an interim receiver of a dividend to creditors. At that time *The Companies' Creditors Arrangement Act, 1933* [16 C.B.R. 447] had not yet been passed and there was no other means of gradually working out of a difficulty short of actual bankruptcy.

8 On December 22, 1933, by order of Armour, J., the Premier Trust Company was substituted for Rutherford Williamson as interim receiver and the control of the interim receiver was extended first to June 4, 1934, and later by subsequent orders from time to time, accounts being passed but no further dividends being paid to the creditors.

9 On October 23, 1935, a new petition in bankruptcy was filed by Bruce Peebles (Canada) Limited. There are some allegations of irregularity in this petition, but they appear to have been cured in the proceedings; and after several adjournments, on July 14, 1936, a receiving order was made by McEvoy, J., upon the petition of the new petitioner, the order reciting that the previous petitioner, Frankel Brothers Limited, had been paid off. The Premier Trust Company now became trustee in bankruptcy of the estate.

10 The applicant Barber's claim to rank as a creditor arose upon a promissory note dated April 28, 1931, made by the debtor in favour of a machinery company, and endorsed by the latter to the Bank of Nova Scotia. The amount of the note was $6,000 and interest.

11 The bank filed a claim with the new trustee on August 19, 1936, for a sum of $7,460.54, including interest.

12 On December 15, 1936, the creditor Barber took an assignment from the Bank of Nova Scotia of all its interest in the said note and claim, together with proof of debt by himself against the estate in the last mentioned sum.

13 This claim was subsequently disallowed by the trustee but on appeal by order of McEvoy, J., dated March 8, 1937, the right of the claimant Barber to rank as a creditor in the sum of $6,000 was established.

14 On April 7, 1937, the solicitors for Barber advised the solicitors for the trustee that Barber claimed the right to be paid the same dividend which had been paid by the interim receiver to other creditors before any further dividends were distributed to other creditors.

15 On April 16, 1937, Barber was notified through the trustee's solicitors that the trustee and inspectors refused to acknowledge any such right.

16 The trustee contends that by sec. 84 of the Act [9 C.B.R. 190] if the creditor is aggrieved by any act or decision of the trustee, he may apply to the Court, and that not having done so he is debarred from raising this point several months after the decision has been made. No time limit seems to be given for this application by the Act and I greatly doubt if the informal correspondence filed could be considered a decision of the trustee within this section.

17 It was only on December 29, 1937, after a final dividend sheet and notice of application for discharge had been sent out by the trustee to the creditors, that the creditor Barber (informally again) asserted his right and finally was given leave by the Registrar to file notice of dispute.

18 By sec. 123 of the Act [9 C.B.R. 259] it is provided that all debts proved in the bankruptcy shall be paid *pari passu*. The trustee, however, claims that sec. 76 of the Act [16 C.B.R. 187], which provides for distribution by the trustee only applies to the dividend paid by the trustee, and has no application to payments made either by the debtor or the receiver or anyone else prior to the date of the petition, and that in this case the petition that counts is the one launched by Bruce Peebles (Canada) Limited on October 23, 1936, and that the so-called dividend payments made by the first interim receiver were not in the scheme of the Act, and had the same effect as if made by the debtor, and that the trustee has no authority under the Act to take these payments into account in making his distribution. If the contention of the trustee is correct, each creditor other than Barber will get a dividend of 32.72 per cent., while the creditor Barber will only be paid a dividend of 12.72 per cent.

19 It is quite clear from the material filed (the facts being not in dispute) that not only the creditor Barber but also his predecessors in title have been guilty of gross laches, and therefore if he does not receive his full dividend, he can deserve very little sympathy.

20 Notwithstanding this, however, and notwithstanding the brilliant argument of Mr. Bristol, I am of opinion that the scheme of the Act requires all creditors to be treated equally.

21 Bankruptcy has been defined by Halsbury, vol. 2, p. 4, as "a proceeding by which .... the State .... takes possession of .... [the property of a debtor] by an officer appointed for the purpose, and such property is realised and distributed .... [ratably] amongst the persons to whom the debtor owes money or has incurred pecuniary liabilities." In the meantime the debtor has secured immunity from suits etc.

22 At the time of the presentation of the second petition in bankruptcy, the property of the debtor had actually been in the custody of the Court (or of the State as Halsbury puts it) for over three years, and the whole proceedings were continuous and must be regarded as being one proceeding in bankruptcy. The present trustee has been, in one form or another, in charge of the estate of the debtor since December 22, 1933.

23 The whole course of proceedings has been that the Court has regarded them as being one continuous proceeding, and the original petition was not dismissed as required by sec. 4(9) of the Act [9 C.B.R. 32]. That this is true also is evident by the fact that the present accounts show the dealings, at least of this trustee, both as receiver and trustee as one account.

24 Why Barber's claim was not known to the debtor does not appear, but in evidence it is said that his predecessors were not on the company's books as a creditor, although undoubtedly they had the right at the time of the bankruptcy to be considered as such. It is probable that as the interim receiver had no power to advertise for creditors, the necessity of claiming was not brought to the creditor's attention.

25 Judgment will therefore go declaring that the dividend sheet submitted by the trustee shall be revised and provision should be made for the payment to the claimant Barber of 20 per cent. of his claim, which claim I fix at $6,000 but without interest owing to the aforesaid laches, and that what remains in the hands of the trustee for distribution among all the creditors including Barber should then be divided *pari passu*.

26 It must not be forgotten that had not the two orders for payment of dividends by the interim receiver, for which I can find no authority, been made, the funds in the hands of the trustee for distribution would now be increased by the 20 per cent. dividend paid to the other creditors.

27 The orders will provide (again owing to the laches of Barber) that he shall pay his own costs of this motion. The costs of the trustee shall be paid on a solicitor and client basis out of the estate before what remains, after the above payment of 20 per cent. to Barber, is paid out.

28 The remuneration of the Premier Trust Company, as interim receiver in the sum of $10,813.70 is confirmed and allowed. The motion for discharge of trustee will be enlarged until the new dividend sheet has been revised and accepted and the dividend paid.

End of Document

TAB 12

2003 CarswellOnt 5054
Ontario Superior Court of Justice

MacDonald Homes Inc., Re

2003 CarswellOnt 5054, [2003] O.J. No. 5140, 127 A.C.W.S. (3d) 831, 48 C.B.R. (4th) 105

In the Matter of the Bankruptcy of MacDonald Homes Inc. of the City of Ottawa (formerly Nepean), in the Province of Ontario

In the Matter of the Bankruptcy of Douglas R. MacDonald of the Village of Ashton, Regional Municipality of Ottawa-Carleton, Province of Ontario, Businessman

In the Matter of the Bankruptcy of David C. Anderson of the Town of Manotick, Regional Municipality of Ottawa-Carleton, Province of Ontario, Businessman

In the Matter of the Bankruptcy of The Douglas MacDonald Development Corporation of the City of Ottawa, Province of Ontario

Chadwick J.

Judgment: December 15, 2003
Docket: Ottawa 075717

Counsel: Eric M. Appotive for KPMG Inc., in its capacity as Trustee in the Estate of MacDonald Homes Inc.
Leigh Ann Kirby for PricewaterhouseCoopers Inc., Trustee of the Estates of Douglas R. MacDonald, David C. Anderson, The Douglas MacDonald Development Corporation
Wayne Young for Unsecured Creditor

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Dividends — Distribution of dividends — General principles

Bankrupt corporation was homebuilder — Bankruptcy was complex and lasted over seven years — Court authorized final distribution to all unsecured creditors on pro rata basis without determination of trust claims of lienholders — Trustee sent letters containing final dividend cheques to creditors — Trustee of principals of bankrupt corporation then submitted claims — Canada Post returned all but four cheques which had been cashed to trustee — Trustee brought motion for directions — Trustee was not obliged to entertain new claims — Funds were already distributed within meaning of Bankruptcy and Insolvency Act — Distribution was approved by court and inspectors — Trustee prepared distribution statement and deposited cheques with Canada Post — Trustee was not obliged to give notice of distribution to potential claimants — There was no explanation for long delay in submitting new claims.

MOTION by trustee in bankruptcy for directions.

Chadwick J.:

1 MacDonald Homes Inc. was adjudged bankrupt on November 25, 1994. MacDonald Homes carried on a business as a residential homebuilder in Eastern Ontario. At the time of the bankruptcy they were involved in the development of a subdivision known as Crown Point in Orleans, Ontario.

2 The actual owner of the lot was a limited company 974040 Ontario Limited (hereinafter referred to as 974). At the time of the bankruptcy the sole director of 974 was Keith Henry who was the son-in-law of Douglas R. MacDonald, the main principal of MacDonald Homes. The other principal was David C. Anderson.

3 The homes in the Crown Point subdivision were at various stages of construction and the trustee was required to complete a number of the houses.

4 There were lien claimants and a distribution was made to some of the lien claimants.

5 On October 10, 2002, the court made an order authorizing the final distribution of the funds held by the trustee pursuant to the *Bankruptcy and Insolvency Act*, to all unsecured creditors of the bankrupt on a pro rata basis without the necessity of determining which funds may constitute "trust funds" pursuant to the *Construction Lien Act* or *Trustee Act*. This order was made as the trustee was unable to determine which claims may have been trust claims as a result of the poor financial records and also the lack of co-operation of the principals of MacDonald Homes.

6 The trustee brought legal action against 974 and Sinco Treuhand relating to the Crown Point lands.

7 Sinco was a Swedish company who took an assignment of the Bank of Montreal mortgage on the Crown Point land. There was some suspicion that Sinco was owned by Douglas MacDonald.

8 Prior to commencing the action against 974 and Sinco, the solicitors for the trustee met with the trustee in bankruptcy for the Estate of David C. Anderson, Douglas R. MacDonald and Douglas MacDonald Development Corporation. The purpose of the meeting was to see whether they were interested in taking part in the litigation against 974 and Sinco. This meeting took place in January of 1999 and there was no further response from them.

9 There was correspondence between the two trustees. The trustees for Anderson, MacDonald and Douglas MacDonald Development Corporation originally took the position they were entitled to the assets of 974 as MacDonald and Anderson had been the principals of that company. They took no action to advance their position, nor did they file a proof of claim.

10 The bankruptcy of MacDonald Homes Inc. was complicated. It lasted over seven years and the trustee took numerous legal actions and was involved in many investigations.

11 Likewise, the bankruptcy of Douglas R. MacDonald, David C. Anderson and Douglas MacDonald Development Corporation was also complicated involving many legal actions to set aside conveyances and other actions along with an RCMP investigation. There was a lack of co-operation from the principals of the company, however, David Anderson, in the last few years has been co-operative.

12 Robert W. Wener, Senior Vice-President with KPMG, the Trustee for MacDonald Homes, has filed two affidavits in support of their motion. In these affidavits he outlines the history and background of the MacDonald Homes Inc. bankruptcy and, in particular, the correspondence and contact between the trustee of MacDonald Homes Inc. and PricewaterhouseCoopers Inc., trustee for MacDonald, Anderson and Douglas MacDonald Development Corporation.

13 On November 12, 2002, Mr. Wener wrote to Steven Mallette, the Vice President PricewaterhouseCoopers Inc. and in part advised them as follows:

> KPMG Inc. wound up all matters with respect to the Construction Lien Act appointment in 1999 and was subsequently discharged. KPMG Inc. has made no distribution to creditors under the BIA appointment, however we are in the process of winding up the Estate and are hopeful that a final distribution can be made in the next few months.

14 It's apparent from the affidavits filed that the creditors, in particular the lien claimants, agreed to a pro rata distribution in order to avoid the limited funds being dissipated in legal costs and administration fees.

15 The trustee received the authorization of the inspectors of the Estate to declare a final dividend and received court approval to its final dividends sheet and statement of receipts and disbursements.

16 On July 11, 2003 the trustee sent letters containing the final dividend cheques to the creditors of the bankrupt Estate. Late in the afternoon of July 11, 2003, after the letters had been picked up and delivered to the Canada Post Distribution Centre, the trustee received a letter from PricewaterhouseCoopers Inc. as trustee of the Estate of David C. Anderson and Douglas R. MacDonald enclosing proof of claims with respect to the Estate of Douglas R. MacDonald in the amount of $2,315,760.00 and the Estate of David C. Anderson in the amount of $1,543,840.00.

17 In support of the proof of claim, PricewaterhouseCoopers Inc. attached an undated agreement entered into between Douglas R. MacDonald, David C. Anderson, Douglas MacDonald Development Corporation, Douglas B. MacDonald and MacDonald Homes Inc. The agreement provided for the divisions of the proceeds of sale from the Crown Point lands between Douglas MacDonald and David Anderson.

18 The trustee asked Canada Post to return the dividend cheques. Canada Post, in an unusual procedure, returned the cheques. The trustee was able to recover all of the cheques except four that had already been cashed.

19 The trustee brings this motion for direction as to whether he is entitled to proceed with the distribution as approved or whether he must entertain the claims from Douglas R. MacDonald and David C. Anderson. In other words, have the funds of bankrupt Estate been "distributed" within the meaning of s. 150 of the *Bankruptcy and Insolvency Act*. Section 150 reads as follows:

> A creditor who has not proved his claim before the declaration of any dividend is entitled on proof of his claim to be paid, out of any money for the time being in the hands of the trustee, any dividend or dividends he may have failed to receive before that money is applied to the payment of any future dividend, but he is not entitled to disturb the distribution of any dividend declared before his claim was proved for the reason that he has not participated therein, except on such terms and conditions as may be ordered by the court.

20 Ms. Kirby, counsel on behalf of PricewaterhouseCoopers Inc., takes the position that KMPG trustee should have given notice to PricewaterhouseCoopers Inc. pursuant to s. 149(1) of the *Bankruptcy and Insolvency Act* as they were aware from the correspondence that they may have a claim. In my view, the trustee is not obligated to give notice under s. 149(1) as the wording of the *Act* says:

> The trustee may, after the first meeting of creditors, give notice by registered or certified mail to every person with a claim . . .

The wording would certainly indicate it's discretionary upon the trustee.

21 There is no question that the courts have been quite lenient in allowing claimants to file late proof of loss as long as the Estate has not been distributed. *Pilot Butte Sand & Gravel Co., Re* (1968), 11 C.B.R. (N.S.) 254 (Sask. Q.B.); *Bank of Nova Scotia v. Janzen (Trustee of)* (1989), 71 C.B.R. (N.S.) 277, 90 N.S.R. (2d) 67, 230 A.P.R. 67 (N.S. T.D.); *Atlas Acceptance Corp. v. Fratkin* (1978), 27 C.B.R. (N.S.) 220, [1978] 3 W.W.R. 289 (Man. C.A.).

22 The word "distribute" is defined in Blacks Law Dictionary as "to deal or divide out in portion or in shares". In my view, the Estate has been distributed within the meaning of s. 150 of the *Bankruptcy and Insolvency Act*. My reasons for this conclusion are as follows:

> (a) The court had approved the distribution;

(b) The inspectors had approved the distribution;

(c) The truseee had prepared the distrubution statement and cheques in accordance with the distribution sheet;

(d) The cheques had been deposited with Canada Post which means they become the property of the addressee;

(e) Four of the cheques have already been cashed; and

(f) Although the Trustee recovered most of the cheques, he was holding them in trust for the creditors.

23 The total amount of distribution was $321,638.00. It is obvious from the affidavit material the lien claimants would not have agreed to the trust funds being distributed on a pro rata basis if they were faced with proof of claims in the amount of $3,859,600.00.

24 In addition, there is no explanation why the agreement attached to the proof of claims was not brought to the attention of the trustee during the seven years of the administration of the Estate of MacDonald Homes Inc.

25 PricewaterhouseCoopers Inc. also brought a cross motion requiring the trustee in bankruptcy of the Estate of MacDonald Homes Inc. to deliver or make accessible to PricewaterhouseCoopers Inc. all books, documents or paper of any kind relating in whole or part to the bankrupts, Douglas R. MacDonald, David C. Anderson and the Douglas MacDonald Development Corporation. Under these circumstances and in view of my ruling, the Estate has been distributed. There are no further assets left in the Estate. If PricewaterhouseCoopers Inc. are seeking specific documents, I'm sure the trustee will co-operate and provide them to them at PricewaterhouseCoopers Inc. costs.

Order accordingly.

TAB 13

2014 ONSC 3393
Ontario Superior Court of Justice

Timminco Ltd., Re

2014 CarswellOnt 9328, 2014 ONSC 3393, 14 C.B.R. (6th) 113, 242 A.C.W.S. (3d) 764

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

In the Matter of a Plan of Compromise or Arrangement of Timminco Limited and Bécancour Silicon Inc.

Morawetz R.S.J.

Heard: July 22, 2013
Judgment: July 7, 2014
Docket: CV-12-9539-00CL

Counsel: Jane Dietrich, Kate Stigler for Board of Directors, except John Walsh
Kenneth D. Kraft for Chubb Insurance Company of Canada
James C. Orr for Plaintiff, St. Clair Pennyfeather in the Class Action
Maria Konyukhova for Timminco Entities
Robert Staley for John Walsh
Linc Rogers for Monitor

Subject: Civil Practice and Procedure; Insolvency

Headnote

Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — Grounds — Another proceeding pending — General principles

Representative plaintiff P brought class action against against corporate defendant T, individual defendants who were officers of T, and third party — Action was based in alleged misrepresentations by defendants, causing investors to buy stock in T — Some 2.5 years later, T obtained stay of class action under Companies' Creditors Arrangement Act (CCAA) — T also obtained Claims Procedure Order (CPO) which established deadline for claims against directors — P did not file claim by deadline — P moved to lift stay that remained in place — Motion granted — Stays and orders to lift stay were discretionary — Assets of T had been sold, and distributions had been made to secured creditors -- Under these circumstances, stay and claims order did not serve their original purpose — There was no CCAA plan in place, and there was no stated intent to create one — Claims-bar order was not proper bar to P's claim in this case — P's claim was to be decided on merits, and any problems with claim were not bar to claim being able to proceed.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay

Representative plaintiff P brought class action against against corporate defendant T, individual defendants who were officers of T, and third party — Action was based in alleged misrepresentations by defendants, causing investors to buy stock in T — Some 2.5 years later, T obtained stay of class action under Companies' Creditors Arrangement Act (CCAA) — T also obtained Claims Procedure Order (CPO) which established deadline for claims against directors — P did not file claim by deadline — P moved to lift stay that remained in place — Motion granted — Stays and orders to lift stay were discretionary — Assets of T had been sold, and distributions had been made to secured creditors — Under these circumstances, stay and claims order did not serve their original purpose — There was no CCAA plan in place, and there was no stated intent to create one — Claims-bar order was not proper

bar to P's claim in this case — P's claim was to be decided on merits, and any problems with claim were not bar to claim being able to proceed.

MOTION by representative plaintiff to lift stay of class action, obtained by defendant corporation.

Morawetz R.S.J.:

Introduction

1 On May 14, 2009, Kim Orr Barristers PC, counsel to the representative plaintiff Mr. St. Clair Pennyfeather ("Plaintiff's Counsel"), initiated the proposed class action (the "Class Action"), which names as defendants Timminco Limited ("Timminco"), a third party, Photon Consulting LLC, and certain of the directors and officers of Timminco, (the "Directors").

2 The Class Action focusses on alleged public misrepresentations that Timminco possessed a proprietary metallurgical process that provided a significant cost advantage in manufacturing solar grade silicon for use in manufacturing solar cells.

3 Mr. Pennyfeather alleges that the representations were first made in March 2008, after which the shares of Timminco gained rapidly in value to more than $18 per share by June 5, 2008. Subsequently, Mr. Pennyfeather alleges that as Timminco began to acknowledge problems with the alleged proprietary process, the share price fell to the point where the equity was described as "penny stock" prior to its delisting in January 2012.

4 In the initial order, granted January 3, 2012 in the *Companies' Creditors Arrangement Act*., R.S.C. 1985, c. C-36, as amended (the "CCAA") proceedings, Timminco sought and obtained stays of all proceedings including the Class Action as against Timminco and the Directors (the "Initial Order").

5 Timminco also obtained a Claims Procedure Order on June 15, 2012 (the "CPO"). Among other things, the CPO established a claims-bar date of July 23, 2012 for claims against the Directors. Mr. Pennyfeather did not file a proof of claim by this date.

6 No CCAA plan has been put forward by Timminco and there is no intention to advance a CCAA plan.

7 Mr. Pennyfeather moves to lift the stay to allow the Class Action to be dealt with on the merits against all named defendants and, if necessary, for an order amending the CPO to exclude the Class Action from the CPO or to allow the filing of a proof of claim relating to those claims.

8 The Class Action seeks to access insurance moneys and potentially the assets of Directors.

9 The respondents on this motion, (the Directors named in the Class Action), contend that the failure to file a claim under the CPO bars any claim against officers and directors or insurance proceeds.

10 Neither Timminco nor the Monitor take any position on this motion.

11 For the reasons that follow, the motion of Mr. Pennyfeather is granted and the stay is lifted so as to permit Mr. Pennyfeather to proceed with the Class Action.

The Stay and CPO

12 The Initial Order contains the relevant stay provision (as extended in subsequent orders):

> 24. This Court Orders that during the Stay Period... no Proceeding may be commenced or continued against any former, current or future directors or officers of the Timminco Entities with respect to any claim against the directors

> or officers that arose before the date hereof and that relates to any obligations of the Timminco Entities whereby the directors or officers are alleged under any law to be liable in their capacities as directors or officers for the payment or performance of such obligations, **until a compromise or arrangement in respect of the Timminco Entities, if one is filed, is sanctioned by this court or is refused by the creditors of the Timminco Entities or this Court.**
>
> [emphasis added]

13 In May and June 2012, The Court approved sales transactions comprising substantially all of the Timminco Entities' assets. In their June 7, 2012 Motion, the Timminco Entities sought an extension of the Stay Period to "give the Timminco Entities sufficient time to, among other things, close the transactions relating to the Successful Bid and carry out the Claims Procedure". The Timminco Entities sought court approval of a proposed claims procedure to "identify claims which may be entitled to distributions of potential proceeds of the ... transactions..." The Timminco entities took the position that the Claims Procedure was "a fair and reasonable method of determining the potential distribution rights of creditors of the Timminco Entities".

14 The mechanics of the CPO are as follows. Paragraph 2(h) of the CPO defines the Claims Bar Date as 5:00 p.m. on July 23, 2012. "D&O Claims" are defined in para. 2(f)(iii):

> Any existing or future right or claim of any person against one or more of the directors and/or officers of the Timminco Entity which arose or arises as a result of such directors or officers position, supervision, management or involvement as a director or officer of a Timminco Entity, whether such right, or the circumstances giving rise to it arose before or after the Initial Order up to and including this Claims Procedure whether enforceable in any civil, administrative, or criminal proceeding (each a "D&O Claim") (and collectively the "D&O Claims"), including any right:
>
> a. relating to any of the categories of obligations described in paragraph 9 of the Initial Order, whether accrued or falling due before or after the Initial Order, in respect of which a director or officer may be liable in his or her capacity as such;
>
> b. in respect of which a director or officer may be liable in his or her capacity as such concerning employee entitlements to wages or other debts for services rendered to the Timminco Entities or any one of them or for vacation pay, pension contributions, benefits or other amounts related to employment or pension plan rights or benefits or for taxes owing by the Timminco Entities or amounts which were required by law to be withheld by the Timminco Entities;
>
> c. in respect of which a director or officer may be liable in his or her capacity as such as a result of any act, omission or breach of duty; or
>
> d. that is or is related to a penalty, fine or claim for damages or costs.
>
> Provided however that in any case "Claim" shall not include an Excluded Claim.

15 The CPO appears to bar a person who fails to file a D&O Claim by the Claims Bar Date from asserting or enforcing the claim:

> 19. This Court orders that any Person who does not file a proof of a D&O Claim in accordance with this order by the claims-bar date **or such other later date as may be ordered by the Court**, shall be forever barred from asserting or enforcing such D&O Claim against the directors and officers and the directors and officers shall not have any liability whatsoever in respect of such D&O Claim and such D&O Claim shall be extinguished without any further act or notification.
>
> [emphasis added]

Mr. Pennyfeather's Position

16 Mr. Pennyfeather advances a number of arguments. Most significantly, he argues that it is not fair and reasonable to allow the defendants to bar and extinguish the Class Actions claims through the use of an interim and procedural court order. He submits that the respondents attempt to use the CCAA in a tactical and technical fashion to achieve a result unrelated to any legitimate aspect of either a restructuring or orderly liquidation. The operation of the fair and reasonable standard under the CCAA calls for the exercise of the Court's discretion to lift the stay and, if necessary, amend the CPO to either exclude the Class Action claims or permit submissions of a class proof of claim.

17 In support of this argument, Mr. Pennyfeather adds that there is no evidence that any of the Directors who are defendants in the class action contributed anything to the CCAA process, and that the targeted insurance proceeds are not available to other creditors. Thus, he submits, a bar against pursuing these funds benefits only the insurance companies who are not stakeholders in the restructuring or liquidation.

18 Mr. Pennyfeather advances a number of additional arguments. Because I am persuaded by this first submission, it is not necessary to discuss the additional arguments in great detail. However, I will give a brief summary of these additional arguments below.

19 First, Mr. Pennyfeather submits, since the stay was ordered, he has attempted to have the stay lifted as it relates to the Class Action.

20 Second, Mr. Pennyfeather submits that the CPO did not permit the filing of representative claims, unlike, for example, claims processed in *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 ONSC 1078, 100 C.B.R. (5th) 30 (Ont. S.C.J. [Commercial List]). Representative claims are generally not permitted under the CCAA and the solicitors for the representative plaintiff do not act for class members prior to certification (see: *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 218 (Ont. S.C.J. [Commercial List])). Therefore, Mr. Pennyfeather submits that the omission in the order obtained by the Timminco entities, of the type of provision contained in the *Sino-Forest* Claims Order, precluded the action that they now assert should have been taken.

21 Third, Mr. Pennyfeather responds to the significant argument made by the responding parties that the CPO bars the claim. He submits that the Class Action, which alleges, *inter alia*, misrepresentations and breaches of the *Securities Act*, R.S.O. 1990, c. S.5, is unaffected by the CPO. There are several reasons for this. First, the CPO excludes claims that cannot be compromised as a result of the provisions of s. 5.1(2) of the CCAA. Alternatively, even if Mr. Pennyfeather and other class members are not creditors pursuant to section 5.1(2), he submits that Parliament has clearly intended to exclude claims for misrepresentation by directors regardless of who brought them. In addition, insofar as the Class Action seeks to recover insurance proceeds, the CPO did not, according to Mr. Pennyfeather, affect that claim.

22 In summary, Mr. Pennyfeather's most significant argument is that the CCAA process should not be used in a tactical manner to achieve a result collateral to the proper purposes of the legislation. The rights of putative class members should be determined on the merits of the Class Action, which are considerable given the evidence. Further, the lifting of the stay is fair and reasonable in all of the circumstances.

Directors' Position

23 Counsel to directors and officers named in the proposed class action, other than Mr. Walsh (the "Defendant Directors") submit there are three issues to be considered on the motion: (a) should the CPO be amended to grant Mr. Pennyfeather the authority to file a claim on behalf of the class members in the D&O Claims Procedure? (b) if Mr. Pennyfeather is granted the authority to file a claim on behalf of the class members, should the claims-bar date be extended to allow him the opportunity to file a late claim against the Defendant Directors? and (c) if Mr. Pennyfeather is permitted to file a late claim against the Defendant Directors, should the D&O stay be lifted to allow the proposed class action to proceed against the Defendant Directors?

24 The Defendant Directors take the position that: (a) Mr. Pennyfeather does not have the requisite authority and/or right to file a claim on behalf of the class action members and the CPO and should not be amended to permit such; (b) if Mr. Pennyfeather is granted the authority to file a claim on behalf of the class members, the claims-bar date should not be extended to allow Mr. Pennyfeather to file a late claim; and (c) if Mr. Pennyfeather is permitted to file a late claim, the D&O stay should not be lifted to allow the proposed class action to proceed against the Defendant Directors.

25 The Defendant Directors counter Mr. Pennyfeather's arguments with a number of points. They take the position that while they were holding office, they assisted with every aspect of the CCAA process, including (i) the sales process through which the Timminco Entities sold substantially all of their assets and obtained recoveries for the benefit of their creditors; and (ii) the establishment of the claims procedure, resigning only after the claims-bar date passed.

26 The Defendant Directors also submit that Mr. Pennyfeather has been aware of, and participated in, the CCAA proceedings since the weeks following the granting of the Initial Order. They submit that at no time prior to this motion did Mr. Pennyfeather take any position on the claims procedures established to seek the authority to file a claim on behalf of the class members. They submit that, at this point, Mr. Pennyfeather is asking the court to exercise its discretion to (i) amend the CPO to grant him the authority to file a claim on behalf of the class members; (ii) extend the claims-bar date to allow him to file such claim; and (iii) lift the stay of proceedings. They submit that Mr. Pennyfeather asks this discretion be exercised to allow him to pursue a claim against the Defendant Directors which remains uncertified, is in part statute barred, and lacks merit.

27 Counsel to the Defendant Directors submits that the D&O Claims Procedure was initiated for the purpose of determining, with finality, the claims against the directors and officers. They submit that the D&O Claims Procedure has at no time been contingent on, tied to, or dependent on the filing of a Plan of Arrangement by the Timminco Entities.

28 Simply put, the Defendant Directors submit that the CPO sets a claims-bar date of July 23, 2012 for claims against Directors and Mr. Pennyfeather did not file any Proof of Claim against the Defendant Directors by the claims-bar date. Accordingly, they submit that the claims against the Defendant Directors contemplated by the Class Action are currently barred and extinguished by the CPO.

29 The arguments put forward by Mr. Walsh are similar.

30 Counsel to Mr. Walsh attempts to draw similarities between this case and *Sino-Forest*. Counsel submits this is a case where Mr. Pennyfeather intentionally refused to file a Proof of Claim in support of a securities misrepresentation claim against Timminco and its directors and officers.

31 They further submit that Mr. Pennyfeather is asking for the Court to exercise its discretion in his favour to lift the stay of proceedings, in order to allow him to pursue a proceeding which has been largely, if not entirely neutered by the Court of Appeal (leave to appeal to the Supreme Court of Canada dismissed). They point out that just like in *Sino-Forest*, to lift the stay would be an exercise in futility where the Court commented that "there is no right to opt out of any CCAA process...by virtue of deciding, on their own volition, not to participate in the CCAA process", the objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding.

32 Counsel to Mr. Walsh also takes the position that Mr. Pennyfeather's only argument is a strained effort to avoid the plain language of the CPO in an effort to say that his claim is an "excluded claim" and therefore a Proof of Claim was never required. Even if Mr. Pennyfeather was right, counsel to Mr. Walsh submits that Mr. Pennyfeather still would have been required to file a Proof of Claim, failing which his claim would have been barred. Under the CPO, proofs of such claims were still called for, even if they were not to be adjudicated.

33 They note that Mr. Pennyfeather was aware of the CCAA proceeding and the Initial Order. As early as January 17, 2012, counsel to Mr. Pennyfeather contacted counsel for Timminco, asking for consent to lift the Stay.

34 Counsel contends that the "excluded claim" language that Mr. Pennyfeather relies on is not found in the definition of D&O Claim. Under the terms of the CPO, the language is a carve-out from the larger definition of "claim", not the subset definition of D&O Claim. As a result, counsel submits that proofs of claim are still required for D&O Claims, regardless of whether they are excluded claims. In that way, the universe of D&O Claims would be known, even if excluded claims would ultimately not be part of a plan.

35 Mr. Walsh also takes the position that Mr. Pennyfeather made an intentional decision not to file a claim. Mr. Walsh emphasizes that Mr. Pennyfeather had full notice of the motion for the CPO and chose not to oppose or appear on the motion. Further, at no time did Mr. Pennyfeather request the Monitor apply to court for directions with respect to the terms of the CPO.

36 Mr. Walsh submits he is prejudiced by the continuation of the Class Action and he wants to get on with his life but is unable to do so while the claim is extant.

Law and Analysis

37 For the purposes of this motion, I must decide whether the CPO bars Mr. Pennyfeather from proceeding with the Class Action and whether I should lift the stay of proceedings as it applies to the Class Action. For the reasons that follow, I conclude that the CPO should not serve as a bar to proceeding with the Class Action and that the stay should be lifted.

38 As I explain below, the application of the claims bar order and lifting the stay are discretionary. This discretion should be exercised in light of the purposes of both claims-bar orders and stays under the CCAA. A claim bar order and a stay under the CCAA are intended to assist the debtor in the restructuring process, which may encompass asset realizations. At this point, Timminco's assets have been sold, distributions made to secured creditors, no CCAA plan has been put forward by Timminco, and there is no intention to advance a CCAA plan. It seems to me that neither the stay, nor the claims bar order continue to serve their functional purposes in these CCAA proceedings by barring the Class Action. In these circumstances, I fail to see why the stay and the claim bar order should be utilized to obstruct the plaintiff from proceeding with its Class Action.

The Purpose of Stay Orders and Claims-Bar Orders

39 For the purposes of this motion, it is necessary to consider the objective of the CCAA stay order. The stay of proceedings restrains judicial and extra-judicial conduct that could impair the ability of the debtor company to continue in business and the debtor's ability to focus and concentrate its efforts on negotiating of a compromise or arrangement: *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.).

40 Sections 2, 12 and 19 of the CCAA provide the definition of a "Claim" for the purposes of the CCAA and also provide guidance as to how claims are to be determined. Section 12 of the CCAA states

> 12. The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

The use of the word "may" in s. 12 indicates that fixing deadlines, which includes granting a claims bar order, is discretionary. Additionally, as noted above the CPO provided at para. 19 that a D&O Claim could be filed on "such other later date as may be ordered by the Court".

41 It is also necessary to return to first principles with respect to claims-bar orders. The CCAA is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.

42 Adherence to the claims-bar date becomes even more important when distributions are being made (in this case, to secured creditors), or when a plan is being presented to creditors and a creditors' meeting is called to consider the plan of compromise. These objectives are recognized by s. 12 of the CCAA, in particular the references to "voting" and "distribution".

43 In such circumstances, stakeholders are entitled to know the implications of their actions. The claims-bar order can assist in this process. By establishing a claims-bar date, the debtor can determine the universe of claims and the potential distribution to creditors, and creditors are in a position to make an informed choice as to the alternatives presented to them. If distributions are being made or a plan is presented to creditors and voted upon, stakeholders should be able to place a degree of reliance in the claims bar process.

44 Stakeholders in this context can also include directors and officers, as it is not uncommon for debtor applicants to propose a plan under the CCAA that compromises certain claims against directors and officers. In this context, the provisions of s. 5.1 of the CCAA must be respected.

45 In the case of Timminco, there have been distributions to secured creditors which are not the subject of challenge. The Class Action claim is subordinate in ranking to the claims of the secured creditors and has no impact on the distributions made to secured creditors. Further, there is no CCAA plan. There will be no compromise of claims against directors and officers. I accept that at the outset of the CCAA proceedings there may very well have been an intention on the part of the debtor to formulate a CCAA plan and further, that plan may have contemplated the compromise of certain claims against directors and officers. However, these plans did not come to fruition. What we are left with is to determine the consequence of failing to file a timely claim in these circumstances.

46 In the circumstances of this case, i.e., in the absence of a plan, the purpose of the claims bar procedure is questionable. Specifically, in this case, should the claims bar procedure be used to determine the Class Action?

47 In my view, it is not the function of the court on this motion to determine the merits of Mr. Pennyfeather's claim. Rather, it is to determine whether or not the claims-bar order operates as a bar to Mr. Pennyfeather being able to put forth a claim. It does not act as such a bar.

48 It seems to me that CCAA proceedings should not be used, in these circumstances, as a tool to bar Mr. Pennyfeather from proceeding with the Class Action claim. In the absence of a CCAA proceeding, Mr. Pennyfeather would be in position to move forward with the Class Action in the usual course. On a principled basis, a claims bar order in a CCAA proceeding, where there will be no CCAA plan, should not be used in such a way as to defeat the claim of Mr. Pennyfeather. The determination of the claim should be made on the merits in the proper forum. In these circumstances, where there is no CCAA plan, the CCAA proceeding is, in my view, not the proper forum.

49 Similar considerations apply to the Stay Order. With no prospect of a compromise or arrangement, and with the sales process completed, there is no need to maintain the status quo to allow the debtor to focus and concentrate its efforts on negotiating a compromise or arrangement. In this regard, the fact that neither Timminco nor the Monitor take a position on this motion or argue prejudice is instructive.

Applicability of Established Tests

50 The lifting of a stay is discretionary. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of (a) the balance of convenience; (b) the relative prejudice to the parties; and (c) where relevant, the merits of the proposed action: *Canwest Global Communications Corp., Re*, 2011 ONSC 2215, 75 C.B.R. (5th) 156 (Ont. S.C.J. [Commercial List]), at para. 27.

51 Counsel to Mr. Walsh submit that courts have historically considered the following factors in determining whether to exercise their discretion to consider claims after the claims-bar date: (a) was the delay caused by inadvertence and, if

so, did the claimant act in good faith? (b) what is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay; (c) if relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing? and (d) if relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

52 These are factors that have been considered by the courts on numerous occasions (see, for example, *Sino-Forest*; *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), *Blue Range Resource Corp., Re*, 2000 ABCA 285, 193 D.L.R. (4th) 314 (Alta. C.A.), leave to appeal to S.C.C. refused, (S.C.C.); *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (2008), 48 C.B.R. (5th) 41 (Ont. S.C.J.); and *Ivorylane Corp. v. Country Style Realty Ltd.*, [2004] O.J. No. 2662 (Ont. S.C.J. [Commercial List])).

53 However, it should be noted that all of these cases involved a CCAA Plan that was considered by creditors.

54 In the present circumstances, it seems to me there is an additional factor to take into account: there is no CCAA Plan.

55 I have noted above that certain delay can be attributed to the CCAA proceedings and the impact of *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90 (Ont. C.A.), at the Court of Appeal. That is not a full answer for the delay but a partial explanation.

56 The prejudice experienced by a director not having a final resolution to the proposed Class Action has to be weighed as against the rights of the class action plaintiff to have this matter heard in court. To the extent that time constitutes a degree of prejudice to the defendants, it can be alleviated by requiring the parties to agree upon a timetable to have this matter addressed on a timely basis with case management.

57 I have not addressed in great detail whether the CPO requires excluded claims to be filed. In my view, it is not necessary to embark on an analysis of this issue, nor have I embarked on a review of the merits. Rather, the principles of equity and fairness dictate that the class action plaintiff can move forward with the claim. The claim may face many hurdles. Some of these have been outlined in the factum submitted by counsel to Mr. Walsh. However, that does not necessarily mean that the class action plaintiff should be disentitled from proceeding.

58 In the result, the motion of Mr. Pennyfeather is granted and the stay is lifted so as to permit Mr. Pennyfeather to proceed with the Class Action. The CPO is modified so as to allow Mr. Pennyfeather to file his claim.

Motion granted.

Court File No. CV-15-10832-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., ET AL. Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

Proceeding commenced at Toronto

BRIEF OF AUTHORITIES OF THE RESPONDING PARTY, CAPITAL BRANDS, LLC

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